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The Prison Rape Elimination Act: Sword or Shield?

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THE PRISON RAPE ELIMINATION ACT: SWORD OR SHIELD?

I. INTRODUCTION

Professor Malcolm Feeley accurately articulated the gravity of the problem of prison rape when he said, "[i]t may be the single largest shame of the American criminal justice system, and that's saying a lot."[1] Human rights groups, such as Stop Prison Rape, say that prison rape is a form of torture that violates international human rights laws, a "form of institutionalized brutality [that] is a violation of the United States' duty to uphold basic

1. Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL'Y REV. 489, 500 (2011).

standards of international human rights."[2] But this level of seriousness is not often reflected in eye-catching national news headlines, nor in connection with the powerful hashtag of the MeToo movement.[3] For the most part, the gravity of this problem is hidden from the public eye. Legions of incarcerated persons have shared their stories, relating intensely traumatic memories of rape, sexual abuse, and sexual harassment in attempts to heal, advocate for change, or to simply be heard.[4] Sometimes survivors are not afforded the opportunity to speak for themselves. Linda Bruntmyer took advantage of the opportunity to be heard when she testified in front of Congress following her seventeen-year-old son's death by suicide after being repeatedly raped while incarcerated.[5] Her son was imprisoned for setting a trashcan on fire.[6]

It is not particularly surprising that prison rape, if and when it is acknowledged, is not considered to be a pressing issue worthy of widespread public action. Prison rape is routinely portrayed in popular culture as something that inevitably accompanies being in jail or prison. Movies and television shows such as *The Shawshank Redemption*, *American History X*, and *Orange is the New Black* all seem to make use of prison rape, whether inmate-on-inmate or guard-on-inmate, as a plot point that results in the characters progressing further along their respective character arcs.[7] Phrases like "don't drop the soap" are oftentimes used in jest—an art student created a prison-themed board game named after the same phrase.[8] The prevalence of prison rape is apparently not a secret.[9] Whether general attitudes toward the problem are a result of indifference, apathy, or acceptance that rape and sexual abuse are a part of prison life, the public disregard of the gravity of prison rape is clear.

In such an environment, the Prison Rape Elimination Act of 2003[10] (PREA) was an unprecedented effort toward solving a problem that "for too long our society ha[s] preferred to downplay or ignore."[11] PREA was unanimously passed through the United

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2. *Id.* at 508 (quoting *Fact Sheet: Prisoner Rape is Torture Under International Law,* JUST DETENTION INTERNATIONAL (2009), https://justdetention.org/publication/ (follow "Publication" hyperlink; then click on "Fact Sheets" and scroll down).

3. Me Too, https://metoomvmt.org/about/#history (last visited Nov. 16, 2019) "The 'me too.' movement was founded in 2006 to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing. Our vision from the beginning was to address both the dearth in resources for survivors of sexual violence and to build a community of advocates, driven by survivors, who will be at the forefront of creating solutions to interrupt sexual violence in their communities."

4. Just Detention International, https://justdetention.org/story/ (last visited Sept. 23, 2019).

5. Elizabeth Stoker Bruenig, *Why Americans Don't Care About Prison Rape: And What Happens When the Problem Escapes from Behind Bars*, THE NATION (Mar. 2, 2015), https://www.thenation.com/article/why-americans-dont-care-about-prison-rape/.

6. *Id.*

7. THE SHAWSHANK REDEMPTION (Castle Rock Entertainment Oct. 14, 1994); AMERICAN HISTORY X (New Line Cinema Nov. 1, 1998); *Orange is the New Black: A Tittin' and a Hairin'* (Netflix June 11, 2015).

8. Owen Duffy, *Don't Drop the Soap — The Game That Makes Racism, Homophobia and Prison Rape FUN!*, MEDIUM (Nov. 24, 2018), https://medium.com/@owen_duffy/in-october-this-year-i-went-to-the-annual-internationale-spieltage-game-fair-in-essen-germany-b39ff44b666.

9. Chandra Bozelko, *Why We Let Prison Rape Go On*, N.Y. TIMES (Apr. 17, 2015), https://www.nytimes.com/2015/04/18/opinion/why-we-let-prison-rape-go-on.html.

10. Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301–09 (2003).

11. Letter from Eric Holder to Frank R. Wolf and Bobby Scott (June 22, 2010), http://big.assets.huffingtonpost.com/PREAletter.pdf.

States Senate and the House of Representatives, signed by President George W. Bush, and enacted, all within two months.[12] In 2012, President Barack Obama reaffirmed PREA's purpose in a presidential memorandum.[13] The goal of eliminating, or at the very least, reducing prison rape garnered bipartisan support in a Republican-controlled Congress, as it addressed not only egregious human rights violations, but also the spread of sexually transmitted diseases, such as Acquired Immune Deficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV).[14] PREA's enactment was a government response that acknowledged the gravity of prison sexual abuse, a problem that "we have underestimated" for centuries.[15]

Although PREA seemingly made its way through Congress and across the President's desk without much difficulty, its authors and supporters made significant compromises to the original legislation to make its passage so seamless.[16] The first notable compromise was the removal of PREA's ability to create a private cause of action.[17] The second compromise abandoned any explicit protection of inmates' Eighth Amendment right against cruel and unusual punishment.[18] Ultimately, these two compromises effectively eliminated PREA's metaphorical legal teeth. Courts routinely dismiss claims brought under PREA and disregard evidence of PREA violations in cases involving Eighth Amendment claims of sexual abuse.[19] In 2012, the Attorney General issued final standards, or PREA standards, making PREA into enforceable law, but as a result of the compromises made, PREA imposes minimal consequences on state facilities that violate its standards.[20]

Despite the laudable attempt to tackle the issue of prison rape through PREA, the PREA standards have not been entirely successful in effecting systemic and lasting change within America's criminal justice system. This is partially a result of PREA's power being severely hindered when courts deem its standards to be irrelevant to the issues they are charged with deciding. Courts make this determination even when, as evidenced by its resounding support in Congress, PREA was intended to be a strong vehicle for change. PREA's failure to engender lasting change is illustrated by the difficulties that inmates often face in seeking justice after experiencing rape or sexual abuse in institutional settings. Despite PREA and its corresponding standards being a tangible set of documents signed, sealed, and delivered by the people's elected representatives, courts have not used them to hold correctional staff or guards accountable for Eighth Amendment violations. Because PREA's abilities to protect Eighth Amendment rights are limited, inmates are

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12. Jenness & Smyth, *supra* note 1, at 491.

13. Implementing the Prison Rape Elimination Act, 77 Fed. Reg. 30873 (May 17, 2012).

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

15. Jenness & Smyth, *supra* note 1, at 500.

16. Smith, *supra* note 14, at 11.

17. *Id.*

18. *Id.*

19. *See* Monts v. Greer, No. 5:12-cv-258-MP-GRJ, 2013 WL 5436763 (N.D. Fla. July 15, 2013); Colon v. Kenwall, No. 1:18-CV-840, 2018 WL 5809863 (M.D. Pa. Nov. 6, 2018) (dismissing inmate's claims brought under PREA because the Act does not give rise to a private cause of action).

20. Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U.J. LEGIS. & PUB. POL'Y 801, 805 (2014).

forced to seek legal remedies elsewhere.[21] Under laws such as the Prison Litigation Reform Act (PLRA), inmates are required to exhaust administrative measures before they can bring Section 1983 actions, and therefore, receiving remedies for violations of Eighth Amendment rights is significantly more difficult.[22]

Courts frequently use various standards such as those articulated by the American Bar Association's Model Rules of Professional Conduct (Model Rules) and the American Correctional Association to supplement their reasoning; courts should likewise use the PREA standards to guide their decision making. It is not unheard of, nor is it uncommon for courts to refer to other professional standards, including those promulgated by organizations possessing notably less legal authority than the United States Congress, in written opinions for the purpose of assessing and evaluating conduct.[23] Notably, courts have allowed defendants, oftentimes prison staff and guards, to use PREA standards to demonstrate that they have not committed an alleged violation.[24]

The courts use various professional standards to assess constitutional violations. They also allow PREA standards to be used, although this seems to be restricted to their use in favor of defendants. Therefore, federal courts should also consider violations by prison staff of the standards set out in PREA to be relevant as persuasive authority in regard to private Eighth Amendment claims of sexual abuse or harassment arising from a prison setting. A neutered version of PREA in which the standards are not given much credence by the judiciary contradicts the core purpose of PREA and undermines progress in extinguishing prison rape, sexual abuse, and sexual harassment.

Part II of this Comment will explore the creation of PREA standards and how courts approach Eighth Amendment claims of sexual abuse and harassment in the prison setting. Part II begins by describing the events that led to Congress's creation of legislation that more explicitly addressed the issue of prison rape. This section will provide support for the notion that, given the amount of support shown by numerous organizations and Congress, PREA was enacted for the purpose of directly combating prison rape, as opposed to merely acting as guidelines to discourage it. But PREA's history will also demonstrate that, partially due to late-term opposition from correctional organizations, PREA was not vested with the power that accompanies creation of a private cause of action for cruel and unusual punishment claims. Part II will then briefly examine the slowly changing legal standards courts are using in sexual abuse and harassment cases brought by inmates against guards and other prison staff. This section will illustrate the difficulty inmates experience in attempting to bring Eighth Amendment claims and how definitions of what constitutes sexual abuse and sexual harassment have constantly evolved throughout history and continue to do so. It will show that courts, by slightly restructuring established definitions of abuse and harassment, are reinforcing the increased seriousness shown to the issue of sexual misconduct overall.

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21. Arkles, *supra* note 20, at 802–03.

22. 42 U.S.C. § 1983 (1996) (stating "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law"); Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2013).

23. *See* Gates v. Cook, 376 F.3d 323 (5th Cir. 2004).

24. *See* Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011).

Part III will explain why PREA standards are plainly relevant in regard to sexual abuse and harassment claims brought by inmates and should be given as much credence as other professional standards referred to in other cases involving constitutional violations, such as Sixth Amendment ineffective assistance of counsel claims. Part III will begin by acknowledging that the Act did not create a private cause of action, but that this does not render the legislation completely irrelevant. Then, Part III will discuss instances in which courts have used other standards to assess the quality of mental health care and of living conditions to determine that constitutional violations existed. Finally, Part III will depart from the application of standards strictly within institutional settings and consider the American Bar Association Model Rules of Professional Conduct in regard to Sixth Amendment claims.

II. PREA ATTEMPTED TO ADDRESS THE SERIOUS ISSUE OF PRISON RAPE AND SEXUAL ABUSE IN AMERICA'S PRISONS

A. History: The Development and Implementation of Standards Without Teeth

The issue of rape and sexual assault within institutional settings, particularly in carceral settings, is not just a contemporary problem; critics of United States correctional facilities have been denouncing the indifference shown toward prison rape for nearly a century.[25] Although precise statistics for the frequency of prison rape are difficult to obtain, as there was little to no data collected on the issue prior to PREA, about four percent of prison inmates reported experiencing one or more incidents of sexual victimization in the past twelve months.[26] This statistic does not account for inmates who choose not to report abuse or participate in the data-gathering process.

Despite society's acknowledgment of the issue for at least a century, initiatives to end rape and sexual abuse in America's prisons and jails have appeared to gain more strength in the past few decades. Before PREA was enacted, the Women's Rights Division of Human Rights Watch, an international advocacy group, made efforts to combat rape in women's prisons by documenting incidents of abuse in women's correctional facilities.[27] Following the Human Rights Watch's report reflecting data collected on prison rape in women's facilities, Congressman John Conyers introduced the Prevention of Custodial Sexual Assault by Correctional Staff Act in 1999.[28] This legislation was to be integrated into the Violence Against Women Act and proposed creating a database naming correctional staff who had participated in custodial sexual misconduct and withholding federal funds from states that failed to criminalize sexual misconduct between correctional staff and inmates.[29] Although this legislation failed, the movement toward enacting similar

25. Jenness & Smyth, *supra* note 1, at 489.

26. Allen J. Beck, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-2012*, at 8 (2013). *See also* 34 U.S.C. § 30301(2) (2003) (stating that, as of 2003, "experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison").

27. Brenda V. Smith, *Prison and Punishment: Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 187 (2006).

28. *Id*.

29. *Id.* at 188.

legislation pressed on. In 2002, a Republican Representative for Virginia, Frank Wolf, proposed the Prison Rape Reduction Act, but it ultimately did not pass, partly as a result of a lack of involvement of particular organizations, such as the American Correctional Association, and other groups with direct interests in dealing with prison rape.[30] Although this legislation did not pass, it received bipartisan support, and would be quickly reintroduced with modifications in the next year.[31]

Groups such as the Prison Fellowship Ministries and Just Detention International continued to advocate for reform targeting the epidemic of prison rape.[32] The following year, Congress enacted PREA into law in an effort to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States."[33] It passed unanimously through the Republican-controlled House of Representatives and the Senate, becoming law on July 25, 2003.[34] Additionally, it was signed by a Republican president and, nine years later, reaffirmed by a Democratic president.[35] The resounding bipartisan support likely contributed to the Act's speedy passage, demonstrating that Congress found the legislation to be a necessary part of the solution to the serious problem of prison rape.[36]

Eliminating prison rape was the Act's overarching goal.[37] But, in enumerating a number of shorter-range objectives, PREA also aimed to develop standards that could be implemented nationally—increasing the accountability of prison staff in addressing prison rape and protecting inmates' Eighth Amendment rights.[38] PREA was meant to achieve these goals by disseminating national standards and creating standard definitions of rape, sexual abuse, and sexual harassment to increase definitional consistency.[39] The Act also offered federal funding to incentivize states to contribute to the effectiveness of PREA.[40] All of these efforts were to be propagated in adult correctional facilities, juvenile facilities, and immigration detention centers.[41]

To accomplish the aforementioned goals, PREA created the National Prison Rape Elimination Commission (NPREC).[42] This body of nine individuals was responsible for conducting a comprehensive legal and factual study on the impact that prison rape had on governments and communities.[43] The study was issued five years after the initial meeting

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30. *Id.* at 188–89. *See* Prison Rape Reduction Act of 2002, H.R. 4943, 107th Cong. (2002); Prison Rape Reduction Act of 2002, S. 2619, 107th Cong. (2002) (These bills were introduced by Representative Frank R. Wolf and Senator Edward M. Kennedy, respectively.).

31. Smith, *supra* note 27, at 189.

32. Arkles, *supra* note 20, at 804.

33. 34 U.S.C. § 30302(1).

34. Jenness & Smyth, *supra* note 1, at 491.

35. 77 Fed. Reg. 30873 (May 17, 2012); Jenness & Smyth, *supra* note 1, at 490.

36. Smith, *supra* note 14, at 10–11 (suggesting that, while PREA was meant to deal with human rights abuses, conservative support was partially a result of the fear of male prison rape, apprehension about homosexuality, and concern about the spread of sexually transmitted diseases, such as HIV and AIDS).

37. 34 U.S.C. § 30302(3), (6), (7).

38. *Id.*

39. *Id.* §§ 30301–09.

40. *Id.*

41. *Id.* § 30307.

42. 34 U.S.C. § 30306.

43. *Id.*

of the committee.[44] NPREC's report aimed to provide the Attorney General and the Secretary of Health and Human Services with recommendations for national standards regarding the elimination of prison rape.[45] In 2009, NPREC issued its recommendations.[46] Within a year of NPREC's submission of the report, the Attorney General would publish a final rule outlining the national standards under PREA.[47] But, in a letter to two members of the House of Representatives, former Attorney General Eric Holder expressed that the Department of Justice would not be able to issue national standards within the one-year deadline, as he "want[ed] to ensure that, once promulgated, the national PREA standards [would be] successful."[48] In 2012, the Attorney General published the final rules, known as the National Standards to Prevent, Detect, and Respond to Prison Rape or PREA standards, two years after the deadline and nine years after PREA first became law.[49]

While the Attorney General could encourage states to comply with PREA through financial incentives, the Act specifically applied to and created consequences for the Federal Bureau of Prisons, detention facilities operated by the Department of Homeland Security, and custodial facilities operated by the Department of Health and Human Services.[50] PREA required that the Attorney General assist states with PREA compliance by providing "funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape."[51] But, unless a state facility submits proof showing that it has either been certified and is in full compliance with PREA standards or assured that it intends to be compliant in the future, the Attorney General is required to withhold five percent of all federal funding for prison purposes normally received within a fiscal year.[52] Although the possibility of withheld funding may influence some state correctional facilities to be PREA compliant, as of 2011, only 2.9% of most state prison budgets consist of federal funding.[53]

In response to the lack of reliable data on the incidence of prison rape, the Bureau of Justice Statistics of the Department of Justice (BJS) received fifteen million dollars between 2004 and 2010 to collect annual data on prison rape and sexual abuse in order to create a comprehensive statistical review and analysis of the issue.[54] This yearly comprehensive report was to consist of a random sampling of at least ten percent of the nation's federal, state, and county prisons, with a requirement that the report include data

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44. *Id.*

45. *Id.*

46. Arkles, *supra* note 20, at 805.

47. 34 U.S.C. § 30307.

48. Letter from Eric Holder to Frank R. Wolf and Bobby Scott (June 22, 2010), http://big.assets.huffingtonpost.com/PREAletter.pdf.

49. 28 C.F.R. § 115 (2012); Arkles, *supra* note 20, at 805.

50. 34 U.S.C. § 30307.

51. *Id.* § 30305(a).

52. *Id.* § 30307(e)(2)(A); 28 C.F.R. § 115.401(a) (2012) (Additionally, detention facilities are also subject to audits once every three years.).

53. National Association of State Budget Officers, State Spending for Corrections: Long-Term Trends and Recent Criminal Justice Policy Reforms 3 (2013) https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Issue%20Briefs%20/State%20Spending%20for%20Corrections.pdf.

54. 34 U.S.C. § 30303 (2003).

that was representative of each of the fifty states.[55] Under PREA, the BJS had the authority to choose what actions or events garnered data collection and how to define those actions or events.[56] The latest BJS report analyzed statistics not only regarding the incidence of prison rape, but also nonconsensual sexual acts, abusive sexual contact, staff sexual misconduct, and staff sexual harassment.[57] The broader definition of prison rape the BJS chose to adopt for purposes of data collection, which includes any form of sexual misconduct, reflects a change in the approach to possibly illegal conduct, whether it be by inmate or staff, that serves no penological purpose.[58]

B. What PREA's Final Rule Requires of Prisons

When sexual abuse and sexual harassment do occur, inmates may file a PREA complaint in accordance with the National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act.[59] All correctional agencies must make multiple internal ways of privately reporting incidents available to victims, including at least one method of outside reporting.[60] Victims can report incidents in a variety of ways, including verbally, in writing, anonymously, or by third parties.[61] Following a report, the correctional agency is required to make a final decision within ninety days of the grievance filing.[62] Furthermore, agency staff are required to immediately report any "knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment."[63] The rules also outline agency responsibilities following a report, some of which require that action be taken to protect the inmate from both imminent and further abuse or harassment and also that the individual who reported an incident be shielded from retaliation.[64]

After an inmate reports an incident, PREA standards mandate that the agency conduct an investigation.[65] The investigators must collect and preserve evidence, and the investigation should be documented in a written report, which the agency is to preserve for a minimum of five years.[66] Agencies are required to refer any substantiated allegations that may be criminal in nature to law enforcement.[67] The evidentiary standard for

55. *Id.*

56. *Id.*

57. Ramona R. Rantala, Bureau of Justice Statistics, *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15* 2 (2018) (The data that BJS gathered was based on "reported sexual violence from administrative records and allegations of sexual victimization directly from victims through surveys of inmates in prisons and jails and surveys of youth held in juvenile correctional facilities.").

58. *See also* Smith, *supra* note 27, at 192.

59. 28 C.F.R. § 115 (2012).

60. *Id.* § 115.51(a), (b).

61. *Id.* § 115.51(c).

62. 28 C.F.R. § 115.5 (To clarify, "agency means the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents, including the implementation of policy as set by the governing, corporate, or nonprofit authority"); § 115.52(d)(1).

63. *Id.* § 115.61(a).

64. 28 C.F.R. § 115.62–68.

65. *Id.* § 115.71.

66. *Id.* § 115.71(c), (f)(2), (i).

67. *Id.* § 115.71(h).

administrative PREA investigations does not exceed the preponderance of the evidence standard.[68]

If an investigation reveals a violation of agency sexual abuse and harassment policies, PREA standards allow for agency discretion as to whether to impose disciplinary action and what discipline to inflict.[69] An agency may terminate the staff member or impose some other disciplinary sanction, but if a staff member is found to have violated sexual abuse policy, then "[t]ermination shall be the presumptive disciplinary sanction."[70] Curiously, these standards require that a report be made to law enforcement only when a staff violation of the agency sexual abuse or sexual harassment policies results in a termination or resignation.[71]

PREA is an explicit acknowledgement by the federal government that prison rape and sexual abuse is a problem demanding a meaningful solution. The trauma of experiencing sexual abuse or sexual harassment, which is oftentimes compounded by significant stigma, particularly for incarcerated men, was serious enough to warrant congressional action.[72] It was an effort to combat the infringement of inmates' Eighth Amendment rights in a system plagued by sexual violence.[73] But while Congress may have intended PREA to be a vehicle for widespread systemic change, the Act did not create a private cause of action or remedy.[74] Given that PREA's predecessors, such as the Prevention of Custodial Sexual Assault by Correctional Staff Act and the Prison Rape Reduction Act, failed to get through Congress, PREA's supporters made concessions to secure its passage.[75] Yet one of PREA's expressed purposes is to protect Eighth Amendment rights, making the Act's lack of legal teeth somewhat contradictory.[76] This contradiction suggests that the Act's original purpose was to create an avenue by which inmates could pursue rape and sexual assault claims, but that the Act's force was reduced as a result of significant push-back.[77] Because of these concessions, an inmate cannot use PREA to assert claims of rape, sexual abuse, or sexual harassment, but must bring such claims under the Eighth Amendment or other legal avenues.[78] As a result of defenses like qualified immunity for correctional staff and courts' disagreement as to what constitutes sexual abuse, bringing successful cruel and unusual punishment claims can be incredibly difficult for inmates.[79]

The Prison Litigation Reform Act (PLRA), which requires that inmates exhaust administrative remedies before bringing an action under 42 U.S.C. § 1983, poses another hurdle to successful Eighth Amendment claims.[80] More specifically, inmates must exhaust

68. *Id.* § 115.72.
69. 28 C.F.R. § 115.76(a).
70. *Id.* § 115.76(b).
71. *Id.* § 115.76(d).
72. *See* 34 U.S.C. §§ 30301–09.
73. *Id.*
74. Arkles, *supra* note 20, at 802–03.
75. Smith, *supra* note 14, at 11.
76. 34 U.S.C. § 30302.
77. Smith, *supra* note 14, at 11.
78. 34 U.S.C. §§ 30301–09 (PREA does not create a private cause of action.).
79. *See* Rafferty v. Trumbull Cty. Ohio, 915 F.3d 1087 (6th Cir. 2019).
80. 42 U.S.C. § 1997e(a) (2013).

any and all of the correctional facility's grievance procedures for filing grievances before bringing constitutional claims, as this process "gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors."[81] Therefore, an inmate must file a PREA complaint unless the prison rules specify otherwise, then wait for the correctional agency to conduct an investigation and decide what action to take as a result of its findings before bringing an Eighth Amendment claim.

The PLRA was enacted in 1996 in an attempt to reduce prisoner litigation following a significant increase in the number of inmates filing suits.[82] It mandates that inmates must exhaust all administrative remedies before bringing a claim in federal court under Section 1983 or other federal law.[83] Although administrative procedures vary from state to state and among municipalities, even PREA standards seem to communicate the idea that avoidance of litigation is prioritized over the Act's explicit goal of protecting inmates' Eighth Amendment rights. Despite the risk of being subjected to retaliation from other inmates or correctional staff, inmates are required to pursue complaints against staff members alleging conduct for which they could be terminated through an internal process administered by the staff members' co-workers, which may be confidential in theory, but is unlikely to be so in practice.[84] Once an inmate has completed all administrative steps, which could take several months and place the inmate at risk of retaliation, the inmate faces the challenge of seeking relief in federal court.[85]

C. Constitutional Standards of Cruel and Unusual Punishment in Prison Are Evolving

i. Sexual Abuse and Harassment Claims in Prison Settings

Inmates who are sexually abused or harassed most frequently seek relief through Section 1983 of the Civil Rights Act of 1871 or through what is commonly referred to as a *Bivens* action.[86] An action filed under Section 1983 creates a civil cause of action for violations of constitutional rights by state officials.[87] Just as Section 1983 claims allow inmates in state facilities to sue state correctional staff for constitutional violations, *Bivens* actions, which derive from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, allow for federal inmates to bring claims against federal staff.[88] Since these are civil claims, remedies can include the award of damages, declaratory relief, or injunctive

81. Woodford v. Ngo, 548 U.S. 81, 94 (2006).

82. Ann H. Mathews, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 538 (2002).

83. 42 U.S.C. § 1983; 42 U.S.C. § 1997e(a).

84. 28 C.F.R. § 115.76(b).

85. 42 U.S.C. § 1997e.

86. Megan Coker, Note, *Common Sense About Common Decency: Promoting a New Standard for Guard-on-Inmate Sexual Abuse Under the Eighth Amendment*, 100 VA. L. REV. 437, 440 (Apr. 2014). Following the decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), it is unclear whether *Bivens* actions are still available to federal prisoners bringing claims of sexual abuse.

87. 42 U.S.C. § 1983.

88. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *See also* Coker, *supra* note 86, at 440–41.

relief.[89]

The Supreme Court has been relatively clear in the way it treats Eighth Amendment claims by providing a two-pronged test to determine if there has been a rights violation. The test applies in all Eighth Amendment cases except those involving use of force allegations. The Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment protects against "'unnecessary and wanton' inflictions of pain" that are "'totally without penological justification.'"[90] And while, "the Constitution 'does not mandate comfortable prisons,' . . . neither does it permit inhumane ones."[91]

First, an inmate must satisfy the objective component of the two-pronged test by proving that the petitioner experienced an "objectively, sufficiently serious" injury, which is determined by using evolving or "contemporary standards of decency."[92] Physical injuries are typically found to satisfy this objective component.[93] While psychological injury resulting from rape or other violence can be sufficient to satisfy the objective standard, courts have not consistently considered psychological injury resulting from other types of sexual abuse to meet this component.[94] The Eighth Amendment also "imposes duties on [prison] officials, who must provide humane conditions of confinement."[95] Therefore, if the claim involves a failure to protect an inmate from injury, an inmate must show that facility conditions pose a substantial risk of serious harm.[96]

The second prong of the two-pronged test is subjective and determines whether the accused prison official acted or failed to act with a "sufficiently culpable state of mind."[97] Courts have typically found the subjective component is satisfied when abuse by prison officials occurs "without a legitimate penological purpose."[98] In regard to failures to protect inmates from abuse, deliberate indifference requires "something more than mere negligence";[99] it requires a showing of subjective awareness that there was an excessive risk and that the risk was disregarded.[100]

In recent years, the Supreme Court's jurisprudence has been impacted by the passage of PLRA, which makes it more challenging for inmates to bring successful damages claims of violations of Eighth Amendment rights that involve sexual abuse or sexual harassment.[101] Congress amended PLRA in 2013, to include a limitation on the types of injury that could trigger a federal civil action, barring damages for an alleged mental or emotional injury without physical injury.[102] This amendment made it difficult for courts

89. Coker, *supra* note 86, at 440–41.
90. U.S. CONST. amend. VIII; Rhodes v. Chapman, 452 U.S. 337, 346 (1981).
91. Farmer v. Brennan, 511 U.S. 825, 832 (1994).
92. Hudson v. McMillian, 503 U.S. 1, 21–22 (1992).
93. Coker, *supra* note 86, at 445.
94. *Id.* at 451–53.
95. *Farmer*, 511 U.S. at 832.
96. *Id.* at 834.
97. *Hudson*, 503 U.S. at 8.
98. Coker, *supra* note 86, at 445.
99. *Farmer,* 511 U.S. at 835.
100. *Id.* at 835–37 (It should be noted that the Supreme Court reiterated that the deliberate indifference standard is not appropriate for cases that involve excessive uses of force.).
101. Coker, *supra* note 86, at 441.
102. 42 U.S.C. § 1997e(e) (stating "[n]o federal civil action may be brought by a prisoner confined in a jail,

to determine how to deal with allegations of sexual abuse that did not involve a physical component.[103] And while PLRA appears to focus mostly on the severity of the injury inflicted, the Supreme Court has articulated that injury is merely a single component of Eighth Amendment claims.[104] Of equal importance is the motivation behind inflicting the injury: whether it had a penological purpose or was instead to "maliciously and sadistically [] cause harm."[105] Correctional staff are mandated by the Eighth Amendment to "ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates,'" suggesting that rape and sexual assault have no justifiable penological purpose.[106] Furthermore, courts have explicitly stated that sexual assault in correctional institutions has no legitimate purpose and is, therefore, malicious and sadistic.[107]

Moreover, PLRA's definitions of sexual abuse and harassment are different and significantly narrower from those of PREA.[108] Under PLRA, a "sexual act" is limited to sexual contact, penetration, or intentional touching.[109] PREA defines sexual abuse of an inmate by a staff member to include "any attempt, threat, or request" to engage in sexual conduct, "any display by a staff member" of private parts of the body, and voyeurism.[110] PREA definitions also include sexual harassment, which involves "repeated and unwelcome sexual advances" and "repeated verbal comments or gestures of a sexual nature."[111] PREA standards more accurately reflect contemporary and evolving standards of decency, as demonstrated by its more expansive sexual abuse and harassment definitions.[112] By creating these definitions, PREA promotes definitional consistency. It also reflects societal opinions as to the seriousness of sexual abuse and harassment, whether in carceral settings or not.[113] Both of these aspects of PREA render it a useful tool that courts could use in assessing inmates claims of Eighth Amendment sexual abuse. But while courts appear to be considering injury more broadly as an act that inflicts harm without a legitimate purpose, the tests that courts continue to employ make bringing

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prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18)").

103. Coker, *supra* note 86, at 441–42.

104. *Hudson*, 503 U.S. at 7.

105. *Id*.

106. *Farmer*, 511 U.S. at 832.

107. *See* Wood v. Beauclair, 692 F.3d 1041, at 1050 (9th Cir. 2012); Smith v. Cochran, 339 F.3d 1205, at 1212–13 (10th Cir. 2003).

108. § 1997e; 28 C.F.R. § 115.6.

109. 18 U.S.C. § 2246(2) (1998) (There have been no amendments or alterations made to any of the definitions in this section since 1994 despite the Supreme Court's declaration that "contemporary standards of decency" be applied in addressing Eighth Amendment sexual abuse claims.).

110. 28 C.F.R. § 115.6 ("Voyeurism by a staff member . . . means an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions.").

111. *Id.*

112. *Id.*

113. *See also* Bromell v. Idaho Dep't of Corrs., No. CV05-419-N-LMB, 2006 WL 3197157, at *4 (D. Idaho Oct. 31, 2006) (acknowledging that "where uninvited sexual contact is totally without penological justification, even though it does not produce serious injury, it results in the gratuitous infliction of suffering, which always violates contemporary standards of decency").

successful sexual abuse and harassment claims difficult for inmates.

ii. The Verbal Abuse+ Test

A restrictive interpretation of the *Farmer* test used by lower courts is the Verbal Abuse+ Test.[114] This test is narrow and oftentimes yields negative results for inmates seeking relief.[115] Even if an inmate experiences repeated, persistent verbal sexual harassment from a guard, courts have consistently held that, absent physical contact that constitutes more than *de minimis* injury, the harm caused by such harassment does not rise to the level of a constitutional violation.[116] Some have referred to this standard as the "verbal abuse plus" test.[117] Requiring that harassment be accompanied by more than *de minimis* physical contact has made it difficult for inmates alleging constitutional violations based on sexual harassment alone to succeed in court.[118] With a seemingly low likelihood that sexual harassment will be deemed a constitutional violation, guards are given latitude to inflict verbal harassment on inmates as long as said harassment is not accompanied by physical action. And while inmates can proceed through administrative remedies and file claims alleging PREA violations, these claims are not guaranteed to result in disciplinary action against correctional staff.[119] When sexual harassment that takes place in correctional settings is considered to inflict minimal injury on its victims and judicial remedies are difficult to secure, PREA's goal of eliminating sexual harassment in carceral settings is further impeded.

In *Jones v. Heyns*, the District Court for the Western District of Michigan demonstrated the challenges presented by the verbal abuse+ test.[120] In *Heyns*, Anthony Jones, an inmate incarcerated by the Michigan Department of Corrections (MDOC), sued several MDOC employees alleging that Corrections Officer Shreve sexually harassed him in violation of his Eighth Amendment rights.[121] Jones was leaving the prison cafeteria with another inmate named Walker, when Shreve said, "Jones, I always see you and Walker, walking together. I wonder know [sic] which one of you are the boy, and who's the girl," causing Shreve and another corrections officer to begin laughing.[122] Jones requested that Shreve not refer to him as a boy, as this implies that someone is homosexual, which can increase an inmate's risk of harm.[123] Jones then filed a grievance alleging that Shreve had violated MDOC policy.[124] Shreve denied making the comment and Captain Makara issued inmate Jones a Class II misconduct charge for filing an unfounded grievance.[125] Lieutenant Randle found Jones guilty of the misconduct, which Jones

114. James E. Robertson, *The Verbal Abuse+ Test: A "Safe Harbor" for Sexual Harassment in Correctional Institutions*, CORR. L. REP., Aug.–Sept. 2019, at 25.
115. Jones v. Heyns, No. 1:12-CV-1341, 2013 WL 353762 (W.D. Mich. Jan. 29, 2013).
116. *Id.*
117. Robertson, *supra* note 114, at 26.
118. *Id.* at 26.
119. 28 C.F.R. § 115.76.
120. *Heyns*, 2013 WL 353762.
121. *Id.* at *1–2.
122. *Id.* at *1.
123. *Id.*
124. *Id.*
125. *Heyns*, 2013 WL 353762, at *1.

claimed was not unusual, as inmates were often charged with misconduct for filing grievances.[126] In addition to alleging retaliation and violation of his First Amendment rights, Jones claimed that the alleged sexual harassment violated his Eighth Amendment rights.[127]

The court acknowledged that "sexual harassment or abuse of an inmate by a corrections officer can *never* serve a legitimate penological purpose and may well result in severe physical or psychological harm" and "constitute the 'unnecessary and wanton infliction of pain.'"[128] While the court was obviously aware that sexual harassment can result in severe psychological harm to prisoners, it nevertheless employed the verbal abuse+ test.[129] Because circuit courts have considered psychological pain insufficient to satisfy the objective component of a constitutional claim of sexual harassment, the court used the test to conclude that the harassment allegedly inflicted on Jones by Shreve was insufficient to support an Eighth Amendment violation.[130] The court dismissed Shreve's behavior as simply unprofessional, "but . . . not ris[ing] to the level of an Eighth Amendment violation."[131]

The sexual harassment that Jones allegedly sustained seemed to be an isolated incident, which is not to suggest that it is any less serious. But inmates who have brought similar claims who have endured repeated, persistent harassment have also had their claims summarily dismissed under the verbal abuse+ test.[132] And if administrative remedies do not rectify the harmful behavior, inmates are confined to a setting in which the harassment is virtually inescapable. Congress, through PREA, condemned sexual harassment in prisons as well as rape and other physical abuse, and, through its explicit inclusion of sexual harassment, supported the notion that such harassment is capable of inflicting serious psychological harm and is therefore unacceptable in correctional settings.[133]

iii. The Further Evolution of the *Farmer* Test

Some courts appear to be shifting away from the narrow verbal abuse+ test, suggesting that incremental changes are taking place in courts' approaches to inmate claims of Eighth Amendment cruel and unusual punishment violations. In *Rafferty v. Trumbull County Ohio*, the Sixth Circuit Court of Appeals avoided applying the verbal abuse+ test by framing what arguably could be termed sexual harassment as sexual abuse in order to satisfy the requirement that there be physical touching.[134]

In *Rafferty*, two female inmates, Sherman and Rafferty, were incarcerated at the Trumbull County Jail from 2013 to 2014.[135] In 2014, Correctional Officer Drennen

126. *Id.*
127. *Id.* at *2.
128. *Id.* at *3 (emphasis added).
129. *Id.*
130. *Heyns*, 2013 WL 353762 at *4.
131. *Id.*
132. Robertson, *supra* note 114, at 27.
133. 28 C.F.R. § 115.6.
134. Rafferty v. Trumbull Cty. Ohio, 915 F.3d 1087 (6th Cir. 2019).
135. *Id.* at 1091.

demanded that Sherman expose herself to him on several occasions.[136] Drennen also ordered Sherman to masturbate for him on multiple occasions.[137] While Drennen never physically touched Sherman, she felt that she had to comply with his commands.[138] Both of the women, who were cellmates, sued, alleging Fourth and Eighth Amendment violations.[139]

In outlining the components of the Eighth Amendment test for sexual abuse claims, the court noted that the objective component of the test is meant to be "a 'contextual' inquiry that is 'responsive to contemporary standards of decency'" and that courts must interpret the Eighth Amendment using "'evolving standards of decency that mark the progress of a maturing society.'"[140] Despite the lack of physical contact between Sherman and Drennen, the court referred to the harm as sexual abuse and found that it was sufficiently serious, satisfying the objective component of the test.[141] Interestingly, the court construed Drennen's acts as sexual abuse because it found that physical contact occurred when the officer demanded that Sherman touch herself.[142] And, because inmates cannot legally consent to sexual relations with prison staff, Drennen could not use Sherman's acquiescence to his demands as a defense.[143]

The Sixth Circuit could have construed Drennen's behavior as sexual harassment, which would have most likely rendered Sherman and Rafferty's claims unsuccessful, as the objective component would not have been satisfied due to the lack of physical touching.[144] The definitions of sexual abuse and sexual harassment appear to be malleable, as the distinctions between sexual abuse absent physical touching and sexual harassment are somewhat vague. Definitional inconsistencies in how courts may define these terms can have significant negative impacts on inmates seeking legal relief, as it makes predicting the receipt of relief more difficult.[145] Because PREA standards clearly define both sexual harassment and sexual abuse, they offer a solution to the issue of definitional inconsistency.[146] While PREA seems to include the definition of sexual harassment within its definition of sexual abuse, PREA's inclusion of sexual harassment at all suggests that such behavior within carceral settings is contrary to contemporary standards of decency, capable of inflicting serious injury, and should not be tolerated.[147]

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Rafferty*, 915 F.3d at 1092.

140. *Id.* at 1094 (quoting Williams v. Curtin, 631 F.3d 380, 383 (6th Cir. 2011); Kent v. Johnson, 821 F.2d 1220, 1227 (6th Cir. 1987)).

141. *Rafferty*, 915 F.3d at 1095.

142. *Id.* at 1096.

143. *Id.*

144. While courts seem to apply a heightened standard to inmate Eighth Amendment claims in order to satisfy the objective component, the Equal Employment Opportunity Commission defines sexual harassment as, "unwelcome sexual advances, requests for sexual favors, and other verbal or *physical* harassment of a sexual nature" *See* Equal Employment Opportunity Commission (last visited Nov. 22, 2019), https://www.eeoc.gov/laws/types/sexual_harassment.cfm (emphasis added).

145. For a brief discussion of the impact of definitional consistency, *see* Coker, *supra* note 86, at 442–44.

146. 28 C.F.R. § 115.6.

147. *Id.* (The definition of sexual harassment is a subpart of the definition of voyeurism, which PREA has categorized as sexual abuse, despite the lack of physical touching inherent in voyeurism).

In another example demonstrating the increased seriousness attributed by courts to the harm that sexual abuse and harassment can inflict on inmates, the Seventh Circuit Court of Appeals ruled that "attempt[ing] to draw a categorical distinction between verbal and physical harassment is arbitrary."[148] In *Beal v. Foster*, Beal brought a suit under Section 1983 against the prison warden (Foster) and a prison guard (Schneider), alleging that he had been subjected to cruel and unusual punishment after the guard repeatedly subjected him to sexual harassment.[149] The alleged harassment included repeated sexual comments suggesting that Beal was homosexual and the defendant guard intentionally urinating in front of Beal and other inmates.[150] The district court dismissed the claim at screening, stating that verbal harassment alone does not constitute cruel and unusual punishment.[151] The Seventh Circuit viewed the lower court's reasoning as clearly erroneous, noting that verbal harassment can be as severe as "physical brutalization of prisoners by guards" and that cruel and unusual punishment may be physical or psychological.[152] The court acknowledged that it had previously held that "simple verbal harassment" is not cruel and unusual punishment, but recognized the vagueness of the term "simple."[153] It clarified that "simple" was meant to mean "fleeting," distinguishing between verbal harassment that makes a lasting impact and harassment that does not.[154] The court noted the repetitiveness of the harassment, the prison guard's rank as a Sergeant, and the increased risk of bodily harm to the inmate as a result of the guard's comments.[155]

Despite the court's attempt at clarification between simple and complex harassment, it seems that its assessment of the impact the harassment imposes on a prisoner continues to be extremely personal and subjective, eluding definitional consistency.[156] The court concluded that the district court erred, but it points out that, simple or complex, verbal harassment claims typically do not rise to the level of cruel and unusual punishment.[157] Still, some of these claims *do* rise to the level of cruel and unusual, but the court did not articulate a clear and concise rule or standard to help in making this determination. Regardless of the definitional ambiguity, the Seventh Circuit emphasized the seriousness of psychological harm and that such harm can be inflicted through both physical and verbal means.[158] PREA, which acknowledges the damage sexual abuse and harassment can have on inmates, reinforces this court's approach of assessing what types of injuries satisfy the objective component of the Eighth Amendment test.[159]

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148. Beal v. Foster, 803 F.3d 356, 357 (7th Cir. 2015).

149. *Id.*

150. *Id.* at 357–58.

151. *Id.* at 357. 'Screening' refers to "the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted." *See* Definition of Screening, LAW INSIDER, https://www.lawinsider.com/dictionary/screening (last visited May 31, 2020).

152. *Id.* at 358.

153. *Beal*, 803 F.3d at 358.

154. *Id.*

155. *Id.* (It is also important to note that the inmate filed a grievance with the prison and that grievance was upheld, but it is unknown whether this resulted in any punishment of the defendant.).

156. *Id.* at 358.

157. *Id.*

158. *Beal*, 803 F.3d at 357.

159. *Id.*

Both *Rafferty* and *Beal* illustrate changing approaches to inmate claims of Eighth Amendment sexual abuse and harassment. Increasingly, there seems to be a trend of moving away from an absolute requirement that an inmate sustain a physical assault defined as contact between two individuals. Instead, there is movement towards expanding the objective component of the Eighth Amendment test to encompass psychological harm resulting from either sexual abuse or harassment.[160] As these standards continue to evolve, it becomes necessary for courts to reference sources that can inform them of how to define "contemporary standards of decency."[161] PREA is a source that courts can use to traverse these evolving standards and tests. Given that PREA was developed by Congress with the input of numerous organizations and that the final rule published by the Attorney General was informed by ample research and data on the issue, the Act is highly relevant.[162]

D. Cruel and Unusual Punishment Claims Given More Serious Consideration

Some cases acknowledge PREA's relevance. In *Zollicoffer v. Livingston*, the plaintiff was a transgender inmate who had been housed in seven different Texas prison units.[163] She experienced sexual assault or abuse in all seven facilities, despite satisfying administrative reporting requirements and requesting that protective measures be taken to prevent future assaults.[164] The plaintiff brought a Section 1983 action against the Executive Director of the Texas Department of Criminal Justice (TDCJ) alleging deliberate indifference.[165]

While the case was deferred for decision based on the issue of whether the defendant was shielded by qualified immunity, the district court determined that the defendant could be liable under Section 1983 for being deliberately indifferent to the inmate's risk of being sexually abused.[166] In addition to the PREA standards being incorporated into TDCJ's policies, the defendant was also Chair of the Standards Committee for the American Correctional Association and "personally participated in PREA hearings."[167] The court found the defendant's involvement and awareness of the PREA standards important enough to constitute knowledge (or that he should have had knowledge) and deliberate indifference towards the heightened risk of sexual assault within prison.[168] Furthermore, the court noted the extremely high rates of sexual abuse within Texas correctional facilities, referencing the statistics that have to be reported to BJS in order for a state to receive funding through PREA.[169]

Although this case involved a correctional official who had a direct link to PREA,

160. *See Hudson,* 503 U.S. 1, 16 (Blackmun, H., concurring) ("I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes. If anything, our precedent is to the contrary.").

161. *Hudson*, 503 U.S. at 2, 8, 9.

162. Jenness & Smyth, *supra* note 1, at 491.

163. 169 F. Supp. 3d 687, 689 (S.D. Tex. 2016).

164. *Id.* at 690.

165. *Id.* at 689.

166. *Id.* at 696.

167. *Id.*

168. *Zollicoffer*, 169 F. Supp. 3d at 696.

169. *Id.* at 690–91.

Zollicoffer is a good example of how courts could and should reference PREA standards. If state correctional facilities are receiving funding through PREA, then it is not unreasonable to assume that they should have knowledge of the standards and be held accountable when a violation occurs. The court here considered PREA highly relevant, making its determination partially based on the existence of PREA standards and the BJS statistics that were a direct result of PREA.[170] While this case dealt specifically with deliberate indifference, it illustrates the importance and relevancy of PREA to defendants' knowledge of the risk of sexual assault in regard to Eighth Amendment claims of sexual abuse, which can be brought under Section 1983.

III. RELEVANCE OF PREA STANDARDS TO PRIVATE CLAIMS OF CARCERAL SEXUAL ABUSE

A. No Right to Private Cause of Action, But Completely Irrelevant?

As mentioned previously, claims brought under PREA will not succeed because PREA did not create a private cause of action. But while this conclusion is undisputed, it is erroneous to infer that PREA standards are entirely irrelevant to sexual abuse claims brought under the Eighth Amendment. *Njos v. United States* is one of many examples in which a court immediately dismissed a claim because an inmate, who was proceeding *pro se*, mistakenly brought a claim under PREA.[171] The plaintiff brought Eighth Amendment claims, in addition to claims under the Federal Torts Claim Act and *Bivens*, alleging that he did not receive adequate psychological treatment after being raped by his cellmate.[172]

The court dismissed the claims brought under PREA, simply stating that the standards do not give rise to a private cause of action and that any claims brought under them must fail.[173] The plaintiff argued that he had not made PREA claims, but used PREA standards to define "evolving standards of decency" to support his Eighth Amendment claim.[174] Although the court noted this argument, it chose not to address whether or not PREA standards could or should be used as support for Eighth Amendment claims, but merely stated that PREA did not create a private cause of action.[175] The Eighth Amendment claims failed for other reasons, but the court allowed the inmate, who was proceeding *pro se*, an opportunity to amend his complaint.[176]

The court's failure to address whether PREA standards are relevant to this Eighth Amendment claim disregards the possibility that the standards may be used to support such claims and should not be unceremoniously dismissed as automatically irrelevant. Many state facilities have either adopted PREA standards or adapted and incorporated them into their own policies, signaling that the standards are important to the operation of the facility.[177] PREA was meant to eliminate prison rape by outlining standards for

170. *Id.*
171. No. 3:14-CV-1960, 2016 WL 1720816 (M.D. Penn. Apr. 29, 2016).
172. *Id.* at *1.
173. *Id.* at *3.
174. *Id.* at *2.
175. *Id.* at *3.
176. *Njos*, 2016 WL 1720816, at *5.
177. U.S. Dep't of Just., Bureau of Just. Assistance, FY 2017 LIST OF CERTIFICATION AND ASSURANCE

correctional staff on how to handle the occurrence of sexual abuse or harassment.[178] Given PREA's intent and recency, the inmate's use of PREA standards in the *Njos* case to define "evolving standards of decency" seems logical.[179] Even if PREA standards cannot, alone, be used to prove such an evolving standard, they can certainly bolster such an argument. They do not create a private cause of action and therefore cannot be used to file a claim.[180] But this does not and should not render PREA standards irrelevant in their entirety.

Demonstrating just how relevant PREA can be, the District Court for the Eastern District of Louisiana deemed the standards to be significant enough to reference when approving a consent judgment to remedy constitutional violations, some of which included allegations of sexual abuse and assault.[181] The case of *Jones v. Gusman* involved a class action lawsuit, which was filed against the Orleans Parish Prison and the City of New Orleans, alleging a number of unconstitutional conditions within the facility.[182] As a result, there was a proposed consent judgment.[183] In 2009, the Department of Justice conducted a site visit and found that there were unlawful conditions pertaining to "inmate violence, staff use of force, mental health care, and environmental condition."[184]

The court noted that PREA does not create a cause of action, but that the facility had committed several PREA violations.[185] The parties involved were in agreement that the consent judgment should be tailored to address the PREA violations.[186] While the resulting agreement addressed many issues within the facility, it is important to note that the court found PREA standards sufficiently relevant in attempting to rectify the various identified constitutional violations, despite its inability to create a cause of action. This would suggest that, if the facility was noncompliant with the consent decree, PREA standards would also be relevant in regard to assessing and rectifying that noncompliance.

While *Gusman* involved the drafting and enforcement of a consent decree for numerous constitutional violations, including Eighth Amendment violations, the decree specifically sought to prevent further sexual abuses within the prison.[187] This case illustrates just how PREA could be used when addressing Eighth Amendment violations by using PREA standards as one piece of supporting relevant evidence; violations of PREA standards alone may not be sufficient to prove Eighth Amendment violations, but may offer further support to show that "contemporary standards of decency" were violated.[188]

Moreover, courts have been inconsistent in their determination of PREA standards' relevancy, reinforcing the notion that the standards do offer some level of relevancy. Many inmates have tried to bring claims of sexual abuse against prison staff by alleging PREA

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178. 34 U.S.C. § 30302.
179. 2016 WL 1720816, at *2.
180. 34 U.S.C. § 30301.
181. *See* Jones v. Gusman, 296 F.R.D. 416, 454 n.488 (E.D. La. 2013).
182. *Id.* at 423–25.
183. *Id.* at 426–27.
184. *Id.* at 424.
185. *Id.* at 454 n.448.
186. *See Jones*, 296 F.R.D. at 454 n.488.
187. *Id.* at 431.
188. *Hudson*, 503 U.S. 1, 10, 22–23.

violations, as opposed to Eighth Amendment violations, which can be more difficult to prove.[189] Courts have summarily dismissed such claims brought under PREA because, as stated previously, PREA did not in fact create a private right of action.[190] But, while violations of PREA may not be adjudicated in isolation in the court system, such violations should not be considered irrelevant to sexual abuse claims brought under the Eighth Amendment—one of PREA's explicitly stated goals was to reduce and eliminate the occurrence of Eighth Amendment violations in prisons.[191]

Courts appear to make PREA's relevancy dependent upon whether PREA is being used as either a sword or a shield. Defendants in Eighth Amendment sexual abuse cases, typically prison staff, have been allowed to use PREA as a shield, while inmates have been barred from using it as a sword, specifically, because PREA did not create a private cause of action.[192] Congress enacted PREA to protect inmates from rape and sexual abuse, thus it appears as though the courts are flouting Congress's intentions through such inconsistent treatment of parties with regard to the application of PREA. By allowing defendants to use PREA to their advantage, the courts have equipped prison staff with yet another means of protection from accountability.[193]

Courts have enabled prison staff to use PREA as a shield, deeming PREA standards relevant in regard to a defense. For example, prison officials have cited PREA and their duty to reduce prison rape when justifying prohibiting an inmate from having prayer oils, despite the defendants never articulating a logical connection between PREA and their actions; in an Eighth and Fourteenth Amendment case, prison officials used PREA to justify withholding hormone treatment to a transgender inmate, as they claimed it would increase the inmate's risk of being raped; and prison officials have employed PREA compliance as a defense against various types of inmate claims, despite courts' rulings that compliance with standards, such as American Correctional Association standards, does not automatically give rise to the conclusion that a violation has not occurred.[194]

This treatment of PREA suggests that, while PREA violations are supposedly not relevant to Eighth Amendment sexual abuse claims, the standards are relevant in proving that such violations have not occurred. Such positions are discordant and ignore PREA's ultimate purpose.[195] Inmates, in whose interests the law was enacted, have effectively been equipped with a tool that has been severely hindered by many courts' seemingly dissonant interpretation.[196] As illustrated by cases in which the courts have allowed them to be used as a defense, PREA standards are of at least minimal relevance and should be made equally available to both parties.

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189. *See* Colon v. Kenwall, No. 1:18-CV-840, 2018 WL 5809863, at *1, *2, *5 (M.D. Pa. Nov. 6, 2018).

190. 34 U.S.C. § 30301.

191. *Id.* § 30302.

192. *See* Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011), Hammons v. Jones, No. 00-CV-143 GKFSAJ, 2007 WL 2219521, at *1, *3 (N.D. Okla. July 27, 2007), Crane v. Allen, 3:09-CV-1303-HZ, 2012 WL 602432 (D. Or. Feb. 22, 2012).

193. Qualified immunity is another such tool of protection used by prison staff.

194. Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011), Hammons v. Jones, No. 00-CV-143 GKFSAJ, 2007 WL 2219521 (N.D. Okla. July 27, 2007), Crane v. Allen, 3:09-CV-1303-HZ, 2012 WL 602432, at *1, *8 (D. Or. Feb. 22, 2012).

195. 34 U.S.C. § 30302.

196. *See* Arkles, *supra* note 20.

B. Standards Used to Assess Various Conditions Within Prisons

Other types of standards created and used by various correctional agencies have also been used to evaluate unconstitutional conditions within carceral settings.[197] While many of these standards have not been approved or enacted by such an authoritative body as Congress, courts have used them as relevant evidence in assessing the quality of mental health care, safety, and living conditions in correctional facilities.[198]

i. Mental Health Care

Courts have used various organizational standards to both assess and remedy the existence of constitutional violations within carceral institutions, reinforcing the notion that certain standards, such as PREA, are relevant.[199] For example, in *Gates v. Cook*, the Fifth Circuit Court of Appeals affirmed a lower court's order of injunctive relief which required the correctional facility in question to adhere to the standards of the American Correctional Association (ACA) and the National Commission on Correctional Health Care (NCCHC).[200] The ACA and NCCHC are non-profit organizations that produce non-governmental standards.[201]

The plaintiff, an inmate incarcerated at the Mississippi State Penitentiary, sued the Mississippi Department of Corrections (MDOC) alleging that many of the facility conditions on Death Row were in violation of he and other inmates' Eighth Amendment rights against cruel and unusual punishment.[202] The District Court of Northern Mississippi found that several of the facility conditions constituted Eighth Amendment violations and ordered MDOC to comply with injunctive relief meant to remedy such violations.[203] The district court found that there were severe issues with the sanitation, heating and cooling, pest control, plumbing, and lighting on Death Row.[204] Furthermore, laundry was returned unclean, inmates were forced to exercise in inappropriate footwear, and the mental health care was "grossly inadequate."[205] The district court ordered that, to address the issues with pest control and mental health care, MDOC adhere to ACA and NCCHC standards.[206] The Fifth Circuit affirmed the lower court's order to comply with ACA and NCCHC standards as to those issues.[207]

The conditions within the Mississippi State Penitentiary's Death Row arguably

197. *See* Gates v. Cook, 376 F.3d 323 (5th Cir. 2004); Hall v. Bennett, 379 F.3d 462 (7th Cir. 2004).
198. *Id.*
199. *Gates*, 376 F.3d at 333–34, 337.
200. *Id.* at 342.
201. *Standards & Accreditation,* AM. CORR. ASS'N, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/ACA_Member/Standards_and_Accreditation/SAC.aspx?hkey=7f4cf7bf-2b27-4a6b-b124-36e5bd90b93d (last visited Jan. 19, 2020); *Standards & Resources*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/standards-resources (last visited Jan. 19, 2020).
202. *Gates*, 376 F.3d at 327.
203. *Id.*
204. *Id.* at 333–35.
205. *Id.* at 335.
206. *Id.* at 336.
207. *Gates*, 376 F.3d at 340–43.

rendered it unfit for human habitation.[208] These unconstitutional conditions, such as the lack of adequate lighting and sanitation, directly impacted the quality of the inmates' mental health.[209] The court found it important to note that, while "the Constitution does not mandate comfortable prisons, [] neither does it permit inhumane ones."[210] Courts use an "evolving standard[] of decency that mark[s] the progress of a maturing society" in order to distinguish inhumane from humane prison conditions.[211] The ACA and NCCHC standards apparently demonstrated "evolving standards of decency," which the court found sufficiently relevant in drafting injunctive relief measures to remedy the Eighth Amendment violations.[212]

The organizational standards in *Gates* were referenced in regard to remedying constitutional violations, not necessarily to proving the existence of those constitutional violations.[213] But, by requiring the facility's compliance with ACA and NCCHC standards, one can draw the conclusion that a violation of those standards would, at the very least, support a future Eighth Amendment claim of cruel and unusual punishment, rendering such organizational standards relevant. PREA standards were enacted to improve conditions within carceral settings and protect inmates from violations of their rights, just as the ACA and NCCHC are committed to improving correctional institutions.[214] Similar to ACA and NCCHC standards, PREA sets forth "evolving standards of decency"; PREA's passage was written with the involvement of various organizations, including correctional bodies, and its standards were enumerated less than a decade ago.[215] The Fifth Circuit acknowledged in *Gates* that "mental health needs are no less serious than physical needs."[216] Prison rape and sexual assault and harassment, which PREA standards attempt to prevent, disrupt both mental and physical health.[217] Therefore, PREA standards represent an "evolving standard of decency" that is relevant in assessing Eighth Amendment claims of sexual assault.

ii. Safety and Living Conditions

In addition to using organizational standards to assess the inadequacy of mental health care within prisons, courts have also used them in examining inmate claims of deliberate indifference of correctional staff.[218] In *Hall v. Bennett*, the Seventh Circuit Court of Appeals found that a jury could conclude correctional staff should have been aware of a substantial risk posed to an inmate given the existence of the National Electrical

208. *Id.* at 327 (The plaintiff alleged that the inmates were "subjected to profound isolation, lack of exercise, stench and filth, malfunctioning plumbing, high temperatures, uncontrolled mosquito and insect infestations, a lack of sufficient mental health care, and exposure to psychotic inmates in adjoining cells.").
209. *Id.* at 335.
210. *Id.* at 332.
211. *Id.* at 333.
212. *Gates*, 376 F.3d at 342–44.
213. *Id.* at 342.
214. AM. CORR. ASS'N, *supra* note 201.
215. *Gates*, 376 F.3d at 333.
216. *Id.* at 332.
217. 34 U.S.C. § 30301.
218. *Hall*, 379 F.3d 462 (7th Cir. 2004).

Safety Code (NESC).[219]

The plaintiff was an inmate at the Correctional Industrial Facility in Pendleton, Indiana, working as an electrician.[220] According to the plaintiff, he was assigned to do electrical work on live electrical lines without protective gloves.[221] He was not a journeyman electrician.[222] The plaintiff experienced a severe electrical shock that traveled from his left finger to his left knee, allegedly due to a slit in the protective insulation on the pliers he had been using.[223] He then brought a Section 1983 suit against his supervisors Stan Russell, the plant engineer, and Allen Bennett, the foreman electrician, alleging deliberate indifference and negligence.[224]

The Seventh Circuit vacated and remanded the district court's grant of summary judgment for the defendants.[225] The court reasoned that, because Bennett was an electrician foreman, he would have or should have "been aware of general safety codes that compel those working on even low-voltage circuits to wear insulated gloves," citing NESC.[226] Furthermore, the court determined that a jury could find that, given the defendants' professional experience and their awareness of such organizational codes as the NESC, they should have been aware of the substantial risk of doing electrical work without protective gloves.[227]

The Seventh Circuit ruled that it would be reasonable for a jury to draw the inference that the disregard of certain professional codes can result in liability.[228] As previously discussed, courts have used the high occurrence of sexual abuse and harassment, which occurs in carceral settings as sufficient to assume that correctional staff should be aware that inmates are at substantial risk of such harm.[229] PREA provided resources to BJS to gather statistics, research, and data on prison rape, to assess the extent of and increase awareness of the problem of prison rape.[230] But, even if correctional staff should not necessarily be expected to know exact statistics, they presumably should have some amount of personal awareness of the issue, given that they are oftentimes either directly involved with or on the periphery of the occurrence of the problem.

The subjective component of the *Farmer* test requires something more than mere negligence.[231] Therefore, knowledge alone that sexual abuse is a persistent problem within correctional facilities generally is insufficient to satisfy the subjective prong of the test. But, similar to the way the court used NESC in *Hall*, courts could consider PREA standards in Eighth Amendment sexual abuse cases as supportive, as opposed to direct,

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219. *Id.* at 466.
220. *Id.* at 463.
221. *Id.*
222. *Id.* (A journeyman electrician is an electrician, despite not obtaining licensure as a master electrician, who has the training and experience necessary to work independently.).
223. *Hall*, 379 F.3d at 463.
224. *Id.*
225. *Id.* at 466.
226. *Id.* at 465.
227. *Id.* at 466.
228. *Hall*, 379 F.3d at 465–66.
229. *Zollicoffer*, 169 F. Supp. 3d 687, 691 (S.D. Tex. 2016).
230. 34 U.S.C. § 30303.
231. *Farmer*, 511 U.S. at 835–37.

evidence of the subjective component of the *Farmer* test. Just as NESC informs electrical professionals of precautions to take to promote safety, PREA standards offer guidance to correctional professionals on how to protect inmates from violations of their Eighth Amendment rights.

Moreover, in *Hall*, the defendants' failure to supply the plaintiff with protective gloves was in direct disregard of NESC recommendations.[232] The court's reference to NESC demonstrated that it found such organizational standards relevant in addressing the defendants' subjective awareness of the situation.[233] Published and written by the Institute of Electrical and Electronics Engineers, NESC is a voluntary standard, which a majority of the States have adopted as law.[234] PREA, created by numerous organizations and enacted by Congress, has been fully adopted by nineteen States, with twenty-nine additional States, the District of Columbia, and four United States territories, giving assurance of compliance.[235]

C. Professional Standards and Other Areas of Law

Not only have courts used other organizational standards to assess various conditions in correctional facilities, courts have used professional standards in determining the existence of constitutional violations.[236] This suggests that, while such standards may not be dispositive that a violation has occurred, they are relevant in assessing claims of constitutional violations.

i. The ABA Model Rules of Professional Conduct and Ineffective Assistance of Counsel Claims

The Supreme Court has used the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) in regard to Sixth Amendment ineffective assistance of counsel claims.[237] Notably, the Court used the Model Rules in establishing the test used to assess Sixth Amendment claims, in addition to using them in many other legal contexts.[238] Therefore, the Court has acknowledged the Model Rules, which were produced by a professional organization and are not law, as persuasive authority. Given that the Court has deemed rules written by a body with far less authority than that of Congress to be relevant in addressing claims of Sixth Amendment violations, it would be inconsistent for federal courts to not consider PREA relevant as persuasive authority in regard to Eighth Amendment claims of sexual abuse or harassment arising from a prison

232. *Hall*, 379 F.3d at 465.

233. *Id.*

234. *National Electrical Safety Code Adoption/Reference of 2012 Edition Survey*, INST. ELEC. & ELECS. ENG'RS, https://standards.ieee.org/content/dam/ieee-standards/standards/web/documents/other/2012-nesc-state-adoption-reference-survey.pdf.

235. U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE, FY 2017 LIST OF CERTIFICATION AND ASSURANCE SUBMISSIONS FOR AUDIT YEAR 3 OF CYCLE 1 (2017), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fy17-prea-certification-assurance-submissions.pdf.

236. *See* Strickland v. Washington, 466 U.S. 668 (1984).

237. *Strickland*, 466 U.S. 668.

238. *See* George L. Hampton IV, *Toward an Expanded use of the Model Rules of Professional Conduct*, 4 GEO. J. LEGAL ETHICS 655 (1991).

setting.

The Model Rules were developed and adopted by the ABA, a voluntary bar association, in 1979, to establish disciplinary procedures for ethical violations within the legal profession.[239] The use of the term "law," in this context, is somewhat of a misnomer though, as the Model Rules are not binding in the same way that a federal or state statute would be, but allow legal professionals to regulate one another and impose discipline on those who do not "maintain appropriate standards of professional conduct."[240] Given the gravity of practicing a profession in which a client's rights and outcomes directly hinge upon their attorney's performance, such self-regulation is also meant to "protect the public and administration of justice."[241]

A violation of the Model Rules may not result in legal ramifications, unless an attorney has simultaneously committed an unlawful act, as "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."[242] The Model Rules are meant to "define minimum standards of acceptable attorney conduct."[243]

The Supreme Court has referenced the Model Rules numerous times to address various types of legal questions.[244] Furthermore, the Court has used the Model Rules to make ethical determinations about the legal profession.[245] This demonstrates that the Model Rules, although not controlling authority, are given significant weight within the judicial system. The Court illustrated the importance of the Model Rules when it made direct reference to them in developing the *Strickland* test, which has been used to assess ineffective assistance of counsel claims since.[246]

In *Strickland*, the defendant was accused of a number of serious crimes.[247] Contrary to defense counsel's recommendations, the defendant eventually confessed, waived his right to a jury trial, and plead guilty to all of the charges, which included three counts of capital murder.[248] Due to strategy considerations and for other reasons, defense counsel did not gather character witnesses or order a psychiatric evaluation of the defendant.[249] The defendant was subsequently sentenced to death.[250]

At the time of this decision, the Supreme Court had "never directly and fully addressed a claim of 'actual ineffectiveness' of counsel's assistance in a case going to

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239. *Id.* at 657.

240. *Id.*

241. *Id.*

242. MODEL RULES OF PROF'L CONDUCT, Scope (AM. BAR ASS'N 2019), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/.

243. Hampton, *supra* note 238, at 659.

244. Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPPERDINE L. REV. 77, 79 (2007).

245. *Id.* at 80.

246. *Strickland*, 466 U.S. 668 (It should be noted that the *Strickland* test is not the sole precedent test used by the Supreme Court to assess ineffective assistance of counsel claims.).

247. *Id.* at 672.

248. *Id.*

249. *Id.* at 673.

250. *Id.* at 675.

trial."[251] While a number of federal and state courts had adopted a "reasonably effective assistance" standard, there was still inconsistency between courts as to what standard to apply in ineffective assistance of counsel claims.[252] In addressing this inconsistency, the Court declared that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[253] In determining what constitutes a reasonable performance, the Court referenced the Model Rules, as "[p]revailing norms of practice [are] reflected in American Bar Association standards . . . and ABA Standards for Criminal Justice."[254] Although the Model Rules are only "guides to determining what is reasonable," the Court explicitly sanctioned the use of the Model Rules to define "reasonable performance."[255]

As mentioned previously, the Model Rules were written by a professional body with no legal authority. Nonetheless, the Court found that the Model Rules were relevant in helping to fashion a constitutional test to assess Sixth Amendment violations. The Court relies, to some degree, on the ABA to inform lawyers of what constitutes professional norms. Furthermore, the ABA is able to adapt the Model Rules to changing norms in order to revise professional expectations as necessary or appropriate. The Court's deference to an organizational body's standards, such as the ABA's Model Rules, demonstrates that, while not controlling, such standards may be relevant in determining the existence of a constitutional violation.[256]

Despite the Supreme Court's setting out of a definitive two-part test, Justice Marshall expressed concern in his dissenting opinion that the vagueness of the term "reasonable" would undermine consistency within the lower courts as to what qualified as ineffective assistance of counsel.[257] Furthermore, Marshall argued that a standard of "reasonableness" was too malleable and that such a term might result in rendering successful ineffectiveness claims difficult.[258] While the *Strickland* test has remained in place, it has sustained criticism "for setting the constitutional and ethical safeguards too low" and allowing deficient attorney performance to go undisciplined.[259]

Although *Strickland* initially set out the test for assessing ineffective assistance of counsel claims, the Supreme Court has reaffirmed its use of the Model Rules in later cases.[260] In *Wiggins v. Smith*, the Court displayed deference to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in assessing "prevailing professional standards" in regard to capital defense work.[261] More recently, the Court expressed in *Bobby v. Van Hook* that, in order to properly assess professional

251. *Strickland*, 466 U.S. at 683.
252. *Id.* at 684.
253. *Id.* at 688.
254. *Id.*
255. *Id.*
256. *See* Roe v. Flore-Ortega, 528 U.S. 470, 479 (2000).
257. *Strickland*, 466 U.S. at 707 (Marshall, T., dissenting).
258. *Id.*
259. Rigg, *supra* note 244, at 97.
260. Bobby v. Van Hook, 558 U.S. 4 (2009); Wiggins v. Smith, 539 U.S. 510 (2003).
261. *See generally* 539 U.S. 510.

norms, courts must apply up-to-date standards.[262] After a lower court used the 2003 ABA guidelines to assess an attorney's performance in an eighteen-year-old case, the Court reiterated that the Model Rules, while certainly relevant to assessing Sixth Amendment claims, are "only [relevant] to the extent they describe the professional norms prevailing when the representation took place," emphasizing the importance of maintaining contemporary professional standards.[263]

The Supreme Court expanded the reach of the *Strickland* test to include performance in plea bargaining and attorney-client communications.[264] In 2012, the Court decided in *Missouri v. Frye,* that the failure of defense counsel to communicate a formal plea offer to a client constituted deficient performance.[265] Furthermore, in cases addressing immigration-related issues, the Court decided that the failure to communicate the possibility of deportation, which might accompany entering a guilty plea, constituted deficient performance by counsel.[266]

While the two-part test may not result in a significant number of successful ineffective assistance of counsel claims, some argue that the Model Rules are a sufficient supplement, providing the *Strickland* test with "teeth."[267] Given that subpar performances by attorneys may not necessarily rise to the level of failing the *Strickland* test, it can be argued that use of the test alone is ineffective as a means of imposing consequences in those cases where an attorney has merely performed poorly. Thus, the Model Rules are not only relevant in addressing Sixth Amendment ineffective assistance of counsel claims, but also create a way to impose discipline on substandard performances that do not rise to the level of constitutional violations.

Unlike the Model Rules, which were made by and for a professional organization, PREA was an explicit acknowledgement by the federal government that prison rape and sexual abuse is a problem demanding a meaningful solution. Similar to the Supreme Court's use of the Model Rules to determine what qualifies as "prevailing professional norms," the Court relies on "contemporary standards of decency" for assessing Eighth Amendment sexual abuse and harassment claims brought by inmates.[268] PREA, by setting forth the goal of reducing Eighth Amendment violations by eliminating prison rape and outlining how to achieve that goal, is relevant in defining such standards of decency.

There is inconsistency in how courts define the objective component of the *Farmer* test, with only some courts finding that both physical and psychological injuries can be "sufficiently serious."[269] But PREA provides clear definitions of what constitutes sexual abuse and harassment, and, by extension, identifies what behaviors are unacceptable.[270] Congress enacted PREA in 2003, the Attorney General disseminated PREA standards nine

262. 558 U.S. at 7.
263. *Id.* at 7.
264. *See* Missouri v. Frye*,* 566 U.S. 134 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010).
265. 566 U.S. 134, 145.
266. *Padilla*, 559 U.S. 356, 384, 388.
267. *See* Riggs, *supra* note 244, at 78.
268. *Strickland*, 466 U.S. at 688; *Farmer*, 511 U.S. at 858.
269. Coker, *supra* note 86, at 451–53.
270. 28 C.F.R. § 115.6.

years later, and, in 2012, President Obama reaffirmed PREA's purpose.[271] Therefore, the courts could look to PREA in determining "contemporary standards of decency" with regard to the issues of sexual abuse and harassment in carceral settings as its standards appear to reflect just that.

Although Congress may have intentionally restricted PREA's power, this does not suggest that the standards contained therein are completely irrelevant to Eighth Amendment claims, as some courts seem to have concluded.[272] Even though violations of the Model Rules do not create a private cause of action, the Supreme Court has nevertheless found them to be relevant in assessing Model Rule violations that also result in constitutional violations.[273]

The courts consider the Model Rules, which were written by a professional organization, relevant to Sixth Amendment claims.[274] Given that Congress drafted PREA with the assistance of many organizations, some of them professional organizations similar to the ABA, reference to PREA standards seems relevant in addressing Eighth Amendment claims.[275]

IV. CONCLUSION

PREA came into being over a decade ago. And it has been almost a decade since the Attorney General published the PREA standards. Courts, albeit incrementally, have begun acknowledging the gravity of the issue of prison rape, as demonstrated by the application of evolving standards of contemporary decency to assess Eighth Amendment claims. The courts appear to be responding to changing societal standards in regard to rape and sexual abuse by adjusting their legal tests. Unfortunately, despite Congress's action in establishing PREA, the problem of prison rape persists at unacceptably high rates. It is doubtful that Congress meant for this to be the case when it enacted PREA with overwhelming bipartisan support, seeing as PREA's express purpose was to eradicate rape and sexual assault in any and all carceral settings.

Although the way in which Eighth Amendment cruel and unusual claims are being judicially addressed is changing, PREA's failure to succeed in achieving its ultimate purpose is partially attributable to courts' obstruction of the use of PREA standards. The courts have made it quite clear that PREA did not create a right to a private cause of action, but this fact does not provide a comprehensive explanation as to why courts have also dismissed PREA standards as irrelevant to Eighth Amendment sexual abuse claims. The standards were found to be sufficiently relevant in addressing Eighth Amendment violations in regard to mental health care and safety and living conditions within carceral institutions. Furthermore, the courts have allowed PREA standards to be used inconsistently, deeming them relevant when applied by defendants, who are typically prison staff attempting to defend against inmate claims.

Moreover, the courts certainly are not strangers to using professional and

271. 77 Fed. Reg. 30873 (May 17, 2012).
272. The restriction of power refers to PREA not creating a private cause of action.
273. *Strickland*, 466 U.S. at 688.
274. *Id.*
275. Arkles, *supra* note 20, at 804; Smith, *supra* note 14, at 11.

organizational standards to assess constitutional claims. The Model Rules, which consist of standards written by a voluntary body lacking any legal authority, have been referred to as relevant authority in assessing Sixth Amendment ineffective assistance of counsel claims. In a legal setting, it would appear reasonable to assume that Congressional acts would carry more weight and authority than do professional organizations' model standards, such as the American Bar Association's Model Rules.

Federal courts, if they are to be consistent and apply PREA standards in a way that reflects congressional intent, should acknowledge that PREA and its standards are clearly relevant in evaluating Eighth Amendment claims of rape and sexual assault in prisons and jails.[276] While PREA standards do not possess controlling authority, they do have persuasive authority and should be used as such.

- *Sage Martin*[*]

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[*] Sage Martin is a Juris Doctor Candidate at The University of Tulsa College of Law and currently serves as Executive Editor of the Tulsa Law Review. She would like to thank her parents, Steve J. Martin and Regina S. Martin, without whom she could not have succeeded. Both her mother and father have set outstanding examples of what it means to be an advocate and have instilled in her the work ethic, determination, and drive that made both of them successful. She would also like to thank John Boston, Fred Cohen, and Bill Collins for providing invaluable feedback on this Comment, ensuring its credibility. She hopes that this Comment has a positive impact on the fight to eliminate prison rape. Nelson Mandela said it best when he pronounced that "[n]o one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens but its lowest ones."

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