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**ABSTRACT**

Recent studies show the rate of sexual abuse endured in prisons has been steadily increasing. To remedy this issue, the Prison Rape Elimination Act was passed in 2003, however it has had no legitimate impact on the rate of sexual abuse in prisons due to the absence of mandatory rules upon prisons and a private right of action. This note will argue that prison rape is an Eighth Amendment violation but is not punished as one and that the Prison Rape Elimination Act failed to provide Survivors of prison sexual abuse with any legitimate recourse against violators of the law. This note will outline Supreme Court precedent relating to sexual abuse and the rights of prisoners, the law of Eighth Amendment violations, the current state of prison sexual abuse, and the ways in which the current version of the Prison Rape Elimination Act fails. It concludes with a revised version of the Prison Rape Elimination Act showcasing the major changes that should be made.

**AUTHOR'S NOTE**

Savannah G. Plaisted received her B.A in Political Science, with a minor in Women's and Gender Studies, from Providence College. She expects to receive her J.D. from the University of Massachusetts School of Law in 2024. The author would like to give special thanks to Professor Laurel Albin for her unwavering support in the creation of this article and the encouragement of the author's legal career pursuits. Thank you to Professor Abigail Brooks of Providence College for her encouragement in keeping women's and gender studies central to my research, which has extended to this paper. Thank you to Professor Paul Herron of Providence College for his dedication to helping students gain entry to law school and for supporting the author's first publication on criminal justice reform. The author also wants to express deep gratitude to her parents and her brother, Logan, for their encouragement of the author's pursuit of a legal career. The author must also thank her partner, Kenzie Magnan, for her unconditional support through law school and the writing of this paper. The author wants to thank the Editor in Chief, Managing Editor, Lead Editor, and the full team of editors who contributed to the development of this note.

## INTRODUCTION

Women make up roughly 7% of the current prison population in the United States.[1] Yet in a 2014 study conducted by the Bureau of Justice Statistics (BJS), women accounted for 33% of the victims of sexual assault committed by staff members in federal and state prisons.[2] This poses a problem because women have been the fastest growing population in U.S. prisons since 1980.[3] Additionally, according to a gender-neutral study conducted by BJS between 2015 and 2018, the sexual assault rate in prisons has increased by 14%.[4] These statistics indicate a problem on the rise rather than on the decline and showcase the necessity for a private remedy to sexual violence committed by correctional officers against women in prisons.[5]

The Prison Rape Elimination Act (PREA or Act) was passed unanimously by Congress in 2003.[6] Congress conducted extensive research regarding the prevalence of prison rape, and the Act was intended to be a signal that prison rape was a problem that could not be

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1 Sarah Nawab, *A Different Way Forward: Stories from Incarcerated Women in Massachusetts and Recommendations*, PRISON LEGAL SERV., 7 (July 11, 2022), https://plsma.org/wp-content/uploads/2022/07/PLS_A-Different-Way-Forward-2022_07_11.pdf [https://perma.cc/QTJ5-B46X]; *see also Facts About the Over-Incarceration of Women in the United States*, ACLU (Dec. 12, 2007), https://www.aclu.org/other/facts-about-over-incarceration-women-united-states [https://perma.cc/JDE3-ZQZ9].

2 Nawab, *supra* note 1, at 8.

3 Kirsten Budd & Niki Monazzam, *Incarcerated Women and Girls*, SENT'G PROJECT (Apr. 3, 2023), https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls/ [https://perma.cc/2D9Z-68E3].

4 Emily D. Buehler, *Sexual Victimization Reported by Adult Correctional Authorities, 2016-2018*, U.S. DEP'T OF JUST., 1 (June 2021), https://bjs.ojp.gov/content/pub/pdf/svraca1618.pdf [https://perma.cc/8ZCM-ZKXE].

5 *See generally* Nawab, *supra* note 1 (explaining the disproportionate amount of women experiencing sexual assault in prisons); *see generally* Buehler, *supra* note 4 (explaining the rising rate of sexual assault between the last studies conducted by the federal government on the matter); *see generally Facts About the Over-Incarceration of Women in the United States*, *supra* note 1 (explaining the population growth of women in prisons which allows for an increasing incident rate).

6 Derek Gilna, *Five Years After Implementation, PREA Standards Remain* Inadequate, PRISON LEGAL NEWS (Nov. 8, 2017), https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/ [https://perma.cc/JJC7-6JAJ]; *see also* Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 (2003).

ignored.[7] The major parts of PREA include: (1) the standards necessary to collect and distribute information on the findings of prison rape; (2) the increase of federal expenditures through grants in various sectors relating to criminal justice reform; and (3) the creation of national standards for "the detection, prevention, reduction, and the punishment of prison rape."[8] While one of the main purposes of PREA is the protection of prisoners' rights under the Eighth Amendment, it fails to give any private right of action to Survivors of sexual abuse in prisons.[9] In failing to do so, PREA did not provide the Survivors it intended to protect with any legal remedy for the failure of prisons and their guards to comply with its requirements.[10]

In cases that have been brought through the circuit courts, Survivors of sexual assault committed by prison guards have been barred from recovery on the basis that the Act did not provide a private right of action to sue for noncompliance.[11] This Note will argue that sexual abuse endured by women in prisons violates their Eighth Amendment rights[12] and requires a private right of action which is inadequately

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7 *Id.*

8 Prison Rape Elimination Act of 2003, 45 U.S.C. § 15602 (2003).

9 *See Id.* § 15601. The Act merely describes where an Eighth Amendment violation comes into play in the case of prison rape but fails to go any further. *Id. See also* Brenda Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, AM. UNIV. WASH. COLL. OF. L. BRIEF 10 (2008) https://digitalcommons.wcl.american.edu/facsch_lawrev/891 [https://perma.cc/XEX7-VY32] (citing Alexander v. Sandoval, 532 U.S. 275, 291 (2003) which holds that, without explicit authorization from Congress, no private right of action is created by statute).

10 *Infra* note 153 (Cases such as *Hayes v. Dahkle* and *Doe v. District of Columbia*, which will be explained later in the paper will explain in greater depth, scenarios where inmates attempted to utilize the Act in conjunction with Eighth Amendment right violations, who were prevented from doing so). "The penalty for noncompliance is 5 percent of any DOJ grant funds 'that it would otherwise receive for prison purposes,' a term that is undefined in statute." *PREA and the Penalty on State and Local Government*, NAT'L CRIM. JUST. ASS'N, https://nmcsap.org/wp-content/uploads/NCJA_Background_on_PREA_Penalty_updated120113.pdf [https://perma.cc/VG9W-P9S4] (last visited Oct. 26, 2023).

11 *Infra* note 153.

12 Prison Rape Elimination Act of 2003, 45 U.S.C. § 15601 (2003). The analysis provided in this paper will have a sole focus on female prisons and will include female-identifying people, transgender women, and non-binary persons who have been placed in female prisons.

addressed in the current rendition of the Prison Rape Elimination Act.[13] This Note begins by providing both a national and state-level overview, based on various reports and studies, to provide readers a comprehensive understanding of the current state of sexual abuse in U.S. prisons. The Note then highlights precisely where PREA fails and details how prison rape violates the Eighth Amendment. Following this analysis, the Note ends with a comprehensive rewrite of PREA, including a § 1983 based private right of action and enhanced sentencing provisions, in addition to updating the Act itself.

## I. BACKGROUND

### A. United States National Overview

While the research on sexual abuse in prisons is lacking in many respects,[14] context on the topic is essential to understanding the legal issue surrounding it. First, this section will outline the Bureau of Justice Statistics report, required by the Prison Rape Elimination Act.[15] It will then provide an analysis of the recent memorandum by the Department of Justice, detailing the 2022 finding that the Federal Bureau of Prisons mishandles cases of misconduct by correctional officers and its recommendations to remedy the situation.

#### 1. Bureau of Justice Statistics Report

The Bureau of Justice Statistics (BJS) is required by PREA to compile a comprehensive statistical review of the incident rate of prison rape.[16] From this data, the allegations are divided into four categories: 1) substantiated; 2) unsubstantiated; 3) unfounded; and 4) under investigation.[17] Each classification is defined in the report as follows:

> Substantiated allegation means the event was investigated and determined to have occurred, based on a preponderance of the evidence. Unsubstantiated allegation means the investigation

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13 *Id.* at § 15607.

14 Gina Fedock et al., *Incarcerated Women's Experiences of Staff-Perpetrated Rape: Racial Disparities and Justice Gaps in Institutional Responses*, 36 J. OF INT'L VIOLENCE 17 (2019).

15 Prison Rape Elimination Act of 2003, 45 U.S.C. § 15604 (2003).

16 Buehler, *supra* note 4, at 2. The manner in which BJS studies this phenomenon is by administering the survey to all federal and state prisons and a representative sample of jails. *Id.* at 1-2. This paper has a sole focus on federal and state prisons; the statistics presented below relate only to federal and state prisons.

17 *Id.* at 3.

> concluded that evidence was insufficient to determine whether or not the event occurred. Unfounded allegation means the investigation determined that the event did not occur. Under investigation means that correctional administrators were still investigating an allegation at the time of data collection.[18]

In 2018, BJS reported a total of 18,884 allegations of sexual misconduct in federal and state prisons.[19] Of those allegations, 1,673 were substantiated, with 707 being incidents perpetrated by staff.[20] There are breakout categories provided by the report wherein the allegations against staff are broken down into percentages based on substantiated, unsubstantiated, and unfounded allegations.[21] For the aggregate allegations from the period of 2016-18, the percentage of substantiated incidents remains less than 7%.[22] This figure, however, should not be considered indicative of false allegations, rather it should be viewed with an understanding of the difficulty in providing enough evidence against a correctional officer who perpetuates sexual violence.[23]

Delving further into these egregious offenses, there were a total of 15,914 completed investigations concerning correctional officer misconduct in BJS's 2016-18 report; 6.5% were substantiated allegations, 47.7% were unsubstantiated, and 45.8% were unfounded.[24] In analyzing these statistics, for over 15,000 people to come forward with allegations, the ratio of substantiated incidents to unsubstantiated or unfounded seems to be nothing short of questionable.[25] It is worth noting, however, that going forward with a complaint of this nature will notify the accused staff member and can therefore place a target on the

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18 *Id.*

19 *Id.* at 4.

20 *Id.* at 9.

21 Buehler, *supra* note 4, at 7.

22 *Id.*

23 *Deterring Staff Sexual Abuse of Federal Inmates*, DEP'T OF JUST. (Apr. 2005), https://oig.justice.gov/sites/default/files/archive/special/0504/index.htm#:~:text=Moreover%2C%20it%20is%20often%20difficult,exchange%20for%20the%20sexual%20acts [https://perma.cc/BZ3N-8VMQ].

24 Buehler, *supra* note 4, at 7. This report defines staff sexual misconduct as **"**any consensual or nonconsensual behavior or act of a sexual nature directed toward an inmate by staff, including romantic relationships." *Id.* "*Staff sexual harassment* includes repeated verbal comments or gestures of a sexual nature to an inmate by staff." *Id.*

25 *Id.*

back of the victim.[26] Turning to the reports analysis on staff sexual harassment, there were a total of 13,723 investigations completed; 2.5% of allegations were deemed substantiated, 58.7% were unsubstantiated, and 38.8% were unfounded.[27] In sum, more often than not, prisoners during this period could not substantiate their sexual misconduct or sexual harassment allegations against staff perpetrators.[28] Additionally, "[d]uring the 3-year aggregated period of 2016-18, investigations were completed for 74,477 of 81,144 allegations of sexual victimization. (92%)."[29] While some of the investigations were not completed solely because the survey had to have a cutoff point, these figures still represent women making a plea for help against the injustices they face and being given nothing in return, not even an investigation, showcases the need for change.[30]

The BJS report itself contains a substantial number of shortcomings and areas requiring improvement for clarity and accurate figures. For one thing, at the end of the report, there are six and a half pages containing the list of facilities that failed to respond to the survey at least once from the 2016-18 collection period.[31] The fact that six pages, out of a twenty-seven-page report, are dedicated solely to prisons that did not respond indicates an issue not only with responsiveness but also with failing to provide these Survivors with even an acknowledgment of their basic human rights. This also indicates that the figures provided are likely to be lacking and not representative of the actual and complete incident rate across the US.[32] In addition, there are two pages near the end of this report dedicated to inmate-on-inmate sexual misconduct with additional graphs, highlights, and tables of information to help decipher the issue; meanwhile, there is no equivalent in the entire report for staff

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26 *Prison Rape Elimination Act (PREA) Investigation*, WASH. STATE DEP'T OF CORR. (Sept. 1, 2013), https://www.doc.wa.gov/information/policies/files/490860.pdf [https://perma.cc/T4ZH-4CUY].

27 Buehler, *supra* note 4, at 7. Staff sexual harassment is defined by the report as "repeated verbal comments or gestures of a sexual nature to an inmate by staff." *Id.*

28 *Id.*

29 *Id.* at 6.

30 *Id.*

31 *Id.* at 15-21 ("Facilities did not report data in at least 1 year in which they were in a Survey of Sexual Victimization sample. Facilities may not have been in a sample in each year from 2016 to 2018.")

32 Buehler, *supra* note 4, at 15-21.

on inmate sexual misconduct.[33] The insufficient attention to staff on inmate sexual abuse indicates a lack of transparency on a prevalent issue in U.S. prisons. It also represents clear favoritism towards the staff running prisons and the act of turning a blind eye to the human rights violations they perpetuate.[34] While this report is useful and worth continuing to execute, it must increase the rates at which prisons respond to its inquiries and add a section dedicated solely to staff on inmate sexual abuse.

2. Department of Justice Memorandum of 2022

In October of 2022, the Department of Justice (DOJ) released a memorandum titled, "Notification of Concerns Regarding the Federal Bureau of Prisons' (BOP) Treatment of Inmate Statements in Investigations of Alleged Misconduct by BOP Employees."[35] The memo was released following an inquiry by the Officer of the Inspector General (OIG) into the BOP's disciplinary treatment of an employee who committed sexual abuse against a prisoner.[36] After investigating this issue, the OIG found that if cases of sexual abuse by BOP employees are not going to be criminally prosecuted, the BOP avoids relying on inmate testimony when investigating employee misconduct, "unless there is evidence aside from inmate testimony that independently establishes the misconduct, such as a video capturing the act of misconduct, conclusive forensic evidence, or an admission from the subject."[37] This practice is an obvious problem because it imposes

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33 *Id.* at 10-11.

34 *Id.*

35 DEP'T OF JUST., NOTIFICATION OF CONCERNS REGARDING THE FEDERAL BUREAU OF PRISONS' (BOP) TREATMENT OF INMATE STATEMENTS IN INVESTIGATIONS OF ALLEGED MISCONDUCT BY BOP EMPLOYEES, OIG-23-001 (2022), https://oig.justice.gov/sites/default/files/reports/23-001.pdf [https://perma.cc/9K82-P29D] [hereinafter DOJ REPORT NO. OIG-23-001].

36 *Id.*

37 *Id.*

> The OIG found that, while the BOP does not have a formal policy or practice of categorically rejecting inmate testimony, the BOP is reluctant to rely on inmate testimony in administrative matters, has a general practice of avoiding calling inmates as witnesses in Merit Systems Protection Board (MSPB) and arbitration proceedings, and, at least in matters involving staff on inmate sexual assault, is effectively requiring significantly more than the applicable preponderance of the evidence standard to sustain employee misconduct and impose discipline.

unreasonably tolerant penalties on employees for misconduct to avoid the appeals process (which can only be utilized if discipline is over fourteen days of suspension) and makes it less daunting for employees to engage in misconduct because they know the penalties for doing so are minimal.[38]

The memorandum concludes with three recommendations by the OIG to the BOP.[39] These recommendations are to:

> 1. Immediately notify all BOP employees involved with administrative misconduct and disciplinary matters, in writing, that all administrative misconduct cases must be handled on a case-by-case basis and that there is no prohibition against substantiating employee misconduct based on inmate testimony.
>
> 2. Create a policy regarding the proper handling of inmate statements in administrative matters. At a minimum, this policy, like the BOP's Prison Rape Elimination Act Policy, should require the credibility of alleged victims, suspects, and witnesses in all administrative proceedings to be assessed on an individual basis and not be determined solely based on the person's status as inmate or staff.
>
> 3. In consultation with the Department, provide training to all BOP employees involved with administrative misconduct and disciplinary matters on the preponderance of the evidence standard and the proper treatment of inmate statements.[40]

The first and third suggestions were accepted by the BOP, while the second was rejected.[41] The fact that such crucial recommendations were proposed twenty years after the passage of PREA indicates the lack of progress made in the area of sexual abuse against prisoners.[42]

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*Id.*

38 *Id.*

39 *Id.*

40 DOJ REPORT NO. OIG-23-001, *supra* note 35

41 *Id.* The rejection is as stated:

> First, all BOP policy requires labor-management negotiation. This recommendation would subject BOP's investigative practices and litigation strategies to labor-management negotiations. Particularly with respect to litigation strategy, this potentially causes ethical dilemmas by limiting attorney discretion and the inherent leeway afforded to practicing litigators to make strategic decisions in defense of their cases . . . Second, to create a policy exposes BOP to legal challenges as to whether the agency complied with the policy.

*Id.*

42 *Id.*

### B. State Specific Overview

To provide additional insight into the issue from a more localized perspective, it helps to look at how a state combats the issue of prison sexual abuse. The DOJ investigated the state of Massachusetts in 2020 for alleged Eighth Amendment violations of prisoners' rights.[43] While the investigation was not for the purpose of uncovering sexual abuse, it did cover the lack of adequate mental health practices at the prison as well as the use of solitary confinement, both of which contain intersecting issues regarding sexual misconduct.[44] Two years after the DOJ's investigation, Prisoners' Legal Services of Massachusetts (Prison Legal Services) published an anonymous study to determine the level of misconduct endured by inmates in Massachusetts prisons.[45] Both the DOJ investigation and the Prison Legal Services' study are outlined in the below sections.

#### 1. DOJ Massachusetts Prisons Investigation

After investigating the Massachusetts Department of Corrections (MDOC), the DOJ determined that the conditions and practices found violate the Eighth Amendment rights of prisoners.[46] An investigation into a prison is prompted by a host of reasons, but once authorized, the Civil Rights of Institutionalized Persons Act grants the U.S. Attorney General authority to investigate institutions within the law's

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[43] DEP'T. OF JUST., INVESTIGATION OF THE MASS. DEP'T OF CORR. (2020), https://www.justice.gov/opa/press-release/file/1338071/download [https://perma.cc/YTS7-B4RT] [hereinafter INVESTIGATION OF MASS. DOC].

[44] *Id.* These concepts intersect because mental health can be a factor in play in a woman's life before sexual abuse and can put her in a vulnerable position that a victimizer might attempt to prey on. In similar fashion, the mental health problems associated with abuse can range from PTSD to anxiety and depression as a result of a sexual assault. *See generally* Nicole Yuan et al., *The Psychological Consequences of Sexual Trauma*, VAW NET (Mar. 2006), https://vawnet.org/material/psychological-consequences-sexual-trauma [https://perma.cc/77BF-23UK]. In addition, solitary confinement is oftentimes used to keep a woman out of the general population after an instance of sexual abuse. *Still Worse Than Second-Class*, ACLU 9, https://www.aclu.org/wp-content/uploads/legal-documents/062419-sj-solitaryreportcover.pdf [https://perma.cc/5UQX-NX7C] (last visited Nov. 30, 2023).

[45] *See generally* Nawab, *supra* note 1.

[46] INVESTIGATION OF MASS. DOC, *supra* note 43.

jurisdiction.[47] The basis for the investigation was not outlined by the report, rather the questions they attempted to answer were discussed.[48] While the areas in which these violations were found do not pertain to sexual abuse in prisons, they reflect an evidence based demonstration by the DOJ that MDOC is already violating the Eighth Amendment rights of their prisoners.[49] This is key to understanding why additional studies have been performed to determine the extent of those Eighth Amendment violations.[50] The finding of human rights violations in these investigations indicate that the sexual violation of prisoners rises to the level of an Eighth Amendment violation.[51] The DOJ provided notice that the conditions of particular concern include:

> MDOC fails to provide constitutionally adequate supervision to prisoners in mental health crisis . . . MDOC fails to provide adequate mental health care to prisoners in mental health crisis . . . MDOC's use of prolonged mental health watch under restrictive housing conditions, including its failure to provide adequate mental health care, violates the constitutional rights of prisoners in mental health crisis.[52]

The recent nature of this investigation, having been released in November of 2020, gave background context regarding the violations in MDOC prisons to the following study by Prison Legal Services, which investigated the Eighth Amendment violation of sexual abuse in MDOC.[53] This investigation, especially in the context of this paper, is significant because these human rights violations indicate that it would not be unreasonable to posit that sexual violation of prisoners not only happens but rises to the level of Eighth Amendment violations.[54]

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47 *Civil Rights of Institutionalized Persons Act*, DISABILITY RTS. AND RES., https://www.drradvocates.org/civil-rights-of-institutionalized-persons-act/ [https://perma.cc/8MEW-C8DD**] (**last visited Oct. 20, 2023)**.**

48 *See generally* INVESTIGATION OF MASS. DOC, *supra* note 43.

49 *Id*.

50 *See generally* Nawab, *supra* note 1.

51 *Id*.

52 INVESTIGATION OF MASS. DOC, *supra* note 43, at 1.

53 *See generally* Nawab, *supra* note 1.

54 *Id*.

2. Prison Legal Services Study

In response to the DOJ investigation, Prison Legal Services released a study on the state of Massachusetts in 2022.[55] The report interviewed twenty-two women and anonymously surveyed ten.[56] Nineteen of the twenty-two women interviewed experienced or witnessed sexual misconduct by correctional staff, and six of the ten surveyed experienced or witnessed the same.[57]

In the background of the Prison Legal Services report, highlighting the PREA investigation in 2019 into Massachusetts prisons, the findings indicated that the determination of unsubstantiated or unfounded allegations was frequently based solely on the testimony of the alleged assailant.[58] For further explanation, the report states, that "disturbingly, in some cases, where investigations consisted of the incarcerated person's word against the staff's word, investigators concluded that the allegation was unfounded. This self-policing system, therefore, appears to treat the staff's word as proof that the incident did not occur."[59] Not only that, but when an allegation was deemed "unfounded" that opens the door for "disciplinary sanctions" to be taken against the person making the allegation.[60] The inherent biases of people, whether implicit or explicit, run the risk of contributing to the lack of findings in sexual abuse cases.[61] In addition, there is naturally a reduced ability to acquire evidence regarding sexual abuse in prisons given that the Survivor is at the will of the prison guards and therefore cannot use typical evidence gathering processes a Survivor has access to outside of a prison.

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55 *Id.*

56 *Id.* at 3.

57 *Id.*

58 Nawab, *supra* note 1, at 8.

59 *Id.* at 9.

60 *Id.*

61 *Improving Law Enforcement Response to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias*, DEP'T OF JUST. 6, https://www.justice.gov/media/1224961/dl?inline [https://perma.cc/5498-VY5W] (last visited Oct. 27, 2023) (These biases can constitute unlawful gender-based discrimination where they "profoundly undermine an effective response" to sexual assault. This includes where an officer dismisses the severity of an assault "because the victim was assaulted by an acquaintance or was intoxicated when the assault occurred, or because of stereotypical assumptions about victims who are gay or lesbian assaulted by their partners, or because the officer relates more to the perpetrator than the victim.").

The results of the study itself indicate many of the patterns and problems that persist in female prisons.[62] The main categories of the study include various forms of vulgar abuse, including verbal and physical violence on female inmates, specifically during strip searches.[63] A noteworthy example of the extent of the verbal assaults includes that "officers call women 'bitches,' 'whores,' and 'cunts,' and also tell women they 'hate' them."[64] One of the most graphic instances of sexual abuse occurring during a strip search describes:

> 'D' was previously incarcerated at MCI-F and has since been released. She reported that, during a strip search, two officers raped her with a flashlight. As a result of the rape, 'D' bled and was unable to walk correctly. Staff did not take her to a hospital until a week later. At the hospital, doctors prescribed cream for her vaginal injuries; this was the first treatment she received. She reported the incident and gave an interview to internal investigators but reported that she was not aware of any investigation. One of the officers who assaulted her retaliated against her by yelling at her and refusing to give her the medicine she needed.[65]

The report contains further instances of such heinous assaults that are classified as sexual misconduct or otherwise.[66]

The year is 2024. The Prison Rape Elimination Act was passed in 2003.[67] The level of sexual abuse in prisons since the passage of this Act has not decreased; rather, it has increased.[68] The level of abuse that women are enduring in U.S. prisons is not only abominable, but it is a clear human rights violation.[69] The reports outlined above show how little progress has been made, given that the same violations that prompted the passage of PREA continue to persist in the modern-day prison with no assistance from the remedies of PREA by those who attempted to utilize it. In fact, the law did so little (if anything at all) that the situation it attempted to resolve has only gotten worse since PREA

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62 *See generally* Nawab, *supra* note 1.

63 *Id.* at 11.

64 *Id.*

65 *Id.*

66 *Id.* at 11-12.

67 Prison Rape Elimination Act of 2003, 45 U.S.C. § 15602 (2003).

68 Buehler, *supra* note 4; *see also* Budd, *supra* note 3.

69 *See generally* Bearchild v. Cobban, 947 F.3d 1130, 1134 (9th Cir. 2020). This case is a clear instance of finding an Eighth Amendment violation in the context of sexual abuse in a prison, which contributes to the understanding of this concept as being a violation of human rights. *Id.*

passed in Congress. With that being the case, it becomes plainly obvious that PREA failed in its intended purpose and needs to be altered substantially.

### C. Sociological Background

To fully grasp the gravity of the human rights issue that prison rape presents, it is essential to understand the context of vulnerable populations in prisons. Prisoners are generally regarded as vulnerable populations, but there are additional characteristics that make a given population of prisoners more susceptible to abuse.[70] Some of those characteristics include race, gender identity, sexual orientation, age, disability, and many others.[71] In addition, prior sexual victimization constitutes a substantial source of additional vulnerability for women entering prison.[72] According to the most recent BJS Statistics study performed on "Prior Abuse Reported by Inmates and Probationers" in 1999, one-third of women in state prisons and one-sixth of women in federal prisons were raped prior to their sentence.[73] In addition, in state prisons, one in twenty men in comparison to one in four women reported that they had been sexually abused before the age of eighteen.[74] Additionally, over half the women entering state prisons have been sexually abused at some point in their lifetime.[75]

It is crucial to understand the impact that prior sexual abuse has on sexual victimization in prisons, given that it represents an increase in

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70 *Vulnerable Populations- Prisoners*, IOWA STATE UNIV. (Sept. 8, 2022), https://www.compliance.iastate.edu/sites/default/files/imported/irb/guide/docs/vulpop-prisoners.pdf [https://perma.cc/Y3UT-LRSB] ("Prisoners are considered to be vulnerable because the constraints of incarceration can affect their ability to make truly voluntary decisions to serve as research subjects.").

71 Nawab, *supra* note 1, at 8. Throughout the paper, the author not only lists gender identity and race as predominant indicators for increased risk of sexual violence, but she also includes examples from survey responses that referenced individuals being targeted for things like their age, disability, and body size. *Id.* at 18. Furthermore, the author indicates that the intersection of multiple marginalized qualities is likely to increase the risk of sexual violence. *Id.* at 8.

72 *Id.*

73 Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers*, DEP'T OF JUST., 1 (Apr. 1999), https://bjs.ojp.gov/content/pub/pdf/parip.pdf [https://perma.cc/HS4N-RJHT].

74 *Id.*

75 *Id.*

the likelihood of new reports of victimization while in prison.[76] The BJS study found that roughly 6.7% of prisoners who had been sexually victimized prior to entering prison reported sexual victimization by staff members.[77] In a fact sheet discussing the determinations of the BJS survey, Just Detention International describes some of the factors contributing to the increased likelihood of further sexual victimization, with an example of those being "these survivors, especially those who were abused as children, may believe they should expect or tolerate abuse, or may not expect that staff, or anyone else, will help them."[78] Not only that, but many of the predatory members of staff that intend to prey on vulnerable populations are oftentimes skilled at testing the boundaries of such inmates and coercing them to be groomed for sexual abuse.[79]

In prisons, where most correctional officers are men, female inmates exist in an environment characterized by a stark power imbalance, as men exert control over most of their actions.[80] Given that correctional officers are meant to both protect these women and exercise power over them, responding to abuse from correctional officers presents an altogether new issue.[81] This power imbalance also enables correctional

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76 Allen J. Beck, *Sexual Victimization in Prisons and Jails Reported by Inmates*, DEP'T OF JUST., 19 (May 2013), https://bjs.ojp.gov/content/pub/pdf/svpjri1112.pdf [https://perma.cc/S2NM-5D96].

77 *Id.* (It is important to note that this section of the report does not account for gender).

78 *Sexual Abuse in Detention: The Most Vulnerable Inmates*, JUST DETENTION INT'L, 1 (Oct. 2018), https://justdetention.org/wp-content/uploads/2019/07/Fact-sheet-Sexual-Abuse-in-Detention-The-Most-Vulnerable-Inmates.pdf [https://perma.cc/9U5Y-GAAH].

79 *Id.*

80 Kristen Seddiqui, *Graham v. Sheriff of Logan County: Coercion in Rape and the Plight of Women Prisoners*, 92 DENV. U. L. REV. 671, 675 (2015); HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISIONS 43, 75 (1996) ("Correctional officers' absolute power over giving warnings, infractions, and punitive measures may provide opportunities for the development of exploitative relationships that hinge on 'favor-giving' and avoiding punishment."); Anthea Dinos, Note, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281, 282 (2001); *Correctional Officers and Jailers*, DATA USA, https://datausa.io/profile/soc/correctional-officers-and-jailers# [https://perma.cc/NSH9-LP3F] (last visited Nov. 19, 2023).

81 Katherine C. Parker, Note, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia,* 10 AM. U. J. GENDER SOC. POL'Y & L. 443, 444 (2002).

officers to withhold basic necessities in order to force compliance with their wishes or to punish women who do not assent.[82]

## II. ANALYSIS

### A. Case Law on Eighth Amendment Violations in Prison

What constitutes an Eighth Amendment violation is not plainly written into the language of the Constitution.[83] Rather, the components of a violation have been written by the judiciary through an ever-evolving chronicle of case law.[84] The elements needed for an Eighth Amendment violation are different in the context of proportionate sentencing, juvenile sentencing, and prison beatings.[85] The Supreme Court of the United States has not, to date, handed down a specific ruling pertaining to the circumstances of a prison rape or sexual assault committed by a correctional officer against an inmate.[86] However, the Court has ruled on the nature of Eighth Amendment violations in circumstances which may help to formulate the elements necessary to prove an Eighth Amendment violation in the context of sexual abuse suffered within prisons.[87] In addition, the Ninth Circuit court has begun to provide their legal reasoning on the issue and is therefore able to lend

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82 Dinos, *supra* note 80, at 283 (It is also important to point out the more obvious public safety problem that violent correctional officers pose to society outside of prison walls. Logically, a correctional officer who is not stopped from continuing to abuse inmates in a prison has the same ability to abuse outside a prison, given that they are in the position to leave the grounds).

83 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

84 *See generally* Bearchild v. Cobban, 947 F.3d 1130 (9th Cir. 2020); Coker v. Georgia, 433 U.S. 584 (1977); Farmer v. Brennan, 511 U.S. 825 (1994); Wilkins v. Gaddy, 559 U.S. 34 (2010); Hudson v. McMillian, 503 U.S. 1 (1992); Woodford v. Ngo, 548 U.S. 81 (2006).

85 *Cruel and Unusual Punishment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/cruel_and_unusual_punishment [https://perma.cc/7EEJ-SBCZ] (last visited Dec. 2, 2022).

86 *See generally* Bearchild v. Cobban, 947 F.3d 1130 (9th Cir. 2020); Coker v. Georgia, 433 U.S. 584 (1977); Farmer v. Brennan, 511 U.S. 825 (1994); Wilkins v. Gaddy, 559 U.S. 34 (2010); Hudson v. McMillian, 503 U.S. 1 (1992); Woodford v. Ngo, 548 U.S. 81 (2006).

87 *See generally* Hudson v. McMillian, 503 U.S. 1 (1992) (setting the precedent that evolving standards of decency are to be considered in Eighth Amendment violation cases).

insight into the beginnings of how a case of prisoner sexual abuse can and should be dealt with by the courts.[88]

The Court's history of dealing with sexual abuse begins with an abysmal understanding of its consequences.[89] The case of *Coker v. Georgia* in the late 1970s reflects the attitude at the time towards sexual assault. The Court provided very brief facts of a woman's house being burglarized and her subsequent rape and kidnapping.[90] The Court, in its majority opinion, glosses over the rape entirely.[91] After being burglarized, raped, and kidnapped in her own family car, the Court felt comfortable considering her "unharmed."[92] The dissenting opinion provided by Chief Justice Burger and Justice Rehnquist pointed out the harm imposed by such a statement by not only quoting the statement itself but also providing a brief analysis of the long-lasting effects sexual assault can have on Survivors.[93] Nonetheless, this opinion has influenced the perception of sexual abuse by the highest court of the United States for decades and provided a precedent for similar cases.[94] This is an abundantly clear instance of the dissent getting the opinion right and the majority getting it wrong. While progress has been made concerning the Court's perception of violence against women since the *Coker* opinion, the highest court was quick to dismiss sexual abuse against women.

The next major development in case law regarding Eight Amendment violations was a step in the right direction but, again, failed

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88 *See generally* Bearchild v. Cobban, 947 F.3d 1130 (9th Cir. 2020).

89 *See* Coker v. Georgia, 433 U.S. 584, 587 (1977).

90 *Id.* at 587 (majority opinion).

91 *Id.*

92 *Id.*

93 *Id.* at 612 (Burger, J. and Rehnquist, J., dissenting). One of the portions worth noting is as follows:

> Mr. Justice POWELL would hold the death sentence inappropriate in this case because 'there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury.' Ante, at 601. Apart from the reality that rape is inherently one of the most egregiously brutal acts one human being can inflict upon another, there is nothing in the Eighth Amendment that so narrowly limits the factors which may be considered by a state legislature in determining whether a particular punishment is grossly excessive.

*Id*. at 607-08.

94 *See generally* Coker v. Georgia, 433 U.S. 584 (1977).

to go far enough. In the case of *Farmer v. Brennan*, the petitioner is referred to as "transsexual" and as "project[ing] feminine characteristics" in the facts.[95] This petitioner was located in a male prison where they were oftentimes housed in segregation due to the treatment they faced by other inmates.[96] For instance, the petitioner was repeatedly raped and beaten by another inmate after being transferred to the general population in a penitentiary.[97] In response to these assaults, the petitioner alleged that they were owed damages and an injunction to prevent "future confinement in any penitentiary" given the greater propensity for violence and assaults against them.[98] On review, the Supreme Court held that "a prison official may be held liable under the Eighth Amendment for acting with 'deliberate indifference' to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[99] This language should be used to contribute to the understanding of, and elements of, an Eighth Amendment violation in the context of sexual abuse in prisons.[100] The phrasing of "deliberate indifference" here contributed to the implementation of such a clause in the rewrite of PREA found at the end of the paper. Those that accommodate or turn a blind eye to sexual abuse in prisons must be prosecuted in addition to those that commit the offense. The courts do not need to rewrite the law in this respect, rather this language can and must extend to the analysis of an Eighth Amendment claim.[101] Additionally, this language can help to explain why it is necessary to include a provision pertaining to the legal consequences associated with aiding and abetting sexual abuse in prisons in the rewrite of the Prison Rape Elimination Act.

Further developments of case law related to Eighth Amendment violations focus on the severity of injuries in relation to the standing of Eighth Amendment claims. The following case does not discuss an

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95 Farmer v. Brennan, 511 U.S. 825, 829 (1994). The exact language is directly quoted from the facts, but it is worth noting that the language here is outdated and inappropriate with respect to how transgender people are to be identified.

96 *Id.* at 829-30.

97 *Id.* at 830.

98 *Id.* at 831.

99 *Id.* at 831-32.

100 Farmer v. Brennan, 511 U.S. 825, 831-32 (1994).

101 *Id.*

instance of sexual abuse in prison but provides a key element of the Supreme Court's Eighth Amendment violation case law.

In the case of *Wilkins v. Gaddy*, the prisoner brought a 42 U.S.C. § 1983 claim against a correctional officer alleging that they used excessive force and violated his Eighth Amendment rights.[102] Wilkins alleged that Gaddy, a correctional officer, "snatched [Wilkins] off the ground and slammed him onto the concrete floor" and "proceeded to punch, kick, knee and choke [Wilkins] until another officer had to physically remove [Gaddy] from [Wilkins]."[103] Wilkins stated that "[a]s a result of the excessive force used by [Gaddy], [he] sustained multiple physical injuries including a bruised heel, lower back pain, increased blood pressure as well as migraine headaches and dizziness" and "psychological trauma and mental anguish including depression, panic attacks and nightmares of the assault."[104] While the injuries sustained in this case are not of a sexual connotation, it is worth describing the case given the extreme physical violence Wilkins sustained and how the Court dealt with it.[105] This level of violence is not uncommon concerning incidents of sexual violence, as indicated by the sexual assaults described earlier in this Note.[106] The Court stated that Wilkins can prevail only if he can prove "not only that the assault actually occurred but also that it was carried out 'maliciously and sadistically' rather than as part of 'a good-faith effort to maintain or restore discipline.'"[107] In setting such a standard, the Supreme Court built the concept of the severity of injuries not being the breaking point of an Eighth Amendment violation claim.[108] This is a key concept for any elements pertaining to sexual abuse given that the severity of injuries should not be a consideration. Instead, the existence of sexual misconduct should be sufficient to equate an Eighth Amendment violation.[109]

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102 Wilkins v. Gaddy, 559 U.S. 34, 34-35 (2010).

103 *Id.* at 35.

104 *Id.*

105 *Id.*

106 Nawab, *supra* note 1, at 12.

107 *Id.* at 40.

108 *Id.*

109 *See generally* Yuan *supra* note 44 (explaining that some women experience incredibly psychological trauma, even to the point of PTSD from sexual assault, meanwhile others might experience no psychological pain).

The issue with associating the punishment with the severity of the physical injury is the insufficient focus on the psychological trauma associated with such an incident, and therefore physical injury alone should not become the predicate for punishment of violators.[110] Any sexual assault by a prison guard on an inmate should be sufficient to punish the guard due to their violation of human rights and the immense psychological implications of such abuse.[111] Likewise, sexual abuse can be as severe, less severe, or more severe than what occurred in this case. Regardless, it must be classified, prosecuted, and punished according to the standard for sexual abuse, not the arbitrary standard of "how bad" it was.

Additionally, the Supreme Court dealt with a similar Eighth Amendment violation in the case of *Hudson v. McMillian*.[112] Keith Hudson was an inmate in Angola Penitentiary in Louisiana when he was placed in handcuffs and shackles after an argument with a correctional officer named McMillian.[113] Hudson was walked to the "administrative lockdown" part of the prison, where he was punched in the eyes, mouth, chest, and stomach while being held down, kicked, and punched from behind by another officer.[114] Hudson suffered minor bruises and swelling on his face, loosened teeth, and a crack in his dental plate which prevented him from using it for multiple months.[115] The Court determined that:

> When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.[116]

The Court ultimately held that even while the injuries sustained were not necessarily extensive, the petitioner may still bring their case because the injuries suffered clearly crossed the line into cruel and unusual punishment.[117] This case should serve as the concrete

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110 *Id.*

111 *Id.*

112 Hudson v. McMillian, 503 U.S. 1, 4 (1992).

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* at 9.

117 Hudson v. McMillian, 503 U.S. 1, 9-10 (1992).

foundation for bringing an Eighth Amendment claim alleging sexual abuse.[118] A rape report might not document the extensive physical injury, but *Hudson* makes clear that the severity or extent of the injury is not the decisive factor for an Eighth Amendment violation.[119] Rather, it is defined by the use of official power to inflict sadistic or malicious punishment.

In 2020, the Ninth Circuit Court of Appeals heard a case dealing with sexual abuse by a prison guard and established a bright-line rule for handling Eighth Amendment violations via sexual abuse.[120] *Bearchild v. Cobban* involved a male inmate in a male prison who had a "pat-down [that] lasted about five minutes and involved rubbing, stroking, squeezing, and groping in intimate areas."[121] On appeal, the circuit court held:

> A prisoner presents a viable Eighth Amendment claim where he or she proves that a prison staff member, acting under color of law and without legitimate penological justification, touched the prisoner in a sexual manner or otherwise engaged in sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner.[122]

The establishment of such elements is a substantial first step in providing Survivors with the legal remedies they deserve.[123] These elements could act as an example of the language necessary to provide Survivors with a private right of action through a rewrite of the Prison Rape Elimination Act. [124]

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118 *See generally id.*

119 *Id.*

120 Dale Chappell, *Ninth Circuit Announces New Rule on Eighth Amendment Violation Due to Sexual Assault by Montana Prison Staffer*, PRISON LEGAL NEWS, https://www.prisonlegalnews.org/news/2020/jul/1/ninth-circuit-announces-new-rule-eighth-amendment-violation-due-sexual-assault-montana-prison-staffer/ [https://perma.cc/7L3S-RWVL] (last visited Oct. 27, 2023)*;* Bearchild v. Cobban, 947 F.3d 1130, 1144 (9th Cir. 2020).

121 Bearchild v. Cobban, 947 F.3d 1130, 1135 (9th Cir. 2020).

122 *Id.* at 1144.

123 *Id.*

124 *Id.* The "elements" referred to here can be parsed out accordingly:

> A prisoner presents a viable Eighth Amendment claim where he or she proves that [1] a prison staff member, [2] acting under color of law and without legitimate penological justification, [3] touched the prisoner in a sexual manner, or otherwise engaged in sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner.

The most recent case in which the Supreme Court spoke about the issue of sexual abuse in prisons came in the form of a dissenting opinion in the 2006 case of *Woodford v. Ngo*.[125] The passage of note is best understood if stated in its entirety:

> Consider, for example, an inmate who has been raped while in prison. Such a scenario is far from hypothetical; in enacting the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 et seq. (2000 ed., Supp. III), Congress estimated that some one million people have been sexually assaulted in the Nation's prisons over the last 20 years, § 15601(2). Although not all of these tragic incidents result in constitutional violations, the sovereign does have a constitutional duty to "provide humane conditions of confinement." Accordingly, those inmates who are sexually assaulted by guards, or whose sexual assaults by other inmates are facilitated by guards, have suffered grave deprivations of their Eighth Amendment rights. Yet, the Court's engraftment of a procedural default sanction into the PLRA's exhaustion requirement risks barring such claims when a prisoner fails, inter alia, to file her grievance (perhaps because she correctly fears retaliation) within strict time requirements that are generally no more than 15 days, and that, in nine States, are between 2 and 5 days (internal citations omitted).[126]

While this opinion is a dissent and is, therefore, dicta, it indicates an understanding by some of our prior Supreme Court Justices that PREA not only failed to provide a private right of action, but the abuse suffered by Survivors in prison constitutes an Eighth Amendment violation with little to no feasible legal remedy.[127]

Each of the aforementioned cases illustrates the complex nature of the precedents set by the Supreme Court and the beginnings of circuit courts dealing with the egregious state of the rights of Survivors of

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Bearchild v. Cobban, 947 F.3d 1130, 1144-45 (9th Cir. 2020).

125 Woodford v. Ngo, 548 U.S. 81, 104 (2006) (Stevens, J., dissenting).

126 *Id.* at 118. In *Woodford*, the Supreme Court defined the PLRA's "proper exhaustion" requirement as "compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90-91.

127 *Id.* S*ee also* Margaret Penland, *A Constitutional Paradox: Prisoner "Consent" to Sexual Abuse in Prison Under the Eighth Amendment*, 33 L. & INEQ. 507, 518-21 (2015) (explaining that many of the sexual abuse claims that have utilized the Eighth Amendment as the basis for their claim and that the defense of consent utilized by some courts is neither constitutionally sound nor a departure from long established gender stereotypes).

sexual abuse in prison.[128] While the Court has not yet dealt with a case arising out of sexual abuse in a prison, its depictions of Eighth Amendment violations are similar to cases of sexual abuse that have come up, and should therefore indicate Eighth Amendment violations in the case of sexual abuse in prison.[129] Additionally, the lack of remedies afforded by the Prison Rape Elimination Act is indicated by the fact that lower courts have struggled to afford Survivors such remedies.[130] This is because the legislature failed to create strict standards by which courts can determine whether rights have been violated in these circumstances.[131]

### B. Inability to Utilize 42 U.S.C § 1983 Claims with PREA

A claim under 42 U.S.C § 1983 is a civil claim alleging a deprivation of rights that is brought against state government employees.[132] Claims must be brought alleging a constitutional right violation and must concern civil rights that already exist as § 1983 itself does not outline

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128 *See generally* Bearchild v. Cobban, 947 F.3d 1130 (9th Cir. 2020); Coker v. Georgia, 433 U.S. 584 (1977); Farmer v. Brennan, 511 U.S. 825 (1994); Wilkins v. Gaddy, 559 U.S. 34 (2010); Hudson v. McMillian, 503 U.S. 1 (1992); Woodford v. Ngo, 548 U.S. 81 (2006).

129 *See generally* Bearchild v. Cobban, 947 F.3d 1130 (2020); Coker v. Georgia, 433 U.S. 584 (1977); Farmer v. Brennan, 511 U.S. 825 (1994); Wilkins v. Gaddy, 559 U.S. 34 (2010); Hudson v. McMillian, 503 U.S. 1 (1992); Woodford v. Ngo, 548 U.S. 81 (2006).

130 Hayes v. Dahlke, 976 F.3d 259, 268 (2d Cir. 2020).

131 *Id*.

132 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id*.

specific rights that can be violated.[133] Section 1983 is frequently used by the prison population to bring claims alleging civil rights violations.[134] In 2016, prisoners filed over 27,000 § 1983 claims in federal district courts, which represented roughly 10% of the courts' docket.[135] The more concerning statistic is that 92% of prisoners that filed these actions did so pro se (which is required by some jurisdictions of the U.S.).[136] Such significant numbers of claims brought by prisoners pro se puts prisoners, and their legal claims, at a disadvantage due to their lack of legal knowledge.[137] Furthermore, these claims are brought against prison institutions, which have a significant advantage in their ability to obtain counsel and exert control over the prisoners filing the given suits.[138]

If a plaintiff in prison is filing a § 1983 claim pro se, one of the most substantial hurdles they must overcome is writing a complaint that will not be dismissed for failure to state a claim upon which relief can be granted.[139] In addressing the standard for dismissal, the Supreme Court established new standards through *Bell Atlantic Corp. v. Twombly*, then through *Ashcroft v. Iqbal*, which created higher requirements for a case to move beyond pleadings. One study determined that these new standards generally increased the rate of dismissal by pro se plaintiffs by up to 85%. [140] These cases can also take a large variety of time frames to complete and typically span multiple years to be resolved, not including possible appeals.[141]

In the case of a Survivor of sexual abuse who is currently imprisoned, the necessity to file a § 1983 claim to recover potential damages for their pain and suffering within the statute of limitations

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133 *See Civil Rights in the United* States, UNIV. OF MINN. L. SCH., https://libguides.law.umn.edu/c.php?g=125765&p=2893387 [https://perma.cc/HDX4-X4Z2] (last updated Oct. 18, 2023, 10:13 AM).

134 Martin A. Schwartz, *Section 1983 Civil Rights Litigation from the October 2006 Term*, 23 TOURO L. REV. 827, 827 (2008).

135 Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. UNIV. L. REV. 899, 901 (2017).

136 *Id.*

137 *Id.*

138 *Id.*

139 FED. R. CIV. P. 12(b)(6).

140 Frankel, *supra* note 135, at 933.

141 Taylor Dalton, *The Trajectory of Civil Cases in Federal Court*, ABOVE THE L. (May 28, 2021, 3:15 PM), https://abovethelaw.com/2021/05/the-trajectory-of-civil-cases-in-federal-court/ [https://perma.cc/B7JH-W3S4].

should be indicative of injustice already.[142] However, the added knowledge that these Survivors likely have no legal background, minimal education generally, and are currently engaged in working through the trauma associated with their abuse serves to heighten the injustice suffered.[143] In addition, it is possible that these Survivors will still have to see or even take orders from their assaulter and will run the risk of being retaliated against for the mere act of filing a complaint against them.[144] The feasibility of filing a legal claim in the aftermath of trauma, with these added factors, is not a fair ask of any sexual abuse Survivor.[145]

When it comes to § 1983 claims, there is also the barrier posed by governmental immunity.[146] Immunity allows for government officials to avoid being held liable.[147] However, a state employee "acting under color of law who deprives a person of a federal right may be personally liable under § 1983 for damages caused by that deprivation."[148] Under the concept of qualified immunity, there is an exception to immunity if a government officer violates "a statutory or constitutional right; and that right was clearly established at the time of the challenged conduct."[149] The Eighth Amendment has been an established constitutional right since 1791.[150] Therefore, a government officer acting in their capacity as an agent for the government in a state or

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142 *A Section 1983 Primer (5): Statutes of Limitations*, NAHMOD L., https://nahmodlaw.com/2011/10/27/a-section-1983-primer-5-statutes-of-limitations/ [https://perma.cc/587U-6SP2] (last visited Oct. 20, 2023).

143 Frankel, *supra* note 135, at 901-03.

144 *Id.* at 938.

145 *See generally id.*

146 *See* Sun Choy et al., *Section 1983: Personal Immunities*, THOMAS REUTERS, https://1.next.westlaw.com/Document/Ic35d1c4f1b1511e698dc8b09b4f043e0/View/FullText.html?transitionType=Default&contextData=(sc.Default) [https://perma.cc/S9TZ-66SK] (last visited Nov. 11, 2023).

147 *Id.*

148 *Id.*

149 *Id.*

150 *Cruel and Unusual Punishment- Conversation Starter*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_education/programs/constitution_day/conversation-starters/cruel-and-unusual-punishment/ [https://perma.cc/237A-RCCQ] (last visited Nov. 30, 2023); *see also* INVESTIGATION OF MASS. DOC, *supra* note 43 (One state has been met with evidence that the sexual assaults and personal violations occurring in their prisons constitute an Eighth Amendment Violation. This demonstrates that one state is only a case study, and the issue is larger reaching that one state's independent study).

federal prison, using their power to sexually victimize inmates, is acting under color of law to violate constitutional rights.[151]

### C. Failures of the Prison Rape Elimination Act

The Prison Rape Elimination Act contains no private rights of action for Survivors to bring cases against the correctional officers who have violated their rights.[152] There has only been success in cases where this Act was used in conjunction with Eighth Amendment violations that could be proven in cases such as *Hayes v. Dahkle* out of New York and *Doe v. District of Columbia* out of the D.C. Circuit.[153] The *Hayes* case presented the question of "whether an inmate who has adequately completed every step of the New York State Department of Corrections and Community Supervision ('DOCCS') Inmate Grievance Procedure must wait indefinitely for prison officials to respond to his final appeal before he may commence suit in federal court."[154] The petitioner was sexually molested during a pat down, filed a grievance via the prison, was retaliated against for doing so, and filed additional grievances accordingly.[155] The committee tasked with reviewing such grievances failed to provide a response within 30 days as required, so Hayes filed suit alleging First and Eighth Amendment violations.[156] While the 2nd Circuit Court of Appeals did not grant Hayes remedies for his alleged rights violations, the court did, at the very least, rule that "an inmate exhausts administrative remedies when he follows the procedure in its entirety but the Central Office Review Committee fails to respond within the 30 days it is allocated under the regulations."[157]

In *Doe v. District of Columbia*, the plaintiff, a transgender woman, was serving a sentence at District of Columbia's Central Detention Facility ("D.C. Jail").[158] Although she was considered on "house alone" status, she was placed by two guards in a cell with a male inmate, who raped her twice overnight.[159] This was also the second time that the

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151 Choy et al., *supra* note 146.

152 *See generally* Prison Rape Elimination Act of 2003, 45 U.S.C. § 15602 (2003).

153 *See generally* Hayes v. Dahlke, 976 F.3d 259 (2d Cir. 2020); Doe v. District of Columbia, 215 F. Supp. 3d 62 (D.D.C. 2016).

154 *Hayes*, 976 F.3d at 263.

155 *Id.* at 265-67.

156 *Id.* at 264.

157 *Id.* at 270.

158 Doe v. District of Columbia, 215 F. Supp. 3d 62, 64 (D.D.C. 2016).

159 *Id.*

perpetrator of the rape was improperly transferred into the cell of a person he allegedly raped.[160] This case was one of the few where the plaintiff was able to successfully invoke an Eighth Amendment claim on the basis of PREA.[161] The court found that the claim must proceed on the basis that the defendant officers had been trained on PREA and therefore should have been aware of the likelihood of the plaintiff being sexually victimized by the perpetrator.[162]

Overall, these cases illustrate the slow movement towards the acknowledgment of PREA in court cases, but they simultaneously demonstrate how PREA did not effectively grant any remedies to prisoners that suffer from prison rape.[163] The intent in including *Doe v. District of Columbia* last was to show what can be done with a private right of action from PREA. *Doe* is an example of a case where some semblance of justice was served. This is a trend courts should begin moving towards, and a rewrite of the law would enable them to find a private right of action where it previously didn't exist.

One of the problems with PREA is that Congress effectively highlighted many of the issues they should be concerned with in such a law, but each of the remedies afforded is purely a "recommendation" rather than being "mandatory."[164] Many of the recommendations made in PREA would in fact be very effective in lessening the incident rates of sexual abuse in prisons if they were made mandatory.[165] Under the "Recommendations" subheading, the Act states that the Attorney General and the Secretary of Health and Human Services can make recommendations on a variety of topics relating to prison rape.[166] An example of which is "the preservation of physical and testimonial evidence for use in an investigation of the circumstances relating to the rape."[167] The Act itself was made for the purpose of dealing effectively with prison rape, therefore this should have been done prior to its

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160 *Id.*

161 *Id.* at 80-81.

162 *Id.*

163 *See generally* Hayes v. Dahlke, 976 F.3d 259 (2d Cir. 2020); Doe v. District of Columbia, 215 F. Supp. 3d. 62 (D.D.C. 2016).

164 Prison Rape Elimination Act of 2003, 45 U.S.C. §§ 15601-15609 (2003).

165 *Id.* at § 15607.

166 *Id.* at § 15606.

167 *Id.*

passage, rather than recommending that these government positions conduct research on its behalf to determine the best course of action.[168]

Section V of PREA which is supposed to provide for "prison rape prevention and prosecution" is not only one of the shortest sections of the entire piece of legislation, but it also only points toward periodic training in regards to prison rape and the establishment of a National Clearinghouse within the National Institute of Corrections in relation to the matter.[169] Section 6(b)(1)(c) of this Act provides for the use of grant money for "prosecuting prison rape," however this is only one tiny portion of the provision and it is placed alongside sections regarding the prevention of prison rape and investigating incidents of prison rape.[170] One of the most glaring failures of this Act is that in a small subsection the Act states, "the Commission shall not propose a recommended standard that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities."[171] In other words, if a remedy or standard that the Commission would want to impose costs too much money, the Commission cannot even make the recommendation.[172] This obscene and cheap limitation on the work of the Commission prevents any meaningful changes from being made in a prison system that continues to perpetuate pervasive sexual abuse.[173]

## III. PROPOSED REMEDIES TO PREA

First and foremost, the language of the Act must be updated. The term "Survivor" must be adopted over the prior language of the word "victim."[174] The change in this language gives the power back to the person who has been assaulted.[175] Next, a remedies section must be

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168 *Id.*

169 Prison Rape Elimination Act of 2003, 45 U.S.C. § 15604 (The statute establishes a National Clearinghouse, which is "responsible for the prevention, investigation, and punishment of instances of prison rape" and provides assistance to local, State, and Federal authorities).

170 *Id.* § 15605.

171 *Id.*

172 *Id.*

173 *Id.*

174 Charnell Covert, *Survivor, Victim, Victim-Survivor*, FORCE UPSETTING RAPE CULTURE, https://upsettingrapeculture.com/survivor-victim/ [https://perma.cc/92JM-RW2Q] (last visited Oct. 19, 2023).

175 *Id.*

included outlining the ways in which Survivors of the abuse targeted by the Act are able to take legitimate recourse against the institutions and/or persons that have abused them.[176] The remedies section includes injunctive relief, monetary damages, pressing criminal charges, and a requirement that there be no administrative exhaustion requirement.[177] Additionally, a section outlining the specific language guaranteeing a private right of action should be its own section, which has been included in the proposed revision.[178] This revised section cites to a test that was established in *Bearchild v. Cobban* for determining if a person's rights had been violated via sexual abuse by prison officials.[179] This test represents a substantial first step in establishing a national standard for Eighth Amendment violations for sexual abuse endured within the confines of a prison.[180] Having such a distinct test be codified into law would assist the courts in assessing whether national standards of decency have been met in prisons, and if they have not, Survivors can be accorded the proper compensation or other remedy.[181]

The next major section of note is the enhanced sentencing policy section. In order to send a legitimate and strong message to offenders of PREA, the sentencing for offenses of this law must call for enhanced sentencing requirements.[182] Not only that, but prisoners constitute vulnerable populations given the complete control correctional officers maintain over them, rendering them a population in need of specific protections.[183] Finally, language pertaining to the collection of data surrounding prison rape and many of the remaining original sections must be updated to be more inclusive and to provide stronger language

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176 *See infra* pp. 159-65; for the text of the proposed statute; *see* Appendix, Sec 5, Remedies.

177 *See infra* pp. 165; for the text of the proposed statute; *see* Appendix, Sec 5, Remedies.

178 *See infra* pp. 166; for the text of the proposed statute; *see* Appendix, Sec. 6, Private Right of Action.

179 9.*26A Particular Rights-Eighth Amendment-Convicted Prisoner's Claim of Sexual Assault*, MANUAL OF MODEL CIV. JURY INSTRUCTIONS (May 2020), https://www.ce9.uscourts.gov/jury-instructions/node/761 [https://perma.cc/R7MW-JHBP].

180 *Id.*

181 *Id.*

182 *See infra* pp. 166; for the text of the proposed statute; *see* Appendix, Sec. 7, Enhanced Sentencing.

183 *Sexual Abuse in Detention: The Most Vulnerable Inmates*, *supra* note 78.

in order to make this Act as effective as it should have been.[184] The adoption of the law as written in the Model Statute found in the Appendix of this paper would represent a substantial first step in providing Survivors of sexual abuse in prison with the proper means to acquire justice.[185]

## IV. CONCLUSION

The most basic understanding of what Congressional acts are meant to do stems from the U.S. Constitution itself.[186] Article I, Section VIII of the Constitution refers to Congress being required to "provide for the . . . general welfare."[187] In addition, the Constitution expressly outlines in the Eighth Amendment that cruel and unusual punishment is strictly prohibited.[188] Sexual abuse by correctional officers, whether of the State or otherwise, is a clear example of cruel and unusual punishment in addition to being a human rights violation.[189] The Prison Rape Elimination Act of 2003 sought to remedy this problem but completely failed to do so in its lack of legitimate remedies for prisons and its failure to provide a private right of action to Survivors.[190]

The rate at which female inmates in the United States are sexually abused by correctional officers is on the rise rather than the decline.[191] While it was an issue that was addressed on a national scale by Congress with the passage of the Prison Rape Elimination Act, the Act itself has proven to be a failed remedy.[192] There are a substantial number of remedies that must be taken in order to effectively deal with the problem of sexual abuse in prisons and the other problems it intersects with in United States prisons—so substantial a number that they cannot effectively be dealt with in a singular paper. At the very least, a rewrite of the Prison Rape Elimination Act must be the first step to adequately address the pressing needs of an immensely vulnerable population in the U.S.

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184 *See infra* pp. 159-79.

185 *See infra* pp. 159-79.

186 U.S. CONST. art. I.

187 U.S. CONST. art. I, § 8.

188 U.S. CONST. amend. XIII.

189 *Id.*

190 Prison Rape Elimination Act of 2003, 45 U.S.C. § 15602 (2003).

191 Buehler, *supra* note 4.

192 Prison Rape Elimination Act of 2003, 45 U.S.C. §§ 15601-15609 (2003).

## V. MODEL STATUTE

The following model statute comes from a full copy of the original statute's language. The most substantial changes made were those outlined in the paper, such as the sections added for a private right of action and enhanced sentencing. In addition, the language has been changed to use the term "Survivor" rather than victim. The numerical values and years originally in the statute have also been changed and eliminated to keep the statute up to date.

## APPENDIX

### Model Legislation to Amend the Prison Rape Elimination Act

SECTION 1. TABLE OF CONTENTS.



SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Insufficient research has been conducted, and insufficient data has been reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the Survivors of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.

(2) Inmates with mental illness are at increased risk of sexual victimization. America's jails and prisons house more mentally ill individuals than all the Nation's psychiatric hospitals combined. As many as 16 percent of inmates in State prisons and jails, and 7 percent of Federal inmates, suffer from mental illness.

(3) Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.

(4) Most prison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults.

(5) Prison rape often goes unreported, and inmate Survivors often receive inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all.

(6) Members of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates.

(7) The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In Farmer v. Brennan, 511 U.S. 825 (1994), the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Eighth Amendment rights of State and local prisoners are protected through the Due Process Clause of the Fourteenth Amendment. Pursuant to the power of Congress under Section Five of the Fourteenth Amendment, Congress may take action to enforce those rights in States where officials have demonstrated such indifference. States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference. Therefore, such States are not entitled to the same level of Federal benefits as other States.

(8) The high incidence of prison rape undermines the effectiveness and efficiency of United States Government expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment and homelessness. The effectiveness and efficiency of these federally funded grant programs are compromised by the failure of State officials to adopt policies and procedures that reduce the incidence of prison rape in that the high incidence of prison rape—

> (A) increases the levels of violence, directed at inmates and at staff, within prisons;
>
> (B) increases health care expenditures, both inside and outside of prison systems, and reduces the effectiveness of disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases;
>
> (C) increases mental health care expenditures, both inside and outside of prison systems, by substantially increasing the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates;
>
> (D) increases the risks of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape; and
>
> (E) increases the level of interracial tensions and strife within prisons and, upon release of perpetrators and Survivors, in the community at large.

(9) The high incidence of prison rape has a significant effect on interstate commerce because it increases substantially—

> (A) the costs incurred by Federal, State, and local jurisdictions to administer their prison systems;

(B) the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases, contributing to increased health and medical expenditures throughout the Nation;

(C) the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates, contributing to increased health and medical expenditures throughout the Nation; and

(D) the risk of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape.

## SEC. 3. PURPOSES.

The purposes of this Act are to—

(1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;

(2) protect the Eighth Amendment rights of Federal, State, and local prisoners;

(3) make the prevention of prison rape a top priority in each prison system by establishing better reporting standards and eliminating practices such as strip searches;

(4) implement national standards for the detection, prevention, reduction, and punishment of prison rape;

(5) increase the available data and release of such data on the incidence of prison rape, consequently improving the management and administration of correctional facilities;

(6) standardize the definitions used for collecting data on the incidence of prison rape;

(7) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;

(8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness.

## SEC. 4. COLLECTION OF NATIONAL PRISON RAPE STATISTICS, DATA, AND RESEARCH.

(a) ANNUAL COMPREHENSIVE STATISTICAL REVIEW.—

(1) IN GENERAL.—The Bureau of Justice Statistics of the Department of Justice (in this section referred to as the ''Bureau'') shall carry out, for each calendar year, a comprehensive statistical review and analysis of the incidence and effects of prison rape. The statistical review and analysis shall include, but not be limited to, the identification of the common characteristics of—

(A) both Survivors and perpetrators of prison rape;

(B) prisons and prison systems with a high incidence of prison rape.

(C) demographic characteristics of Survivors, including but not limited to race, ethnicity, gender affiliation, sexual orientation, etc.

(2) CONSIDERATIONS.—In carrying out paragraph (1), the Bureau shall consider—

(A) how rape should be defined for the purposes of the statistical review and analysis;

(B) how the Bureau should collect information about staff-on-inmate sexual assault;

(C) how the Bureau should collect information beyond inmate self-reports of prison rape;

(D) how the Bureau should adjust the data in order to account for differences among prisons as required by subsection (c)(3);

(E) the categorization of prisons as required by subsection (c)(4).

(3) SAMPLING TECHNIQUES.—The review and analysis under paragraph (1) shall be based on a random sample, or other scientifically appropriate sample, of not less than 10 percent of all Federal, State, and county prisons, and a representative sample of municipal prisons. The selection shall include at least one prison from each State. The selection of facilities for sampling shall be made at the latest practicable date prior to conducting the surveys and shall not be disclosed to any facility or prison system official prior to the time period studied in the survey. Selection of a facility for sampling during any year shall not preclude its selection for sampling in any subsequent year.

(4) SURVEYS.—In carrying out the review and analysis under paragraph (1), the Bureau shall, in addition to such other methods as the Bureau considers appropriate, use surveys and other statistical studies of current and former inmates from a sample of Federal, State, county, and municipal prisons. The Bureau shall ensure the confidentiality of each survey participant.

(5) PARTICIPATION IN SURVEY.—Federal, State, or local officials or facility administrators that receive a request from the Bureau under subsection (a)(4) or (5) will be required to participate in the national survey and provide access to any inmates under their legal custody. Financial penalties will be imposed for a lack of required participation.

(b) REVIEW PANEL ON PRISON RAPE.—

(1) ESTABLISHMENT.—To assist the Bureau in carrying out the review and analysis under subsection (a), there is established, within the Department of Justice, the Review Panel on Prison Rape (in this section referred to as the ''Panel'').

(2) MEMBERSHIP.—

(A) COMPOSITION.—The Panel shall be composed of 3 members, each of whom shall be appointed by the Attorney General, in consultation with the Secretary of Health and Human Services.

(B) QUALIFICATIONS.—Members of the Panel shall be selected from among individuals with knowledge or expertise in matters to be studied by the Panel.

(3) PUBLIC HEARINGS.—

(A) IN GENERAL.—The duty of the Panel shall be to carry out, for each calendar year, public hearings concerning the operation of the three prisons with the highest incidence of prison rape and the two prisons with the lowest incidence of prison rape in each category of facilities identified under subsection (c)(4). The Panel shall hold a separate hearing regarding the three Federal or State prisons with the highest incidence of prison rape. The purpose of these hearings shall be to collect evidence to aid in the identification of common characteristics of both Survivors and perpetrators of prison rape and the identification of common characteristics of prisons and prison systems with a high incidence of prison rape, and the identification of common characteristics of prisons and prison systems that appear to have been successful in deterring prison rape.

(B) TESTIMONY AT HEARINGS.—

(i) PUBLIC OFFICIALS.—In carrying out the hearings required under subparagraph (A), the Panel shall request the public testimony of Federal, State, and local officials (and organizations that represent such officials), including the warden or director of each prison, who bears responsibility for the prevention, detection, and punishment of prison rape at each entity, and the head of the prison system encompassing such prison.

(ii) SURVIVORS.—The Panel may request the testimony of prison rape Survivors, organizations representing such Survivors, and other appropriate individuals and organizations.

(c) REPORTS.—

(1) IN GENERAL.—Not later than June 30 of each year, the Attorney General shall submit a report on the activities of the Bureau and the Review Panel, with respect to prison rape, for the preceding calendar year to—

(A) Congress; and

(B) Secretary of Health and Human Services, and

(C) The public.

(2) CONTENTS.—The report required under paragraph

(1) shall include—

(A) with respect to the effects of prison rape, statistical, sociological, and psychological data;

(B) with respect to the incidence of prison rape—

(i) statistical data aggregated at the Federal, State, prison system, and prison levels;

(ii) a listing of those institutions in the representative sample, separated into each category identified under subsection (c)(4) and ranked according to the incidence of prison rape in each institution; and

(iii) an identification of those institutions in the representative sample that appear to have been successful in deterring prison rape;

(C) a listing of any prisons in the representative sample that did not cooperate with the survey conducted pursuant to section 4.

(3) DATA ADJUSTMENTS.—In preparing the information specified in paragraph (2), the Attorney General shall use established statistical methods to adjust the data as necessary to account for differences among institutions in the representative sample, which are not related to the detection, prevention, reduction, and punishment of prison rape, or which are outside the control of the State, prison, or prison system, in order to provide an accurate comparison among prisons. Such differences may include the mission, security level, size, and jurisdiction under which the prison operates. For each such adjustment made, the Attorney General shall identify and explain such adjustment in the report.

(4) CATEGORIZATION OF PRISONS.—The report shall divide the prisons surveyed into three categories. One category shall be composed of all Federal and State prisons. The other two categories shall be defined by the Attorney General in order to compare similar institutions.

(d) CONTRACTS AND GRANTS.—In carrying out its duties under this section, the Attorney General may—

(1) provide grants for research through the National Institute of Justice; and

(2) contract with or provide grants to any other entity the Attorney General deems appropriate.

(e) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $15,000,000 for each of fiscal years from 2023 on to carry out this section.

## SEC. 5. REMEDIES

(A) Injunctive relief

To obtain a permanent injunction, the moving party must demonstrate:

(1) that it has suffered an irreparable injury;

(2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

(3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and

(4) that the public interest would not be disserved by a permanent injunction.[193]

(B) Monetary Damages

(1) Punitive damages,

(2) Compensatory damages to cope with the following but not limited to this list:

(i) Medical bills in association with sexual or physical abuse,

(ii) Pain and suffering,

(iii) Intentional infliction of emotional distress,

(iv) Legal fees in association with bringing claims.

(C) Pressing criminal charges

(D) No administrative exhaustion requirement

There is no requirement that a plaintiff exhaust all administrative remedies prior to bringing a claim under this legislation.

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193 Title XI Legal Manual, DEP'T OF JUST., https://www.justice.gov/crt/fcs/T6Manual9 [https://perma.cc/8894-PVLL] (last visited Oct. 19, 2023).

## SEC. 6. PRIVATE RIGHT OF ACTION.

To prove the defendant deprived the plaintiff of this Eighth Amendment right, the plaintiff must establish the following elements by a preponderance of the evidence:

1. [Defendant] acted under color of law;

2. [Defendant] acted without penological justification; and

3. [Defendant] [touched the prisoner in a sexual manner] [engaged in sexual conduct for the defendant's own sexual gratification] [acted for the purpose of humiliating, degrading, or demeaning the prisoner].[194]

Defendants may also be charged with aiding and abetting a felony if they aid, abet, counsel, command, or induce the commission of a sexual assault by a prison guard against an inmate. [195] The elements of which are proved by a preponderance of the evidence when:

1. A crime was committed,

2. The accused intentionally aided, counseled, commanded, induced, or procured the person committing the crime;

3. The accused acted with the intent to facilitate the crime; and

4. The accused acted before the crime was completed.[196]

## SEC. 7. ENHANCED SENTENCING.

All Survivors, being vulnerable populations in prisons, should be entitled to receive protection and justice for their traumas.[197]

The common requirement of knowledge of a vulnerable status to necessitate an enhancement in sentencing is applicable here. This legislation is directly aimed at

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194 *9.26A Particular Rights-Eighth Amendment-Convicted Prisoner's Claim of Sexual Assault*, *supra* note 179.

195 *Particular Allegations-Aiding and Abetting*, US DEP'T OF JUST. ARCHIVES (October 1998), https://www.justice.gov/archives/jm/criminal-resource-manual-233-particular-allegations-aiding-and-abetting#:~:text=Section%202%20of%20Title%2018,or%20another%20would%20be%20an [https://perma.cc/85SS-8PDE].

196 *5.1 Aiding and Abetting*, *Manual of Model Criminal Jury Instructions*, U.S. COURTS FOR THE NINTH CIRCUIT (Oct. 2019), https://www.ce9.uscourts.gov/jury-instructions/node/367 [https://perma.cc/VXV2-9DJZ].

197 *Crimes Against Children and Elderly Persons Increased Punishment Act*, U.S. GOV'T PUBL'G OFF., House Report 104-548 (May 1, 1996) https://www.govinfo.gov/content/pkg/CRPT-104hrpt548/html/CRPT-104hrpt548.htm [https://perma.cc/DJS4-RJF2].

correctional officers, making this requirement apparent and obvious given their position in the prison workforce.”.

Mandating a set amount of years for a sentencing enhancement is unnecessary, as such discretion should be left to the judges and juries deciding such cases.

## SEC. 8. PRISON RAPE PREVENTION AND PROSECUTION.

(a) INFORMATION AND ASSISTANCE.—

(1) NATIONAL CLEARINGHOUSE.—There is established within the National Institute of Corrections a national clearinghouse for the provision of information and assistance to Federal, State, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.

(2) TRAINING AND EDUCATION.—The National Institute of Corrections shall conduct periodic training and education programs for Federal, State, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.

(b) REPORTS.—

(1) IN GENERAL.—Not later than September 30 of each year, the National Institute of Corrections shall submit a report to Congress and the Secretary of Health and Human Services. This report shall be available to the Director of the Bureau of Justice Statistics.

(2) CONTENTS.—The report required under paragraph (1) shall summarize the activities of the Department of Justice regarding prison rape abatement for the preceding calendar year.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $5,000,000 for each of fiscal years from 2022 on to carry out this section.

## SEC. 9. GRANTS TO PROTECT INMATES AND SAFEGUARD COMMUNITIES.

(a) GRANTS AUTHORIZED.—From amounts made available for grants under this section, the Attorney General shall make grants to States to assist those States in ensuring that budgetary circumstances (such as reduced State and local spending on prisons) do not compromise efforts to protect inmates (particularly from prison rape) and to safeguard the communities to which inmates return. The purpose of grants under this section shall be to provide funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape.

(b) USE OF GRANT AMOUNTS.—Amounts received by a grantee under this section may be used by the grantee, directly or through subgrants, only for one or more of the following activities:

(1) PROTECTING INMATES.—Protecting inmates by—

(A) undertaking efforts to more effectively prevent prison rape;

(B) investigating incidents of prison rape; or

(C) prosecuting incidents of prison rape.

(i) deployment of law enforcement resources (including probation and parole resources); and

(ii) delivery of services (such as job training and substance abuse treatment) to those released inmates;

(D) promoting collaborative efforts among officials of State and local governments and leaders of appropriate communities to understand and address the effects on a community of the presence of a disproportionate number of released inmates in that community; or

(E) developing policies and programs that reduce spending on prisons by effectively reducing rates of parole and probation revocation without compromising public safety.

(c) GRANT REQUIREMENTS.—

(1) PERIOD.—A grant under this section shall be made for a period of not more than 2 years.

(2) MAXIMUM.—The amount of a grant under this section may not exceed $1,000,000.

(3) MATCHING.—The Federal share of a grant under this section may not exceed 50 percent of the total costs of the project described in the application submitted under subsection (d) for the fiscal year for which the grant was made under this section.

(d) APPLICATIONS.—

(1) IN GENERAL.—To request a grant under this section, the chief executive of a State shall submit an application to the Attorney General at such time, in such manner, and accompanied by such information as the Attorney General may require.

(2) CONTENTS.—Each application required by paragraph (1) shall—

(A) include the certification of the chief executive that the State receiving such grant—

(i) has adopted all national prison rape standards that, as of the date on which the application was submitted, have been promulgated under this Act; and

(ii) will adopt all national prison rape standards that are promulgated under this Act after such date;

(B) specify with particularity the preventative, prosecutorial, or administrative activities to be undertaken by the State with the amounts received under the grant; and

(C) in the case of an application for a grant for one or more activities specified in paragraph (2) of subsection

(i) review the extent of the budgetary circumstances affecting the State generally and describe how those circumstances relate to the State's prisons;

(ii) describe the rate of growth of the State's prison population over the preceding 10 years and explain why the State may have difficulty sustaining that rate of growth; and

(iii) explain the extent to which officials (including law enforcement officials) of State and local governments and Survivors of crime will be consulted regarding decisions whether, or how, to moderate the growth of the State's prison population.

(e) REPORTS BY GRANTEE.—

(1) IN GENERAL.—The Attorney General shall require each grantee to submit, not later than 90 days after the end of the period for which the grant was made under this section, a report on the activities carried out under the grant. The report shall identify and describe those activities and shall contain an evaluation of the effect of those activities on—

(A) the number of incidents of prison rape and the grantee's response to such incidents; and

(B) the safety of the prisons and the safety of the communities in which released inmates are present.

(2) DISSEMINATION.—The Attorney General shall ensure that each report submitted under paragraph (1) is made available under the national clearinghouse established under section 5.

(f) STATE DEFINED.—In this section, the term ''State'' includes the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(g) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—There are authorized to be appropriated for grants under this section $40,000,000 for each fiscal year from 2022 on.

(2) LIMITATION.—Of amounts made available for grants under this section, not less than 50 percent shall be available only for activities specified in paragraph (1) of subsection (b).

## SEC. 10. NATIONAL PRISON RAPE REDUCTION COMMISSION.

(a) ESTABLISHMENT.—There is established a commission to be known as the National Prison Rape Reduction Commission (in this section referred to as the ''Commission'').

(b) MEMBERS.—

(1) IN GENERAL.—The Commission shall be composed of 9 members, of whom—

(A) are experts in the field- professors, activists, or lawyers appointed by Congress.

(2) PERSONS ELIGIBLE.—Each member of the Commission shall be an individual who has expertise in matters to be studied by the Commission.

(3) TERM.—Each member shall be appointed for the life of the Commission.

(4) TIME FOR INITIAL APPOINTMENTS.—The appointment of the members shall be made not later than 60 days after the date of enactment of this Act.

(5) VACANCIES.—A vacancy in the Commission shall be filled in the manner in which the original appointment was made, and shall be made not later than 60 days after the date on which the vacancy occurred.

(c) OPERATION.—

(1) CHAIRPERSON.—Not later than 15 days after appointments of all the members are made, the members shall determine a chairperson for the Commission from among its members.

(2) MEETINGS.—The Commission shall meet at the call of the chairperson. The initial meeting of the Commission shall take place not later than 30 days after the initial appointment of the members is completed.

(3) QUORUM.—A majority of the members of the Commission shall constitute a quorum to conduct business, but the Commission may establish a lesser quorum for conducting hearings scheduled by the Commission.

(4) RULES.—The Commission may establish by majority vote any other rules for the conduct of Commission business if such rules are not inconsistent with this Act or other applicable law.

(d) COMPREHENSIVE STUDY OF THE IMPACTS OF PRISON RAPE.—

(1) IN GENERAL.—The Commission shall carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States on—

(A) Federal, State, and local governments; and

(B) communities and social institutions generally, including individuals, families, and businesses within such communities and social institutions.

(2) MATTERS INCLUDED.—The study under paragraph (1) shall include—

(A) a review of existing Federal, State, and local government policies and practices with respect to the prevention, detection, and punishment of prison rape;

(B) an assessment of the relationship between prison rape and prison conditions and of existing monitoring, regulatory, and enforcement practices that are intended to address any such relationship;

(C) an assessment of pathological or social causes of prison rape;

(D) an assessment of the extent to which the incidence of prison rape contributes to the spread of sexually transmitted diseases and to the transmission of HIV;

(E) an assessment of the characteristics of inmates most likely to commit prison rape and the effectiveness of various types of treatment or programs to reduce such likelihood;

(F) an assessment of the characteristics of inmates most likely to be Survivors of prison rape and the effectiveness of various types of treatment or programs to reduce such likelihood;

(G) an assessment of the impacts of prison rape on individuals, families, social institutions and the economy generally, including an assessment of the extent to which the incidence of prison rape contributes to recidivism and to increased incidence of sexual assault;

(H) an examination of the feasibility and cost of conducting surveillance, undercover activities, or both, to reduce the incidence of prison rape;

(I) an assessment of the safety and security of prison facilities and the relationship of prison facility construction and design to the incidence of prison rape;

(J) an assessment of the feasibility and cost of any particular proposals for prison reform;

(K) an identification of the need for additional scientific and social science research on the prevalence of prison rape in Federal, State, and local prisons;

(L) an assessment of the general relationship between prison rape and prison violence;

(M) an assessment of the relationship between prison rape and levels of training, supervision, and discipline of prison staff; and

(N) an assessment of existing Federal and State systems for reporting incidents of prison rape, including an assessment of whether existing systems provide an adequate assurance of confidentiality, impartiality and the absence of reprisal.

(3) REPORT.—

(A) DISTRIBUTION.—Not later than 2 years after the date of the initial meeting of the Commission, the Commission shall submit a report on the study carried out under this subsection to—

(i) the President;

(ii) the Congress;

(iii) the Attorney General;

(iv) the Secretary of Health and Human Services;

(v) the Director of the Federal Bureau of Prisons; (vi) the chief executive of each State; and

(vii) the head of the department of corrections of each State.

(B) CONTENTS.—The report under subparagraph (A) shall include—

(i) the findings and conclusions of the Commission;

(ii) recommended national standards for reducing prison rape;

(iii) recommended protocols for preserving evidence and treating Survivors of prison rape; and

(iv) a summary of the materials relied on by the Commission in the preparation of the report.

(e) RECOMMENDATIONS.—

(1) IN GENERAL.—In conjunction with the report submitted under subsection (d)(3), the Commission shall provide the Attorney General and the Secretary of

Health and Human Services with recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape.

(2) MATTERS INCLUDED.—The information provided under paragraph (1) shall include recommended national standards relating to—

(A) the classification and assignment of prisoners, using proven standardized instruments and protocols, in a manner that limits the occurrence of prison rape;

(B) the investigation and resolution of rape complaints by responsible prison authorities, local and State police, and Federal and State prosecution authorities;

(C) the preservation of physical and testimonial evidence for use in an investigation of the circumstances relating to the rape;

(D) acute-term trauma care for rape Survivors, including standards relating to—

(i) the manner and extent of physical examination and treatment to be provided to any rape victim; and

(ii) the manner and extent of any psychological examination, psychiatric care, medication, and mental health counseling to be provided to any rape victim;

(E) referrals for long-term continuity of care for rape Survivors;

(F) educational and medical testing measures for reducing the incidence of HIV transmission due to prison rape;

(G) post-rape prophylactic medical measures for reducing the incidence of transmission of sexual diseases;

(H) the training of correctional staff sufficient to ensure that they understand and appreciate the significance of prison rape and the necessity of its eradication;

(I) the timely and comprehensive investigation of staff sexual misconduct involving rape or other sexual assault on inmates;

(J) ensuring the confidentiality of prison rape complaints and protecting inmates who make complaints of prison rape;

(K) creating a system for reporting incidents of prison rape that will ensure the confidentiality of prison rape complaints, protect inmates who make prison rape complaints from retaliation, and assure the impartial resolution of prison rape complaints;

(L) data collection and reporting of—

(i) prison rape;

(ii) prison staff sexual misconduct; and

(iii) the resolution of prison rape complaints by prison officials and Federal, State, and local investigation and prosecution authorities; and

(M) such other matters as may reasonably be related to the detection, prevention, reduction, and punishment of prison rape.

(3) LIMITATION.—The Commission shall not propose a recommended standard that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.

(f) CONSULTATION WITH ACCREDITATION ORGANIZATIONS.—In developing recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape, the Commission shall consider any standards that have already been developed, or are being developed simultaneously to the deliberations of the Commission. The Commission shall consult with accreditation organizations responsible for the accreditation of Federal, State, local or private prisons, that have developed or are currently developing standards related to prison rape. The Commission will also consult with national associations representing the corrections profession that have developed or are currently developing standards related to prison rape.

(g) HEARINGS.—

(1) IN GENERAL.—The Commission shall hold public hearings. The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out its duties under this section.

(2) WITNESS EXPENSES.—Witnesses requested to appear before the Commission shall be paid the same fees as are paid to witnesses under section 1821 of title 28, United States Code. The per diem and mileage allowances for witnesses shall be paid from funds appropriated to the Commission.

(h) INFORMATION FROM FEDERAL OR STATE AGENCIES.—The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out its duties under this section. The Commission may request the head of any State or local department or agency to furnish such information to the Commission.

(i) PERSONNEL MATTERS.—

(1) DETAIL OF FEDERAL EMPLOYEES.—With the affirmative vote of 2/3 of the Commission, any Federal Government employee, with the approval of the

head of the appropriate Federal agency, may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status, benefits, or privileges.

(2) PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES.—Upon the request of the Commission, the Attorney General shall provide reasonable and appropriate office space, supplies, and administrative assistance.

(j) CONTRACTS FOR RESEARCH.—

(1) NATIONAL INSTITUTE OF JUSTICE.—With a 2⁄3 affirmative vote, the Commission may select nongovernmental researchers and experts to assist the Commission in carrying out its duties under this Act. The National Institute of Justice shall contract with the researchers and experts selected by the Commission to provide funding in exchange for their services.

(2) OTHER ORGANIZATIONS.—Nothing in this subsection shall be construed to limit the ability of the Commission to enter into contracts with other entities or organizations for research necessary to carry out the duties of the Commission under this section.

(k) SUBPOENAS.—

(1) ISSUANCE.—The Commission may issue subpoenas for the attendance of witnesses and the production of written or other matters.

(2) ENFORCEMENT.—In the case of contumacy or refusal to obey a subpoena, the Attorney General may, in a Federal court of appropriate jurisdiction, obtain an appropriate order to enforce the subpoena.

(3) CONFIDENTIALITY OF DOCUMENTARY EVIDENCE.—Documents provided to the Commission pursuant to a subpoena issued under this subsection shall not be released publicly without the affirmative vote of 2⁄3 of the Commission.

(l) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this section.

(m) TERMINATION.—The Commission shall terminate on the date that is 60 days after the date on which the Commission submits the reports required by this section.

(n) EXEMPTION.—The Commission shall be exempt from the Federal Advisory Committee Act.

## SEC. 11. ADOPTION AND EFFECT OF NATIONAL STANDARDS.

(a) PUBLICATION OF PROPOSED STANDARDS.—

(1) FINAL RULE.—Not later than 1 year after receiving the report specified in section 7(d)(3), the Attorney General shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape.

(2) INDEPENDENT JUDGMENT.—The standards referred to in paragraph (1) shall be based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission under section 7(e), and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.

(3) LIMITATION.—The Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities. The Attorney General may, however, provide a list of improvements for consideration by correctional facilities.

(4) TRANSMISSION TO STATES.—Within 90 days of publishing the final rule under paragraph (1), the Attorney General shall transmit the national standards adopted under such paragraph to the chief executive of each State, the head of the department of corrections of each State, and to the appropriate authorities in those units of local government who oversee operations in one or more prisons.

(b) APPLICABILITY TO FEDERAL BUREAU OF PRISONS.—The national standards referred to in subsection (a) shall apply to the Federal Bureau of Prisons immediately upon adoption of the final rule under subsection (a)(4).

(c) ELIGIBILITY FOR FEDERAL FUNDS.—

(1) COVERED PROGRAMS.—

(A) IN GENERAL.—For purposes of this subsection, a grant program is covered by this subsection if, and only if—

(i) the program is carried out by or under the authority of the Attorney General; and

(ii) the program may provide amounts to States for prison purposes.

(B) LIST.—For each fiscal year, the Attorney General shall prepare a list identifying each program that meets the criteria of subparagraph (A) and provide that list to each State.

(2) ADOPTION OF NATIONAL STANDARDS.—For each fiscal year, any amount that a State would otherwise receive for prison purposes for that fiscal year under a grant program covered by this subsection shall be reduced by 5 percent unless the chief executive of the State submits to the Attorney General—

(A) a certification that the State has adopted and is in full compliance with the national standards described in section 8(a); or

(B) an assurance that not less than 5 percent of such amount shall be used only for the purpose of enabling the State to adopt, and achieve full compliance with, those national standards, so as to ensure that a certification under subparagraph (A) may be submitted in future years.

(3) REPORT ON NONCOMPLIANCE.—Not later than September 30 of each year, the Attorney General shall publish a report listing each grantee that is not in compliance with the national standards adopted pursuant to section 8(a).

(4) COOPERATION WITH SURVEY.—For each fiscal year, any amount that a State receives for that fiscal year under a grant program covered by this subsection shall not be used for prison purposes (and shall be returned to the grant program if no other authorized use is available), unless the chief executive of the State submits to the Attorney General a certification that neither the State nor any political subdivision or unit of local government within the State, is listed in a report issued by the Attorney General pursuant to section 4(c)(2)(C).

(5) REDISTRIBUTION OF AMOUNTS.—Amounts under a grant program not granted by reason of a reduction under paragraph (2), or returned by reason of the prohibition in paragraph (4), shall be granted to one or more entities not subject to such reduction or such prohibition, subject to the other laws governing that program.

(6) IMPLEMENTATION.—The Attorney General shall establish procedures to implement this subsection, including procedures for effectively applying this subsection to discretionary grant programs.

(7) EFFECTIVE DATE.—

(A) REQUIREMENT OF ADOPTION OF STANDARDS.—The first grants to which paragraph (2) applies are grants for the second fiscal year beginning after the date on which the national standards under section 8(a) are finalized.

(B) REQUIREMENT FOR COOPERATION.—The first grants to which paragraph (4) applies are grants for the fiscal year beginning after the date of the enactment of this Act.

## SEC. 12. REQUIREMENT THAT ACCREDITATION ORGANIZATIONS ADOPT ACCREDITATION STANDARDS.

(a) ELIGIBILITY FOR FEDERAL GRANTS.—Notwithstanding any other provision of law, an organization responsible for the accreditation of Federal, State, local, or private prisons, jails, or other penal facilities may not receive any new Federal grants during any period in which such organization fails to meet any of the requirements of subsection (b).

(b) REQUIREMENTS.—To be eligible to receive Federal grants, an accreditation organization referred to in subsection (a) must meet the following requirements:

(1) At all times after 90 days after the date of enactment of this Act, the organization shall have in effect, for each facility that it is responsible for accrediting, accreditation standards for the detection, prevention, reduction, and punishment of prison rape.

(2) At all times after 1 year after the date of the adoption of the final rule under section 8(a)(4), the organization shall, in addition to any other such standards that it may promulgate relevant to the detection, prevention, reduction, and punishment of prison rape, adopt accreditation standards consistent with the national standards adopted pursuant to such final rule.

## SEC. 13. DEFINITIONS.

In this Act, the following definitions shall apply:

(1) CARNAL KNOWLEDGE.—The term ''carnal knowledge'' means contact between the penis and the vulva or the penis and the anus, including penetration of any sort, however slight.

(2) INMATE.—The term ''inmate'' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

(3) JAIL.—The term ''jail'' means a confinement facility of a Federal, State, or local law enforcement agency to hold—

(A) persons pending adjudication of criminal charges; or

(B) persons committed to confinement after adjudication of criminal charges for sentences of 1 year or less.

(4) HIV.—The term ''HIV'' means the human immuno- deficiency virus.

(5) ORAL SODOMY.—The term ''oral sodomy'' means contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus.

(6) POLICE LOCKUP.—The term ''police lockup'' means a temporary holding facility of a Federal, State, or local law enforcement agency to hold—

(A) inmates pending bail or transport to jail;

(B) inebriates until ready for release; or

(C) juveniles pending parental custody or shelter placement.

(7) PRISON.—The term ''prison'' means any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government, and includes—

(A) any local jail or police lockup; and

(B) any juvenile facility used for the custody or care of juvenile inmates.

(8) PRISON RAPE.—The term ‘‘prison rape’’ includes the rape of an inmate in the actual or constructive control of prison officials.

(9) RAPE.—The term ‘‘rape’’ means—

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

(B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person’s will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or

(C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.

(10) SEXUAL ASSAULT WITH AN OBJECT.—The term ‘‘sexual assault with an object’’ means the use of any hand, finger, object, or other instrument to penetrate, however slightly, the genital or anal opening of the body of another person.

(11) SEXUAL FONDLING.—The term ‘‘sexual fondling’’ means the touching of the private body parts of another person (including the genitalia, anus, groin, breast, inner thigh, or buttocks) for the purpose of sexual gratification.

(12) EXCLUSIONS.—The terms and conditions described in paragraphs (9) and (10) shall not apply to—

(A) custodial or medical personnel gathering physical evidence, or engaged in other legitimate medical treatment, in the course of investigating prison rape;

(B) the use of a health care provider’s hands or fingers or the use of medical devices in the course of appropriate medical treatment unrelated to prison rape; or

(C) the use of a health care provider’s hands or fingers and the use of instruments to perform body cavity searches in order to maintain security and safety within the prison or detention facility, provided that the search is conducted in a manner consistent with constitutional requirements.