PRISON RAPE ELIMINATION ACT LITIGATION AND THE PERPETUATION OF SEXUAL HARM

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INTRODUCTION

Law reform of any sort often sparks controversy. In the prison context, those committed to prison change and prisoner justice hotly debate paths for pursuing their goals. Many scholars and leaders caution that even well-meaning prison law reform projects can lead to

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prison expansion, cooptation, and unanticipated harms to prisoners and communities.[1] At the same time, they urge that we must not abandon reform projects that have the potential to improve brutal conditions in the near future.[2]

The Prison Rape Elimination Act (PREA) is perhaps the most significant law reform project undertaken on U.S. prison issues in the twenty-first century. Congress passed PREA unanimously in 2003.[3] In 2012, the Department of Justice (DOJ) promulgated long-awaited implementing regulations, pursuant to the statutory mandate to detect, prevent, reduce, and punish prison rape.[4] In 2014, the Department of Homeland Security (DHS) followed suit.[5] In the decade since PREA was enacted, it has been mentioned in around 225 cases available on Westlaw, many of them decided in the time since the regulations were promulgated.[6]

In this Article, I provide the first scholarly analysis of the role of PREA in prison litigation. Both plaintiffs and defendants invoke PREA in litigation, even though PREA does not create a private right of action or affirmative defense. Courts have not responded to these invocations consistently, raising questions about what role the statute and its regulations should have in evaluation of claims and defenses. In a legal landscape where it is increasingly difficult to rely on an

1. *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 103 (2003) ("A major challenge of this movement is to do the work that will create more humane, habitable environments for people in prison without bolstering the permanence of the prison system."); Morgan Bassichis, Alexander Lee & Dean Spade, *Building an Abolitionist Trans and Queer Movement with Everything We've Got*, *in* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 15, 34 (Eric A. Stanley & Nat Smith eds., 2011) ("We can respond to the crises that our communities are facing right now while refusing long-term compromises that will strengthen the very institutions that are hurting us."); Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731, 759–60 (2010) (discussing unintended harms of prison reform litigation); Reina Gossett & Dean Spade, *No One is Disposable*, BARNARD (Feb. 7, 2014), http://bcrw.barnard.edu/event/no-one-is-disposable-everyday-practices-of-prison-abolition/ (discussing ways to support currently incarcerated people while practicing prison abolition).

2. *See supra* note 1.

3. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003).

4. 28 C.F.R. § 115 (2014).

5. *See* 42 U.S.C. § 15602(3) (2012).

6. As of December 2014, 227 decisions available on Westlaw mentioned PREA. I say mentioned rather than cited because in quite a few of these cases PREA is mentioned only as a designation for a particular policy or practice that a state or local detention agency presumably implemented in an effort to comply with PREA. The actual language of the statute is not always considered and a citation to it is not always included.

implied private right of action,[7] the question of the appropriate impact of federal legislation and regulation on separate claims in lawsuits takes on particular importance. In this piece, I examine current approaches and recommend improving them.

I do not seek to give a comprehensive review of litigation involving PREA. Instead, I deliberately foreground those situations where PREA has disserved prisoners, and pick apart how and why that disservice occurs. In emphasizing these situations, I do not mean to imply that PREA has only harmed prisoners or has always completely failed to help them. Some cases and the experiences of some advocates bear out a more complex reality: at times, in ways, PREA has helped. Those stories, however, get told elsewhere.[8]

I want to tell the stories of how PREA has gone wrong, harming the people it should protect, because these stories matter. They matter for their own sake and for the sake of understanding how PREA, prison litigation, and the facilities that incarcerate millions of people in the U.S. operate. They matter for understanding constitutional, criminal, and administrative law. They matter also because they provide a wedge for prying open stubborn and crucial questions—how do power structures co-opt progressive law reform? What traps must those who wish to improve social conditions be wary of? Can

7. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) ("We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. . . ."); Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . ") (citation omitted); Blessing v. Freestone, 520 U.S. 329, 340–41 (1997) (requiring showing that Congress intended to benefit plaintiff, that Congress created a right that is not too "vague or amorphous" for enforcement, that Congress "unambiguously impose[d] a binding obligation on the States," and that Congress did not preclude the remedy) (citations omitted).

8. *See, e.g.*, Robert A. Shuhmann & Eric J. Wodahl, *Prison Reform Through Federal Legislative Intervention: The Case of the Prison Rape Elimination Act*, 22 CRIM. JUST. POL'Y REV. 111 (2011) (noting optimism for legislative change in prison reform in the wake of PREA); Sarah K. Wake, *Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220, 235 (2006) ("[I]t initially appears that the PREA is meeting some of its goals and causing a change in the way that prison rape is viewed in America."); *A Lifeline for Prisoner Rape Survivors Still Behind Bars*, JUST DETENTION INT'L, http://www.justdetention.org/en/10-years-PREA.aspx ("The services offered at CCI and CIW represent one of the success stories of the Prison Rape Elimination Act."); ACLU, *Advocacy Guide*, *in* END THE ABUSE: PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT 2 (2014), https://www.aclu.org/sites/default/files/assets/012714-prea-combined.pdf, ("The final PREA regulations can be leveraged to reduce the violence and other common problems that LGBTI individuals experience while incarcerated.").

marginalized peoples accomplish meaningful social change though legislative, administrative, and judicial processes, and if so, how?

To these ends, I first provide background on PREA and on the constitutional and statutory standards that govern most claims related to sexual abuse in detention. Second, I describe and analyze the key ways in which PREA has failed prisoners. Third—because I too do not wish to abandon a tool with promise for reducing some of the harms that prisoners experience—I lay out proposals for judicial approaches to PREA that would make better doctrinal and normative sense than current trends, including using PREA to inform judicial understandings of "evolving standards of decency"[9] under the Eighth Amendment. Fourth and finally, I reflect on the implications of my analysis for the larger questions about law reform and social justice I have invoked.

I.
BACKGROUND

Organizations concerned with the prevalence of sexual abuse in detention collaborated to lobby for the passage of PREA. They operated from diverse ideological positions. Arguably the most influential among them was Prison Fellowship Ministries, which opposes prison rape from an evangelical Christian perspective.[10] Just Detention International, another major player, opposes prison rape from a secular human rights perspective.[11] The bill obtained bipartisan support in Congress. Surprisingly little opposition to the measure emerged, and in 2003, Congress unanimously passed PREA.[12]

PREA declares a "zero tolerance" standard for prison rape, requires data collection and analysis of prison rape, provides grants "to prevent and prosecute prisoner rape," and directs the United States Attorney General (AG) to adopt "national standards for the detection, prevention, reduction, and punishment of prison rape."[13] PREA ad-

9. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (internal citation omitted).

10. *See, e.g.*, Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL'Y REV. 489, 501 (2011).

11. *Id.* at 504–05.

12. *See* Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 122 (2009) ("The bill received bi-partisan support, passed unanimously, and immediately received the signature of President George W. Bush enacting it into law."); Rep. Bobby Scott & Rep. Frank Wolf, Op-Ed., *Ending Prison Rape is a Bipartisan Cause*, RICH. NEWS, Aug. 4, 2012, http://www.prearesourcecenter.org/news-events/news/947/ending-prisoner-rape-is-a-bipartisan-cause.

13. 42 U.S.C. § 15602 (2012).

dresses not just forcible rape but also other forms of sexual abuse, whether perpetrated by prisoners or staff.[14] PREA also addresses sexual abuse that takes place in forms of detention other than prisons, including jails, police lockups, juvenile detention facilities, and immigration detention facilities.[15] Congress did not, however, indicate an intention to create a private right and remedy in a way that courts would recognize under current Supreme Court precedent.[16]

The process of developing PREA regulations was extensive. PREA created and funded the National Prison Rape Elimination Commission (NPREC) to conduct research, hold hearings, and develop recommended standards for the prevention, detection, and response to sexual abuse in detention.[17] After five years of activity, NPREC issued draft proposed standards in 2008 and held a notice and comment period before issuing revised final recommended standards in 2009.[18] PREA required the AG to consider the proposed standards and issue regulations within one year of the report.[19] However, the AG missed that deadline.[20] It was another two years, and two notice and comment periods,[21] before the final rule was issued in May 2012. Even after the nine years of drafting and commenting following the passage of the initial legislation, the process was not complete.[22] DHS only promul-

14. 42 U.S.C. § 15609 (2012) (defining rape to include, among other acts, "the carnal knowledge, oral sodomy, sexual abuse with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury").

15. *Id.* (defining prison to include local jails, police lockups, and juvenile facilities).

16. Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.").

17. 42 U.S.C. § 15606 (2012).

18. NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 27 (2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf [hereinafter NPREC Report].

19. 42 U.S.C. § 15607(a)(1) (2012).

20. Letter from Eric Holder, U.S. Att'y Gen., to Frank R. Wolf and Bobby Scott, Members, U.S. House of Representatives (June 22, 2010), *available at* http://big.assets.huffingtonpost.com/PREAletter.pdf.

21. Advanced Notice of Proposed Rulemaking, National Standards To Prevent, Detect, and Respond to Prison Rape, 75 Fed. Reg. 11077-01 (March 10, 2010); Notice of Proposed Rulemaking, National Standards To Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248-01 (Feb. 3, 2011).

22. The AG requested additional comments on one aspect of the rules in the final rule. President Obama instructed other federal agencies that confine prisoners to develop regulations within 120 days. Memorandum from President Barack Obama to Heads of Executive Departments and Agencies, Implementing the Prison Rape Elimination Act, 77 Fed. Reg. 30873 (May 17, 2012).

gated regulations implementing PREA for immigration detention in March 2014.[23]

The DOJ regulations directly bind the Federal Bureau of Prisons.[24] The primary means of enforcement of PREA for state agencies, however, is through financial incentives. State detention agencies must have their facilities audited at least once every three years.[25] If an agency's facilities are not in full compliance with PREA, its qualifying federal grants may be reduced by five percent unless the Governor of the state certifies that those funds will only be used to come into compliance with PREA.[26] Any funds that are not granted to an agency for this purpose must be re-granted to other eligible agencies.[27]

While many detention agencies have taken steps in response to PREA,[28] it remains unclear how forceful an incentive a possible reduction in federal funds will prove in the long term. Given the budget crises many states face,[29] the incentive may be strong. However, depending on other political and administrative pressures, the withdrawal of a relatively small percentage of funds may not seem an overwhelming threat. Federal funding accounts for only 2.9% of state prison budgets.[30] So far, seven states and one territory have chosen not to certify that they have complied or that they will use the funds to comply.[31] Furthermore, local agencies, such as city or county jails and

23. Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100 (March 7, 2014) (to be codified at 6 C.F.R. pt. 115).

24. 42 U.S.C. § 15607(b) (2012).

25. 28 C.F.R. § 115.401(a) (2014).

26. 42 U.S.C. § 15607(c) (2012).

27. 42 U.S.C. § 15607(c)(5) (2012).

28. *See, e.g.*, CALIFORNIA DEPARTMENT OF CORRS. AND REHAB., OPERATIONS MANUAL, PRISON RAPE ELIMINATION POLICY 54040.1 ET SEQ. (2014); IDAHO DEP'T OF CORR., STANDARD OPERATING PROCEDURE, PRISON RAPE ELIMINATION 325.02.01.001 (2009); MONTANA DEP'T OF CORRS., POLICY DIRECTIVE DOC 1.3.14, PRISON RAPE ELIMINATION ACT OF 2003 (2012); NEW YORK DEP'T OF CORRS. AND CMTY. SUPERVISION, DIRECTIVE 4027A, SEXUAL ABUSE PREVENTION AND INTERVENTION, INMATE-ON-INMATE (2005); VIRGINIA DEP'T OF CORRS., OPERATING PROCEDURE 038.3, PRISON RAPE ELIMINATION ACT (PREA) (2013).

29. Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POLICY PRIORITIES 1 (June 27, 2012), http://www.cbpp.org/files/2-8-08sfp.pdf.

30. NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE SPENDING FOR CORRECTIONS: LONG-TERM TRENDS AND RECENT CRIMINAL JUSTICE POLICY REFORMS 3 (2013) https://www.nasbo.org/sites/default/files/pdf/State%20Spending%20for%20Corrections.pdf.

31. Ryan J. Reilly, *Seven Republican Governors Won't Comply with Anti-Rape Rules*, HUFFINGTON POST (May 28, 2014), http://www.huffingtonpost.com/2014/05/28/prison-rape-elimination-act-doj_n_5406665.html (listing Arizona, Florida, Idaho, Indiana, Nebraska, Texas, Utah, and the Northern Marianas Islands as those states and territories not seeking compliance with PREA).

lockups, are not bound by this or any other administrative enforcement mechanism.[32] Some Senators seek to amend the law to give it even less bite, through removing the administrative enforcement mechanism for states.[33]

Of course, prisoners litigated about sexual abuse in detention long before Congress passed PREA. Substantively, prisoners usually bring claims about sexual abuse in detention through 42 U.S.C. § 1983 based on the Eighth Amendment.[34] Under the Eighth Amendment, if the sexual abuse was perpetrated by another prisoner, plaintiffs who seek to hold staff liable must prove that the staff members were deliberately indifferent to a substantial risk of serious harm.[35] Plaintiffs often also seek to hold supervisory staff liable in cases of staff-perpetrated sexual abuse. Because detention agencies may refuse to indemnify staff who sexually abuse prisoners, proving liability of supervisory defendants can be particularly important in achieving any meaningful monetary recovery.[36] Liability for supervisory defendants can also be critical in achieving meaningful injunctive relief or incentivizing policy change.

Eighth Amendment claims involve both objective and subjective components. An act must be sufficiently, objectively serious before it rises to the level of constitutional violation.[37] The subjective prong of the Eighth Amendment test demands that a defendant prison official have a culpable state of mind.[38] Unlike negligence, it is not enough that an official *should* have known about a substantial risk of serious danger to a prisoner and failed to address it.[39] In deliberate indiffer-

32. National Standards to Prevent, Detect, and Respond to Prison Rape: Final Rule, 77 Fed. Reg. 37,106, 37,196 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115) ("For county, municipal, and privately run agencies that operate confinement facilities, PREA lacks any corresponding sanctions for facilities that do not adopt or comply with the standards.").

33. Sarah Childress, *Will Congress Gut Law to Eliminate Prison Rape?*, PBS FRONTLINE (Dec. 3, 2014), http://www.pbs.org/wgbh/pages/frontline/criminal-justice/will-congress-gut-law-to-eliminate-prison-rape/.

34. The Eighth and Fourth Amendments apply to states through the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

35. Farmer v. Brennan, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment.").

36. *See* Dorsey v. Givens, 209 F. Supp. 2d 850, 853 (N.D. Ill. 2001) (finding sheriff need not indemnify officer accused of inappropriate sexual touching of prisoner as such touching was outside the scope of employment).

37. Farmer, 511 U.S. at 825 ("[A] constitutional violation occurs only where the deprivation alleged is, objectively, 'sufficiently serious . . . .'").

38. *Id*.

39. *Id.* at 835 ("[D]eliberate indifference describes a state of mind more blameworthy than negligence . . . .").

ence cases, the official must have *actual* knowledge of the danger to the prisoner and choose not to prevent it.[40] The same standard applies to deliberate indifference to serious medical needs.[41]

Prisoners also use a number of other types of claims. Many claims concerning sexual abuse in detention that arise in the context of a search also rely on a Fourth Amendment theory. Reasonableness is the cornerstone of Fourth Amendment analysis.[42] While sharply curtailed under *Turner*,[43] *Bell*,[44] and *Florence*,[45] an expectation to bodily privacy does survive imprisonment.[46] As such, body searches must be reasonable to survive Fourth Amendment scrutiny. The Supreme Court established the test that applies to most types of constitutional litigation by prisoners in *Turner v. Safley*.[47] Under the *Turner* test, a detention agency can infringe on prisoners' constitutional rights so long as the restriction is rationally related to a legitimate penological objective.[48] The four factors courts must consider include whether there is a "valid, rational connection" between the regulation and the interest; whether "alternative means" remain open to prisoners to exercise their constitutional rights; the impact accommodation of the prisoners' rights would have on staff, other prisoners, and allocation of

40. *Id.* at 837 ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

41. Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment.'") (citation omitted).

42. "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . . " U.S. CONST. amend. IV (emphasis added).

43. Turner v. Safley, 482 U.S. 78 (1987).

44. Bell v. Wolfish, 441 U.S. 520, 558 (1979) (finding visual body cavity searches of prisoners following contact visits were not unreasonable under the Fourth Amendment).

45. *See* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1526 (2012).

46. *Id*. at 1523 (finding the strip search policies at issue to be "a reasonable balance between inmate privacy and the needs of the institutions"); *see also* Nicholas v. Goord, 430 F.3d 652, 658 (2d Cir. 2005), *cert. denied*, 549 U.S. 953 (2006) ("prisoners retain a right to bodily privacy"); Fortner v. Thomas, 983 F.2d 1024, 1026 (11th Cir. 1993) ("we hold that a prisoner retains a constitutional right to bodily privacy"). Because the Court has ruled that prisoners have no reasonable expectation to privacy in their property, the Fourth Amendment does not apply to cell searches. Hudson v. Palmer, 468 U.S. 517, 525–26 (1984) ("[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.").

47. 482 U.S. at 78.

48. *Id.* at 89.

agency resources; and the availability of ready alternatives to the infringement.[49] The prisoner, not the official, has the burden of proof.[50] While the Court has stated that *Turner* applies to Fourth Amendment questions,[51] more classically Fourth Amendment balancing of individual and government interests still plays a role.[52] Using this analysis, the Court held in *Bell* that visual body cavity searches of convicted prisoners do not ordinarily violate the Fourth Amendment,[53] and under *Florence* the Court held that suspicionless visual body cavity searches of misdemeanor arrestees likewise do not necessarily violate the Fourth Amendment.[54] Prisoners may also bring state claims related to sexual abuse, often tort claims.

The Prison Litigation Reform Act (PLRA) presents major barriers to prisoner plaintiffs, even if they have meritorious constitutional or state law claims. One of the provisions of the PLRA requires prisoners to exhaust administrative remedies prior to bringing a case in federal court.[55] In *Woodford v. Ngo*, the Supreme Court interpreted the PLRA to require "proper exhaustion," which means that prisoners must follow all of the procedural rules that detention agencies have developed for internal grievances before suing.[56] *Woodford*'s holding increases the barrier presented by the PLRA, in part because many detention systems have extremely short timelines for filing a grievance.[57] If a prisoner does not file a grievance within that timeframe, which may be two weeks or less, she has lost her opportunity to sue for as long as she is incarcerated (which, if the statute of limitations expires prior to release, means she has permanently lost her opportunity to sue).[58] This limitation applies even when the case concerns an

49. *Id.* at 89–90.

50. Overton v. Bazzetta, 539 U.S. 126, 132 (2003) ("The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.").

51. *Florence*, 132 S. Ct. at 1518 ("The current case is set against this precedent and governed by the principles announced in *Turner* and *Bell*.").

52. *Id.* at 1516 ("The need for a particular search must be balanced against the resulting invasion of personal rights.").

53. *Bell*, 441 U.S. at 558.

54. 132 S. Ct. at 1518.

55. 42 U.S.C. § 1997e(a) (2012).

56. 548 U.S. 81, 94 (2006).

57. *Id.* at 95–96 (noting that according to defendants most deadlines for filing a grievance are from 14–30 days and that according to plaintiff they are even shorter).

58. JOHN BOSTON, PRISON LITIGATION REFORM ACT 39 (2012) ("It is only in cases where the defense is waived, the prisoner has properly completed exhaustion after the litigation was filed, prison officials allow the filing of an out-of-time grievance, or the prisoner has been released from prison and can refile without being subject to the exhaustion requirement, that dismissal for non-exhaustion without prejudice will allow the prisoner to re-file and litigate the claim.").

abuse as serious as rape.[59] Particularly for survivors reeling from the trauma of sexual abuse and reasonably fearful of retaliation for complaining about it, a two-week timeline is often not feasible.[60] In fact, the dissent in *Woodford* cited to PREA's finding about the prevalence of sexual abuse in detention to highlight the potentially grave consequences of the majority's reasoning.[61]

In federal courts in 2011, 93% of petitions brought by prisoners were pro se.[62] Of those cases that have resulted in a written opinion mentioning PREA, around three-quarters were brought pro se. It is well-established law that the complaints of pro se litigants must be construed liberally.[63] *Twombly*[64] and *Iqbal*[65] have not changed this doctrine.[66] Courts must interpret a pro se complaint "to raise the strongest claim it suggests."[67] Thus, even if pro se prisoner plaintiffs

59. *See, e.g.*, Minix v. Pazera, No. 1:04 CV 447 RM, 2005 WL 1799538, at *4 (N.D. Ind. July 27, 2005) (granting summary judgment against young person who alleged that he was raped in juvenile detention for failure to exhaust administrative remedies); Mendez v. Herring, 2005 WL 3273555, at *2 (D. Ariz. Nov. 29, 2005) (dismissing claim of a prisoner who alleged that he was raped based on failure to exhaust administrative remedies).

60. *See, e.g.*, Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79—The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 142, 154 (2006) ("Most prison sexual assault victims do not report the incidents to correctional authorities, because they fear reprisals, fear no one will believe them, or think it will only cause more problems."); Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 226 (2003) ("Given the chilling consequences of reporting, many women are reluctant or unwilling to report sexual misconduct, sexual harassment and/or privacy violations.").

61. 548 U.S. at 118 (2006) (Stevens, J., dissenting).

62. THOMAS F. HOGAN, ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 12 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C13Sep11.pdf.

63. Haines v. Kerner, 404 U.S. 519, 520 (1972) ("however inartfully pleaded . . . we hold [pro se complaints] to less stringent standards than formal pleadings drafted by lawyers"); Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("The handwritten pro se document is to be liberally construed.").

64. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–63 (2007).

65. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

66. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (holding that courts should continue to give pro se pleadings a liberal reading notwithstanding the new *Twombly* plausibility standard); *see also, e.g.*, Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) ("*Iqbal* incorporated the *Twombly* pleading standard and *Twombly* did not alter courts' treatment of *pro se* filings; accordingly, we continue to construe *pro se* filings liberally when evaluating them under *Iqbal.*").

67. DiPetto v. U.S. Postal Serv., 383 F. App'x 102, 103 (2d Cir. 2010); *see also* Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (describing liberal construction as compelling court to read the pleadings to state a valid claim if reasonable despite "confusion of various legal theories" and "poor syntax and sentence construction").

fail to articulate with precision the way that PREA should enter into courts' consideration, courts should construe these claims fairly and consistently with the law.

II.
How Judicial Treatment of PREA Has Harmed Prisoners

Courts treat PREA inappropriately in several ways. They often disregard any favorable implications PREA could have on the constitutional claims of imprisoned survivors of sexual abuse. However, courts do entertain arguments from defendants who seek to use PREA to justify infringements on prisoners' constitutional rights. Courts have also interpreted PREA to raise, not lower, the barrier of exhaustion of administrative remedies before prisoners may bring a claim about sexual abuse.

A. Presumption of Irrelevance to Plaintiffs' Constitutional Claims

One of the most striking aspects of case law involving PREA is that many courts refuse to acknowledge that PREA could have any relevance to claims of survivors of sexual abuse in detention. In most cases where prisoners raise violations of PREA in their complaints, courts decline to consider PREA at all because of the lack of a private right of action.[68] Courts seem to construe even pro se arguments about PREA quite narrowly, as if the lack of private right of action automatically means that PREA could not have any possible relevance to Eighth Amendment or other claims. In fact, legislation without a private right of action can offer important guidance for interpreting facts and law relevant to other claims. As I discuss below in Section III.A., consideration of statutes forms a core part of Eighth Amendment doctrine.

68. *See, e.g.*, Monts v. Greer, No. 5:12-CV-258-MP-GRJ, 2013 WL 5436763, at *3 (N.D. Fla. July 15, 2013) *report and recommendation rejected sub nom*. Monts v. Dep't of Corr., No. 5:12-CV-00258-MP, 2013 WL 5436758 (N.D. Fla. Sept. 27, 2013) (discussing PREA only to note lack of private right of action); Brown v. Parnell, CIV.A No. 5:09CV-P159-R, 2010 WL 1418735, at *5 (W.D. Ky. Apr. 7, 2010) (same); Faz v. North Kern State Prison, No. CV-F-11-0610-LJO-JLT, 2011 WL 4565918 at *5 (E.D. Cal. Sept. 29, 2011) (same); Inscoe v. Yates, No. 1:08-CV-001588 DLB PC, 2009 WL 3617810, at *3 (E.D. Cal. Oct. 28, 2009) (same); LeMasters v. Fabian, No. 09-702 DSD/AJB, 2009 WL 1405176, at *2 (D. Minn. May 18, 2009) (same); Pirtle v. Hickman, No. CV05-146-S-MHW, 2005 WL 3359731, at *1 (D. Idaho Dec. 9, 2005) (same); Rindahl v. Weber, No. CIV. 08-4041-RHB, 2008 WL 5448232, at *1 (D.S.D. Dec. 31, 2008) (same); Rivera v. Drake, No. 09-CV-1182, 2010 WL 1172602, at *3 (E.D. Wis. Mar. 23, 2010) (same).

Law v. Whitson presents one example of judicial disregard of PREA. Officials denied forensic examination and medical treatment to an imprisoned man who was raped and experienced rectal injuries.[69] When he brought a claim, he alleged in part that a rape kit had to be provided under PREA.[70] PREA regulations do require detention agencies to offer these exams.[71] The court dismissed the case during prescreening, stating that PREA did not provide a private right of action and that the allegations were insufficient to sustain a deliberate indifference claim.[72] The court did not contemplate any relationship between the provisions of PREA and the deliberate indifference standard.

Similarly, in *Woodstock v. Golder*, a district court dismissed the claims of a prisoner who attempted suicide after he complained about being raped by other prisoners.[73] He alleged that officials neither investigated his complaint nor provided him with any treatment.[74] The court mentioned the prisoner's assertions regarding PREA only to state that no private right of action existed, again disregarding any information PREA could have provided about the content of the other claims.[75] PREA provides guidance about the mental health treatment prisons must make available to survivors of sexual abuse, which could have shed light on whether the defendants were deliberately indifferent to a serious medical need.

Bell v. County of Los Angeles provides an even more explicit example of this approach to PREA. In this case, the court granted a motion for summary judgment against an imprisoned transgender

69. No. 2:08-CV-0291-SPK, 2009 WL 5029564, at *3 (E.D. Cal. Dec. 15, 2009); *see also* NPREC REPORT, *supra* note 18 at 132 ("Victims of sexual abuse may experience health problems that manifest weeks or months after the abuse has occurred.").

70. 2009 WL 5029564, at *4.

71. 28 C.F.R. § 115.21(c) (2014).

72. 2009 WL 5029564, at *4. The court did grant leave to file an amended complaint, which survived pre-screening but was then dismissed for failure to exhaust administrative remedies. Law v. Noriega, No. 2:08-CV-0291 JAM EFB, 2012 WL 2445565, at *4 (E.D. Cal. June 26, 2012).

73. No. 10-CV-00348-ZLW-KLM, 2011 WL 1060566 (D. Colo. Feb. 7, 2011) *report and recommendation adopted*, No. 10-CV-00348-ZLW-KLM, 2011 WL 1044236 (D. Colo. Mar. 23, 2011).

74. *Id.*

75. *Id.*; *see also* McNaughton v. Arpaio, No. CV-10-1250-PHX-DGC, 2010 WL 2899077, at *3 (D. Ariz. July 22, 2010) (finding that PREA had no relevance to a claim brought by a woman who was sexually assaulted by a psychiatrist while in jail and dismissing her claim against the sheriff responsible for the jail); Chinnici v. Edwards, No. 1:07-CV-229, 2008 WL 3851294, at *3, *7 (D. Vt. Aug. 12, 2008) (dismissing claim against supervisory officials where prisoner alleged that a guard attacked and fondled him and curtly rejecting assertions related to PREA as without legal merit).

woman whom an officer sexually assaulted during a search.[76] The court held that PREA did not affect its analysis because it lacked a private right of action.[77] In fact, the court titled a section of its opinion granting supervisory defendants' motion for summary judgment "Plaintiff's Citation of the Prison Rape Elimination Act Does Not Affect the Court's Analysis."[78] The section contained a brief discussion of the lack of private right of action under PREA.[79] The court did not provide any reasoning to support the move from acknowledgement that PREA does not have a private right of action to the conclusion that PREA should have no impact on the analysis of the plaintiff's other claims.

In the smaller number of cases where courts at least briefly considered plaintiffs' arguments regarding PREA, they often remained unswayed.[80] In *Jenkins v. Hennepin*, other prisoners sexually assaulted the plaintiff.[81] He alleged that defendant officials were deliberately indifferent through failing to create or implement any policy with regard to sexual abuse.[82] Congress may have agreed with the plaintiff's interpretation, having stated in PREA that failure to take measures to eliminate sexual abuse amounts to deliberate indifference in violation of the Eighth Amendment.[83] Jenkins argued that defendants knew about the need for such a policy in part because of PREA.[84] The court granted defendants' motion for summary judgment on the basis that even though defendants did have some knowledge of PREA, the plaintiff had not offered sufficient evidence that they consciously understood the risk of rape and deliberately chose not to create a policy.[85]

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76. Bell v. County of Los Angeles, Verdict and Summary Statement, No. CV-07-8187, 2009 WL 6407941 (Nov. 2, 2009).

77. Bell v. County of Los Angeles, No. CV 07-8187-GW(E), 2008 WL 4375768, at *6 (C.D. Cal. Aug. 25, 2008).

78. *Id.*

79. *Id*.

80. *See, e.g.*, Doe v. United States, No. CV 08-00517 BMK, 2011 WL 1637147, at *6–7 (D. Haw. Apr. 29, 2011) (rejecting motion for reconsideration based on new evidence regarding PREA because evidence not of sufficient magnitude to have likely influenced disposition).

81. Jenkins v. County of Hennepin, Minn., No. CIV.06-3625(RHK/AJB), 2009 WL 3202376, at *1 (D. Minn. Sept. 30, 2009).

82. *Id.* at *2.

83. 42 U.S.C. § 15601 (2012) ("States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference.").

84. *Jenkins*, 2009 WL 3202376, at *2.

85. *Id.* at *3; *see also* Hall v. Hawkins Cnty. Tenn., No. 2:05-CV-252, 2008 WL 474168, at *5 (E.D. Tenn. Feb. 20, 2008) (finding that reports from National Prison Rape Elimination Commission about inadequate classification procedures in jail did

In Louisiana, women who had been raped by an officer brought a claim against a supervisory defendant in part based on the theory that his failure to create any policies to prevent sexual assault constituted deliberate indifference.[86] The court found that, because the officer's actions in raping the women were so self-evidently wrong, the supervisory defendant did nothing wrong in failing to create policies to prevent those actions, and his knowledge or lack of knowledge of PREA was irrelevant.[87] This ruling pretended that PREA requires only that agencies and facilities clarify whether "ambiguous" conduct might constitute sexual abuse, ignoring the comprehensive findings about ways to prevent deliberate rape.[88] The Supreme Court of Appeals in West Virginia reached a similar conclusion in a negligence case.[89] That court reasoned that the state agency had immunity because it had not violated any clearly established law.[90] PREA did not count as clearly established law because "PREA merely 'authorizes grant money, and creates a commission to study the [prison rape] issue. . . . The statute does not grant prisoners any specific rights."[91] The court disregarded entirely the provisions of PREA regarding regulation and enforcement.

B. Presumption of Relevance to Defenses

Courts' resistance to considering plaintiffs' claims concerning PREA would be more doctrinally justifiable, or at least consistent, if courts reacted with comparable resistance to defendants' arguments concerning PREA. However, at times courts have seemed more receptive to arguments about PREA when offered by defendants rather than plaintiffs.

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not establish jail officials' knowledge that prisoner with mental retardation and breasts would be vulnerable to sexual abuse under current classification procedures).

86. *See* Rudd v. Tatum, No. 5:11-CV-373-RS-CJK, 2013 WL 4017333 at *6 (N.D. Fla. Aug. 7, 2013).

87. *See id.* at *9.

88. *See, e.g.*, 28 C.F.R. § 115.17 (2014) (regarding hiring and screening of employees); 28 C.F.R. § 115.13(d) (2014) (requiring unannounced rounds by supervisors to detect and prevent staff sexual abuse); 28 C.F.R. § 115.11(a) (2014) (requiring written policy about sexual abuse); 28 C.F.R. § 115.15 (2014) (limiting cross-gender viewing and searches).

89. W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B., No. 13-0037, 2014 WL 5507522 (W. Va. Oct. 31, 2014).

90. *Id.*

91. *Id.* (quoting De'Lonta v. Clarke, No. 7:11–cv–00483, 2013 WL 209489, at *3 (W.D. Va. Jan. 14, 2013).

In one case, a Muslim prisoner sued under the Religious Land Use and Institutionalized Person Act (RLUIPA)[92] when he was no longer allowed to have prayer oils.[93] The defendant prison officials argued that they did not permit prayer oils because the scent made it more difficult to detect drugs and because PREA compelled them to take steps to reduce prison rape.[94] The connection between prohibiting prayer oils and preventing rape was never explained.[95] The court relied on the drug-detection argument, but also briefly mentioned the PREA argument in ruling in favor of the defendants.[96]

In another case, defendant prison officials claimed they could not provide medically necessary hormone treatment to a transgender woman because it would increase her vulnerability to attack.[97] The officials cited PREA studies to bolster their defense.[98] The court rejected the defense, but only because of the transparently bad faith conduct of the defendants and the last-minute, patently pretextual nature of their defense.[99] Nothing in the decision rejected the possibility of consideration of such justifications in the future.[100] That the court entertained the argument at all presents a sharp contrast with the curt disregard many courts have exhibited to virtually any argument about PREA that plaintiffs make.

Defendants also used partial compliance with PREA as a defense when an independent publisher sought to send information about sexual abuse in detention to prisoners. In *Prison Legal News v. Livingston*, prison officials successfully defended book censorship from a First Amendment challenge.[101] The officials refused to permit the publisher to send prisoners books about the prison system that in-

92. 42 U.S.C. § 2000cc (2012).

93. Hammons v. Jones, No. 00-CV-143 GKFSAJ, 2007 WL 2219521, at *1 (N.D. Okla. July 27, 2007).

94. *Id*. at *3 n.1.

95. *Id*. at *3.

96. *Id.* at *6.

97. *See* Battista v. Clarke, 645 F.3d 449, 452 (1st Cir. 2011).

98. *Id*. at 451 (arguing that this facility was more dangerous than others in the same system based on data gathered pursuant to PREA).

99. The court acknowledged that "this would be a much harder case" if the defendants had offered an "untainted" judgment that security considerations precluded providing medically necessary treatment. *Id.* at 454. However, the defendants refused to take the request for treatment seriously for an excessively long time, then delayed for additional years after the need for treatment was established. *See id.* at 455. They produced a security justification after they had already made the decision, when counsel suggested it in the course of litigation. *See id.* They also used inaccurate data. *See id.*

100. *See id.* at 454.

101. 683 F.3d 201, 207 (5th Cir. 2012).

cluded passages about the harms of prison rape.[102] The court reasoned that the prison officials did not deprive prisoners altogether of information about prison rape, because the agency provided its own educational materials pursuant to PREA.[103]

Even in cases where prisoners allege that they have been sexually assaulted, prison officials have successfully used PREA to defeat prisoners' claims. For example, when a staff member sexually assaulted an African American woman prisoner, she sued supervisory officials alleging, *inter alia*, that they failed to put procedures in place to prevent the assault.[104] The court granted defendants summary judgment in part because the facility apparently complied with PREA.[105] In *Lowry v. Honeycutt*, a guard caught Lenny Dean Lowry engaging in consensual sexual activity with another prisoner.[106] An officer forced him to get a rape exam against his will, saying that he had no choice because the exam was required under PREA.[107] While a nurse examined him, a guard laughed and made jokes about him.[108] In rejecting Lowry's claim about the forced exam, the district court complained: "The court is not cited to any provision in the Prison Rape Elimination Act or other federal law or even in Kansas prison regulations setting forth minimum conditions which must exist before a prisoner thought to have been involved in prohibited sexual activity may be required to undergo a medical sexual abuse exam."[109] However, nothing in PREA requires prisoners to submit to forensic exams at all.[110] The Tenth Circuit affirmed the dismissal of Lowry's claims.[111]

Courts have also consistently ruled against prisoners seeking to challenge "PREA segregation." Some prisons, as a means of PREA compliance, have begun segregating people they perceive as likely to engage in sexual abuse.[112] Many prisoners, not surprisingly, object to

102. *See id*. at 215–16.
103. *See id*. at 216.
104. *See* Crane v. Allen, 3:09-CV-1303-HZ, 2012 WL 602432, at *7 (D. Or. Feb. 22, 2012).
105. *Id.* at *8–9.
106. 211 F. App'x 709, 710 (10th Cir. 2007). For further discussion of this case in the context of sexual violence, see Gabriel Arkles, *Regulating Sexual Violence,* 7 NORTHEASTERN L.J. (forthcoming 2015).
107. Lowry v. Honeycutt, 05-3241-SAC, 2005 WL 1993460, at *1 (D. Kan. Aug. 17, 2005).
108. *Lowry*, 211 F. App'x at 710–11.
109. *Lowry*, 2005 WL 1993460, at *4.
110. 42 U.S.C. §§ 15601–15609 (2012).
111. *Lowry*, 2005 WL 1993460, at *5.
112. The Arkansas and South Carolina systems of PREA segregation have been litigated most frequently to date. *See, e.g.*, Bailey v. Hobbs, No. 5:11CV00031JLH,

being labeled as sexual predators and placed indefinitely in highly isolating[113] and restrictive settings.[114] PREA regulations do provide some support for considering likelihood of engaging in sexual abuse in classification decisions, although they do not support all of the specific ways that facilities have segregated people.[115]

Courts have almost uniformly rejected challenges to placement in PREA segregation, even when the basis for such placements is dubious at best.[116] In several of these cases, the only evidence apparently

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2012 WL 3038856 (E.D. Ark. July 25, 2012); Fair v. Ozmint, CI.A. 6:10-1268-RMG, 2011 WL 1642383 (D.S.C. Apr. 15, 2011) *report and recommendation adopted*, 6:10-CV-1268-RMG, 2011 WL 1658761 (D.S.C. May 2, 2011) *aff'd*, 449 F. App'x 277 (4th Cir. 2011); Winbush v. Norris, 5:06CV00065 JLH, 2006 WL 2252539 (E.D. Ark. Aug. 7, 2006).

113. The severe harms of solitary confinement have been well documented. *See, e.g.*, *In re* Medley, 134 U.S. 160, 168 (1889) ("A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide . . . ."); SILJA J.A. TALVI, WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM 140 (2007) (noting that individuals in solitary confinement "began to mutilate themselves, swallow sharp objects, or commit suicide"); Cassandra Shaylor, *"It's Like Living in a Black Hole:" Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 397 (1998) ("Research indicates that women are more prone to violent behavior as a result of confinement in solitary units, but violence against themselves.") (footnote omitted); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 462 (2006) ("[A]t least a third of the inmates reacted to isolation with adverse health effects, and at least a third of these . . . might be characterized as suffering from major psychological and psychiatric problems including hallucinations, paranoia, and different kinds of personal degeneration."); THE CORRECTIONAL ASS'N OF N.Y., DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS (2004), *available at* http://www.correctionalassociation.org/publications/download/pvp/factsheets/SHU-fact.pdf (noting that between 1998 and 2001, more than half of the suicides in New York State prisons occurred in disciplinary confinement, although fewer than seven percent of prisoners were housed in these units).

114. *See, e.g.*, Gadeson v. Reynolds, C/A 208-3702-CMC-RSC, 2009 WL 4572872 (D.S.C. Dec. 4, 2009) *aff'd*, 392 F. App'x 234 (4th Cir. 2010); Jones v. Hobbs, 2:10CV00124 DPM/HDY, 2011 WL 6012995 (E.D. Ark. Oct. 4, 2011) *report and recommendation adopted*, 2:10-CV-124-DPM-HDY, 2011 WL 6020161 (E.D. Ark. Dec. 2, 2011); Linell v. Norris, 2009 Ark. 303, 320 S.W.3d 642.

115. *See* 28 C.F.R. § 115.48 (2014).

116. *See, e.g.*, Ashby v. Hobbs, 2:13CV00154 BSM, 2014 WL 505335 (E.D. Ark. Feb. 5, 2014) (denying injunctive relief to remove plaintiff from PREA segregation where plaintiff alleged officials placed him in retaliation for filing grievances); Bailey v. Hobbs, No. 5:11CV00031JLH, 2012 WL 3038856 (E.D. Ark. July 25, 2012); Fair v. Ozmint, CI.A. 6:10-1268-RMG, 2011 WL 1642383 (D.S.C. Apr. 15, 2011) *report and recommendation adopted*, 6:10-CV-1268-RMG, 2011 WL 1658761 (D.S.C. May 2, 2011), *aff'd*, 449 F. App'x 277 (4th Cir. 2011); Winbush v. Norris, 5:06CV00065 JLH, 2006 WL 2252539 (E.D. Ark. Aug. 7, 2006); Gadeson v. Reynolds, C/A 208-3702-CMC-RSC, 2009 WL 4572872 (D.S.C. Dec. 4, 2009) *aff'd*, 392 F. App'x 234 (4th Cir. 2010); Jones v. Hobbs, 2:10CV00124 DPM/HDY, 2011 WL 6012995 (E.D.

considered against people subject to PREA segregation was past participation or expressed interest in *consensual* sex.[117] At the time most of these cases were decided, PREA regulations—which clarify that while consensual sex may be prohibited it may not be considered the equivalent of sexual abuse[118]—were not yet in force. However, at no point did anything in PREA statutory language or NPREC recommendations indicate that prisoners are more prone to sexually abuse others if they have had consensual sex in the past, or that people should be segregated on such a basis.[119] Most of these decisions are primarily based on *Sandin v. Conner*,[120] reasoning that prisoners have no basis for a due process challenge to their segregation because it does not constitute an atypical and significant hardship sufficient to create a liberty interest.[121] Because segregation and solitary confinement, as well as labeling someone as a sexual predator, can actually create greater vulnerability to sexual abuse,[122] these actions may undercut the purported goal of preventing sexual abuse.

Ark. Oct. 4, 2011) *report and recommendation adopted*, 2:10-CV-124-DPM-HDY, 2011 WL 6020161 (E.D. Ark. Dec. 2, 2011); Linell v. Norris, 2009 Ark. 303, 320 S.W.3d 642.

117. *See* Everson v. Cline, No. 101,914, 2009 WL 3172859, at *1 (Kan. App. Oct. 2, 2009) (plaintiff placed in PREA segregation after writing note inviting consensual sexual relationship); Waller v. Maples, 1:11CV00053 JLH-BD, 2011 WL 3861370 (E.D. Ark. July 26, 2011) *report and recommendation adopted*, 1:11CV00053 JLH-BD, 2011 WL 3861369 (E.D. Ark. Aug. 31, 2011) (plaintiff placed in isolation following PREA investigation into allegedly sexual consensual relationship with childhood friend); McKnight v. Hobbs, 2:10CV00168 DPM HDY, 2010 WL 5056024 (E.D. Ark. Nov. 18, 2010) *report and recommendation adopted*, 2:10-CV-168-DPM HDY, 2010 WL 5056013 (E.D. Ark. Dec. 6, 2010) (plaintiff placed on PREA status indefinitely after found guilty of having had consensual sex).

118. 28 C.F.R. § 115.78(g) (2014).

119. *See id.* (noting that prisons have the option of prohibiting consensual sex, but not requiring the prohibition); McKnight v. Hobbs, 2:10CV00168 DPM HDY, 2010 WL 5056024 (E.D. Ark. Nov. 18, 2010) *report and recommendation adopted*, 2:10-CV-168-DPM HDY, 2010 WL 5056013 (E.D. Ark. Dec. 6, 2010); Everson v. Cline, No. 101,914, 2009 WL 3172859 (Kan. App. Oct. 2, 2009).

120. 515 U.S. 472, 486 (1995).

121. *See, e.g.*, Hill v. Norris, No. 5:07CV00270 JLH/BD, 2007 WL 4219444 (E.D. Ark. Nov. 28, 2007) (order adopting magistrate's recommendation in part).

122. *See* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 537 (2009) ("[N]ot only are these [segregated] placements almost always worse than general population in many other ways, but also they often lead to greater, not lesser, violence."); 28 C.F.R. § 115.41 (acknowledging vulnerability of people convicted of sex offenses to sexual violence in prisons).

C. Exhaustion

PREA regulations call on detention agencies to create multiple means to report sexual abuse.[123] Some detention agencies began to respond to these recommendations well before promulgation of the final rule, disseminating to prisoners information about means of reporting sexual abuse.[124] The PREA regulations do not explicitly direct detention agencies on how these alternatives ought to interact with existing grievance systems or impact exhaustion of administrative remedies. However, NPREC and the DOJ acknowledged that the PLRA exhaustion requirements can impose a serious and frequently insurmountable obstacle to bringing meritorious claims about sexual abuse in detention[125] and sought to mitigate this harm.[126]

Nonetheless, some courts have interpreted these policies in ways that impede consideration of complaints about sexual abuse. For example, in *Tracy v. Coover*,[127] the state correctional agency issued a memo to all prisoners pursuant to PREA that instructed them on how to report sexual abuse. Telling a staff member was listed as one of the methods for reporting. When a guard exposed his genitals to Rebecca Tracy and sexually assaulted her, Tracy followed the instructions in the memo and told a counselor in her prison about what happened.[128] When Tracy later sued about the incident, her case was dismissed for failure to exhaust administrative remedies because she had not also filed and pursued a grievance.[129]

By its own terms, the grievance policy only applied to situations where no alternative means of appeal was available.[130] However, the court characterized the means of reporting sexual abuse as not an alternative form of appeal but an informal attempt to resolve a grievance.[131] The court concluded that the memo instructing prisoners on how to report sexual abuse was different from the grievance process in part because the memo was instructing prisoners not on an option they

123. 28 C.F.R. § 115.51(a) (2014).
124. *See* New York State Department of Correctional Services, The Prevention of Sexual Abuse in Prison: An Overview for Offenders (2011), http://www.prearesourcecenter.org/sites/default/files/library/newyorkpreapamphletrevised013111.pdf.
125. NPREC Report, *supra* note 18, at 10 ("The Commission is convinced that the Prison Litigation Reform Act (PLRA) that Congress enacted in 1996 has compromised the regulatory role of the courts and the ability of incarcerated victims of sexual abuse to seek justice in court.").
126. 28 C.F.R. § 115.52 (2014).
127. No. 09–0931, 2011 WL 227629, at *1 (Iowa Ct. App. Jan. 20, 2011).
128. *Id*.
129. *Id*.
130. *Id*. at *2.
131. *Id*. at *7.

had to seek redress, but on an obligation imposed on them through the institutional rules issued pursuant to PREA.[132] The court interpreted the policy to provide a basis for punishing those prisoners who do not report they were sexually assaulted,[133] and expressed no concern that the memo misled prisoners attempting to follow appropriate administrative channels for reporting sexual abuse.[134] A similar Second Circuit case found that prisoners who reported sexual abuse to the Inspector General consistent with the instructions their New York prison provided had nonetheless failed to exhaust administrative remedies because they failed to use the prison grievance appeals process.[135]

III.
How Courts Should Take PREA Seriously

Congress should have created a private right of action. However, even without one, courts should take PREA into account in a way that is consistent with its language and goals. This is not to say that courts should treat PREA as if it defined a new constitutional standard, which of course Congress does not have the power to do,[136] but rather that courts should give the statute and regulations appropriate weight among other factors in keeping with existing law. PREA should have a significant impact on how courts apply both the objective and subjective prongs of the Eighth Amendment in cases concerning sexual abuse, as well as on Fourth Amendment and tort cases. Courts should also not permit prison officials to use PREA against prisoners in ways inconsistent with its plain meaning and legislative intent.

Both Congress and the DOJ indicated that compliance with PREA would reduce Eighth Amendment violations on the part of prison officials. Congress viewed PREA as a means to promote com-

132. *Id*. at *7–8.

133. Prisoners also face discipline for filing reports of sexual abuse if the facility determines that the prisoner was lying. *See* Hawkins v. Akers, No. 2013-CA-000106-MR, 2014 WL 4377848, at *4 (Ky. Ct. App. Sept. 5, 2014) (concluding that due process did not require prisoner to have access to confidential information used against him in concluding he lied when he reported sexual abuse pursuant to PREA policies).

134. In *Porter v. Howard*, the Southern District of California rejected an argument from a prisoner that PREA was an administrative remedy and therefore excused him from exhausting administrative remedies within the state agency. No. 10CV1817 JLS PCL, 2011 WL 2457507, at *2 (S.D. Cal. June 20, 2011). This outcome seems doctrinally correct, although in this terse disposition of a pro se complaint it is difficult to discern if there might have been some merit in his claim based on a prison policy.

135. *See* Amador v. Andrews, 655 F.3d 89, 98–99, 102–03 (2d Cir. 2011).

136. *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

pliance with the Eighth Amendment.[137] In the commentary to the final rule, the DOJ repeatedly clarified that PREA and the Eighth Amendment are not coextensive and that even if an agency complies fully with everything in the PREA regulations, it may still be in violation of the Eighth Amendment.[138] The DOJ also stated that "these standards may influence the standard of care that courts will apply in considering legal and constitutional claims brought against corrections agencies and their employees arising out of allegations of sexual abuse."[139]

A. Evaluating Objective Seriousness

While not determinative in and of itself, PREA should be a part of the analysis about what acts are sufficiently serious to constitute a constitutional violation under the Eighth Amendment.

Circuit courts that have considered the question have generally concluded that staff-perpetrated sexual abuse can, but does not necessarily, rise to the level of objective seriousness sufficient for a violation of the Eighth Amendment.[140] For example, in *Boddie v. Schneider* the Second Circuit concluded that while sexual abuse can constitute an Eighth Amendment violation, acts by a guard including squeezing a prisoner's hand, touching his penis, pressing her body

137. 42 U.S.C. § 15601 (2012).

138. "The standards are not intended to define the contours of constitutionally required conditions of confinement. Accordingly, compliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse. Furthermore, while the standards aim to include a variety of best practices, they do not incorporate every promising avenue of combating sexual abuse, due to the need to adopt national standards applicable to a wide range of facilities, while taking costs into consideration." National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37107 (June 20, 2012). "The Department reiterates, however, that this standard, like all the standards, is not intended to serve as a constitutional safe harbor. A facility that makes its best efforts to comply with the staffing plan is not necessarily in compliance with constitutional requirements, even if the staffing shortfall is due to budgetary factors beyond its control." National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37199 (June 20, 2012).

139. National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37196 (June 20, 2012).

140. *See* Smith v. Cochran, 339 F.3d 1205, 1212 (10th Cir. 2003) (finding that allegations of rape perpetrated by supervisor of work release program satisfied objective prong of Eighth Amendment test); Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) ("severe or repetitive sexual abuse of an inmate by a prison officer can be objectively, sufficiently serious enough to constitute an Eighth Amendment violation") (internal quotation marks omitted); Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004) ("the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment").

against his, and calling him a "sexy black devil" were not sufficiently severe or pervasive to constitute an Eighth Amendment violation.[141]

Courts determine which acts objectively rise to a level of sufficient seriousness to violate the Eighth Amendment based on "evolving standards of decency."[142] The Supreme Court has directed attention to legislation as an important factor in determining the content of contemporary standards of decency.[143] The Court has considered both state and federal statutes in this analysis.[144] While the most prominent recent Eighth Amendment cases that rely on evolving standards of decency have been sentence proportionality cases, the same standard applies to conditions of confinement claims.[145]

The passage of PREA should be considered an indication that sexual abuse in detention is not consistent with contemporary standards of decency, particularly since it was passed unanimously. The statutory language insists that "fondling" be understood as a form of prison rape and creates a "zero tolerance" standard for prison rape.[146] The statute and regulations provide a strong indication that contrary to

141. 105 F.3d at 861; *see also* Jackson v. Madery, 158 F. App'x 656, 661–62 (6th Cir. 2005) (finding that "unprofessional" rubbing of buttocks during a search did not rise to the level of a constitutional violation).

142. *See* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) ("No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") (internal quotation marks omitted).

143. *See* Roper v. Simmons, 543 U.S. 551, 563–64 (2005) (ruling that state legislative enactments rejecting use of the death penalty for juveniles constitute objective indicia of consensus on evolving standards of decency); Atkins v. Virginia, 536 U.S. 304, 315–16 (2002) (reasoning that federal and state laws prohibiting use of death penalty for people with mental retardation were particularly powerful indicators of society's views given the relative difficulty of passing legislation protective of people convicted of crimes).

144. *See* Graham v. Florida, 130 S. Ct. 2011, 2023 (2010), *as modified* (July 6, 2010) (noting state and federal legislation permitting sentences of life without parole for juveniles, but also considering the limited use of these laws in practice).

145. *See* Brown v. Plata, 131 S. Ct. 1910, 1926 n.3 (2011) (noting systemic failures to provide adequate medical care to prisoners in violation of evolving standards of decency); Estelle v. Gamble, 429 U.S. 97, 102–05 (1976) (finding that failure to provide medical care violated evolving standards of decency under Eighth Amendment); *see also* Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 56 (2009) (arguing that analysis from sentencing proportionality cases could reintegrate with conditions of confinement analysis).

146. 42 U.S.C. § 15609 (2012) (defining the term "rape" to include "the carnal knowledge, oral sodomy, sexual abuse with an object, or sexual fondling of a person, forcibly or against that person's will").

cases such as *Boddie*, these forms of sexual abuse are now intolerable.[147]

A single federal statute in and of itself is probably not sufficient to indicate the shift in standards of decency that the Court seeks in Eighth Amendment cases. However, PREA is not alone in expressing condemnation for sexual abuse in detention. Most states prohibit any sexual contact between guards and prisoners.[148] Indeed, a district court has already come to the conclusion that sexual abuse in detention no longer accords with evolving standards of decency, without reference to PREA.[149] In that case, a prisoner alleged that a guard fondled his chest, genitals, and buttocks repeatedly and inappropriately during a pat frisk, describing it as fun and then telling the prisoner to take his "sweet ass" to the yard.[150] The court reasoned that while the incident was similar to the incident in *Boddie*, societal standards had evolved since then as evidenced by the increased number of states criminalizing sexual contact between guards and prisoners.[151]

Taking PREA into account when considering the constitutional claims of prisoners could lead to substantively different outcomes. For example, in *Green v. Brown*, the district court adopted the magistrate judge's recommendation "disregard[ing]" the plaintiff's assertions with regard to PREA.[152] The court also dismissed the plaintiff's claim under the Eighth Amendment, ruling that a guard verbally sexually harassing, masturbating in front of, threatening, and exploiting a prisoner was not objectively serious enough to rise to the level of a constitutional violation.[153] If the court had considered PREA's relevance to an analysis about how serious an act of sexual abuse need be before

147. 42 U.S.C. § 15602 (2012) (declaring "zero tolerance" for sexual abuse in detention).

148. *See, e.g.*, 2008 KY. REV. STAT. ANN. § 510.120 (West); MASS. GEN. LAWS ANN. ch. 268, § 21A (West 2008); MONT. CODE ANN. § 45-5-502 (2013); NEB. REV. STAT. § 28-322.02 (2008); S.D. CODIFIED LAWS § 22-22-7.6 (2013); UTAH CODE ANN. § 76-5-412 (LexisNexis 2012); VA. CODE ANN. § 18.2-64.2 (2014); WASH. REV. CODE ANN. § 72.09.630 (West 2004).

149. Rodriguez v. McClenning, 399 F. Supp. 2d 228, 238 (S.D.N.Y. 2005).

150. *Id*. at 232.

151. *Id*. at 237.

152. No. 10-CV-02669-WYD-MEH, 2011 WL 3799047, at *3 (D. Colo. Aug. 29, 2011).

153. *Id.* at *1; *see also* Monts v. Greer, No. 5:12-CV-258-MP-GRJ, 2013 WL 5436763, at *3 (N.D. Fla. July 15, 2013), *report and recommendation rejected sub nom*. Monts v. Dep't of Corr., No. 5:12-CV-00258-MP, 2013 WL 5436758 (N.D. Fla. Sept. 27, 2013) (dismissing claim of prisoner who was forced to expose his anus while a guard masturbated and made sexual comments as not sufficiently serious to constitute an Eighth Amendment violation and noting that PREA does not provide a private right of action).

amounting to cruel and unusual punishment, the court might not have dismissed the case on those grounds. Similarly, in *Todd v. Smith*,[154] a court held that because the prisoner had had sex "voluntarily" with an officer who promised him better treatment in exchange for sex, the incident did not rise to the level of a constitutional violation. However, both PREA and many states' criminal laws indicate a very different understanding, because of the power and control that prison staff hold over every aspect of prisoners' lives and because prisoners are obligated to follow orders of prison staff or face further punishment.[155] If the court had considered the impact of these laws on evolving standards of decency, it might have given the plaintiff's claim more weight.

B. Evaluating Subjective Knowledge

In terms of the subjective prong of the deliberate indifference test, the Supreme Court has held that actual knowledge may be inferred if a risk is "longstanding, pervasive, well-documented, or expressly noted by prison officials . . . ."[156] While some courts have held that knowledge of a "general risk" alone is insufficient to support an Eighth Amendment claim,[157] courts adopting that limitation still reason that general knowledge may contribute to a finding of deliberate indifference.[158] PREA has extensively documented and forced significant attention among detention officials to the problem of sexual abuse in detention, the vulnerabilities of particular groups of prisoners (such as transgender,[159] disabled,[160] and young[161] prisoners), and ac-

154. No. 1:12-1554, 2013 WL 3716606, at *1 (W.D. La. July 15, 2013).

155. 28 C.F.R. § 115.6 (2014) (defining sexual abuse of a prisoner by a staff member to include any contact between the penis and vulva or anus, and any contact between the mouth and vulva, penis, or anus); *see also Rodriguez*, 399 F. Supp. 2d. at 238 (noting that only four states did *not* criminalize correctional officers having sexual contact with prisoners).

156. Farmer v. Brennan, 511 U.S. 825, 842 (1994).

157. *See, e.g.*, Wooler v. Hickman Cnty., 377 Fed. App'x. 502, 506 (6th Cir. 2010); Dunn v. Hawk, 215 F.3d 1329 (7th Cir., 2000) ("[D]eliberate indifference entails not only awareness of a general risk but also recognition that the risk is significant in a particular situation.").

158. *See* Rich v. Bruce, 129 F.3d 336, 340 n.2 (4th Cir. 1997); *see also* Counterman v. Warren Cnty. Corr. Facility, 176 Fed. App'x 234, 238 (3d Cir. 2006) ("Actual knowledge can be proven circumstantially where the general danger was obvious; that is, where 'a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past,' and where 'circumstances suggest that the defendant official being sued had been exposed to information concerning the risk and thus must have known about it.'") (quoting Beers-Capitol v. Whetzel, 256 F.3d 120, 131 (3d Cir. 2001)).

159. 28 C.F.R. § 115.41(d)(7) (2014).

160. 28 C.F.R. § 115.41(d)(1) (2014).

tions that can aggravate or mitigate vulnerability to sexual abuse. Given the extensive requirements of tracking, reporting, training, and planning to comply with PREA and its regulations, it is increasingly implausible that anyone from line staff to commissioner would remain genuinely ignorant of many of the facts that could contribute to a deliberately indifferent mindset on the subject of vulnerability to sexual abuse in detention. Thus, courts should consider the possibility that PREA can also illuminate the subjective component of the Eighth Amendment standard.

This analysis might have led to a different outcome in *Surratt v. Walker*, where a prisoner alleged that a guard sexually assaulted her after he had already sexually assaulted other prisoners.[162] The prisoner alleged that the specific knowledge from past complaints against the officer, when combined with more general knowledge from PREA and other sources, was sufficient for a finding of deliberate indifference.[163] The court disagreed, noting that the prison had not substantiated the prior complaints and that general knowledge was not sufficient to prove deliberate indifference.[164] Instead, the court should have considered the evidence of knowledge from PREA and the past reported incidents to constitute sufficient evidence to permit the plaintiff to present her case to a jury, and so denied the defendants' motion for summary judgment.

Similarly, in *Lobozzo v. Colorado Department of Correction*, the plaintiff tried using PREA statistics to show the prevalence of prisoner-perpetrated rape in facilities under the defendant agency's control.[165] The Tenth Circuit granted the defendants' motion for summary judgment in that case, explaining that while such statistics could be relevant in an appropriate case they were not sufficient to show deliberate indifference in part because of a lack of specificity to the plaintiff's particular facility and characteristics.[166] The overwhelming evidence of prevalent sexual assault in the defendants' facilities should have received more weight, permitting the plaintiff's claim to survive summary judgment.

161. 28 C.F.R. § 115.41(d)(2) (2014).
162. 08-01228, 2011 WL 1231312 at *5 (C.D. Ill. Mar. 29, 2011).
163. *Id.* at *3.
164. *Id.*
165. 429 Fed. App'x 707, 711 (10th Cir. 2011).
166. *Id.* at 712.

C. Evaluating Other Claims

PREA and its regulations could also be a helpful source for courts to consider in Fourth Amendment claims. In some situations, plaintiffs could credibly offer and courts could appropriately evaluate aspects of PREA as evidence that the connection a defendant offers between a restriction and an interest is not necessarily valid or rational, or that alternative means of accomplishing the interest are readily available. PREA could also shed light on the weight to give the individual's expectation of bodily privacy. A unanimous act of Congress, the research it commissioned, and the regulations the DOJ and DHS promulgated should not be dismissed as irrelevant to the reasonableness of expectations of prisoners and actions of prison officials.

Courts should also consider PREA when relevant to the merits of prisoners' tort claims. To the extent that states[167] and the federal government[168] have abrogated their sovereign immunity, prisoners may bring tort claims about conditions of confinement including sexual abuse in detention. In determining what constitutes negligence in prison cases, courts have frequently considered standards that are not directly judicially enforceable as relevant evidence.[169]

For example, the en banc D.C. Court of Appeals reversed a judgment notwithstanding the verdict in a negligence case against the District of Columbia for causing the death of a prisoner with schizophrenia who was being held in the mental health unit of the jail.[170] A guard saw the prisoner getting anally penetrated by three other prisoners and later slumping naked on the floor of his cell in a pool of feces and vomit.[171] Neither that guard nor any other prison

167. *See, e.g.*, N.Y. CT. CL. ACT § 8 (McKinney 1969); FLA. STAT. ANN. § 768.28 (West 2011); MONT. CODE ANN. § 2-9-102 (2013). Limitations on jurisdiction, caps on damages, and other restrictions are not uncommon. *See, e.g.,* GA. CODE ANN. § 50-21-23 (2013) (restricting jurisdiction to Georgia state courts); MISS. CODE. ANN. § 11-46-5 (West 2013) (waiving immunity but capping damages at $500,000).

168. Federal Torts Claim Act, 28 U.S.C. § 1346 (2012).

169. *See, e.g.*, District of Columbia v. Moreno, 647 A.2d 396, 400 (D.C. 1994) (finding expert testimony inadequate in part because of lack of specific discussion of American Correctional Association standards); Keys v. Dep't of Rehab. & Corr., 2004-Ohio-2751, No. 2002-01594, 2004 WL 1192076 (finding expert testimony unpersuasive in part because expert "acknowledged that he was not aware of any statutory provision, administrative, departmental or Post-Order rule, or any accreditation standard, that was violated with respect to any of the conditions he criticized"); Sanchez v. New York, 784 N.E.2d 675, 675 n.2 (N.Y. 2002) (finding a triable issue of fact as to foreseeability in a negligent supervision claim existed in part based on testimony about standards for supervision issued by the State Commission of Correction).

170. Finkelstein v. District of Columbia, 593 A.2d 591, 593 (D.C. 1991).

171. *Id*. at 592–93.

staff intervened, and they eventually discovered he was dead.[172] In finding that the jury had sufficient basis for finding liability and reversing the trial court's judgment notwithstanding the verdict, the Court of Appeals relied on expert testimony about American Correctional Association (ACA) standards.[173] ACA standards are not judicially enforceable, but are used in a voluntary accreditation process.[174] The expert testified that according to the standards, supervision should have been more frequent and intervention should have happened earlier.[175]

There have been virtually no opinions on tort claims referring to PREA, aside from constitutional cases with supplemental state law claims not discussed on their merits. One exception I discuss elsewhere.[176] The other demonstrates appropriate treatment of PREA. In *Giraldo v. California Department of Correction & Rehabilitation*, a transgender woman sued the state correctional agency after other prisoners raped her.[177] She alleged that the agency had been negligent in placing transgender women in male facilities with no meaningful precautions to promote their safety.[178] A lower court dismissed her claim, finding that the prison did not owe a duty of care to protect prisoners in its custody.[179] The appellate court reversed, relying in part on PREA in finding that a duty did exist based on the vulnerability and dependence of prisoners on prison officials.[180]

D. Evaluating Defenses

Because on its face PREA was intended primarily to benefit prisoners, courts should be wary of attempts to use PREA to benefit prison official defendants in prisoners' rights litigation.[181] While prison officials are generally entitled to deference with regard to their

172. *Id*. at 593.
173. *Id*.
174. *Id*.
175. *Id*.
176. *See supra* notes 88–90 and accompanying text; *infra* notes 186–192 and accompanying text.
177. 85 Cal. Rptr. 3d 371, 375 (Cal. Ct. App. 2008).
178. *Id.*
179. Giraldo v. Cal. Dep't of Corr., No. CGC-07-461473, 2007 WL 4355775 (Cal. Super. Ct. June 15, 2007).
180. *Giraldo*, 85 Cal. Rptr. 3d at 385 ("It is manifestly foreseeable that an inmate may be at risk of harm, as the recently enacted PREA and SADEA show, recognizing the serious problem presented by sexual abuse in the prison environment.").
181. *Cf.* Cannon v. Univ. of Chi., 441 U.S. 677, 689 (1979) (considering whether plaintiff was intended beneficiary of act in determining whether right of action existed).

internal policies, this deference is not unfettered.[182] Congress entrusted DOJ with the authority to implement PREA;[183] thus, only DOJ regulations interpreting PREA should receive *Chevron* deference.[184]

At a minimum, any use of PREA to justify an infringement of prisoners' constitutional rights should bear a close relationship to the actual content of the statute and regulations, in sharp contrast to some past practices. For example, the court in *Lowry*[185] should have referred to the text of PREA. If it had done so, it would have noticed that PREA supported the plaintiff's claim, rather than the defendant's argument. As such, the court should have looked much more skeptically at the nexus between the defendant's "legitimate penological objective" and the defendant's conduct, denying the defendant's motion.

A correction to the lopsided treatment of PREA-related claims and defenses could also have resulted in a different outcome in *A.B.*[186] In that case, the court disregarded the agency's noncompliance with PREA provisions when evaluating the plaintiff's argument against immunity for negligence. However, it effused over the agency's partial compliance with PREA when justifying its decision absolving the agency of any culpability for the repeated rapes of a woman it incarcerated.[187] On the former point, it selectively considered the grant-making aspect of PREA, rather than the regulatory and enforcement provisions.[188] On the latter point, it did not consider the language of PREA at all.[189] If it had, it might have noted that PREA regulations require a good deal more than simply telling officers that it is wrong to

182. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 6 (1992) ("[Prison officials] should be accorded wide-ranging deference in the adoption and execution of policies and practices that are needed to preserve internal order."); Amos v. Md. Dep't of Pub. Safety & Corr. Servs., 178 F.3d 212, 222 (4th Cir. 1999) *vacated,* 178 F.3d 212 (4th Cir. 1999) ("[T]he courts cannot simply defer blindly to either the decisions of the DOJ or to those of prison officials.").

183. 42 U.S.C. § 15605 (2012) (granting DOJ authority to create regulations implementing PREA); 42 U.S.C. § 15603 (2012) (granting DOJ authority to implement PREA through conducting research).

184. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Amos v. Md. Dep't of Public Safety and Corr. Servs., 178 F.3d 212, 222 (4th Cir. 1999)*, vacated,* 178 F.3d 212 (4th Cir. 1999) ("This permissible deference to prison authorities, however, must be balanced with the great deal of deference due the DOJ in this area, since Congress has spoken through the DOJ with respect to interpretation of the ADA.").

185. *See supra* notes 106–111 and accompanying text.

186. W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B., No. 13-0037, 2014 WL 5507522 (W. Va. Oct. 31, 2014).

187. *Id.*

188. *Id.*

189. *Id.* ("The undisputed facts demonstrate that D.H. was trained annually on PREA and unquestionably understood that sexual contact with inmates was prohibited.").

rape, which was the primary form of compliance the court noted.[190] Courts should also not accept apparent partial PREA compliance as a reason to reject Eighth Amendment and RLUIPA claims, as they did in *Crane*[191] and *Prison Legal News*[192] respectively.

In some of the other cases discussed in Section II.B above, this approach might not have changed the outcome, but it would have changed the reasoning. For example, in *Hammons*,[193] the court should have directly rejected the defendant's assertion that PREA prevented permitting prayer oils, given the absence of any statutory or regulatory language supporting such an interpretation.

E. Evaluating Exhaustion

Courts should also interpret means of reporting prison rape that facilities offer pursuant to PREA as proper means of exhausting administrative remedies for purposes of the PLRA. Requiring prisoners to pursue multiple channels for reporting sexual abuse, particularly when contrary to directions from the prison, not only makes no sense and aggravates the already serious barriers to relief for imprisoned survivors of sexual abuse, but also creates a bizarre result exactly contrary to the intent of PREA and its regulations.

At least one court has already demonstrated an appropriate analysis of the exhaustion issue. The Idaho District Court ruled that a prisoner could continue with her claim about a guard sexually assaulting her during a pat frisk despite not having filed a grievance, because the prison had created an alternative remedy through the PREA hotline, which the plaintiff did use.[194] Other courts should follow this reasoning, rather than the reasoning used in cases like *Tracy v. Coover*.[195]

IV.
Reform and Retrenchment

Those who successfully lobbied for PREA, and the prisoners and advocates who shaped PREA regulations during the extensive rulemaking process, surely hoped for better outcomes in litigation than I have described. While perhaps few were optimistic enough to imagine total elimination of sexual abuse in detention, it seems unlikely

190. *Id.*
191. *See supra* note 104 and accompanying text.
192. *See supra* note 101 and accompanying text.
193. *See supra* note 93 and accompanying text.
194. Barkey v. Reinke, 1:07-CV-471-S, 2010 WL 3893897, at *6 (D. Idaho Sept. 30, 2010).
195. *See supra* note 127 and accompanying text.

that they sought or predicted worsened conditions for prisoners experiencing sexual abuse. And yet, for at least some prisoners, PREA *has* worsened conditions. It has provided a route for prison officials to trick prisoners into filing complaints about sexual abuse one way, then keep them from bringing a lawsuit because they didn't do it in another. It has provided an excuse for staff of facilities to force unwanted penetrative exams on prisoners and to place more prisoners in solitary confinement. Meanwhile, courts have cursorily rejected many prisoners' arguments about how PREA should help them.

The problem is not even so limited. In this Article, I have focused exclusively on litigation. However, regulations and everyday practices raise more concerns about the ways that PREA has been used against prisoners, especially prisoners particularly vulnerable to sexual abuse in detention.[196]

While these are not the only stories that can be told about PREA, it is significant that they can be told at all.[197] Reva Seigel describes the tendency of law to change without altering fundamental power relations as "preservation through transformation."[198] While significant shifts have occurred in response to resistance from communities of color and women, legal structures tend to adapt, co-opt, or appear to accommodate particular strains of dissent while retaining unjust dynamics and social hierarchies.[199] Thus, even when it seems that key

196. *See* Jason Lydon, *A Message from Jason*, BLACK AND PINK NEWSLETTER (Apr. 2013) ("Prison officials can claim to have implemented PREA policies without actually changing anything for the lived experience of prisoners."); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 91 (2011) ("It is unclear whether the new rules have reduced sexual violence, but it is clear they have increased punishment"); Idaho Dep't of Corr., Procedure Control No. 325.02.01.001, Prison Rape Elimination 5 (2009) (prohibiting prisoners in women's prisons from having masculine haircuts and prisoners in men's prisons from having effeminate haircuts under guise of compliance with PREA); *Comments on Prison Rape Elimination Act Proposed Regulations*, SYLVIA RIVERA LAW PROJECT, (May 10, 2010) http://archive.srlp.org/files/SRLP%20PREA%20comment%20Docket%20no%20OAG-131.pdf (quoting trans prisoner as saying, "There's zero tolerance for us [gay and trans prisoners] anymore, on account of PREA.").

197. *Cf.* Lisa Crooms, *Everywhere There's War: A Racial Realist's Reconsideration of Hate Crime Statutes*, 1 GEO. J. OF GENDER & L. 41, 44 (1999) (asserting that while stories of Black people convicted of race-based hate crimes against White people are not the only stories that can be told, it is disturbing that they can be told at all).

198. Reva B. Siegel, *"The Rule of Love": Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996).

199. Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("The ways in which the legal system enforces social stratification are various and evolve over time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric . . . In short, status-enforcing state action evolves in form as it is contested."); *see also* Derrick A. Bell, Jr., Brown v. Board of Education *and the*

legal and social constituencies have agreed that a particular practice is disagreeable, if it is a major part of current institutional practices and power relations then significant and often subtle resistance emerges to eliminating it. Indeed, prison law reform in particular can lead to unintended and damaging results.[200]

Sexual abuse in detention involves deeply entrenched hierarchies based on race, gender, and disability. People of color, disabled people, and trans people are much more likely to be incarcerated than white people, nondisabled people, and people who are not transgender.[201] Once within detention, people of color, disabled people, women, and trans people are often targeted for sexual abuse.[202] As such, the com-

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Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites . . . [T]he fourteenth amendment . . . will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.").

200. *See* Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731, 760 (2010) (describing prison litigation which has the effect of legitimizing the prison system); Alexander L. Lee, Nowhere to Go But Out: The Collision Between Transgender and Gender-Variant Prisoners and the Gender Binary in America's Prisons 44 (Spring 2003) (unpublished comment), *available at* http://www.justdetention.org/pdf/nowheretogobutout.pdf) (describing unintended consequences in terms of prison expansion of women's reformatory movement).

201. *See* DAVIS, *supra* note 1, at 28–29; Tushar Kansal, *Racial Disparity in Sentencing: A Review of the Literature*, THE SENTENCING PROJECT (Jan. 2005), available at http:// www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf (discussing the findings of studies that show Blacks and Latinos are fundamentally disadvantaged in the criminal justice system as it pertains to sentencing and the decision to incarcerate); *Justice On Trial - The Leadership Conference on Civil and Human Rights*, THE LEADERSHIP CONFERENCE, http://www.civilrights.org/publications/justice-on-trial/ (last visited Nov. 9, 2014) (citing statistics that speak to the entrenched nature of discrimination against racial minorities in terms of traffic stops and immigration efforts); San Fran. Dep't of Health, *The Transgender Community Health Project* (Feb.18, 1999), *available at* http://hivinsite.ucsf.edu/InSite?page=cftg-02-02 (finding that sixty-five percent of transgender women and twenty-nine percent of transgender men had a history of incarceration); JAIME M. GRANT, LISA A. MOTTET & JUSTIN TANNIS, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163 (2011), *available at* http://transequality.org/PDFs/NTDS_Report.pdf (noting that sixteen percent of trans people had been incarcerated in jail or prison); Jean Stewart and Marta Russell, *Disablement, Prison, and Historical Segregation*, 53 MONTHLY REV. (2001) https://monthlyreview.org/2001/07/01/disablement-prison-and-historical-segregation (noting around 30% of prisoners have hearing loss, 55% of incarcerated youth have learning disabilities, and one sixth to one fourth of California prisoners have a "serious mental disorder").

202. *See* Beth Ribet, *Naming Prison Rape As Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL'Y & L. 281, 289 (2010) (noting that disabled people are more likely to be targeted for prison rape and that prison rape may also cause disabilities); Kim Shayo Buchanan, *E-Race-ing Gender:*

plex resistance to more fundamental change through law reform that Seigel describes may help to explain on a broader level the limited and at times perverse impact of PREA.

Alice Ristroph further explains how any attempt to separate sexuality from carceral punishment cannot succeed. She argues that incarceration is inherently a sexual punishment because of the extent of corporal control that carceral systems exert over prisoners.[203] If Ristroph is right, and incarceration cannot be fully desexualized,[204] then as long as incarceration persists any attempts to remove the sexual aspects of the punishment must be, at best, incomplete.

These observations comport with those of Angela Y. Davis and others that incarceration cannot be "fixed," because it is not "broken"—the violence and social hierarchies enforced through detention systems are not accidental or superficial aspects of incarceration, but rather intrinsic to their function.[205] Despite Congress's incremental move toward increasing bodily autonomy and sexual self-determination of prisoners through seeking to eliminate sexual abuse in detention, the more fundamental commitment to retaining total control over the bodies and behaviors of prisoners retains its force in jurisprudence.

The Racial Construction of Prison Rape, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 187, 187 (Frank R. Cooper & Ann C. McGinley eds., 2012) (explaining that Black prisoners are particularly likely to be targeted for sexual abuse by staff and multiracial prisoners are particularly likely to be targeted for sexual abuse by other prisoners); Valerie Jenness et al., *Violence in Correctional Facilities: An Empirical Examination of Sexual Assault* 3 (2007), available at http:// ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf (finding rates of sexual assault for trans women 13 times higher than for prisoners in men's prisons overall); Paul Guerino & Allen J. Beck, *Sexual Victimization Reported by Correctional Authorities, 2007- 2008* at 6 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svraca0708.pdf ("Females represent 7% of sentenced prison inmates but accounted for 21% of all victims of inmate-on-inmate sexual victimization in federal and state prisons. Similarly, females account for 13% of inmates in local jails but 32% of all victims.").

203. *See* Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006) (explaining that sexual coercion is an inherent aspect of mass confinement).

204. *See id*. at 184 ("At best, it seems that extensive surveillance and strict control of prisoners could reduce the incidents of physically violent rape, but such measures come at the price of prisoners' autonomy and may only increase distortions of sexuality within the prison. However we define rape, however we resolve the difficult issues of force and nonconsent, there remains '*the institution of confinement* itself.'").

205. *See, e.g.,* DAVIS, *supra* note 1, at 28 (describing racism of prison industrial complex and its role in continuing enslavement); Abolish Prisons! An Interview with Isaac Ontiveros, AK PRESS (March 7, 2014), http://www.revolutionbythebook.akpress.org/abolish-prisons/ ("We don't see the prison-industrial complex as broken; we see it working very, very well at surveilling, policing, imprisoning, and killing exactly who it targets.").

My analysis of PREA litigation confirms that concerns about potential harms of well-intentioned law reform projects are warranted. The costs of PREA have been substantial, although because I have not assessed the benefits of the legislation or tried to weigh them against those costs it would be premature for me to attempt an assessment of how worthwhile the legislation is overall.

My analysis also demonstrates that the impact of a particular law reform measure does not hinge solely on what that measure says.[206] The meaning of PREA is not yet settled more than a decade after its passage. The dynamic processes of power, resistance, cooptation, and struggle continue. Particularly in light of the pressures to the contrary, courts and administrators must exert the utmost vigilance to implement the change in law that Congress and stakeholders sought to bring about. Even these efforts may prove inadequate without accompanying cultural change, social mobilization, and decarceration.[207]

The doctrinal shifts I outlined constitute one aspect of what we would need to prevent further perversion of PREA into a measure that harms, rather than supports or protects, imprisoned survivors of sexual abuse. It would take no great ingenuity, just uncommon integrity and attention to the language of the law, for courts to shift PREA from both sword and shield in the hands of detention officials, to a tool available to those PREA ought to help.

CONCLUSION

Despite its articulated goal of ending sexual abuse in detention, PREA has often failed imprisoned survivors of sexual abuse in litigation, and has even been turned against them. In the past ten years, courts have often disregarded the potential of PREA to support prisoners' claims, but have not shown the same disregard to use of PREA as a prison official's defense. In the course of this litigation, courts have rarely devoted even cursory attention to actual language of the statute or the recently promulgated regulations.

206. *See* SPADE, *supra* note 196, at 223 (critiquing shortcoming of social justice approaches that focus on formal legal recognition).

207. *Id.* at 91 ("[R]eform efforts have been incorporated into the project of prison expansion"); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS-INCARCERATION IN AN AGE OF COLOR-BLINDNESS 230 (2010) ("Gains can be made, yes, but the new caste system will not be overthrown by isolated victories in legislatures or courtrooms."); Thompson, *supra* note 12, at 123 ("[A]s prison and corrections officials look to implement the PREA, it becomes clear that much work remains in facilitating the sort of cultural change that could lead to the reduction or elimination of rape in prison and jail.").

While normatively and doctrinally wrong, these results are not shocking. Making meaningful change to reduce sexual abuse in detention demands major shifts in power relations of which courts form a part.

I have shown a few of the ways in which courts may do their part to appropriately incorporate PREA into their analyses. For example, courts should consider PREA a sign of shifting standards of decency for Eighth Amendment purposes, recognizing a broader spectrum of sexual abuse as rising to the level of a Constitutional violation. The extensive information PREA has provided detention officials should also factor into assessments of their subjective frames of mind.

These shifts in adjudication, unfortunately, will not end sexual abuse in detention. We must address far more fundamental problems before that will come to pass. They would, however, prevent some of the miscarriages of justice currently happening in the name of that goal.