NOTES

RIGHTS AND REDRESS FOR TRANSGENDER SURVIVORS OF PRISON RAPE: THE FAILURES OF THE PRISON RAPE ELIMINATION ACT

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INTRODUCTION

[R]ape ... serves no penological purpose. Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity.[1]

[R]esponsibility for avoiding a sexual assault cannot be laid solely on us, the inmates.... [T]heir [sic] needs to be more focus on the needs of ... transgender inmates.[2]

[R]ape is not a penalty we assign in sentencing.[3]

Everyone has heard some variation of the punchline "don't drop the soap." Prison rape is frequently treated as a joke, a joke that is pervasive in American culture.[4] Rape in prisons continues "because it's the cultural wallpaper of American correctional facilities."[5]

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1. United States v. Bailey, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting); *see also* Farmer v. Brennan, 511 U.S. 825, 853 (1994) ("Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit.") (Blackmun, J., concurring). Justice Blackmun was known to have a particular concern for the humane treatment of inmates. *See* JOANNE MARINER, NO ESCAPE: MALE RAPE IN U.S. PRISONS, HUMAN RIGHTS WATCH (2001) (Acknowledgments), https://www.hrw.org/reports/2001/prison/report.html [https://perma.cc/7ZT3-5BMC].

2. DOJ OFFICE OF JUSTICE PROGRAMS, HEARING ON VIOLENCE BEFORE THE REVIEW PANEL ON PRISON RAPE, 167 (Nov. 14, 2006) (statement of Thomas Clinton, survivor), https://ojp.gov/sites/g/files/xyckuh241/files/media/document/transcript_111406.pdf [https://perma.cc/B3XZ-DT6B].

3. Deborah Sontag, *Push to End Prison Rape Loses Earlier Momentum*, N.Y. TIMES (May 12, 2015), https://www.nytimes.com/2015/05/13/us/push-to-end-prison-rapes-loses-earlier-momentum.html?partner=bloomberg [https://perma.cc/67WR-LZQZ].

4. *See* Steven W. Thrasher, *Americans Think Prison Rape Is Funny Because of Who Gets Hurt*, THE GUARDIAN (Apr. 27, 2015, 2:00 PM), https://www.theguardian.com/commentisfree/2015/apr/27/americans-think-prison-is-funny-because-of-who-gets-hurt [https://perma.cc/8H5L-6ZYQ]. Indeed, there is even a Monopoly-esque board game entitled, "Don't Drop the Soap," and bars of soap named "Don't Drop Soap" currently for sale online. *See Governor's Son Creates Prison-Themed Game*, NBC NEWS (Jan. 27, 2008, 6:59 PM), https://www.nbcnews.com/id/wbna22870462 [https://perma.cc/SF7L-ZDEP]; *Don't Drop Soap*, THE CELL BLOCK https://www.stayatthecellblock.com/shop/dont-drop-soap [https://perma.cc/ H2EN-J2U7].

5. Chandra Bozelko, Opinion, *Why We Let Prison Rape Go On*, N.Y. TIMES (Apr. 17, 2015), https://www.nytimes.com/2015/04/18/opinion/why-we-let-prison-rape-go-on.html?partner=bloomberg [https://perma.cc/CT7R-PWUL].

It is an unfortunate reality that rape inside prisons is a prevalent problem in the United States.[6] The effects of prison rape on incarcerated individuals are wide-ranging: it can affect inmates' physical health by increasing the transmission of sexually transmitted infections; it can have mental health effects like depression and post-traumatic stress disorder; it can increase the likelihood of recidivism; and it can make it more likely that victims will commit violent crime once released.[7] Indeed, the public health effects of prison rape extend beyond prison walls—it is estimated that 1.3 million people who have contracted Hepatitis C while in prison will be released back into the community, posing a major public health crisis.[8] This is not something that only the incarcerated should care about.

Transgender people are in a uniquely vulnerable position in prison.[9] Not only are they overrepresented in the criminal justice system and experience high levels of physical assault while incarcerated, but they face significantly higher levels of rape while in prison. They are thirteen times more likely to be sexually assaulted than the average incarcerated person.[10]

In response to sparse empirical data on the incidence and prevalence of sexual assault in prisons, Congress passed the Prison Rape Elimination Act (PREA) in 2003.[11] PREA had lofty goals: to

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6. *See* Nancy Wolff, Cynthia L. Blitz, Jing Shi, Ronet Bachman & Jane A. Siegel, *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835, 844 (2006); Val Kiebala, *"It's an Emergency": Tens of Thousands of Incarcerated People are Sexually Assaulted Each Year*, THE APPEAL (Apr. 18, 2022), https://theappeal.org/cynthia-alvarado-sexual-assault-in-prisons/ [https://perma.cc/4RL9-LHA9].

7. Prison Rape Elimination Act, 34 U.S.C. § 30301(15)(B)-(D).

8. *See* Scott A. Allen, Josiah D. Rich, Beth Schwartzapfel & Peter D. Friedmann, *Hepatitis C Among Offenders—Correctional Challenge and Public Health Opportunity* 67 FED. PROB. 22, 24 (2003).

9. *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE 69 (2016), https://www.lgbtmap.org/file/lgbt-criminal-justice.pdf [https://perma.cc/8TGS-VZ5G].

10. *See* Valerie Jenness, Cheryl L. Maxson, Kristy N. Matsuda & Jennifer Macy Sumner, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, 2 U.C. IRVINE CTR. FOR EVIDENCE-BASED CORR. BULL., June 2007, at 2.

11. *See* 34 U.S.C. § 30301(2) ("Insufficient research has been conducted and insufficient data reported on the extent of prison rape."); BUREAU OF JUST. STAT., STATUS REPORT DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003 1 (2004) ("There have been only a few studies on the prevalence of sexual assault within correctional facilities ... [which tend to be] small in scale, covering only a few facilities.").

"establish a zero-tolerance standard for ... prison rape" and to "make the prevention of prison rape a top priority."[12] It intended to achieve these goals by improving data collection and developing national standards for detecting, preventing, and punishing rape.[13] The national standards were established and promulgated by the Department of Justice in 2012—almost a decade after PREA was enacted.[14]

The lengthy period it took for the DOJ to promulgate the PREA standards is representative of something larger about PREA: what began as a fervent moral imperative to address the problem of prison rape faded, and the version of PREA that was ultimately passed does not reflect these ambitious moral goals.[15] The PREA that exists now is watered down and weak, and it is failing the most vulnerable members of our society.

This Note will argue that PREA provides meager protection and insufficient relief to transgender individuals who have been victims of sexual violence while incarcerated and that the existing mechanisms for relief are insufficient. Because PREA contains no private cause of action to allow survivors of rape to sue for violations of PREA, transgender rape survivors' pain remains unredressed. To address this problem, this Note puts forth a combination of solutions to remove barriers to redress for transgender survivors of prison rape, including amending PREA to include a private cause of action and repealing provisions of the Prison Litigation Reform Act (PLRA) that unduly encumber prisoners' legitimate legal claims. Part I outlines the realities of being transgender in prison and briefly introduces the contours of PREA. It also assesses the ways in which survivors can currently access justice and explains why they are insufficient. Part II examines the reasons PREA lacks a private cause of action and recommends a combination of solutions to fix this deficiency, including specific components to a private cause of action and addressing the ways in which PLRA hinders prisoner lawsuits. Finally, Part III addresses some likely counterarguments,

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12. *See* 34 U.S.C. § 30302(1)-(2).

13. *Id.* § 30302(3)-(4).

14. *About*, NAT'L PREA RES. CTR., https://www.prearesourcecenter.org/about/prison-rape-elimination-act [https://perma.cc/HU6H-378Q]; *see generally* 28 C.F.R. § 115 (2012).

15. *See infra* Part III.B.

which include the practical impossibility of amending a federal statute in today's congressional climate and the possibility that an amendment to PREA will disturb existing laws designed to control excessive prisoner litigation.

I. BACKGROUND

A. Being Transgender in Prison

A transgender person is someone whose gender identity differs from the biological sex assigned to them at birth.[16] Transgender people express their transgender identities in a spectrum of ways, from preferring to use certain pronouns, to changing their name or gender on official documents, to undergoing hormone therapy or surgery.[17] The importance of gender expression cannot be understated, given that "being open about one's gender identity can be life-affirming and even life-saving."[18]

One must look no further than Netflix to understand the difficulties transgender people face in prison. On *Orange is the New Black*, the character of Sophia Burset, played by Laverne Cox, exposed a wide audience to the specific struggles faced by transgender inmates—her transition, her placement in a women's facility, and the transphobia she faces.[19] Additionally, Chelsea Manning's high profile shed light on the difficulty of transitioning while incarcerated.[20] The issues faced by transgender inmates have entered the public conversation, and PREA needs to keep up.

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16. *Transgender*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/transgender [https://perma.cc/LVC8-V2XW].

17. *Understanding Transgender People: The Basics*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jan. 27, 2023), https://transequality.org/issues/resources/understanding-transgender-people-the-basics [https://perma.cc/ACA4-MXYT].

18. *Id.*

19. GraceAnn Caramico, Note, *Thank You Sophia Burset: A Call on the Federal Bureau of Prisons to Break Free of the Chains of Tradition in Order to Protect Transgender Inmates*, 18 GEO. J. GENDER & L. 81, 81 (2017).

20. *See* Jaclyn Diaz, *Chelsea Manning Had to Fight to Transition in Prison. She Wants Better for Others*, NPR (Apr. 9, 2023, 7:03 AM), https://www.npr.org/2023/04/09/1135270366/chelsea-manning-transgender-prisoners [https://perma.cc/6JNP-8P4X]; Jordan Rogers, *Being Transgender Behind Bars in the Era of Chelsea Manning: How Transgender Prisoners' Rights Are Changing*, 6 ALA. C.R. & C.L. L. REV. 189, 193 (2015).

Transgender inmates face a number of challenges even before incarceration, such as difficulty in finding employment and healthcare, likelihood of experiencing homelessness, and lack of access to legal services.[21] This frequently results in transgender individuals resorting to "survival economies" of "sex work" or "drug sales," which puts them at a higher risk of being charged with a crime.[22] In response to surveys of transgender people, 57 percent of respondents reported being uncomfortable seeking help from the police, and 58 percent who interacted with the police reported that they had been harassed, assaulted, or mistreated by police.[23]

In prison, the challenges continue: 37 percent reported being prohibited from taking hormone therapy while incarcerated.[24] A stark 85 percent reported having been placed in solitary confinement.[25] One in five transgender inmates report having been sexually assaulted.[26] Transgender inmates are thirteen times more likely to be sexually assaulted than cisgender inmates.[27]

Housing assignments in prisons present particular dangers to transgender individuals' safety and wellbeing.[28] PREA standards recommend—but do not require—an individual's transgender identity to be "consider[ed] on a case-by-case basis" when deciding to assign them to a male or female facility.[29] This gently worded suggestion results in a different practical reality: "transgender people are almost exclusively placed in facilities in accordance with the sex recorded on their birth certificates."[30] The consequences of

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21. *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCMENT PROJECT, *supra* note 9, at 33.

22. *Id.*

23. *See* SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 185 (2016), https://transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf [https://perma.cc/7BCB-WS33].

24. *Id.* at 193.

25. *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 9, at 92.

26. *See* JAMES ET AL., *supra* note 23, at 191.

27. *See* Jenness et al., *supra* note 10, at 2.

28. *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 9, at 93.

29. 28 C.F.R. § 115.42(c) (2012).

30. *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 9, at 93; *see also* Jaclyn Diaz, *Minnesota Recognizes She's a Woman. She's Locked in a Men's Prison Anyway*, NPR (Oct. 13, 2022, 6:07 AM), https://www.npr.org/2022/10/04/1126801351/trans-rights-transgender-inmates [https://perma.cc/3SVH-SGV6] ("[S]ome states explicitly don't

this are far-reaching, from being denied access to gender-affirming clothing or medication to being exposed to an increased risk of physical and sexual violence.[31] In this regard, PREA does little to respect transgender individuals' identities or protect their safety.

B. The Prison Rape Elimination Act and Its Failures

In 2001, Joanne Mariner of Human Rights Watch wrote a report on the epidemic of prison rape across the United States based on three years of research.[32] It concluded that there was a "shockingly high rate[ ] of sexual abuse" and a severe lack of national data on the frequency of prison rape.[33] This report was the "primary impetus for Congress to pass [PREA]" two years later in 2003.[34] While the Human Rights Watch report focused on male-on-male rape, and scholars have suggested that the passage of PREA was motivated by a perception that white male inmates were vulnerable to sexual assault by men of color,[35] the legislation nonetheless passed unanimously in both houses of Congress.[36]

Two features of PREA that promised the most concrete, measurable change are the requirements for data collection and the

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follow federal guidelines that call for housing decisions to be made on a case-by-case basis. Others have policies that are in line with federal standards, but in practice, they actually tend toward housing inmates based on assigned sex at birth.").

31. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 9, at 93.

32. *See* MARINER, *supra* note 1.

33. *Id.* at pt. I.

34. *See* Wolff et al., *supra* note 6, at 835-36; *see also* Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 AM. U. CRIM. L. BRIEF 10, 10 (2008).

35. *See* Smith, *supra* note 34, at 10; *Prison Rape Reduction Act of 2003: Hearing on H.R. 1707 Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. 44 (2003) (statement of Pat Nolan, President, Justice Fellowship) (describing the sexual assault of a white prisoner who was gang-raped by African-American prisoners who was then released and went on to brutally murder an African-American man).

36. *See* NAT'L PREA RES. CTR., *supra* note 14. Indeed, it was a surprise to many how swiftly PREA passed with uncharacteristic bipartisan support. *See* 149 CONG. REC. 18912 (2003) (statement of Sen. Edward Kennedy) ("I commend the Senate for the bipartisan cooperation in approving the Prison Rape Elimination Act."); *The Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 12 (2002) (statement of Rabbi David Saperstein, Director, Religious Action Center of Reform Judaism) ("Because of the profound moral clarity of the issue, a remarkable coalition of conscience has come together in support of [PREA].").

development of national standards for the prevention of prison rape.[37] This Note will address each in turn.

1. Data Collection

As discussed, prior to the passage of PREA, nationwide data gathering on prison rape was woefully inadequate.[38] PREA requires the Bureau of Justice Statistics (BJS) to conduct a yearly "statistical review and analysis of the incidence and effects of prison rape."[39] There was wide variation between states about what constituted prohibited sexual contact, so BJS first had to develop universal definitions of what constituted sexual violence.[40] It then conducted a number of studies. First, in 2005, the Bureau conducted a baseline study inquiring into incidents of sexual violence that corrections officers knew of.[41] Then, in 2007, BJS conducted its first inmate survey, the results of which, unsurprisingly, suggested that the rate of sexual violence in prisons was much higher than corrections officials had reported a year prior; in 2006, "correctional authorities reported 6,528 cases of sexual violence," and just a "year later, in 2007, inmates reported 189,400 cases."[42]

The data collection component of PREA has successfully rectified the lack of data on incidents of sexual assault in prison, a primary goal of PREA.[43] With new data, BJS was able to identify the corrections institutions with extremely high and extremely low incidents of sexual violence, and those institutions were required by PREA to appear in hearings before a review panel to explain their

37. *See* 34 U.S.C. §§ 30303(a)(1), 30307(a)(1).

38. *See supra* Part I.B; MARINER, *supra* note 1.

39. 34 U.S.C. § 30303(a)(1); *see* BUREAU OF JUST. STAT., *supra* note 11, at 1 ("BJS is tasked with developing reliable methods to measure the problem so that it can be addressed and eliminated.").

40. *See* Smith, *supra* note 34, at 11.

41. *Id.*

42. *Id.* at 12.

43. *See* 34 U.S.C. § 30302(4) ("The purposes of this chapter are to ... increase the available data and information on the incidence of prison rape.").

incident rates.[44] Survivors began to see institutional accountability for sexual violence.

2. Development of National Standards

PREA established the National Prison Rape Elimination Commission, a bipartisan commission tasked with writing a report recommending national standards for reducing rates of prison rape.[45] The Commission's report, including the suggested standards, were supposed to be finalized by July 2006—three years after the passage of PREA.[46] Then, PREA required, within one year of receiving the Commission's report, the Attorney General to develop and promulgate "national standards for the detection, prevention, reduction, and punishment of prison rape" based on the Commission's recommendations.[47]

This timeline was aspirational at best. There were delays in appointing members to the Commission, securing funding, and collecting data.[48] By 2008, Congress amended PREA to give itself more time, "striking '3 years' and inserting '5 years.'"[49] Finally, after years of delay, the standards were published in the Federal Register and became effective in 2012.[50]

3. The Vague Promise of the National Standards

The standards are divided into subparts that each govern a specific type of facility: adult prisons, lockups, community confinement facilities, and juvenile facilities.[51] Each subpart addresses the

44. *See* Smith, *supra* note 34, at 12; 34 U.S.C. § 30303(b)(3)(A) ("The purpose of these hearings shall be to collect evidence to aid in the identification of common characteristics of both victims and perpetrators of prison rape ... of prisons and prison systems with a high incidence of prison rape, and ... of prisons and prison systems that appear to have been successful in deterring prison rape.").

45. 34 U.S.C. § 30306(a), (b)(1), (d)(3)(B)(ii).

46. *See* Smith, *supra* note 34, at 13.

47. 34 U.S.C. § 30307(a)(1).

48. *See* Smith, *supra* note 34, at 13.

49. Second Chance Act of 2007: Community Safety Through Recidivism Prevention (Second Chance Act of 2007), Pub. L. No. 110-199, 122 Stat. 694.

50. *See generally* 28 C.F.R. § 115 (2012).

51. *Id.*

same topics: prevention, response, training, reporting and investigation, among others.[52] Although the standards are binding on the Federal Bureau of Prisons[53] and state departments of corrections,[54] their language is largely discretionary.[55]

For example, one section requires staff to be trained on how to conduct cross-gender searches of transgender and intersex inmates "in a professional and respectful manner, and in the least intrusive manner possible," but with an escape clause: "consistent with security needs."[56] What exactly constitutes a professional and respectful search, and what kinds of security needs excuse it?

Another standard requires facilities to maintain "adequate levels of staffing ... to protect inmates against sexual abuse" based on "[g]enerally accepted detention and correctional practices."[57] However, the regulation lacks further guidance on what is considered adequate staffing or generally accepted correctional practices.

Absent a private cause of action, there is no opportunity for clarification on the vague terms like "security needs" and "generally accepted detention and correctional practices" that make up the standards. As such, prisons can define these terms themselves, making adherence to the standards virtually optional. As one Texas district court put it, "[p]laintiff's ... claim based on ... PREA is fundamentally flawed, as it is based on the faulty assumption that ... the standards established by PREA are 'mandatory requirements.'"[58]

Some standards are specifically relevant to transgender inmates. At first blush, they appear to provide some level of special protection. When first arriving at a facility, all inmates undergo a

52. *Id.*

53. 34 U.S.C. § 30307(b).

54. *See id.* § 30307(e)(2)(A).

55. Claire C. Barlow & Alexander D. Klein, *Taking the Prison Rape Elimination Act Seriously: Setting Clear Standards for Identifying and Protecting Vulnerable Prisoners from Sexual Violence in Confinement*, 19 U. ST. THOMAS L.J. 255, 265-66 (2023) (recognizing that while "some standards use mandatory language" such as "[a]ll inmates *shall* be assessed during an intake screening," the rest are "cloaked in discretionary language" (quoting 28 C.F.R. § 115.41(d))).

56. 28 C.F.R. § 115.15(f).

57. *Id.* § 115.13(a), (a)(1).

58. Longoria v. County of Dallas, No. 3:14-CV-3111-L, 2017 WL 958605, at *16 (N.D. Tex. Mar. 13, 2017), *vacated in part on reconsideration*, No. 3:14-CV-3111-L, 2018 WL 339311 (N.D. Tex. Jan. 9, 2018).

preliminary screening, which has the express goal of assessing their risk of being either victims or perpetrators of sexual abuse.[59] One of the criteria for assessing whether an inmate is at risk for sexual victimization is "[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming."[60] The existence of this criterion seems to suggest that the DOJ recognizes that LGBTQ inmates are at a higher risk of sexual abuse.

The screening information is to be used to "inform" housing assignments[61] in order to keep "the predators from the prey."[62] Section 115.42 of the standards appears to pay special attention to the needs of transgender prisoners, but the protection actually provided by this section is questionable. Section 115.42 requires the following:

> (c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.
>
> (d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.
>
> (e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.[63]

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59. 28 C.F.R. § 115.41(a).

60. *Id.* § 115.41(d)(7).

61. *Id.* § 115.42(a).

62. *See How Should Correctional Facilities Manage Transgender Offenders?: An Interview with Jail Risk Management Consultant Donald L. Leach*, CORRECTIONS1 (June 15, 2010), https://www.corrections1.com/correctional-healthcare/articles/how-should-correctional-facilities-manage-transgender-offenders-qoQcRbhxnE3Obfz5/ [https://perma.cc/TM8P-FTCL].

63. 28 C.F.R. § 115.42(c)-(e). This section also requires transgender inmates to be given the opportunity to shower separately from other inmates and prohibits the placement of lesbian, gay, bisexual, transgender, or intersex inmates in dedicated units based on sexual or transgender identity, unless required by law to protect the safety of the inmate. *See id.* § 115.42(a).

On its face, § 115.42 appears sensitive to the unique challenges transgender inmates face in prison housing determinations. Indeed, to many transgender inmates, their "own views with respect to his or her own safety" may be directly linked to their transgender identity.

However, the standards do not *require* prisons to house transgender prisoners based on their self-determined gender identity, and indeed, many prisons maintain policies of housing inmates based on biological sex.[64] Therefore, § 115.42 is a suggestion at best, meaning transgender inmates' identities are ignored or denied.

4. Transgender Inmates as Political Kickballs: Changes Through Administrations

The toothlessness of PREA and the PREA standards means that changes in presidential administrations can materially alter transgender inmates' experiences in prisons. Indeed, this has already happened. During the final days of the Obama administration, the Bureau of Prisons published the Transgender Offender Manual, meant to offer guidance to prisons on dealing with the unique problems that arise during the incarceration of transgender people.[65] The manual required, among other things, that federal inmates be housed based on gender identity, not biological sex.[66]

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64. *See* Carla Aveledo, Comment, *Ten Years Later, PREA Does Not Live Up to Its Goal: Amending the Statute to Reduce Discriminatory Violence Against Transgender Prisoners*, 27 ROGER WILLIAMS U. L. REV. 89, 101 (2022). *But see* Giovanna Shay, *PREA's Elusive Promise: Can DOJ Regulations Protect LGBT Incarcerated People?*, 15 LOY. J. PUB. INT. L. 343, 352 (2014) (arguing that § 115.42 was "ground-breaking" for transgender inmates). Some states with policies requiring transgender inmates to be housed based on self-determined gender identity are now rolling them back. *See* Dana DiFilippo, *Shifting Policy on Prison Placement of Transgender People Sparks Scrutiny*, N.J. MONITOR (May 8, 2023, 6:32 AM), https://newjerseyymonitor.com/2023/05/08/shifting-policy-on-prison-placement-of-transgender-people-sparks-scrutiny/ [https://perma.cc/9LNZ-66TE]. *But see* CAL. PENAL CODE § 2606(a)(3) (West 2021) (requiring transgender inmates to "[b]e housed ... based on the individual's preference").

65. *See* FED. BUREAU OF PRISONS, DEP'T OF JUST., NO. 5200.4, TRANSGENDER OFFENDER MANUAL (2017).

66. *Id.* For a comprehensive review of the way the Transgender Offender Manual has been amended between administrations, see Catherine Perrone, Comment, *Eliminating Ambiguity and Conflict: Protecting Transgender Inmates from Sexual Violence in Federal Prisons*, 4 ADMIN. L. REV. ACCORD 1, 3-12 (2019), https://administrativelawreview.org/wp-content/uploads/2019/03/Perrone_Final.pdf [https://perma.cc/LL86-9VMG]; *see also* Jennifer Levi &

Shortly after these changes were announced, the Trump administration reversed them.[67] The sentence "[the Transgender Executive Counsel (TEC)] will recommend housing by gender identity when appropriate" was struck and replaced with "[t]he TEC will use biological sex as the initial determination for [housing] designation."[68] Under Trump's manual, housing transgender inmates by self-identified gender identity would be appropriate "only in rare cases."[69]

When President Biden took office, the manual was changed back.[70] The Biden administration inserted further provisions to protect transgender inmates and affirm their identities, like requiring staff to address inmates using their preferred pronouns.[71]

The Transgender Offender Manual is demonstrative of how the treatment of transgender inmates can change drastically depending on who is behind the Resolute desk. Theoretically, a transgender person serving a long sentence could bounce between male and female prisons every four years. Absent a more robust PREA, transgender inmates are not secure in their rights while incarcerated. A stronger PREA would protect transgender inmates from being treated as political kickballs.

Kevin M. Barry, *Transgender Rights & the Eighth Amendment*, 95 S. CAL. L. REV. 109, 138 n.156 (2021).

67. *See* FED. BUREAU OF PRISONS, DEP'T OF JUST., NO.5200.04 CN-1, TRANSGENDER OFFENDER MANUAL (2018). This came amid a flurry of anti-transgender moves made in the early days of the Trump administration. *See* Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html [https://perma.cc/7H3X-SVPX]; Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html [https://perma.cc/YVW8-9E6S].

68. FED. BUREAU OF PRISONS, DEP'T OF JUST. (2018), *supra* note 67, ¶ 5; *see* Jenny Gathright, *The Guidelines for Protection of Transgender Prisoners Just Got Rewritten*, NPR (May 12, 2018 4:18 PM), https://www.npr.org/sections/thetwo-way/2018/05/12/610692321/the-guidelines-for-protection-of-transgender-prisoners-just-got-rewritten [https://perma.cc/NZM6-7YM4].

69. FED. BUREAU OF PRISONS, DEP'T OF JUST. (2018), *supra* note 67, ¶ 5.

70. *See* FED. BUREAU OF PRISONS, DEP'T OF JUST., NO.5200.08, TRANSGENDER OFFENDER MANUAL (2022).

71. *Id.* at 10 ("Deliberately and repeatedly mis-gendering an inmate is not permitted.").

C. Existing Paths to Relief for Transgender Inmates: Bringing Constitutional Claims Under the Eighth Amendment

The Eighth Amendment protects against the infliction of cruel and unusual punishment.[72] One available avenue for prisoners subjected to sexual violence while in detention is to bring claims under the Eighth Amendment through § 1983.[73] PREA itself recognizes that a "high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution."[74] Indeed, Congress enacted PREA in part to "protect the Eighth Amendment rights of Federal, State, and local prisoners."[75] However, the interaction between the Eighth Amendment and PREA is not as harmonious as it seems.

1. Farmer v. Brennan: *Subjective Deliberate Indifference*

For this Note's purposes, it is appropriate to begin with *Farmer v. Brennan*, the only case in which the Supreme Court has explicitly addressed the problem of rape of transgender prisoners.[76] Dee Farmer, a transgender woman incarcerated for credit card fraud, brought a claim under the Eighth Amendment against prison officials after she was violently raped.[77] Without counsel, she argued that prison officials violated her Eighth Amendment rights by acting with deliberate indifference to her safety—deliberate indifference to the specific risk that she, as a transgender woman, was especially vulnerable to sexual assault.[78]

The Court announced a two-prong standard under which a prison official could be found liable for violations of inmates' Eighth

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72. U.S. CONST. amend. VIII.

73. 42 U.S.C. § 1983 (providing a right to sue for violations of federally protected rights by officials acting under color of state law); *see* Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam) (establishing that prisoners have standing to sue under § 1983).

74. 34 U.S.C. § 30301(13).

75. *Id.* § 30302(7).

76. 511 U.S. 825, 829-30 (1994).

77. *Id.* The Court uses the outdated term "transsexual" to describe Ms. Farmer. This Note will use the term "transgender" instead. *See Glossary of Terms: Transgender*, GLAAD MEDIA REFERENCE GUIDE—11TH EDITION, https://glaad.org/reference/trans-terms/ [https://perma.cc/26PV-T967].

78. *Farmer*, 511 U.S. at 830-31.

Amendment rights. A plaintiff must show that (1) he or she was exposed to a substantial risk of harm and (2) the prison official acted with deliberate indifference.[79] The Court held that an official acts with deliberate indifference "if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[80] To prevail, plaintiffs must prove that each defendant acted with subjective recklessness.[81]

Farmer, which predated PREA, was initially thought to be a victory for incarcerated people.[82] However, in reality, the ruling set a high bar for plaintiffs to meet. A subjective standard is a substantial evidentiary burden; proving that an official knew of, and subsequently disregarded, the risk of harm almost certainly requires that the survivor is not listened to the first time.[83] At bottom, this standard requires that an inmate be sexually assaulted before we believe a constitutional violation has occurred.[84]

2. PREA as a Buttress to Eighth Amendment Claims

Some transgender plaintiffs have prevailed on Eighth Amendment claims by using PREA to bolster their arguments. In *Doe v. District of Columbia*, the plaintiff used the fact that officers had received PREA training as evidence of their subjective knowledge of the plaintiff's heightened risk of sexual victimization.[85] In *Hayes v. Dahkle*, a prison guard sexually assaulted the plaintiff during a pat frisk, asking "[d]o you consider yourself a male or female?" and "[d]o you suck dick or fuck men?"[86] The court analyzed the Eighth

79. *Id.* at 834.

80. *Id.* at 847.

81. *Id.* at 839-40.

82. *Hailing Supreme Court Decision*, JUST DET. INT'L (June 7, 1994), https://justdetention.org/hailing-supreme-court-decision/ [https://perma.cc/2Q6K-6NB5]; David G. Savage, *High Court Opens Door to Rape Suits by Inmates*, L.A. TIMES (June 7, 1994), https://www.latimes.com/archives/la-xpm-1994-06-07-mn-1389-story.html [https://perma.cc/5MV3-BVPW].

83. *See* Christina M. Lee, Note, *Transgender Women in Men's Corrections Facilities: A Call for an Objective Deliberate Indifference Test to Better Protect Inmates from Sexual Abuse Behind Bars*, 51 SW. L. REV. 331, 341 (2022).

84. *Id.*

85. *See* 215 F. Supp. 3d 62, 72 (D.D.C. 2016).

86. No. 9:16-CV-1368, 2017 WL 9511178, at *1 (N.D.N.Y. Oct. 30, 2017), *report and recommendation adopted as modified*, No. 9:16-CV-1368, 2018 WL 555513 (N.D.N.Y. Jan. 19, 2018).

Amendment claim under the "evolving standards of decency" test.[87] One factor that informed the court's determination of such evolving standards of decency was the existence of PREA, which the court interpreted to be the "clearest and most reliable objective evidence of contemporary values."[88]

However, using PREA as mere support for Eighth Amendment claims—which have a high evidentiary burden—is not sufficient to achieve its aspirational goals of a zero-tolerance policy for prison rape. It must stand for more.

II. RECOMMENDATIONS FOR A MORE ROBUST PREA: IMPLEMENTING A PRIVATE CAUSE OF ACTION

PREA has a flawed history, and its implementation has been uneven. This, paired with the current insufficient paths to redress for transgender survivors who have been harmed, renders PREA effectively toothless. The threat to transgender inmates is so severe that relief must be proportional; serious problems require serious solutions.

Critics of PREA agree that it does not provide adequate protection to transgender survivors of rape in prison and have recommended a variety of mechanisms to strengthen it.[89] This Note will recommend the statute be amended to include a private cause of action that allows these plaintiffs to sue for violations of the statute.

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87. See Trop v. Dulles, 356 U.S. 86, 99-101 (1958), where the evolving standards of decency test originated. The Court held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

88. *Hayes*, 2017 WL 9511178, at *6 (quoting Crawford v. Cuomo, 796 F.3d 252, 260 (2d Cir. 2015)).

89. *See, e.g.*, Aveledo, *supra* note 64, at 107-08 (recommending reform of PREA's audit function to include a requirement that transgender inmates are housed based on gender identity); Caramico, *supra* note 19, at 95-98 (recommending the development of standards specific to transgender prisoners); Barlow & Klein, *supra* note 55, at 271 (recommending stronger guidance on existing standards).

A. There Is Currently No Statutorily Created Private Cause of Action in PREA

Passion Star, a transgender woman, was incarcerated in a male facility in Texas.[90] As she alleged in her complaint, she was trapped in a cycle: she would be repeatedly violently raped, she would report the incidents to authorities, requesting safekeeping, and she would be ignored or placed in solitary confinement.[91] She would be released back into general population, and she would be raped again.[92]

She sued, alleging violations of PREA standards—even claiming that "PREA training is considered a joke for many ... employees, who believe that sexual assault of LGBT people is funny."[93] She specifically alleged that the prison's failure to adhere to the transgender-specific standards resulted in insufficient protection against sexual violence.[94] The court, in a footnote, disposed of her claims under PREA, noting that "PREA does not establish a private cause of action for allegations of prison rape."[95]

This case is not unique. Courts across the country have declined to read a private cause of action into PREA.[96] In *Bell v. County of*

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90. Zollicoffer v. Livingston, 169 F. Supp. 3d 687, 689 (S.D. Tex. 2016).

91. *Id.* at 690; *see also* Complaint ¶¶ 31-109, Zollicoffer v. Livingston, 169 F. Supp. 3d 687 (S.D. Tex. 2016) (No. 4:14-cv-03037).

92. *Zollicoffer*, 169 F. Supp. 3d at 690.

93. *Id.* at 692.

94. *Id.* Indeed, she alleged that one defendant had personal knowledge of both PREA and the risks of rape specific to transgender inmates: he had been called before the DOJ to justify "the alarming statistics concerning sexual assault at the [Texas Department of Criminal Justice], specifically noting the vulnerability of gay and transgender prisoners to abuse." *Id.* at 696.

95. *Id.* at 700 n.14. The court allowed Ms. Star's other claims to survive: "Plaintiff was sentenced to serve time in prison. She was not sentenced to be raped and assaulted by her fellow inmates." *Id.* at 700.

96. *See, e.g.*, Longoria v. County of Dallas, No. 3:13-CV-3111-L, 2017 WL 958605, at *16 (N.D. Tex. Mar. 13, 2017), *order vacated in part on reconsideration*, No. 3:14-CV-3111-L, 2018 WL 339311 (N.D. Tex. Jan. 9, 2018) ("[N]owhere in PREA is there language to suggest that it was created to provide a private cause of action."); Bennett v. Parker, No. 3:17-cv-1176, 2017 U.S. Dist. LEXIS 169876, at *6 (M.D. Tenn. Oct. 13, 2017) ("[S]everal district courts have recognized that this statute does not create a private cause of action."); Krieg v. Steele, 599 F. App'x 231, 232 (5th Cir. 2015) ("PREA does not establish a private cause of action for allegations of prison rape."); Ball v. Beckworth, No. CV 11-00037-H-DWM, 2011 WL 4375806, at *4 (D. Mont. Aug. 31, 2011), *report and recommendation adopted*, No. CV 11-37-H-DWM-RKS, 2011 WL 4382074 (D. Mont. Sept. 19, 2011) ("PREA provides for the reporting of incidents of rape in prison, the allocation of grants, and it created a study commission. It does

Los Angeles, the court was especially explicit about it.[97] The plaintiff, a transgender woman, was sexually assaulted by a male prison officer during a strip search.[98] The court, in granting summary judgment to the sheriff-defendants, titled one subheading in its opinion, "Plaintiff's Citation of the Prison Rape Elimination Act Does Not Affect the Court's Analysis," explaining why in one short sentence: "Plaintiff has no claim under the Prison Rape Elimination Act; the Act does not create a private right of action."[99]

Perhaps these results are unsurprising. The Supreme Court has been especially hostile to implying private causes of action into legislation without explicit congressional intent.[100] In *Alexander v. Sandoval*, the Court held that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."[101]

This leaves survivors in particularly dire straits: prisons are not compelled to comply with PREA, and prisoners are powerless to take action against those who do not. The injured party, in an already unpopular segment of society, does not have the power to object.

B. Lobbying Efforts Prevented the Inclusion of a Private Cause of Action

During the drafting of PREA, the interests of human rights groups and corrections organizations conflicted. As discussed, the publication of Human Rights Watch's report, *No Escape*, was the primary impetus for Congress to pass PREA,[102] and other human rights and religious organizations like Stop Prisoner Rape and

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not give rise to a private cause of action." (citation omitted)).

97. No. CV 07-8187-GW (E), 2008 WL 4375768, at *1 (C.D. Cal. Aug. 25, 2008).

98. *Id.* Not to mention, the PREA standards explicitly prohibit cross-gender searches. *See* 28 C.F.R. § 115.15 (2012).

99. *Bell*, 2008 WL 4375768, at *6. For further discussion on courts that have declined to read a cause of action into PREA, see Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 811-14 (2014).

100. *See* CHARLES H. KOCH, JR. & RICHARD MURPHY, 3 ADMIN. L. & PRAC. § 8:50 (3d ed. 2024); Alexander v. Sandoval, 532 U.S. 275, 286 (2001); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004); Jesner v. Arab Bank, PLC, 584 U.S. 241, 264 (2018).

101. 532 U.S. at 291.

102. *See supra* Part I.B.

Prison Fellowship Ministries were heavily involved in raising the alarm about prison rape and pushing for legislative action.[103] In fact, groups like these were so heavily involved in the early investigatory stage that Senator Edward Kennedy, a key architect of PREA, commented on it in his opening remarks in a hearing on the bill: "An extraordinary coalition of churches, civil rights groups, and concerned citizens have joined together to act on this issue.... I commend this coalition for its impressive moral leadership."[104]

Notably absent from the early stages of PREA were corrections officials.[105] As Director of Corrections for Rhode Island A.T. Wall put it: "When the bill first surfaced it was something that caught the corrections profession unaware. We had not been involved in crafting the bill."[106]

After corrections officials joined the conversation, PREA changed.[107] At a later hearing, A.T. Wall testified again, expressing concern over the practical effects of PREA on prison operations: "[A]s corrections officials, we are accountable for the operations of our systems, including the implementation of the initiatives that come about as a result of this legislation."[108]

While the practical effects of implementing prison legislation must be given due weight, Mr. Wall's testimony reflects "a commitment to thinking about rape as an operational issue.... [M]oral imperatives fall to the background."[109] Indeed, as PREA scholar Brenda Smith noted: "Human rights organizations like HRW [Human Rights Watch] and Stop Prisoner Rape (SPR) were critical in defining the contours of PREA. Essentially, they made political and strategic concessions, such as explicitly providing that PREA

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103. *See* Smith, *supra* note 34, at 11; Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize to End Prison Rape*, 32 J. LEGIS. 129, 139 (2006).

104. *The Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 2 (2002).

105. *See* 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, 512 (2011).

106. *Id.* at 512-13.

107. *Id.* at 514.

108. *Id.* at 513-14.

109. *Id.* at 514.

does 'not create a private right of action' ... in order to secure PREA's passage."[110]

What began as an impassioned response to a moral problem resulted in a watered-down solution focused on practicability and operationality instead of morality. To restore PREA's initial purpose as a moral imperative, it should be amended to include a private cause of action.

C. Suggested Solutions: Amending PREA

As demonstrated, the paths to redress for transgender survivors of sexual violence in prison are insufficient. To add insult to injury, the PLRA places more hurdles in the way. To ensure a wholly robust PREA, certain provisions of PLRA should be repealed, and PREA's proposed private cause of action should include language to protect against those provisions. This, coupled with clear and unambiguous language establishing a private cause of action under PREA, would achieve PREA's moral imperative and serve the public policy rationales for which it was passed.

1. Repealing the Exhaustion Requirement of the Prison Litigation Reform Act

One major obstacle to making PREA more robust by including a private cause of action is PLRA, which makes it more difficult for prisoners to file and win lawsuits in federal court.[111] One important provision is its exhaustion requirement. Before bringing a § 1983 suit, plaintiffs must pursue all grievance procedures internal to the facility they are being held in, including filing formal and informal grievances.[112] Plaintiffs must prove they have tried to resolve their

110. Smith, *supra* note 34, at 11 (quoting Alexander v. Sandoval, 532 U.S. 275, 291 (2003)).

111. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 804, 110 Stat. 1321 (1996) (codified as amended in scattered titles and sections of the U.S.C.).

112. *See* Thomas v. Cassleberry, 315 F. Supp. 2d 301, 303 (W.D.N.Y. 2004) (holding that prisoner did not exhaust administrative remedies because he failed to follow prison's three-step grievance procedure); Roland v. Murphy, 289 F. Supp. 2d 321, 323-34 (E.D.N.Y. 2003) (holding that prisoners may informally exhaust administrative remedies).

complaint by exhausting all available administrative remedies.[113] Failure to do so results in mandatory dismissal.[114]

In 2006, the Supreme Court raised the bar further by interpreting PLRA to require "proper exhaustion," meaning "using all steps that the agency holds out, and doing so *properly*."[115] Deadlines are short, strict, and must be complied with, or plaintiffs risk having their suits thrown out—a particularly difficult hurdle to overcome for prisoner plaintiffs who are often pro se.[116]

This enables prisons to effectively immunize themselves from liability by setting their own grievance processes, often doing so by constructing programs with prohibitively short deadlines: "[P]rison grievance systems have accordingly transformed into traps for the unwary."[117]

Prison grievance processes are often confusing and hard to navigate. In *Does 8-10 v. Snyder*, the Sixth Circuit reversed the district court's grant of summary judgment based on the plaintiffs' failure to exhaust because the grievance process was so impervious that it was effectively unavailable.[118]

John Doe 8 was incarcerated in an adult facility at the age of seventeen when he was raped in the shower.[119] Following prison procedures, he filed a grievance with the PREA coordinator.[120] A few weeks later, he received a response from the PREA coordinator that his grievance had been received, and that an investigation was pending, but the grievance was now considered closed.[121] As the Sixth Circuit put it, "[i]n the Defendants' view, the grievance is both

113. 42 U.S.C. § 1997e(a), *unconst. on other grounds*, Siggers-El v. Barlow, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006).

114. *See* Petrucelli v. Hasty, 605 F. Supp. 2d 410, 419 (E.D.N.Y. 2009).

115. Woodford v. Ngo, 548 U.S. 81, 90 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)).

116. *See* Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1193 (2023); *see also* Arkles, *supra* note 99, at 809.

117. *See* Yang, *supra* note 116, at 1149-50.

118. *See* 945 F.3d 951, 965 (6th Cir. 2019) ("Clearly, the ... PREA grievance process is, in practice, filled with contradictions and machinations, and these contradictions and machinations render the process 'incapable of use.'" (quoting Ross v. Blake, 578 U.S. 632, 643 (2016)).

119. *See id.* at 957.

120. *See id.*

121. *See id.* at 957-58.

pending and closed. This makes no sense."[122] He filed suit, but according to prison officials, he did not timely appeal this response from the PREA coordinator, so he therefore failed to meet PLRA's exhaustion requirement.[123] The district court agreed, granting summary judgment to the prison officials.[124]

The Sixth Circuit, however, took issue with the clarity of the prison's grievance procedure, holding that Doe 8 was not put on sufficient notice of the deadline to appeal the response from the PREA coordinator:

> MDOC [Michigan Department of Corrections] requires a PREA coordinator to respond to a Step I grievance within sixty days of *receiving* the grievance. One might simply assume that the coordinator receives a grievance on the same day that an inmate submits the grievance. But based on this record, that assumption would be very wrong. Doe 8, for example, filed his grievance on May 20, 2016, but the coordinator did not receive it until June 1, 2016—about twelve days later.... The point is, if an inmate receives no response, he or she must nonetheless submit an appeal within ten days after the date that a response was due —but the inmate really has no idea when the sixty-day clock begins to run for MDOC, and consequently, the date an appeal must be filed is unclear.[125]

As *Does 8-10 v. Snyder* illustrates, PLRA enables prisons to set and enforce their own convoluted grievance procedures, stacking the deck against survivors of prison rape. It took a federal court of appeals to interpret the prison's grievance process and determine it was prohibitively indecipherable; one can imagine the many similar claims dismissed for the same reason.

The interaction between PREA and PLRA is far from harmonious. Congress passed PLRA to curtail frivolous prison lawsuits,[126] whereas it passed PREA to encourage victims to bring meritorious claims of sexual abuse to light.[127] The DOJ, while drafting the PREA

122. *Id.* at 963.
123. *See* Doe 8 v. Snyder, No. 17-11181, 2018 WL 1035715, at *7 (E.D. Mich. Feb. 23, 2018).
124. *Id.*
125. *Does 8-10*, 945 F.3d at 964-65.
126. *See* Yang, *supra* note 116, at 1155.
127. *See* Arkles, *supra* note 99, at 819.

standards, seemed to be aware of the incongruence between PLRA and PREA.[128] It left PLRA's exhaustion requirement intact, but rescinded the time limit for a plaintiff to file a grievance about sexual assault.[129] Notwithstanding the adoption of this change, PLRA still acts as a significant barrier to PREA's goals: courts still dismiss sexual abuse cases based on failure to exhaust.[130] Once again, PREA and its standards prove to be toothless.

To clear the way for survivors to access justice, and to properly implement the goals of PREA, Congress should repeal the exhaustion requirement of PLRA. Indeed, this is not a novel idea. When PREA was passed by the Senate, Senator Edward Kennedy called on Congress to do more.[131] Among his suggestions was to repeal the provisions of PLRA that prevent abuse victims from bringing lawsuits.[132] It is clear that Congress has since failed to heed Senator Kennedy's advice as these provisions of PLRA still exist today.

In addition to repealing the exhaustion provision of PLRA, PREA could also be specifically amended to protect against exhaustion. A proposed private cause of action could include a narrowly drawn provision that exempts sexual assault grievances from exhaustion as required by PLRA. The fact that a PREA standard that exempts survivors from the rigid time constraints required by PLRA already exists indicates that the impetus to treat sexual violence litigation differently from other prison litigation exists. Amending PREA to include a private cause of action that specifically exempts survivors from having to comply with PLRA's exhaustion requirement is the next plausible step.

Repealing PLRA's exhaustion requirement, in addition to amending PREA to specifically exempt sexual assault litigants from exhaustion, would reinforce PREA as a legitimate means to prevent and protect against rape.

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128. *Id.*

129. 28 C.F.R. § 115.52(b)(1) ("The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse."); *see Does 8-10*, 945 F.3d at 956.

130. *See* Tracy v. Coover, No. 09-0931, 2011 WL 227629, at *1 (Iowa Ct. App. Jan. 20, 2011); Amador v. Andrews, 655 F.3d 89, 98-99, 102-03 (2d Cir. 2011); Arkles, *supra* note 99, at 819.

131. 149 CONG. REC. 18912 (2003) (statement of Sen. Edward Kennedy).

132. *Id.*

2. Liberal Injunctive Relief

Another proposed element of a private cause of action in PREA is to allow courts to liberally issue injunctions that are narrowly drawn to the circumstances giving rise to the sexual assault. One of the main ways that PLRA restricts a prison litigant's ability to bring suits is by curbing courts' ability to award injunctive relief.[133] Under PLRA, nonmonetary relief is limited to that which "extend[s] no further than necessary to correct the harm ... and [is] the least intrusive means necessary to correct that harm."[134] In addition, courts are to "give substantial weight to any adverse impact on ... the operation of a criminal justice system,"[135] an escape clause that effectively stacks the deck in favor of the prison.

As such, it is easy to imagine that transgender survivors of prison rape—particularly those housed in prisons that do not align with their gender identity—who are restrained by PLRA's narrow injunctive practice, will not be afforded sufficient protection after a sexual assault has occurred.

Without repealing this provision of PLRA, it is hard to imagine an injunction that would pass muster. Imagine a situation similar to *Zollicoffer v. Livingston*.[136] A transgender woman is housed in a male facility. Imagine she wears her hair long, or she has breast implants. Perhaps she is raped in the shower. She reports the assault, but the grievance process is confusing and drawn-out. Nothing changes, and perhaps she is raped again. She sues, seeking an injunction that requires the prison to move her to a women's prison or to merely house her separately from the perpetrator. If the court does not dismiss the case for failure to exhaust, it could deny both requests for injunction based on that escape clause. Moving her to a different facility, or even to a different wing of the same prison, would be a burden on the operation of the prison, and that is enough to keep her where she is. Where individuals' very bodily safety is at stake, burdens on prison operation should not enter the calculus.

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133. *See* 18 U.S.C. § 3626; Allison M. Freedman, *Rethinking the PLRA: The Resiliency of Injunctive Practice and Why It's Not Enough*, 32 STAN. L. & POL'Y REV. 317, 319 (2021); Yang, *supra* note 116, at 1155 n.53.

134. 18 U.S.C. § 3626(a)(2).

135. *Id.*

136. *See supra* Part II.A; Zollicoffer v. Livingston, 169 F. Supp. 3d 687 (S.D. Tex. 2016).

Requiring proper exhaustion and limiting awards of injunctive relief both clearly serve the policy rationales that motivated Congress to pass PLRA in the first place: to "dampen the explosion of prisoner litigation."[137] The same cannot be said of PREA—in its current form, its policy rationales are simply not being served. It is not protecting those vulnerable to sexual assault.

As such, like the exhaustion requirement, the restrictions on injunctive relief imposed by PLRA should be repealed, and PREA should be amended to specifically protect against it. The private cause of action in PREA could include a provision explicitly permitting courts to use injunctive relief in sexual assault litigation, without the use of limiting language like "narrowly drawn," "least intrusive," or "adverse impact on [prison operation]."[138]

Injunctive relief would necessarily be fact-specific, but examples of injunctions could include requiring an offending prison to overhaul or clarify its grievance process; to house the victim in a separate facility from the perpetrator; or if the sexual violence is perpetrated by a prison official, to pursue administrative action against the official. Permitting courts to impose injunctions tailored to the specific facts of a situation is a solution that is particularly well-suited to prison rape against transgender individuals. The experiences of transgender people are, by nature, varied and complex, which require context-dependent solutions.

3. Other Components to a Private Cause of Action

It is necessary for the private cause of action to define precisely what constitutes a violation of PREA. For our purposes, we should start by looking to the standards that specifically concern transgender individuals.

Section 115.42 requires prisons to "consider on a case-by-case basis" where to place transgender inmates.[139] This standard, however, is largely discretionary due to its escape clause—again, prisons are not obliged to comply if "the placement would present

137. RODNEY A. SMOLLA, 2 FEDERAL CIVIL RIGHTS ACTS § 14:112 (3d ed. 2024).
138. 18 U.S.C. § 3626(a)(2).
139. 28 C.F.R. § 115.42(c); *supra* Part I.B.3.

management or security problems."[140] A private cause of action in PREA that allowed transgender inmates to sue based on failure to adhere to this standard (that is, failure to safely accommodate them in facilities aligning with their gender identity; failure to adequately consider their own wishes in making housing determinations; failure to carry out the twice-yearly housing assessment)[141] would give PREA real teeth in protecting the transgender incarcerated population from an inherently higher risk of rape.

Of course, in the absence of clearer guidance on the standards, as well as their discretionary nature, we have no way to tell what kind of management and security problems are sufficient to justify ignoring an inmate's housing request. With a private cause of action, these issues could be litigated, and the contours of violations of PREA could be better defined as cases make their way through the courts.

Section 1983 is the classic example of how the creation of a private cause of action and subsequent litigation can define violations of laws. It was initially passed as the Ku Klux Klan Act in 1871, in response to state and local government officials' unwillingness to deal with—and sometimes complicity in—violence against the formerly enslaved.[142] It provided a remedy for the violation of constitutional rights at the hands of state actors acting under color of law.[143] Today, it is "the workhorse of civil rights litigation,"[144] with 19,618 prisoner civil rights petitions filed in 2023.[145] Because § 1983 is a widely available and widely used legal mechanism, the case law is well developed, and litigants have a reasonable idea about what constitutes a violation of the Eighth Amendment, and other rights

140. 28 C.F.R. § 115.42(c).

141. *Id.* § 115.42(a)-(e).

142. *See Ku Klux Klan Act of 1871*, "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes*", NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/ku-klux-klan-act-of-1871-april-20-1871-an-act-to-enforce-the-provisions-of-the-fourteenth-amendment-to-the-constitution-of-the-united-states-and-for-other-purposes [https://perma.cc/5NX3-X8CJ].

143. *See id.*

144. Morgan v. District of Columbia, 824 F.2d 1049, 1056 (D.C. Cir. 1987).

145. *U.S. District Courts—Civil Cases Filed, by Nature of Suit—During the 12-Month Periods Ending September 30, 2022 and 2023*, UNITED STATES COURTS (Sept. 30, 2023), https://www.uscourts.gov/statistics/table/c-2a/judicial-business/2023/09/30 [https://perma.cc/DK6E-GWFQ].

assured by the Constitution. They know that guards' deliberate indifference to prisoners' serious medical needs,[146] the unnecessary and wanton infliction of pain,[147] and the deprivation of fundamental human needs[148] can amount to cruel and unusual punishment. It is only because § 1983 provides a private cause of action that the outer bounds of what the Eighth Amendment permits have been defined.

More recently, Congress has amended a statute to address a social problem by writing in a private cause of action. In 2022, Congress passed the Violence Against Women Act (VAWA) Reauthorization Act.[149] This not only reauthorized most existing VAWA programs, but also expanded VAWA's reach to address the nonconsensual dissemination of pornography, or revenge porn.[150] VAWA now provides a private cause of action to those depicted in revenge porn, allowing them to sue the distributor for disclosing the depiction without consent.[151] Plaintiffs have begun to file revenge porn suits in courts across the country,[152] and the contours of this revenge porn law are beginning to develop.[153]

Like revenge porn, rape in prison is a damaging social problem, and the onus lies with Congress to address it. Amending PREA to include a private cause of action could ensure that the contours of what constitutes a violation of PREA are more clearly defined, which would compensate survivors, and hopefully deter the same violation in the future.

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146. Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).

147. Ingraham v. Wright, 430 U.S. 651, 670 (1977); Hope v. Pelzer, 536 U.S. 730, 738 (2002).

148. Wilson v. Seiter, 501 U.S. 294, 304-05 (1991).

149. It was passed as Division W of the Consolidated Appropriations Act of 2022. P.L. 117-103.

150. EMILY J. HANSON, CONG. RSCH. SERV., R47570, 2022 VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 1, 10 (2023).

151. 15 U.S.C.A. § 6851(b)(1)(A) (West 2022).

152. *See, e.g.*, Doe v. Williams, No. 3:24-CV-165, 2024 WL 2805642 (S.D. Miss. May 31, 2024); Doe v. McCoy, No. 1:23-CV-3169, 2024 WL 843908 (N.D. Ga. Feb. 28, 2024); Doe v. Spencer, No. 1:23-CV-00002, 2023 WL 5153569 (M.D. Tenn. Jan. 11, 2023).

153. For example, a Washington court held that a company can be held vicariously liable for its employees' violation of the revenge porn statute. *See* Doe v. T-Mobile USA, Inc., No. 4:23-CV-05166, 2024 WL 1705925, at *4 (E.D. Wash. Apr. 19, 2024).

III. COUNTERARGUMENTS

There are two main counterarguments to adding a private cause of action to PREA. Firstly, there is the practical matter of passing an amendment to a federal statute, which seems idealistic and improbable. Next, there are those who argue that adding a private cause of action to PREA will exacerbate the problem that PLRA was designed to solve; that is, excessive prisoner litigation.

A. Amending the Statute Will Be Difficult to Achieve

Candidly, the outlook is bleak to pass an amendment to PREA. When considering the unique bipartisanship that led to the passage of PREA,[154] it seems rather unreasonable to expect that, in today's deadlocked congressional climate,[155] and in the midst of a torrent of anti-transgender legislation,[156] Congress will be motivated to act on this issue.

PREA in its current form is a failure of the moral imperative that led to its unusually swift passage, which begs the question: what congressional environment would have to exist to generate the political will to amend PREA? Unfortunately, in today's Congress, where members increasingly disagree on policy,[157] one might reasonably predict that it would take a high-profile sexual assault and a significant negative public reaction to garner the goodwill necessary to amend PREA.

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154. *See supra* note 36 and accompanying text.

155. The 118th Congress is set to be the most unproductive session in decades. *See* Andrew Solender, *Capitol Hill Stunner: 2023 Led to Fewest Laws in Decades*, AXIOS (Dec. 18, 2023), https://www.axios.com/2023/12/19/118-congress-bills-least-unproductive-chart [https://perma.cc/QA29-W853]; Gurjit Kaur & Patrick Jarenwattananon, *118th Congress to be the Most Unproductive in Decades*, NPR (Dec. 21, 2023, 5:18 PM), https://npr.org/2023/12/21/1221040449/118th-congress-to-be-the-most-unproductive-in-decades [https://perma.cc/4T9J-BQS4].

156. As of May 2024, forty-two states have proposed over 500 anti-trans bills. *See 2024 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, https://translegislation.com/ [https://perma.cc/KV97-XCHX].

157. *See* NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 18-19 (2d ed. 2016).

However, implausibility does not negate necessity. It remains true that transgender inmates are at high risk of rape in prison, and PREA does little to address the problem. We owe it to our most unpopular and vulnerable populations, who are not empowered to cry foul, to ensure that existing legal safeguards function properly. Sexual violence is never deserved, and PREA fails to protect those most in need of protection.

B. Adding a Private Cause of Action to PREA Undermines PLRA

At face value, including a private cause of action in PREA is in direct conflict with the goals of PLRA. Courts are understaffed and overburdened,[158] so Congress would be understandably reluctant to permit more lawsuits to be filed.

However, an overloaded court docket is not a reason to deny victims justice. A fundamental principle of our legal system is that "every right, when withheld, must have a remedy, and every injury its proper redress."[159] If PREA purports to grant rights to victims, it fails to provide them an adequate remedy, and a right without a remedy is no right at all. Implementing a private cause of action into PREA dovetails neatly with repealing the provisions of PLRA that impede prisoners' legitimate legal claims. PLRA is too restrictive and PREA is not restrictive enough.

Indeed, repealing the exhaustion requirement of PLRA is not the only way to achieve the same desired effect of facilitating inmates' meritorious lawsuits. Other, less drastic means of counteracting the exhaustion requirement could include repealing it with regard to PREA only or amending it to provide clearer guidelines on exhaustion requirements in cases of rape. In short, while some may argue that repealing a provision of a federal statute is a heavy-handed solution, *some* action is necessary in order to address the handicap that PLRA places on PREA.

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158. Kaelan Deese, *Justice Delayed: Federal Case Backlog Prompts Calls to Expand Courts*, WASH. EXAM'R (Sept. 5, 2022, 10:00 AM), https://www.washingtonexaminer.com/policy/courts/caseloads-in-federal-courts-indicate-need-for-more-judges [https://perma.cc/697K-5BG5]; Dimarie Alicea-Lozada, *Court Employee Shortages: Still a Concern*, NAT'L CTR. STATE CTS. (July 5, 2023), https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/court-employee-shortages-still-a-concern [https://perma.cc/T4TU-YE5X].

159. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

Finally, this argument is much ado about nothing. There are only about five thousand transgender prisoners in the United States[160]—five thousand out of a total of two million.[161] In reality, the claim that implementing a private cause of action into PREA for transgender survivors of rape will lead to a torrent of prisoner litigation is, frankly, hyperbolic. It is unlikely that the proportionately small population of transgender inmates will result in a significantly greater burden on courts. While the transgender population may be small in size, the harms suffered by them are severe, and PREA should reflect that.

CONCLUSION

> *[T]he treatment of ... criminals is one of the most unfailing tests of the civilisation of any country.... [It is a] mark and measure [of] the stored-up strength of a nation, and [is] the sign and proof of the living virtue in it.*[162]

> *The degree of civilization in a society can be judged by entering its prisons.*[163]

Prisons are a barometer of what we, as a society, value. How we treat our most vulnerable populations is a mark of who we are. PREA fails transgender people in incarceration and fails us as a society as a result.

Transgender individuals are at higher risks of being incarcerated.[164] In prison, their gender identities are denied when they are placed in facilities according to biological sex.[165] Most importantly, they are at much higher risk of being sexually assaulted

160. *See* Kate Sosin, *Trans, Imprisoned—and Trapped*, NBC NEWS (Feb. 26, 2020), https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436 [https://perma.cc/UR3V-S6TP].

161. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/F4RY-44JN].

162. HC Deb (20 July 1910) (19) col. 1354 (statement of Winston Churchill).

163. Davis v. Ayala, 576 U.S. 257, 290 (2015) (Kennedy, J., concurring) (quoting THE YALE BOOK OF QUOTATIONS 210 (F. Shapiro ed., 2006)).

164. *See supra* Part I.A.

165. *Id.*

than cisgender inmates.[166] More than anyone, they need the protections of PREA, and it is failing them. PREA began with lofty goals, but now, twenty years later, its policy rationales are not being served, the moral fervor with which it was passed has faded, and transgender incarcerated individuals are paying the price.

Professor Valerie Jenness has described PREA as "symbolic law" that has failed to generate enduring effects.[167] Since the passage of PREA, little has changed. We must ask ourselves: do we want PREA to be merely symbolic?

Senator Edward Kennedy, who played an important role in crafting and passing PREA, said upon its passage, "The Prison Rape Elimination Act is an important first step."[168] In the twenty years since then, PREA has proven to be just that: a first step. The next step is clear, and the stakes are high: amending PREA to add a private cause of action would solidify PREA as a legitimate means to protect against and prevent the rape of transgender incarcerated people.

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166. *Id.*

167. Jenness & Smyth, *supra* note 105, at 490.

168. 149 CONG. REC. 18912 (2003) (statement of Sen. Edward Kennedy).

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