



AMERICAN  
CONSTITUTION  
SOCIETY FOR  
LAW AND POLICY

## **Improving Prison Oversight to Address Sexual Violence in Detention**

**By Melissa Rothstein and Lovisa Stannow**

**July 2009**

**All expressions of opinion are those of the author or authors.  
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.**

# Improving Prison Oversight to Address Sexual Violence in Detention

Melissa Rothstein\* and Lovisa Stannow\*\*

## I. Introduction

Sexual abuse in detention is a human rights and a public health crisis. Prisoner rape survivors endure physical scars, contract HIV and other sexually transmitted diseases, and suffer severe psychological harm. As they return home – and more than 95% of all inmates are eventually released<sup>1</sup> – they bring their experiences and medical and mental health conditions with them.

Congress finally brought the problem of sexual violence in detention to the forefront of the public debate by passing the Prison Rape Elimination Act of 2003 (PREA).<sup>2</sup> PREA called for the development of national standards addressing prisoner rape, the gathering of nationwide statistics about the problem, the provision of grants to states to combat it, and the creation of a review panel to hold annual public hearings with the best and the worst performing corrections facilities. As a result of PREA, corrections officials can no longer deny that sexual violence is a problem in their facilities, and leading agencies are developing best practices to improve inmate safety.

PREA in general, and the national standards developed under the law in particular, have the potential to dramatically improve the safety of corrections facilities nationwide for officers and inmates alike. On June 23, 2009, the National Prison Rape Elimination Commission (NPREC), which was also created by PREA, released recommended national standards along with a final report documenting the findings from its comprehensive study.<sup>3</sup> The NPREC's report discusses the systemic problems underlying most instances of sexual abuse behind bars. The standards address core prison management issues – such as staff training, inmate education, housing, and investigations in the aftermath of an assault – that directly affect the levels of sexual abuse in a facility. In accordance with PREA, Attorney General Eric Holder has until June 23, 2010, to publish a final rule adopting national standards.<sup>4</sup> At that time, the standards will be immediately binding on all federal detention facilities; state officials will have one year to certify their compliance or they will lose 5% of their federal corrections-related funding.<sup>5</sup>

---

\* Melissa Rothstein is the East Coast Program Director of Just Detention International (JDI), an international human rights organization committed to ending sexual violence in all forms of detention.

\*\* Lovisa Stannow is JDI's Executive Director.

<sup>1</sup> TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES (2003), *available at* <http://ojp.usdoj.gov/bjs/pub/pdf/reentry.pdf>.

<sup>2</sup> 42 U.S.C. §§ 15601 *et seq.*

<sup>3</sup> The National Prison Rape Elimination Commission, Report (2009) [hereinafter "NPREC Report"], *available at* [http://nprec.us/files/pdfs/NPREC\\_FinalReport.PDF](http://nprec.us/files/pdfs/NPREC_FinalReport.PDF); National Prison Rape Elimination Commission, Standards for the Prevention Detection, Response and Monitoring of Sexual Abuse in Adult Prisons and Jails (2009) [hereinafter "NPREC Standards"], *available at* [http://nprec.us/files/pdfs/NPREC\\_PrisonsJailsStandards.PDF](http://nprec.us/files/pdfs/NPREC_PrisonsJailsStandards.PDF).

<sup>4</sup> 42 U.S.C. § 15607 (a)(1).

<sup>5</sup> 42 U.S.C. § 15607 (b), (c)(2).

This Issue Brief discusses the urgent need for national standards addressing sexual abuse in detention and for a strong monitoring system to improve safety in detention facilities. In the next section, we describe the problem of sexual violence in detention and its systemic and managerial underpinnings. We then discuss the NPREC's standards, and examine the need for improved corrections oversight and the vital role that the national standards can play. Finally, we conclude by urging the Attorney General to ratify the NPREC's standards and establish a strong, independent mechanism for measuring compliance.

## II. The Problem of Prisoner Rape

“When I went to prison, I was 28 years old, I weighed 123 pounds, and I was scared to death. I was right to be afraid. ... As soon as I got there, inmates started acting like they were my friends so they could take advantage of me. I told them I wasn't going to put up with that. I didn't want to be robbed of my manhood. But they jumped on me. They beat me. Within two weeks, I was raped at knife point.”<sup>6</sup>

According to the best available research, 20% of inmates in U.S. men's institutions are sexually abused at some point during their incarceration.<sup>7</sup> The rate for women's institutions varies dramatically from one facility to another, with one in four inmates being victimized at the worst prison.<sup>8</sup> In an inmate survey mandated by PREA and published in December 2007, the Bureau of Justice Statistics (BJS) found that 4.5% (or 60,500) of the more than 1.3 million inmates held in federal and state prisons had been sexually abused in the previous year alone.<sup>9</sup> A subsequent BJS survey in county jails was just as troubling: nearly 25,000 jail detainees reported having been sexually abused in the past six months.<sup>10</sup> These surveys are snapshots, reaching only inmates present on a particular day. As the annual number of admissions to county jails is 17 times higher than the jail population on any day,<sup>11</sup> the BJS data represents just the tip of the iceberg.

These troubling statistics do not portray an inevitable byproduct of incarceration. Rather, sexual violence behind bars is largely the result of mismanagement, deficient policies, and dangerous practices. For example, inmates who are vulnerable are frequently housed with known predators, abused relentlessly, and marked as fair game for future attacks.<sup>12</sup> Incarcerated

---

<sup>6</sup> *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars: Hearing Before the National Prison Rape Elimination Commission* (Aug. 19, 2005) (testimony of Kendall Spruce).

<sup>7</sup> Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67 (1996); see also Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383 (2000).

<sup>8</sup> Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217, 220 (2002).

<sup>9</sup> ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007* (2007).

<sup>10</sup> ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES, 2007* (2008) [hereinafter “BJS JAIL SURVEY”].

<sup>11</sup> WILLIAM J. SABOL & TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, *JAIL INMATES AT MIDYEAR 2007* (2008).

<sup>12</sup> THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *CONFRONTING CONFINEMENT* 29-30 (Vera Institute of Justice 2006), available at [http://www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf);

survivors of sexual violence who are brave enough to report their abuse are frequently not believed, and in some cases punished.<sup>13</sup> Overcrowded facilities burden staff, making it nearly impossible to monitor everything that may be happening in any given area.<sup>14</sup>

The most marginalized detainees are also the most vulnerable to abuse. In particular, inmates who identify as, or are perceived to be, lesbian, gay, bisexual, or transgender (LGBT) are disproportionately targeted for attacks.<sup>15</sup> Young inmates are also at heightened risk, whether housed with adults or in juvenile facilities.<sup>16</sup> Inmates who have a physical disability, a mental illness, or are developmentally delayed are likewise exceptionally at risk.<sup>17</sup>

Survivors can be abused relentlessly, sometimes for long periods of time, and marked as fair game for attacks by other detainees. One study found that nearly 75% of male and 57% of female prisoner rape survivors were sexually abused more than once, and 30% endured six or more assaults.<sup>18</sup> In some cases, prisoners are treated like the perpetrators' property and sold within the facility.

Inmates who are sexually abused rarely have adequate options for reporting their assault.<sup>19</sup> In the worst facilities, corrections officials facilitate or participate in sexual violence, respond to inmates' cries for help with laughter or derision, and grant perpetrators impunity. Many corrections grievance systems lack mechanisms for serious redress, and tend to impose procedural requirements that inmates are unable to meet.<sup>20</sup> As a result, a complaint of sexual abuse in detention typically never reaches the courts, precluding any independent assessment of

---

HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 148-49 (2001) [hereinafter "Human Rights Watch"], available at <http://www.hrw.org/legacy/reports/2001/prison/report.html>.

<sup>13</sup> See, e.g., NPREC Report 102-06; HUMAN RIGHTS WATCH, *supra* note 12, at 130-33.

<sup>14</sup> NPREC Report at 80-81; COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *supra* note 12, at 23-27.

<sup>15</sup> See, e.g., Valerie Jenness et al., Center for Evidence-Based Corrections, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007) (in study funded by the California Department of Corrections and Rehabilitation (CDCR) and conducted at six California men's prisons, 59% of transgender women reported having been sexually abused by another inmate – a rate that was 13 times higher than for the inmate population overall); BJS JAIL SURVEY at 6 ("Inmates with a sexual orientation other than heterosexual reported significantly higher rates of sexual victimization. An estimated 2.7% of heterosexual inmates alleged an incident, compared to 18.5% of homosexual inmates, and 9.8% of bisexual inmates or inmates indicating 'other' as an orientation."); see also NPREC Report at 73-74.

<sup>16</sup> ALLEN J. BECK, DEVON B. ADAMS & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY JUVENILE CORRECTIONAL AUTHORITIES, 2005-06 (2008) (calculating that more than 4,000 reports of sexual abuse were reported to juvenile corrections authorities in 2005 and 2006, resulting in nearly 17 allegations of sexual violence per 1,000 youth held in juvenile facilities); ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005 (2006); see also NPREC Report at 140-48.

<sup>17</sup> NPREC Report at 72-73.

<sup>18</sup> Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. INTERPERSONAL VIOLENCE 1591, 1599 (2006).

<sup>19</sup> NPREC Report at 100.

<sup>20</sup> See generally HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 11-22 (2009) (discussing the technical requirements that make it nearly impossible for prisoners to successfully navigate many facilities grievance systems), available at <http://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf>.

its merits by a judge.<sup>21</sup> To make matters worse, beyond the risk of retaliation from officials and other inmates, survivors who report abuse may themselves be subject to disciplinary sanctions, based on their forced participation in prohibited sexual activity.<sup>22</sup>

Survivors of sexual violence behind bars experience the same devastating repercussions as other rape survivors, and the physical and emotional scars can last for years.<sup>23</sup> During the beatings that frequently accompany prisoner rape, survivors suffer injuries ranging from torn flesh to broken bones to rectal bleeding. Sexually transmitted infections, such as HIV, syphilis, and hepatitis, are significantly more common in prisons and jails than on the outside<sup>24</sup> – and prisoner rape survivors are at particularly high risk. The physical harm is often compounded by a reluctance to seek medical care for fear of ridicule or retribution.

In most cases, prisoner rape survivors are forced to suffer in silence because they have limited resources available to them, their physical safety concerns are often disregarded, and they are restricted from seeking legal recourse. In the short term, survivors experience shame, fear, anger, an exaggerated startle response, impaired memory and concentration, and/or rapid mood swings.<sup>25</sup> The absence of mental health counseling in the wake of a sexual assault places survivors at especially high risk of developing serious long-term problems, such as post-traumatic stress disorder (PTSD), depression, suicidal feelings, and alcohol and drug addiction.

Despite the shocking conditions that exist in some facilities, sexual abuse in detention is almost wholly preventable, as made clear by the fact that some U.S. facilities are plagued by this type of violence, while others are not. And it is clear that safe facilities are led by officials who have a dedication to a zero-tolerance standard, who ensure proper planning, prevention, detection, and response, and who allow their institutions to be monitored internally and externally.

---

<sup>21</sup> *Id.*; Deborah M. Golden, *The Prison Litigation Reform Act – A Proposal for Closing the Loophole for Rapists*, 1 ADVANCE: J. ACS ISSUE GROUPS 95 (2006).

<sup>22</sup> *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 7, § 202.2, Standards of Inmate Behavior: Rule 101.10 (“An inmate shall not engage in or encourage, solicit, or attempt to force another to engage in any sexual act.”).

<sup>23</sup> NPREC Report at 126-30.

<sup>24</sup> *See, e.g.*, Susan Okie, *Sex, Drugs, Prisons, and HIV*, 356 NEW ENG. J. MED. 105 (2007) (finding that, in 2004, the HIV prevalence rate inside U.S. prisons was more than four times higher than in society overall); Scott A. Allen et al., *Hepatitis C Among Offenders – Correctional Challenge and Public Health Opportunity*, 67 FED. PROBATION 22 (Sept. 2003) (finding that Hepatitis C rates are 8 to 20 times higher in prisons than on the outside, with 12 to 35% of prison cases involving chronic infection); Centers for Disease Control & Prevention, U.S. Dep’t Health & Hum. Svcs., *Sexually Transmitted Disease Surveillance 2007* at 89 (2008), available at <http://www.cdc.gov/std/stats07/Surv2007-SpecialFocusProfiles.pdf>.

<sup>25</sup> JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1997); Jenny Petrak, *The Psychological Impact of Sexual Assault*, in *THE TRAUMA OF SEXUAL ASSAULT: TREATMENT, PREVENTION AND PRACTICE* 19 (Jenny Petrak & Barbara Hedge, eds., 2002).

### III. The NPREC Standards for Adult Prisons and Jails

The NPREC is a bipartisan commission mandated by PREA to develop recommended binding national standards to protect inmates from sexual abuse in prisons and jails.<sup>26</sup> The development of the NPREC standards was a five-year process that included holding public hearings around the country, engaging the work of expert committees, and obtaining feedback from people, groups, and organizations nationwide.<sup>27</sup>

The NPREC standards are divided into four categories, representing important components in the effort to end sexual abuse in detention: prevention and response planning; prevention; detection and response; and monitoring. The standards are bold in that they address the broad spectrum of issues that underlies most instances of sexual abuse behind bars, and basic in their identification of systemic issues long known to create problems.

#### A. Prevention and Response Planning

“I was on a paint crew. ... [T]he guard drove me outside the work area and told me that if I didn’t give him oral sex, he would report me as an escapee.

I did what I was told to do, because I wanted to go home. This was the first time I was in prison, and I didn’t know anything. I performed oral sex because I didn’t want to be charged with escape. My mind was somewhere else the whole time. When I got back to my unit, I cried and cried.”<sup>28</sup>

Sound corrections administration requires significant planning and strong leadership. Corrections staff are the ultimate enforcers of human rights in detention and, as such, must adhere to the highest possible professional and ethical standards. If the agency head is not committed to ensuring safety at any cost, dangerous conditions pervade. In such settings, officials who participate or acquiesce in abuse are able to act with impunity, sending a strong message that such behavior is acceptable.

At the outset, facilities must have a zero-tolerance standard for sexual abuse, which prohibits all sexual contact between staff and inmates and all forced or coercive sexual activity among inmates.<sup>29</sup> Agencies also need corresponding written policies and practices to ensure that such a standard can be enforced – what the Director of the Rhode Island Department of Corrections A.T. Wall described to the NPREC as “zero tolerance with teeth.”<sup>30</sup>

---

<sup>26</sup> The NPREC was charged with developing standards for all forms of detention, including immigration detention, juvenile facilities, lockups, and community corrections. This issue brief focuses exclusively on the standards for adult prisons and jails.

<sup>27</sup> NPREC Report at 26-27.

<sup>28</sup> Stop Prisoner Rape, *Stories from Inside: Prisoner Rape and the War on Drugs* 14 (2007), available at <http://www.justdetention.org/pdf/StoriesFromInside032207.pdf> (testimony of Robin McArdle). In September 2008, Stop Prisoner Rape changed its name to Just Detention International.

<sup>29</sup> NPREC Report at 54; NPREC Standards PP-1, PP-2.

<sup>30</sup> NPREC Report at 53.

To provide the needed “teeth,” the NPREC standards require supplementing a written zero-tolerance policy with basic provisions that ensure appropriate supervision and evidence collection, sound hiring decisions, and collaboration with agencies in the community.<sup>31</sup> Cumulatively, these provisions promote the professionalism and expertise needed to maintain safe facilities and take advantage of available community resources.

## B. Prevention

“[O]ne of the things that disturbs me the most is that before the abuse began, I told the officials that I felt vulnerable in the open dormitory unit, and I told the officials that I felt threatened by the assailant. My assailant was a leader in a gang...and he was known for being violent. When he began to threaten and harass me, I told the prison officials, but the prison officials did nothing.”<sup>32</sup>

Ultimately, the goal of all PREA-related efforts is to prevent sexual abuse from occurring. For preventative efforts to be effective, they must begin with educating staff and inmates about the problem and include thorough mechanisms for ensuring that housing and classification decisions promote safety.

Corrections administrators, line staff, contractors, and volunteers all need training on how to detect sexual violence and on their responsibilities in preventing and responding to such abuse. Similarly, inmates must be aware of their absolute right to be free from sexual abuse, and of their responsibility not to engage in predatory behavior. “A strong educational program on sexual abuse sends the message that an agency will not tolerate sexual abuse by staff or prisoners and that preventing abuse and holding perpetrators accountable are top priorities.”<sup>33</sup> The standards identify some of the most basic information that must be conveyed to employees, volunteers, contractors, and inmates, and mandate specialized training for key staff such as investigators and medical and mental health professionals.<sup>34</sup>

Proper classification is critical to ensuring that potential predators and potential victims are not housed together. A good classification system is objective, dynamic, and recognizes that individual safety needs are more unique than the general traits that may place someone at risk.<sup>35</sup> The standards mandate that each phase of classification (intake, full classification, and classification reviews) include a screening for the risk of victimization and abusiveness, which includes consideration of the traits that are known to place someone at risk as well as an individual’s own perception of vulnerability.<sup>36</sup> Importantly, a sound classification system should help break the insidious and common prison practice of automatically placing someone who has been victimized, or is at heightened risk for abuse, in protective custody. While seemingly for the inmate’s own benefit, protective custody is a form of segregation that results in a loss of

---

<sup>31</sup> NPREC Standards PP-3, PP-4, PP-5, RP-1, RP-2, RP-3, RP-4, RP-6.

<sup>32</sup> *The Cost of Victimization: Why Our Nation Must Confront Prison Rape: Hearing Before the National Prison Rape Elimination Commission* (June 14, 2005) (testimony of Keith DeBlasio).

<sup>33</sup> NPREC Report at 58.

<sup>34</sup> NPREC Standards TR 1-5.

<sup>35</sup> NPREC Report at 74-77; COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS, *supra* note 12, at 29.

<sup>36</sup> NPREC Standards SC-1; NPREC Report 70-74.

services and programs, which is punitive by default.<sup>37</sup> The NPREC standards require that segregated housing be used only as a last resort and a temporary option, without limiting access to programs, education, and work opportunities.<sup>38</sup>

### C. Detection and Response

“The guards knew what had happened. The prison doctors knew as well. When I saw the proctologist for my bleeding, I raised concern about the size of his rectal scope, and his reply was, ‘Well, it’s not any larger than what’s been going up there.’”<sup>39</sup>

Rape and sexual assault are highly underreported crimes in communities outside of prison, as well as behind bars.<sup>40</sup> Prisoner rape survivors who report their abuse frequently endure retaliation, punitive conditions, and the high likelihood that their allegations will not be investigated or otherwise acted upon.<sup>41</sup> “[S]uccessful efforts to enhance reporting depend both on the accessibility and safety of mechanisms to report and on serious and timely responses once reports are made.”<sup>42</sup>

The national standards recognize the need to make available multiple reporting channels to inmates, including external ones, and the importance of protective measures that will prevent retaliation.<sup>43</sup> Like other inmates, prisoner rape survivors who are still incarcerated are often precluded from seeking relief in court due to the Prison Litigation Reform Act (PLRA). Among the barriers to litigation posed by this law, the PLRA requires that an inmate fully exhausts administrative remedies, including the often harsh and detailed procedural requirements of the facility’s grievance system.<sup>44</sup> Sexual assault often results in trauma that hinders the survivor’s ability to navigate the grievance process, particularly within the short deadlines many prisons impose. The standards require corrections agencies to adopt a policy with more reasonable requirements for complaints of sexual violence to be considered exhausted.<sup>45</sup>

Responding to a report of sexual abuse requires multiple prompt actions by facility staff, including initiating criminal and administrative investigations and ensuring that the survivor is protected from further abuse and can access needed medical and mental health services.<sup>46</sup> The standards require that such a response include the coordination of: security staff; forensic, medical, and mental health practitioners; investigators; and facility management.<sup>47</sup> Such an

---

<sup>37</sup> NPREC Report 78-80.

<sup>38</sup> NPREC Standards SC-2.

<sup>39</sup> *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars: Hearing Before the National Prison Rape Elimination Commission* (August 19, 2005) (testimony of T.J. Parsell).

<sup>40</sup> MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2007 at 7 (2008) (finding that less than 42% of all rapes and sexual assaults were reported to the police).

<sup>41</sup> See, e.g., HUMAN RIGHTS WATCH, *supra* note 12, 130-33.

<sup>42</sup> NPREC Report at 102.

<sup>43</sup> NPREC Standards RE-1, OR-5

<sup>44</sup> 42 U.S.C. § 1997e(a); see also *supra* notes 21-22.

<sup>45</sup> NPREC Standards RE-2.

<sup>46</sup> NPREC Report at 114.

<sup>47</sup> NPREC Standards OR-4.



approach is aligned with a proven best practice in the community – the development of an interdisciplinary sexual assault response team (SART).<sup>48</sup>

Sexual abuse in detention is a crime<sup>49</sup> and a breach of prison rules. The NPREC standards require that every report of sexual assault be thoroughly investigated in a uniform manner by an investigator who has received training specific to sexual assault cases, and that compelled interviews during an administrative process do not jeopardize any potential criminal prosecution.<sup>50</sup> The standards further mandate corrections authorities to develop a written policy about sanctions for staff and inmates who perpetrate sexual abuse, including a presumptive sanction of termination for perpetrating staff.<sup>51</sup> Such measures will help ensure that sexual violence in detention is taken as seriously as other crimes.

In addition to the investigative response, officials must ensure that survivors can access appropriate medical and mental health care. “[P]roviding appropriate treatment often is the most effective way to promote recovery and reduce the chance that the trauma of sexual abuse will lead to lasting or life-threatening medical or mental health problems.”<sup>52</sup>

The standards seek to provide incarcerated survivors with the same quality of care generally required in the community, including access to emergency services and on-going mental health and medical evaluation and treatment.<sup>53</sup>

#### D. Monitoring

“Few correctional facilities are subject to the kind of rigorous internal monitoring and external oversight that would reveal why abuse occurs and how to prevent it.”<sup>54</sup> The NPREC standards require incident reviews, data collection, and independent audits as means to ensure internal accountability and external scrutiny.<sup>55</sup> The audits and data collected must be made available to the public, with identifying information redacted to protect the safety and privacy of any individuals named, so that outside advocacy groups and other stakeholders can serve as community watchdogs and make sure that the standards are properly implemented.

#### IV. Improving Oversight with the PREA Standards

“While I was in prison, the fear of retaliation by staff or other prisoners haunted me and prevented me from reporting the rape

---

<sup>48</sup> See, e.g., U.S. DEP’T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS, ADULTS/ADOLESCENTS (2004) (cited in NPREC Standards OR-4 discussion).

<sup>49</sup> In addition to the penal laws applicable to sex crimes in the community, every state and the District of Columbia now criminalizes staff-on-inmate sexual activity, regardless of consent. See JUST DETENTION INTERNATIONAL, STATE-BY-STATE COMPARISON OF CUSTODIAL SEXUAL MISCONDUCT LAWS (2007), available at [http://www.justdetention.org/pdf/state\\_chart.pdf](http://www.justdetention.org/pdf/state_chart.pdf).

<sup>50</sup> NPREC Standards IN-2; see also NPREC Report 106-14

<sup>51</sup> NPREC Standards DI-1, DI-2.

<sup>52</sup> NPREC Report 131.

<sup>53</sup> NPREC Standards MM-2, MM-3.

<sup>54</sup> NPREC Report 82.

<sup>55</sup> NPREC Standards DC-1, DC-2, DC-3, AU-1; NPREC Report 84-88.

right away. My fear led me to attempt suicide just to escape the pain of my situation. Because my previous complaints to prison officials resulted in sharp rebukes, and the prison psychologist's assistance was limited, I felt hopeless."<sup>56</sup>

The NPREC kept firmly within its mandate under PREA in placing the responsibility on corrections officials to meet the basic requirements of the standards and limiting its consideration of the larger societal responsibilities for addressing the problem to nonbinding recommendations.<sup>57</sup> As a result, the only oversight mandated by the standards is the monitoring done by corrections officials and by the auditors with whom they contract. While such measures will help administrators identify and correct systemic problems, further external scrutiny is essential to provide a credible, objective assessment of a facility's safety.

Comprehensive oversight encompasses various functions, such as regulation, audit, accreditation, reporting, investigation, and monitoring.<sup>58</sup> No one method of oversight can serve all of these functions. A combination of internal and external oversight measures is essential to putting an end to the sexual abuse that continues to plague U.S. detention facilities. According to Michelle Deitch, an expert on prison oversight, "[e]xternal scrutiny is essential any time that a closed institution is responsible for the control of individuals; it is a linchpin in any effort to ensure the safety of prisoners."<sup>59</sup>

The historical lack of transparency of U.S. prisons and jails has been a major contributor to the widespread human rights abuses that the standards seek to eliminate.<sup>60</sup> Without external monitoring, officials who participate or acquiesce in sexual violence behind bars are placed in powerful positions and are able to act with impunity. Even the most outstanding officials often cannot identify problems within their own system – shortcomings that an outsider often is able to recognize – and may not be aware of best practices from other jurisdictions.

Despite the clear advantages to letting outsiders in, few jurisdictions empower an external entity, such as an inspector general or ombudsperson, to respond to inmate complaints and/or to audit facilities.<sup>61</sup> As U.S. Department of Justice Inspector-General Glenn Fine has noted, "There is tremendous pressure within an institution to keep quiet."<sup>62</sup>

Traditionally, civil rights litigation has served as a strong component of external oversight – allowing those whose rights have been violated to seek redress and demand reforms in court. As mentioned previously, the PLRA virtually bars prisoner rape survivors and other

---

<sup>56</sup> *Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses, Hearing before the House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security* (Nov. 7, 2007) (testimony of Garrett Cunningham), available at <http://judiciary.house.gov/hearings/pdf/Cunningham071108.pdf>.

<sup>57</sup> See NPREC Report, App. C.

<sup>58</sup> *Special Topics In Preventing and Responding to Prison Rape: Medical and Mental Health Care, Community Corrections Settings, and Oversight, Hearing before the National Prison Rape Elimination Commission* (Dec. 6, 2007) (testimony of Michele Deitch).

<sup>59</sup> *Id.*

<sup>60</sup> THE COMMISSION ON THE SAFETY AND ABUSE IN AMERICA'S PRISONS, *supra* note 12, at 77-84.

<sup>61</sup> See *id.* at 79.

<sup>62</sup> *Id.* at 82.

inmates whose constitutional rights have been violated from obtaining federal review of their claims because of the law's complex procedural requirements and substantive demands.<sup>63</sup> While the NPREC standards seek to minimize the impact of the PLRA's exhaustion requirement, they propose only a relatively small fix to one of various barriers imposed by the law on incarcerated survivors who seek assistance from the courts. Other provisions – such as the requirement that an inmate must prove a physical injury in order to receive monetary damages – must be amended.

PREA established clear parameters for how the standards would be developed and ratified; the law is less clear on how the standards will be monitored or enforced. The Attorney General is charged with publishing an annual report listing each state that does not comply with the standards and reducing the amount of federal funds that state would receive “for prison purposes” by 5%.<sup>64</sup> How the Attorney General is to measure compliance is not discussed.

For the standards to be accorded the meaning and impact that Congress intended in the passage of PREA, the Attorney General must do more than rely on the assurances of state officials that their systems are in compliance. The NPREC recommends that the Attorney General establish a PREA Advisory Council to assist with promulgating the standards, assessing their implementation, and proposing amendments as needed, and create a full-time Special Assistant for PREA to have primary responsibility over the implementation of the standards.<sup>65</sup>

Whether the Attorney General follows the NPREC's recommendations, or develops an alternate structure, he must create a strong system for independently measuring whether written policies are sound and whether such policies are put into practice in ways that protect inmates and respond to the conditions within a specific facility. In doing so, information from current and former inmates, advocates, and other stakeholders should be considered along with the assessment of corrections insiders.

## V. Conclusion

“After I was released from jail, I tried to live a normal life, but the rape haunted me. I had flashbacks and nightmares. I was diagnosed with post-traumatic stress disorder. My marriage and my business failed. I have been arrested over and over again for acting out. I've had sexual problems. I've been filled with anger for nearly 40 years.”<sup>66</sup>

When the government removes someone's liberty, it incurs the absolute responsibility to protect that person's safety and dignity. With nearly 2.4 million people in detention at any given time in the United States,<sup>67</sup> often held for long periods of time and in overcrowded facilities,

---

<sup>63</sup> See *id.* at 7 and citations therein.

<sup>64</sup> 42 U.S.C. § 15607(c)(2)-(3).

<sup>65</sup> NPREC Report at 237.

<sup>66</sup> *The Cost of Victimization: Why Our Nation Must Confront Prison Rape: Hearing Before the National Prison Rape Elimination Commission* (June 14, 2005) (testimony of Tom Cahill).

<sup>67</sup> WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007 (2008) (reporting that, on June 30, 2007, there were 1,595,034 people incarcerated in a federal or state prison);

keeping each inmate safe is a formidable task. Far too often, corrections officials are failing at that task. That is why we urge the Attorney General to adopt the carefully crafted NPREC standards, and to develop an oversight mechanism that will ensure that prisons and jails effectively address the problem of sexual assault.

As the NPREC notes, “PREA represents a sea change in public consciousness and in national commitment to protecting individual under correctional supervision from sexual abuse.”<sup>68</sup> The standards addressing sexual violence behind bars have the potential to transform U.S. detention facilities. If the final standards codified by Attorney General Holder remain strong and are effectively monitored, corrections officials nationwide will be compelled to implement policies and practices that dramatically increase safety in their facilities, benefiting inmates and staff alike.

---

WILLIAM J. SABOL & TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2007 (2008) (finding that, on June 29, 2007, there were 780,581 people detained in a county jail).

<sup>68</sup> NPREC Report at 24.