

# CRIMINAL LAW BRIEF

American University Washington College of Law

Providing a Medium for Students, Practitioners, and Academics to Explore, Discuss, and Debate the Far-Reaching Elements of Criminal Law

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# PROPOSED MARYLAND JURY INSTRUCTION ON CROSS-RACIAL IDENTIFICATION

David E. Aaronson\*

## Introduction

This article discusses the merits of a specific jury instruction on cross-racial identification for use in criminal cases when eyewitness identification is the central or critical issue, little or no corroborating evidence is presented, and the circumstances raise doubts about the reliability of the identification.

A proposed instruction developed for use in Maryland is as follows:

In this case, the defendant, \_\_\_\_\_ (*insert name*), is of a different race than \_\_\_\_\_ (*insert name of identifying witness*), the witness who has identified [him][her]. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he][she] would not have greater difficulty in making a reliable identification.]<sup>1</sup>

This instruction is intended to supplement standard jury instructions identifying factors to be considered in evaluating eyewitness identifications including: (1) the opportunity for the witness to observe the offense and the person committing the offense, including the length of time the witness had to observe the person committing the offense, the distance between the witness and the person committing the offense, and the lighting conditions at the time; (2) the witness' state of mind at the time of the offense; (3) the witness' degree of attention to the person during the commission of the offense; (4) whether the witness knew or had seen the person before; and (5) the accuracy of any prior description of the person given by the witness.

The jury is also instructed that it may consider the circumstances of any earlier identification that occurred out of court, such as: (1) the length of time between the offense and the identification; (2) any statements made by the police officer(s) prior to or during the identification procedure; (3) the state of mind of the witness at the time of the identification; and (4) any misidentification by the witness or failure to identify the defendant. In addition, jurors are instructed to consider the

credibility of the identifying witness, including any interest or bias the witness may have in the outcome of a case and other factors affecting credibility.

## The Need for a Jury Instruction on Cross-Racial Identification

The purpose of a specific jury instruction on cross-racial identification is to permit juries to consider the increased possibility of misidentification in determining whether or not there is sufficient evidence of guilt.

Jury instructions specifically tailored to safeguard against cross-racial identification errors would serve to enhance fairness and confidence in the criminal justice system, especially in situations where there is little or no corroborating evidence to substantiate the eyewitness identifications. In appropriate cases, instructions addressing the enhanced risk of cross-racial misidentification should be given after the general instructions regarding identification and credibility of witnesses so that jurors have the means to evaluate the accuracy of the identification.

Research shows that persons of one racial or ethnic group have more difficulty distinguishing among individual faces of another group than among faces of their own group.<sup>2</sup> An inaccurate identification due to the so-called "own race" effect may result in higher wrongful conviction rates when defendants are of different races than the witnesses who identify them.<sup>3</sup> Studies show that persons who primarily interact within their own racial group, especially if they are in the majority, will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups.<sup>4</sup>

For example, during a recent misdemeanor trial in a Maryland state courthouse, an eyewitness to a criminal offense identified a student attorney in the American University Washington College of Law's Criminal Justice Clinic, rather than the defendant, as the perpetrator of the crime. The eyewitness, a Hispanic man, made a statement prior to trial identifying the defendant, an African American man, as the perpetrator and explained that he had known the defendant for three years.

When asked to identify the perpetrator at trial, however, he pointed to the African American law student representing the defendant, resulting in an immediate dismissal of the charges.<sup>5</sup> Unfortunately, cross-racial courtroom misidentifications are rarely as obvious as the one in this example.

Traditional trial protections of suppression hearings, *voir dire*, cross-examination of witnesses, closing arguments, and jury instructions on the credibility of witnesses and evaluation of eyewitness testimony do not adequately address the special recognition impairments often present in cross-racial eyewitness identifications. Abshire and Bornstein state that "[m]uch of the reason for juries' erroneous convictions based on faulty eyewitness identifications is that jurors are not very

sensitive to the factors that determine eyewitness accuracy.”<sup>6</sup> The additional protection of a cross-racial jury instruction is needed, as stated by Johnson, “because the own-race effect strongly influences the accuracy of identification, because that influence is not understood by the average juror, because cross-examination cannot reveal its effects, and because jurors are unlikely to discuss racial factors freely without some authorization to do so.”<sup>7</sup>

### Race, Ethnicity and Cross-Racial Identification Studies

Although eyewitness identifications are often reliable and persuasive evidence, thirty years of social science research and the contributions of the Innocence Project, a national organization dedicated to exonerating wrongfully convicted persons through DNA testing, have shown that erroneous eyewitness identifications are the single greatest cause of wrongful convictions nationwide. Approximately three-quarters of the more than 200 wrongful convictions in the United States overturned through DNA testing resulted from eyewitness misidentifications.<sup>8</sup> Of the seventy-seven percent of cases, where race is known, forty-eight percent of the cases involved cross-racial eyewitness identifications.<sup>9</sup>

Why do persons of one racial group generally have greater difficulty identifying persons of another racial group than among faces of their own group? Loftus, Doyle and Dysart state:

Many possible explanations of the cross-racial effects have been offered; for example, the effects are due to differential experience with members of a different race, to prejudicial attitudes about members of different races, or to different modes of processing faces of another race. These have been thoroughly reviewed. The best explanation seems to be that people make more mistakes on a cross-racial identification for a number of reasons, including, but not limited to, the amount of contact with persons from other racial groups, the amount of attention paid to other race persons, and time spent encoding features that are less useful in discriminating people from other groups (footnotes omitted).<sup>10</sup>

A classic study by psychologists Roy Malpass and Jerome Kravitz compared recognition and memory of identification of persons among students at Howard University, a predominantly black university, and the University of Illinois, a predominantly white university. Photographs of black and white males were shown to the students and later the subjects were tested. Subjects recognized faces of their own race better than faces of the other race. A striking finding was that white subjects from the University of Illinois made two to three times as many false identifications when attempting to identify black faces of students from Howard University than when attempting to identify white faces.<sup>11</sup>

Since the study by Malpass and Kravitz, many other

studies “have been conducted with slightly different results from one study to another but with a generally consistent pattern.”<sup>12</sup> The studies show not only a greater difficulty in recognizing faces of another race, but members of one race also have more difficulty reconstructing faces of other races.<sup>13</sup>

Studies and collected data indicate that this “own race” effect applies across racial groups: Caucasians, African Americans, Asian Americans, and Latino Americans are better able to recognize members of their own race than members of another race. A recent ABA report concluded: “Cross-racial identifications are generally inferior to within-race identifications.”<sup>14</sup>

For example, one study found that both Japanese and Chinese Americans are significantly better at recognizing Asian American faces than African American faces.<sup>15</sup> They are also better at recognizing African American faces than Caucasian faces.<sup>16</sup> Additionally, the study reported that Japanese Americans are only marginally better at recognizing Japanese

American faces than Chinese Americans faces, and the reverse is equally consistent for Chinese Americans recognizing Japanese American faces.<sup>17</sup>

The research on cross-ethnicity identification is less clear-cut. At least one state supreme court, authorizing a cross-racial jury instruction in certain situations, has held that studies on *cross-ethnicity* identification—as opposed to studies of *cross-racial* identification—do not provide enough support to warrant a specific jury instruction.<sup>18</sup>

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*Studies and collected data indicate that this “own race” effect applies across racial groups... A recent ABA report concluded: “Cross-racial identifications are generally inferior to within-race identifications.”*

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### Federal Jurisdictions Permitting the Use of a Cross-Racial Identification Jury Instruction

In *United States v. Telfaire*,<sup>19</sup> the D.C. Circuit affirmed the defendant’s conviction when the trial court refused, in the absence of a request, to give a special instruction on identification finding that the witness had an adequate opportunity to observe the defendant.<sup>20</sup> The court went on to create a model identification instruction to deal with the shortcomings in the identification process, though this instruction omitted consideration of the races of the defendant and the witness.<sup>21</sup> To address this deficiency, Chief Judge David L. Bazelon in a concurring opinion stressed the problems surrounding cross-racial identifications and advocated for the addition of the following language to the court’s model identification instruction:

In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one’s own. If this is also your own experience, you may consider it in evaluating the witness’s testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the defendant’s race that he would not have greater difficulty in making a reliable identification.<sup>22</sup>

Most circuits have approved the *Telfaire* recommended model identification instruction, but not the specific instruction on cross-racial identification in Judge Bazelon's concurring opinion. Although many circuits agree that the recommended model identification instruction may or should be given when identification is the key issue in the case and the identification testimony is uncertain, only some circuits *require* the instruction to be given in these circumstances.<sup>24</sup>

### Maryland Case Law Addressing the Use of a Cross-Racial Identification Jury Instruction

In 2004, the Maryland intermediate appellate court, the Court of Special Appeals, in *Smith v. State*,<sup>25</sup> affirmed the conviction of the defendant, an African American man, of attempted robbery and related offenses, based on the identification and testimony of the victim, a Caucasian woman. At trial, the defendant's counsel requested Chief Judge Bazelon's jury instruction on cross-racial identification from his concurring opinion in *Telfaire*.<sup>26</sup> The trial court refused to give the instruction, instead instructing the jury on the shortcomings of eyewitness identification in general.<sup>27</sup>

In reviewing the trial record, the Court of Special Appeals noted that the victim had significant opportunity to observe the defendant at the time of the crime and gave the police a detailed description immediately afterwards.<sup>28</sup> At trial, the victim stated that she was "extremely good with faces."<sup>29</sup> The victim, an artist and teacher, lived in a mixed-race neighborhood and had the ability to focus on facial features. The jury heard the victim cross-examined and could find her credible as an observer of human faces.<sup>30</sup> The court held that the evidence did not indicate that the victim had problems distinguishing the faces of different African Americans and, therefore, the trial court did not abuse its discretion both in refusing to give a specific jury instruction on cross-racial identification and in rejecting the defendant's claim that the cross-racial identification required special emphasis in closing argument.<sup>31</sup>

Maryland's highest court, the Court of Appeals, reviewing the decision of the Court of Special Appeals, agreed that the trial court did not abuse its discretion in this case, but given another set of facts, the court stated that it may be appropriate for a trial court to give an instruction on cross-racial identification.<sup>32</sup> The court held, however, that the trial court erred in prohibiting defense counsel from commenting on the cross-racial identification in its closing argument, stating that "[g]enerally, counsel has the right to make any comment or argument that is warranted by the evidence proved or the inferences therefrom."<sup>33</sup> Because the victim's identification of the defendant was anchored in her "enhanced ability" to identify faces, the defense counsel's request to discuss the problems that arise as a result of cross-racial identification should have been allowed.<sup>34</sup>

### State Jurisdictions Permitting the Use of a Cross-Racial Jury Instruction

A few state appellate courts either require or authorize a cross-racial identification jury instruction, including

California, Utah, New Jersey, and Massachusetts.

#### California

California Jury Instruction No. 2.92 includes the cross-racial instruction in a short "laundry list" of items that may be considered. The California jury instruction states:

Eyewitness testimony has been received in this trial for the purposes of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

. . . The cross racial [or ethnic] nature of the identification. . . .<sup>35</sup>

*People v. Palmer*<sup>36</sup> is an example of a case in which the California Court of Appeals reversed a robbery conviction based solely on eyewitness identifications of uncertain reliability.<sup>37</sup> The court held on retrial that the defendant would be entitled to an instruction that included, as one factor, the cross-racial nature of the identifications.<sup>38</sup>

#### Utah

In 1986 in *State v. Long*, the Utah Supreme Court abandoned the discretionary approach and mandated trial courts to give the instruction whenever eyewitness identification is a central issue and is requested by the defense.<sup>39</sup> The Utah court stated that a well-constructed cautionary jury instruction would pinpoint identification as a central issue and highlight the factors that bear on its reliability.<sup>40</sup> Furthermore, a cautionary instruction must "respect the jury's function and strike a reasonable balance between protecting the innocent and convicting the guilty."<sup>41</sup> The *Long* court noted that a proper instruction sensitizes the jury to external and internal or subjective factors that empirical research has shown to be important in determining the accuracy of eyewitness identifications.<sup>42</sup> The Utah Supreme Court indicated that the following instruction would "certainly satisfy our expressed concerns about the need for cautionary instructions."<sup>43</sup>

. . . You should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.<sup>44</sup>

#### New Jersey

The New Jersey instruction provides more specificity than the California instruction in explaining to jurors the potential dangers of cross-racial identifications. New Jersey permits the jury to consider the following specific factors in the appropriate case:

The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether

that fact might have had an impact on the accuracy of the witness' original perception, and/or the accuracy of the subsequent identification.

You should consider that in ordinary human experience, people may have greater difficulty in identifying members of a different race.<sup>45</sup>

*State v. Cromedy*<sup>46</sup> is an example of a Supreme Court of New Jersey case in which use of the suggested cross-racial instruction should be considered. In August 1992, an African American man raped a Caucasian woman. The police were notified and received a description from the victim of an African American male in his late 20s to early 30s, about five-feet, five-inches tall, with a medium build, mustache, and unkempt hair.<sup>47</sup> Eight months later, the victim saw an African American male across the street from her whom she thought was her attacker. She studied his face and gait as he walked past her, and then went home to call the police.<sup>48</sup> Fifteen minutes later, the defendant was picked up by the police, and the victim identified him in a show-up—a process of identification usually occurring shortly after arrest in which the accused is usually the only person observed by the victim—as both the man she saw on the street and her attacker. During the trial, the state did not present any forensic evidence linking the defendant to the offenses.<sup>49</sup> Despite these circumstances, a jury found the defendant guilty of first-degree aggravated sexual assault.<sup>50</sup>

In *Cromedy*, the Supreme Court of New Jersey rejected the state's argument that a cross-racial identification instruction should not be required unless there is a demonstrated substantial agreement in the relevant scientific community that cross-racial identification is significantly impaired.<sup>51</sup> In addition, the court recognized that unrestricted use of the cross-racial charge could be counter-productive, and it suggested that an appropriate instruction would carefully delineate the context in which the jury is permitted to consider racial differences.<sup>52</sup> The court reversed the conviction and held that “a cross-racial instruction should be given only when, as in the present case, identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability.”<sup>53</sup>

New Jersey has also permitted cross-racial jury instructions in other cases.<sup>54</sup> However, the Supreme Court of New Jersey recently held that the *Cromedy* cross-racial jury instruction is inapplicable when a cross-ethnic identification is involved.<sup>55</sup> The *Romero* court found “insufficient data to support the conclusion that, as a matter of due process, people of the same race but different ethnicity . . . require a *Cromedy* instruction whenever they are identified by someone of a different ethnicity.”<sup>56</sup>

### Massachusetts

Although Massachusetts does not require the instruction to be given, the Appeals Court of Massachusetts has held that “a judge should consider a request for such an instruction

with a measure of favorable intention to grant it.”<sup>57</sup> Massachusetts courts have approved of the following instruction:

[You] may consider the fact of any cross-racial identification and whether the identification by a person of different race from the defendant may be less reliable than identification by a person of the same race.<sup>58</sup>

### How Proposed Model Instruction Compares to Federal and State Instructions

The proposed Maryland model cross-racial jury instruction draws upon the language of various federal and state instructions, especially the jury instructions in *Telfaire* and *Cromedy*. This instruction should serve as a model for state courts because it properly explains the cross-racial identification theory, instructs the jury that it may discount the validity of a cross-racial identification, and permits the jury to trust that an identification was correct.

Similar to *Telfaire* and *Cromedy* and unlike the California instruction, the proposed instruction explains the meaning of the cross-racial identification theory: “You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.”<sup>59</sup> In addition, similar to *Cromedy* but unlike the *Telfaire* instruction, the proposed instruction explains to jurors that the cross-racial nature of the identification may affect the witness' original perception or the accuracy of a later identification.

The proposed model instruction uses objective language similar to *Cromedy* by focusing on ordinary human experience: “You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.”<sup>60</sup> This contrasts with the language of the *Telfaire* instruction, which takes a subjective approach advising jurors to consider the validity of a cross-racial identification based on their personal beliefs about this theory: “In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your experience, you may consider it in evaluating the witness's testimony.”<sup>61</sup> The proposed instruction's use of objective language permits a juror to discount a cross-racial identification, regardless of his or her personal experiences with identifying persons of a different race.

Finally, the proposed model instruction advises the jury that it is free to consider factors that may reduce the likelihood of a cross-racial misidentification, similar to the *Telfaire* instruction, but unlike the New Jersey, Utah, and Massachusetts instructions. The proposed instruction states: “You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. (For

example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he][she] would not have greater difficulty in making a reliable identification.)"<sup>62</sup> This language is important to an identification instruction because jurors need to be made aware of the relevance of factors other than race in determining the validity of the cross-racial identification; for example, the opportunity of the witness to observe the suspect and the accuracy and degree of detail of the description. Also, this language invites jurors to focus on the witness's contacts and experience with members of the defendant's race.

### Arguments In Opposition to Use of Cross-Racial Identification Jury Instruction

Courts have denied cross-racial jury instructions on the basis that jurors are adequately equipped to consider eyewitness testimony in light of their own personal experiences and common sense.<sup>63</sup> Courts have also denied the instruction based on the argument that it "raises that proposition to the level of a rule of law, which implies a degree of certainty that social science rarely achieves and comes perilously close to a comment on the evidence contrary to the constitutional restriction."<sup>64</sup> Judges in many states, unlike the federal court system, are not permitted to comment to the jury about the evidence.

In *Cromedy*, the Supreme Court of New Jersey suggested that a cross-racial instruction should be given only when identification is a critical issue in the case and when the identification is not corroborated by other additional evidence that gives it independent reliability.<sup>65</sup>

Opponents of the instruction also argue that a cross-racial instruction injects the issue of race into a case where it does not belong and confuses the jury. Their concern is that whenever the witness is of a different race or ethnic group, the defendant may bring in race as an issue. Merely a difference in race between the defendant and the identifying witness, however, does not require that the instruction be given.

### Other Issues Relating to Cross-Racial Identification Jury Instructions

#### Should a Preliminary Showing be Required of an Increased Risk of Error Due to Cross-Racial Factors?

Should courts require defense counsel to elicit information from witnesses to determine the level of contact and familiarity of the witness with persons of the defendant's race as a condition for giving the suggested jury instruction? When requesting the cross-racial identification instruction, some courts have required a preliminary showing of risk that the witness may be mistaken due to cross-racial factors.<sup>66</sup> In *Miller v. State*,<sup>67</sup> the Indiana Court of Appeals held that the defense's requested jury instruction regarding cross-racial identification improperly singled out the eyewitness testimony.<sup>68</sup> The court further held that the cross-racial instruction was adequately covered by the general instruction regarding eyewitness identification.<sup>69</sup>

#### Should Courts Permit Expert Witnesses to Testify on Factors Affecting the Risk of Mistaken Cross-Racial Identification?

Those who favor the admissibility of expert testimony argue that it is crucial to the deliberative process that jurors are educated on the potential errors in cross-racial identifications. Jurors are more apt to comfortably discuss racial differences without fear of discord in the jury room when they have received testimony from an expert considering the possible influence of racial differences as affecting the accuracy of the identification. Also, they argue that the possibility of error in cross-racial identifications is not within the ordinary knowledge of many jurors.<sup>70</sup>

In *Brodes v. State*,<sup>71</sup> the Georgia Court of Appeals stated that expert testimony would have aided the jury in evaluating the reliability of the identification because the expert would have testified about factors affecting the accuracy of the identification.<sup>72</sup> The court suggested that those factors were highly relevant in the case, which involved cross-racial identifications by victims at gunpoint.<sup>73</sup> The court also stated that producing an expert was the only way to present the proffered empirical evidence to the jury.<sup>74</sup>

On the other hand, in *State v. Coley*,<sup>75</sup> the Supreme Court of Tennessee held that expert testimony concerning eyewitness identification is per se inadmissible because the reliability of eyewitness identification is within the common understanding of jurors aided by skillful cross-examination and an appropriate jury instruction.<sup>76</sup> Also, the court held that Tenn. R. Evid. 702, requiring that expert testimony be admissible only if it "substantially" assists the trier of fact, requires "a greater showing of probative force than the federal rules of evidence or the rules of evidence from those states that have followed the federal rules, making the per se exclusion appropriate."<sup>77</sup> The court's recommended jury instruction, however, does not include race as a factor for the jury to consider.<sup>78</sup>

Opponents of expert testimony argue that expert testimony is not needed on the cross-racial identification issue because it is not too complicated an issue and jurors are able to understand and apply the judges' instructions. Deborah Bartolomey, Deputy Attorney General in the Criminal Division of the New Jersey Attorney General's Office, argues that experts may be costly for defendants, confuse the jury rather than clarify the issues, and take up time.<sup>79</sup> A principal drawback of the use of expert witnesses is the lack of their availability, especially for indigent defendants.

Some courts prefer a cross-racial instruction to expert testimony: "We believe that the problem can be alleviated by a proper cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony."<sup>80</sup> In *Cromedy*, the New Jersey court held that the defendant was entitled to a cross-racial jury instruction, but not entitled to expert testimony.<sup>81</sup>

### Conclusion

In *Smith v. State*, the Maryland Court of Appeals in 2005 stated that given another set of facts, it may be appropri-

ate for a trial court to give a jury instruction on cross-racial identification. Defense counsel should consider requesting a cross-racial jury instruction in situations when the risk of a misidentification and a wrongful conviction are highest: (1) identification is a crucial issue in the case; (2) little or no evidence corroborating eyewitness evidence is presented; and (3) the circumstances raise doubts about the reliability of the identification.

A specific jury instruction on cross-racial identification, such as the proposed model instruction, sensitizes jurors to consider whether the fact that the defendant is of a different race than the identifying witness has affected the accuracy of the identification. Jurors are more apt to comfortably discuss racial differences with such an instruction. The proposed model cross-racial jury instruction draws upon various federal and state jury instructions, especially those in *Telfaire* and *Cromedy*.

Defense counsel in cross-racial identification situations need to find out how much contact and experience identifying witnesses have had with persons of a defendant's race. Some states, such as Indiana, require a preliminary showing of a risk that the witness may have been mistaken due to cross-racial factors.

Prosecutors will focus on the circumstances supporting the reliability of the eyewitness identification(s). They should also highlight the degree of contact and experience of the identifying witness with persons of the defendant's race, such as their residence in a mixed race neighborhood.

When loss of liberty and, possibly, the life of a human being are at stake, the additional safeguard of a jury instruction on cross-racial identification, such as the jury instruction proposed in this article, is an important tool to help protect against the heightened risk of eyewitness misidentification and wrongful conviction.

DNA exonerations resulting from work of the Innocence Project, supplemented by decades of scientific research, dramatically spotlight eyewitness misidentification as the leading cause of wrongful convictions in the United States. A high percentage of these cases involve cross-racial misidentifications. There is widespread consensus supported by a substantial body of evidence that persons are less able to recognize faces of a different race than their own. Cross-racial identifications are generally inferior to within-race identifications.

A jury instruction specifically tailored to safeguard against cross-racial identification errors should serve to enhance fairness and confidence in the criminal justice system.

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<sup>1</sup> David E. Aaronson, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY, Instruction, §2.57(B), Cross-Racial Identification of Defendant (LexisNexis, 3d ed., forthcoming 2008).

<sup>2</sup> See, e.g., ELIZABETH F. LOFTUS, JAMES M. DOYLE, & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 103 (4th ed. 2007) ("It is well established that there exists a compar-

ative difficulty in recognizing individual members of a race different from one's own."); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972 (1988); Roy S. Malpass & Jerome Kravitz, *Recognition of Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330, 333 (1969).

<sup>3</sup> See Platz & Hosch, *supra* note 2; Malpass & Kravitz, *supra* note 2, at 333.

<sup>4</sup> See Sherri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); see also Otto H. Macklin & Roy S. Malpass, *Racial Categorization of Faces*, 7 PSYCHOL. PUB. POL'Y & L. 98 (2001).

<sup>5</sup> See E-mail from Professor Binny Miller, Director, Criminal Justice Clinic, Washington College of Law, American University (Oct. 2, 2007) (on file with the author).

<sup>6</sup> See Jordan Abshire & Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 LAW & HUM. BEHAV. 471, 471 (2003).

<sup>7</sup> See Johnson, *supra* note 4, at 982.

<sup>8</sup> See Innocence Project, Fact Sheets, Eyewitness Misidentification and Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org> (last visited Jan. 22, 2008).

<sup>9</sup> See *id.*

<sup>10</sup> See Loftus, Doyle, & Dysart, *supra* note 2, at 105.

<sup>11</sup> See Malpass & Kravitz, *supra* note 2, at 330-34.

<sup>12</sup> See Loftus, Doyle & Dysart, *supra* note 2, at 103; see also Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001). This Article is not intended to provide a thorough analysis of the empirical studies relating to the accuracy of cross-racial identifications. For a more extensive analysis of these considerations, see, e.g., Gary Wells, *Eyewitness Identification: Systematic Reforms*, 2006 WISC. L. REV. 615 (2006); Sam R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); American Psychology Association, Symposium Issue, *The Other Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*, 7 PSYCHOL. PUB. POL'Y & L. 1 (2001); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identification*, 28 AM. J. CRIM. L. 207, 211 (2001); Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOL. PUB. POL'Y & L. 36, 39 (2001); Otto H. MacLin, M. Kimberly MacLin, & Roy Malpass, *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCHOL. PUB. POL'Y & L. 134 (2001); Gary Wells, *Eyewitness Identification: I Noticed You Paused on Number Three*, 20 NOV. CHAMPION 11 (1996).

<sup>13</sup> See Loftus, Doyle & Dysart, *supra* note 2, at 103.

<sup>14</sup> See REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 30 (Giannelli & Raeder eds. 2006).

<sup>15</sup> See Terrence S. Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 39, 40 (1974).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *State v. Romero*, 922 A.2d 693, 700 (N.J. 2007).

<sup>19</sup> 469 F.2d 552 (D.C. Cir. 1972).  
<sup>20</sup> *Id.* at 555-56.  
<sup>21</sup> *Id.* at 557-60.  
<sup>22</sup> *Id.* at 561 (Bazelon, C. J., concurring).  
<sup>23</sup> *See, e.g.*, *United States v. Thomas*, 713 F.2d 604, 607-08 (10th Cir. 1983) (“[The Third and Tenth Circuits] have held that a cautionary instruction must be given when identification is the key issue in the case and the identification testimony is uncertain or qualified . . . [The First, Fourth, Eighth, and DC Circuits] have strongly urged the giving of such an instruction when identification is the main issue in a case and evidence of identification is uncertain or qualified, but have stopped short of saying that failure to give the instruction is reversible error in every case.”).  
<sup>24</sup> *Compare* *United States v. Miranda*, 986 F.2d 1283, 1286 (9th Cir. 1993) (“Even where the only evidence is identification evidence, general instructions on the jury’s duty to determine the credibility of the witnesses and the burden of proof are fully adequate.”) *with* *United States v. Hodges*, 515 F.2d 650, 653 (7th Cir. 1975) (“We now adopt [the *Telfaire* instruction] as the required practice in this Circuit; and although it is not our intention to require that the *Telfaire* model be given verbatim, we hereby publish notice that we shall in the future view with grave concern the failure to give the substantial equivalent of such an instruction.”).  
<sup>25</sup> 857 A.2d 1198 (Md. App. 2004).  
<sup>26</sup> *Id.* at 1201-02.  
<sup>27</sup> *Id.* at 1202.  
<sup>28</sup> *Id.* at 1202-05.  
<sup>29</sup> *Id.* at 1206.  
<sup>30</sup> *Id.* at 1216, 1218.  
<sup>31</sup> *Id.*  
<sup>32</sup> *See* *Smith v. State*, 880 A.2d at 288, 300 (Md. 2005).  
<sup>33</sup> *Id.* at 299.  
<sup>34</sup> *Id.* at 300.  
<sup>35</sup> CAL. CRIMINAL JURY INSTRUCTIONS NO. 2.92 (7th ed. 2003) (emphasis added).  
<sup>36</sup> 154 Cal. App. 3d 79 (1984).  
<sup>37</sup> *Id.* at 83.  
<sup>38</sup> *Id.* at 89.  
<sup>39</sup> *See* *State v. Long*, 721 P.2d 483, 492 (Utah 1986).  
<sup>40</sup> *Id.*  
<sup>41</sup> *Id.*  
<sup>42</sup> *Id.* at 492-93.  
<sup>43</sup> *Id.* at 495.  
<sup>44</sup> *Id.* at 494-95, n.8.  
<sup>45</sup> New Jersey Model Criminal Jury Charges, New Jersey Identification Instruction: In-Court and Out of Court Identification, 2002 WL 32976451 (Revised Oct. 1999).  
<sup>46</sup> 727 A.2d 457 (N.J. 1999).  
<sup>47</sup> *Id.* at 459.  
<sup>48</sup> *Id.*  
<sup>49</sup> *Id.*  
<sup>50</sup> *Id.* at 460.  
<sup>51</sup> *Id.* at 466.  
<sup>52</sup> *Id.* at 467.  
<sup>53</sup> *Id.*  
<sup>54</sup> *See, e.g.*, *State v. Dixon*, 787 A.2d 211 (N.J. 2001) (permitting cross-racial instruction after defense request); *State v. Robinson*, 754 A.2d 1153 (N.J. 2000) (endorsing charge enumerating several factors a jury may need to consider including cross-racial factors).  
<sup>55</sup> *See* *State v. Romero*, 922 A.2d 693, 693 (N.J. 2007) (conclud-

ing that the trial judge did not abuse his discretion by denying a cross-racial jury instruction in a case involving a non-Hispanic Caucasian eyewitness and a Hispanic Caucasian defendant).

<sup>56</sup> *Id.* at 700.  
<sup>57</sup> *See* *Commonwealth v. Jean-Jacques*, 712 N.E.2d 1150, 1152 (Mass. App. 1999); *see also* *Commonwealth v. Hyatt*, 647 N.E.2d 1168, 1171 (Mass. 1995) (“[T]he giving of [a cross-racial jury] instruction may be appropriate in the judge’s discretion.”).  
<sup>58</sup> *See, e.g.*, *Hyatt*, 647 N.E.2d at 1171; *Commonwealth v. Ingram*, 686 N.E.2d 1080, 1082 (Mass. App. 1997).  
<sup>59</sup> Aaronson, *supra* note 1.  
<sup>60</sup> *Id.*  
<sup>61</sup> *United States v. Telfaire*, 469 F.2d 552, 561 (D.C. Cir. 1972).  
<sup>62</sup> Aaronson, *supra* note 1.  
<sup>63</sup> *See, e.g.*, *Lenoir v. State*, 72 S.W.3d 899, 905 (Ark. Ct. App. 2002).  
<sup>64</sup> *See* *Garden v. State*, 815 A.2d 327, 341 (Del. 2003).  
<sup>65</sup> *See* *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999) (holding that the trial court’s failure to submit the defendant’s requested charge on cross-racial identification constituted reversible error, and stating that the purpose of a cross-racial instruction is to “alert the jury through a cautionary instruction that it should pay close attention to a possible influence of race”).  
<sup>66</sup> *See, e.g.*, *Murrell v. Indiana*, 747 N.E.2d 567, 573 (Ind. Ct. App. 2001); *Miller v. State*, 759 N.E.2d 680 (Ind. Ct. App. 2001) (affirming trial court’s denial to give the instruction absent a showing of a specific risk that the witnesses were mistaken due to cross-racial factors).  
<sup>67</sup> 759 N.E.2d 680.  
<sup>68</sup> *Id.* at 684.  
<sup>69</sup> *Id.*  
<sup>70</sup> *See, e.g.*, *People v. Beckford*, 532 N.Y.S.2d 462, 465 (S. Ct. Kings Cty. 1988).  
<sup>71</sup> 551 S.E.2d 757 (Ga. Ct. App. 2001).  
<sup>72</sup> *Id.* at 759.  
<sup>73</sup> *Id.*  
<sup>74</sup> *Id.*  
<sup>75</sup> 32 S.W.3d 831 (Tenn. 2000).  
<sup>76</sup> *Id.* at 838.  
<sup>77</sup> *Id.*  
<sup>78</sup> *Id.* at 835 n.5 (citing *State v. Dyle*, 899 S.W.2d (Tenn. 1995) as providing the appropriate instruction on identification).  
<sup>79</sup> *See* Deborah Bartolomey, *Cross-Racial Identification of Testimony and What Not To Do About It*, 7 PSYCHOL. PUB. POL’Y & L. 247, 252 (2001).  
<sup>80</sup> *See* *State v. Kelly*, 752 A.2d 188 (Me. 2000) (instructing the jury that it could consider whether race had any bearing on the reliability of the identification, but denying expert testimony on the basis that the testimony would not be helpful).  
<sup>81</sup> *See* *State v. Cromedy*, 727 A.2d 457, 467-68 (N.J. 1999).

\* David E. Aaronson is a professor of Law, B.J. Tennery Scholar, and Director, Trial Advocacy Program, at the Washington College of Law, American University. This article is based, in part, on a section of the manuscript for the third edition of *MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY* (LexisNexis, 3d ed., forthcoming 2008). I would like to thank my colleague, Professor Cynthia Jones, for her thoughtful suggestions and Charles B. Rosenberg (J.D. May 2008) for his research assistance.

## EDITORIAL:

### THE ORLEANS PUBLIC DEFENDERS' OFFICE:

### REVAMPING THE NEW ORLEANS CRIMINAL JUSTICE SYSTEM AFTER KATRINA

Anne Keith Walton\*

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They call it the “loading dock.” It is a room in the Orleans Parish Prison that serves as the site for first-appearance hearings. It is where every morning, seven days a week, a handful of attorneys from the recently restructured Orleans Public Defenders’ office go to meet approximately forty to fifty newly-arrested men and women. Together, they navigate a shockingly malfunctioning judicial system to protect the individuals’ Constitutional rights, but they face endless challenges.

After officials escort the arrestees into the “loading dock,” the public defenders have about thirty minutes to address the group, explain the upcoming proceeding, and carefully determine if each arrestee is “indigent” and eligible to receive free legal counsel. When the judge takes the bench, an official in the “loading dock” turns on a television equipped with a video conferencing system, allowing the judge to address the arrestees from the Orleans Parish Criminal District Court located next door. Why the accused do not have the opportunity to join the judge and the prosecutor in the courtroom is unclear, but what *is* clear is that the distance provided by the video conferencing system makes it easier for the judge to run through the list of charges, accept the prosecutor’s accusations as fact, and set astronomical bonds without having to look the jail-bound men and women in the face.

Occasionally, the public defenders make arguments that probable cause does not exist or that the bond set is excessive, but they rarely succeed. Most of the time, the judge views the public defenders’ arguments as interruptions or delays, reprimands them, and proceeds to set bonds so high that one wonders what has happened to the Eighth Amendment’s command that “excessive bail shall not be required.” New Orleans judges set bond in nearly every case, sending many harmless offenders with jobs and families to jail for up to two months while they await indictment, simply because they cannot afford to pay the amount required for their release. No one profits from this system, except perhaps the bail bondsmen who conveniently set up shop across the street from the jail. The dehumanizing process used to usher the arrestees through their first-appearance hearings and into the jail explains why the room where it takes place has been cynically called the “loading dock.”

With so many injustices present in an arrestee’s first appearance before a judge, before charges are ever brought against him, it is clear that the New Orleans criminal justice system is broken and in desperate need of repair. Thanks to the Orleans Public Defenders’ office (OPD), created after Hurricane Katrina hit the city, there is hope. Since its formation in 2006, OPD has made a laudable commitment to restoring justice in New Orleans’ criminal courthouse and to providing the legal representation that accused persons deserve. The dedicated, zealous attorneys that OPD has hired in the last few years are revamping New Orleans’ criminal justice system, and they are capturing the attention and support of people around the country.

Before Katrina, the public defender’s office was a small room located in the courthouse that contained no computers or supplies. In the old system, the court appointed private attorneys worked as public defenders on a part-time basis to represent indigent defendants, resulting in a focus on revenue-generating private cases at the expense of clients who could not pay for the attorneys’ services. Furthermore, a horizontal representation scheme where attorneys were assigned to specific judges and courtrooms created an employer-employee type relationship between judges and public defenders.

After Katrina, Ronald Sullivan, former Director of the Public Defender Service for the District of Columbia (PDS), joined former PDS colleagues, Jonathan Rapping and Steven Singer, to lead a movement for change in New Orleans’ public defender’s office. First, the new team at OPD moved the office out of the courthouse and into a building around the corner, where they occupy an entire floor. Federal funds and grants enabled them to purchase computers and other necessary supplies. Full-time public defenders replaced part-time private attorneys in the office, and vertical replaced horizontal representation so that public defenders now answer to their clients throughout their entire cases instead of to the judges. Two years later, the staff of OPD consists of thirty-six attorneys, a social worker unit, and administrative assistants.

Several important projects are underway, including the development of a computerized case-management system and the creation of a special litigation department that will focus on appellate issues. OPD attorneys have already begun to tackle the first-appearance debacle, concentrating on challenging the statute that allows the government to hold arrestees who cannot afford to post bond for forty-five to sixty days without formally charging them with any crime. In the next few years, OPD hopes to expand its office, hire more supervising attorneys, and reduce the enormous caseloads that public defenders now carry.

To accomplish its goals, the office needs to continue to hire attorneys who are passionate about public defense, are excited to join a growing office, and are motivated to fight an uphill battle to fix a broken system. OPD offers a unique opportunity for those who join its staff to determine the future of public defense in New Orleans and to help rebuild a city that is still rebounding from Katrina. With excellent leaders and high-quality attorneys and staff at OPD, hopefully one day the “loading dock” and the problems that surround it will be history.

*\* Anne Keith Walton is a third-year law student at the American University Washington College of Law and received her Bachelor of Arts in Literature & Cultural Studies, magna cum laude, from Duke University. She currently works as a student attorney for the D.C. Law Students in Court criminal defense clinic and has volunteered in the Orleans Public Defenders’ office with the Student Hurricane Network.*

# THE PRISON RAPE ELIMINATION ACT: IMPLEMENTATION AND UNRESOLVED ISSUES

Brenda V. Smith\*

In September 2003, the United States Congress unanimously passed the Prison Rape Elimination Act (PREA).<sup>1</sup> The Act was the culmination of a collaborative effort between human rights, faith-based, and prison rape advocacy.<sup>2</sup> The aim of the Act is to create “zero tolerance” for prison rape<sup>3</sup> by using a variety of tools or mechanisms including data collection;<sup>4</sup> grants to the states;<sup>5</sup> technical assistance to the states to improve their practices;<sup>6</sup> research;<sup>7</sup> the development of national standards;<sup>8</sup> and the diminution of federal criminal justice assistance to states who fail to comply with the standards.<sup>9</sup> This article aims to provide a brief background of the Act and the important political forces that shaped its passing, the current status on implementation of the Act, including progress made with each of the tools, and a prediction about issues that will arise in the enactment and implementation of the standards required by PREA.

## Genesis of the Act

While prison rape has been an abiding feature of U.S. prisons almost since their inception,<sup>10</sup> the event that contributed most to the passage of the Prison Rape Elimination Act was the 2001 publication of *No Escape: Male Prisoner Rape* by Human Rights Watch (HRW). Though HRW had published several reports on sexual violence in U.S. prisons dating back to its initial report on the rape of female prisoners, *All too Familiar: Sexual Abuse of Women in U.S. State Prisons*, in 1996,<sup>11</sup> there was little traction in Congress to pass legislation aimed at ending sexual violence in custody. In fact, an early effort to pass legislation introduced by Congressman John Conyers, Jr. (D. MI) to create a registry of staff involved in sexual abuse of inmates in custody failed to garner enough support even for consideration.<sup>12</sup> The legislation, “The Custodial Sexual Abuse Act of 1998,” was stripped from the reauthorization bill for the “Violence Against Women Act” and was never reintroduced.<sup>13</sup>

How is it then that a mere five years later, legislation passed which included provisions aimed at ending all sexual violence including sexual abuse of inmates by staff? Three important events created the conditions for passage of the Act: (1) the increase in persons under custodial supervision, in particular, white men;<sup>14</sup> (2) a focus on male-on-male prison rape as opposed to sexual abuse of women in custody; (3) and the concern among conservatives about the ramifications of sexual violence in custody.<sup>15</sup>

First, a little known fact about the increase of persons in custody over the past twenty years, is that an increasing number of white men are being imprisoned as well.<sup>16</sup> From 2000 to 2006, the number of white men in custody has increased from 398,000 to 478,000, an eighty-three percent increase.<sup>17</sup> The perception is that those men are first time offenders who are vulnerable to physical and sexual abuse in custody. Additionally, the disproportionate number of men of color in

custody has fed another perception that white offenders will be sexually assaulted by men of color, predominantly African American men. That perception was very evident in testimony before Congress in support of the Prison Rape Elimination Act<sup>18</sup> and is supported by research data which suggests that the male victims of sexual violence in prison are often white and that the perpetrators are African American.<sup>19</sup>

However, there are several reasons to view this data cautiously. First, there is significant underreporting of all sexual offenses, in general.<sup>20</sup> Second, this reluctance to report is magnified by cultural norms in African American communities about masculinity, which often prohibit African American inmates from admitting that they were victimized in custody by other male inmates. Third, people of color, especially men of color are disproportionately imprisoned<sup>21</sup> – one in thirty-three African American men is under custodial supervision, and one in seventy-nine Hispanic men is under custodial supervision.<sup>22</sup> In many large jurisdictions, white men make up a very small percentage of those in custody.<sup>23</sup> In a correctional environment, anyone who is different – racially, physically, or appearance – is vulnerable. Thus white men, who are in the minority, may be vulnerable, as would any minority in any prison system.<sup>24</sup> Finally, reporting sexual victimization in custody often exposes victims to additional victimization and retaliation.<sup>25</sup>

A second factor that contributed to the passage of the Act is frankly that sexual victimization of women in our society is entrenched. While society takes as a given that women will be victimized both in the free world and in custody, the image of male rape was much more disturbing to members of Congress. In fact, the initial version of PREA only sought to address male prison rape.<sup>26</sup> In the initial congressional hearing, most of the survivors were male.<sup>27</sup> One of the significant critiques of the initial legislation was its failure to include sexual violence against women in custody, which was more likely to be staff initiated.<sup>28</sup> In its second iteration, PREA included staff sexual misconduct against inmates, but continued to focus heavily on male-on-male inmate rape.<sup>29</sup> Thus, it seemed that the unacceptability or perceived greater harm attached to male rape was a significant factor in the passage of PREA.

The fear of male prisoner rape had its genesis in several factors. Certainly, one was the increase in the number of high profile white criminals sentenced to prison for their crimes.<sup>30</sup> One of the explicit fears was that these individuals with little experience of the justice system would be sentenced to prison and victimized sexually and financially by more criminally sophisticated inmates.<sup>31</sup> There were also significant concerns about homosexual sex – a key issue for conservative constituencies – and the spread of AIDS to “innocent” defendants.<sup>32</sup> In particular, Prison Fellowship Ministries, The Hudson Institute, and other Christian organizations were visible proponents of PREA and testified about these issues.<sup>33</sup> Thus, the act passed because while it sought to remedy a serious domes-

tic human rights problem, it also garnered the support of conservatives who could frame PREA to their constituencies as advancing interests that were core to their political ideology and politically salient for the Republican-dominated Congress.

Human rights organizations like HRW and Stop Prisoner Rape (SPR) were critical in defining the contours of PREA.<sup>34</sup> Essentially, they made political and strategic concessions, such as explicitly providing that PREA does “not create a private right of action”<sup>35</sup> and “protects the Eighth Amendment rights of prisoners” in order to secure PREA’s passage.<sup>36</sup> These concessions neutralized concerns raised by powerful unions and the corrections community in response to the earlier Custodial Sexual Abuse Act of 1998<sup>37</sup> – that the legislation would create a new avenue for prisoner litigation, resulting in damage awards and attorneys’ fees. In fact, correctional actors like the American Correctional Association and the Association of State Correctional Administrators were caught unaware by the passage of PREA and came in at the end of the process to ameliorate the impacts of PREA by testifying in support of grants to assist states and agencies to meet PREA’s requirements.<sup>38</sup>

Finally, PREA’s initial proponents did not involve established advocates and litigators who had primarily litigated and worked on issues of sexual abuse of women in custody.<sup>39</sup> Indeed, the HRW report that generated initial action on the litigation made little reference to the earlier report authored by the Women’s Rights Division of HRW.<sup>40</sup> This failure to address staff sexual abuse of inmates, which disproportionately affects women in custody, delayed initial passage of PREA. At the end of the day, however, PREA passed unanimously in both houses of Congress. In this way, regardless of the underlying political and strategic reasons behind its passage, PREA signaled an important shift toward more humane treatment of persons in custody.<sup>41</sup>

## Current Status of Implementation of PREA

PREA is an ambitious piece of legislation which fundamentally seeks to prohibit sexual violence in all custodial correctional settings – juvenile, adult, community corrections, and immigration – whether operated by the federal, state, or local government. At base, however, it established a set of tools – data collection, research, training, technical assistance, grants, and standards – to prevent, reduce, and sanction sexual violence in custody. In the event that these measures did not work, PREA leaves open the option of denying five percent of federal criminal justice assistance to states and agencies that do not meet the federal standards.<sup>42</sup>

### Data Collection

One of the major features of PREA is the requirement of data collection. While seemingly uncontroversial, this is a very important tool for behavior change – whenever individuals or agencies collect data it changes behavior.<sup>43</sup> In this instance, Section four of PREA requires the Bureau of Justice Statistics (BJS) to collect statistics on the incidence of prison sexual vio-

lence in state, local, and federal custodial facilities. The simple requirement of data collection has created important changes that have the potential to reduce sexual violence in custody. First, BJS had to develop common definitions of sexual violence in custody.<sup>44</sup> Prior to enactment of PREA, there was tremendous variation in definitions between and within states about what constituted sexual violence against inmates.<sup>45</sup> Many states had no policies that articulated prohibited sexual contact between staff and inmates and between inmates and other inmates.<sup>46</sup> Still others only defined sexual intercourse as sexual violence,<sup>47</sup> failing to recognize that other behaviors such as verbal sexual harassment, voyeurism, fondling, oral and anal sex, and forcing inmates to masturbate or have sex with other inmates was also sexual violence. In part, this failure to identify these behaviors as prohibited was based in lack of knowledge about sexual behavior in general and about lack of knowledge of sexual behavior in custodial settings, in particular.

In order to create a data collection instrument, BJS had to collaborate with a different set of players, in particular the Centers for Disease Control (CDC).<sup>48</sup> This collaboration created a less security focused instrument and one that seemed much more public health focused. At the same time, these collaborations emboldened the CDC to combine its work on HIV and AIDS and sexual violence to draw important connections about prison as a vector for contracting HIV and AIDS.<sup>49</sup> This was a particularly important connection given new theories that one of the reasons for the increasing rates of HIV infection in communities of color was a result of men

of color who had been formerly imprisoned and contracted HIV/AIDS while engaged in unprotected voluntary or forced sex while incarcerated.<sup>50</sup>

The data collection has had a clear impact on the corrections community – both adult and juvenile. In structuring the data collection, BJS chose a three-pronged strategy: (1) creating a baseline by doing an administrative records data collection of sexual violence reported by correctional authorities; (2) collecting information directly from inmates; and (3) looking for independent indicators of sexual violence from medical and other records.<sup>51</sup> Thus far, BJS has deployed the first two strategies with some success.

The first baseline survey, “Sexual Violence Reported by Correctional Authorities,” was completed in July 2005.<sup>52</sup> This publication analyzed the incidents of sexual violence in calendar year 2004 that correctional officials reported *knowing*. This initial survey included data on both adult and juvenile facilities. The comparisons were stark and in many ways surprising. This survey made clear that juvenile agencies reported much higher rates of sexual violence—both staff sexual misconduct and youth-on-youth sexual abuse, three and seven times higher respectively—than adult facilities. This is due in large part to mandatory reporting statutes that require juvenile agencies to report all incidents of physical or sexual abuse and the continued oversight of outside agencies and actors in the juvenile justice system.<sup>53</sup>

In the initial study, adult facilities had exceedingly low rates of sexual violence—both inmate-on-inmate and staff sexual

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*At base, however, PREA established a set of tools – data collection, research, training, technical assistance, grants, and standards – to prevent, reduce, and sanction sexual violence in custody.*

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misconduct or violence in an entire year.<sup>55</sup> Several of the states reporting no complaints or low complaints were involved in ongoing public investigations of sexual violence in their facilities.<sup>56</sup> Other important findings included the high rates of sexual violence committed by female staff, both with regard to male inmates and with regard to youth of any gender. The report found that the most likely perpetrator of sexual violence in state prisons was a female staff member.<sup>57</sup> Certainly this is reasonable given that 93.1% of persons in custody are male.<sup>58</sup> It was surprising nonetheless. The study found that women were more likely to be victimized in jail than in prison and that girls were at higher risk for sexual violence than boys in custody.<sup>59</sup>

In 2007, the study was repeated but changed to include acts of sexual contact that “appeared to be willing.” The study found that agencies characterized the large majority of staff on inmate sexual abuse as “consensual” notwithstanding both policies and laws, which prohibit the conduct and in many instances specifically provide that inmates cannot “consent” to sex with staff.<sup>60</sup> Finally, the study found that fifty-five percent of staff sexual misconduct and forty-five percent of inmate-on-inmate sexual abuse complaints that correctional authorities received were closed as unsubstantiated, meaning that agencies could neither prove nor disprove that the conduct occurred—a measure of the efficacy of institutional investigations.<sup>61</sup>

In the fall of 2007, BJS published the findings of its first inmate survey. Not surprisingly, the sexual violence reported by inmates was much higher than that reported by correctional authorities. Inmates reported sexual violence rates of 4.5% per 1,000 inmates<sup>62</sup> compared to 2.91% reported by correctional authorities for 2006.<sup>63</sup> The survey was consistent with the report of the correctional authorities in several important respects. In both reports, the ratio of staff sexual misconduct and inmate-on-inmate sexual violence was approximately the same, the rates of sexual and non-sexual staff misconduct was nearly identical, and overall federal facilities had the lowest reported rates of sexual violence.<sup>64</sup> While it is not possible to directly compare the correctional authority survey and the inmate survey,<sup>65</sup> it is important to note correctional authorities reported 6,528 cases of sexual violence in 2006, whereas one year later, in 2007, inmates reported 189,400 cases.

Based on the inmate survey, BJS was able to analyze facility level data.<sup>66</sup> BJS used both sets of reports to create a list of facilities with the three highest and two lowest rates of sexual violence. These facilities were required by statute to appear before a review panel created by PREA<sup>67</sup> to explain their incident rates.<sup>68</sup> The selected facilities included state adult correctional facilities from Nebraska, Indiana, Florida, Texas, and California Departments of Corrections and the Federal Bureau of Prisons.<sup>69</sup> While some facilities admitted that they had serious issues with sexual violence in custody, several argued that their high numbers reflected improved grievance and investigative processes. Interestingly, states with the lowest numbers made the same claims and pointed to leadership and healthy institutional culture as preventive features.

## Research

Thus far, reactions to funded research about sexual violence in custody have been mixed. While much research has been funded by the National Institute of Justice (NIJ) and the Bureau of Justice Assistance (BJA), little has been completed. For example, NIJ funded eight research projects including research on: policies and practices in male and female prison facilities; assessment tools and instruments and descriptive analysis of characteristics of perpetrators and victims; prison perceptions of sexual violence; classification and risk assessment for vulnerability and predation; impact of victimization; sexual violence in the context of other violent acts in female facilities and jails; jails and their design, safety and security as they implement interventions to sexual violence; and promising practices in juvenile institutions and jails. Once completed, this research has the potential to identify risk factors for both vulnerability and propensity to commit sexual violence. It also has the potential to identify effective strategies to prevent, reduce and respond to sexual violence—for both victims and staff and inmate perpetrators. Thus far, only one project by Mark Fleischer has been completed and disseminated and even that report has received significant critique as being inaccurate, methodologically flawed and unhelpful.<sup>70</sup>

## Training and Technical Assistance

One area where there has been tremendous progress has been in training and providing technical assistance to the states to address sexual violence in custody. Under Section five of PREA, NIC received funding to administer a national clearinghouse on sexual violence in custody and to provide training and technical assistance to the field.<sup>71</sup> NIC was well situated to accomplish this given its decade long work to address staff sexual abuse of inmates, prior to the enactment of PREA. In accomplishing its mandate, NIC awarded two cooperative agreements—one to American University, Washington College of Law, which it had funded since 2000 for its work on staff sexual abuse of persons in custody, and another to the Moss Group, led by Anadora Moss, a former NIC employee and long-time correctional leader in the area of sexual violence against women in custody. To date, the projects have collaborated to provide training or technical assistance, and often both, to every state, the District of Columbia, Puerto Rico, Guam, and facilities in Indian country.<sup>72</sup> Additionally, the projects have produced research, reports, curricula, web chats, videoconferences, and training films that have provided valuable resources for all of the various institutional actors involved in implementing PREA.<sup>73</sup>

## Grants to the States

Another important feature of PREA, strongly advocated by correctional authorities, was the authorization of funds to assist states to meet the PREA requirements.<sup>74</sup> PREA authorized \$60MM in funds to the states; Congress appropriated \$40MM. Thus far, BJA has made approximately fifty grants to thirty-three different states and several additional grants for research, technical assistance and the development of training in key areas. States have used the grants

to provide training for staff and offenders,<sup>75</sup> improve or create investigative structures,<sup>76</sup> develop data collection capacities,<sup>77</sup> enhance security by installing cameras or identifying institutional vulnerabilities,<sup>78</sup> develop classification and housing options for victims and perpetrators,<sup>79</sup> enhance medical and mental health treatment for victims,<sup>80</sup> community reintegration and services for victims and perpetrators,<sup>81</sup> and hiring staff to implement PREA.<sup>82</sup> These grants have been extremely helpful to corrections agencies and have both improved practice and created buy-in among agencies for implementing PREA. There has been significant critique, however, about poor coordination of the grants, the lack of readily available information about who has received grants and the aims and outcomes of the grants, and the lack of funding to Native American communities, jails, juvenile agencies and local governments.

In addition to grants to states, BJA has also funded several research and service delivery projects. For example, BJA provided funds to: the American Probation and Parole Association to develop a community corrections guide for compliance with PREA and develop PREA-related products for tribal jurisdictions; the American Prosecutor Research Institute to complete a publication on prosecuting sexual violence in institutional settings; Community Resource for Justice to develop a guidebook on residential community corrections; and the Center for Innovative Public Policy to develop curricula and technical assistance for law enforcement and jails.

### The Development of National Standards

One of the most concrete aims of PREA is the publication of a report on the causes and consequences of prison sexual violence and the development of national standards for the prevention, investigation and prosecution of prison rape. Section 7 creates the National Prison Rape Elimination Commission. The Commission, appointed by the President of the United States and the House and Senate leadership of both parties, has held hearings<sup>83</sup> and has begun the process of writing both its report and the national standards.<sup>84</sup> The draft report and standards will cover a range of topics including leadership and accountability, prevention, training, reporting, data collection, discipline, investigations, medical and mental health services and prosecution.<sup>85</sup> Initially, the standards were to be final by July 2006.<sup>86</sup> However, delays in appointing the Commission, securing appropriate resources and staff for the Commission's work, and the delay in the publication of surveys and research by other federal actors such as BJS and NIJ, have delayed the development and publication of the standards. For example, BJS has not published any data on the prevalence of sexual violence in youth facilities since 2005, nor has it done any data collection on facilities run by community corrections agencies. This lack of data collections means that these agencies are less ready to implement the national standards because they have not had to examine the issues of sexual violence in response to BJS data collection or ensuing oversight by media,

citizens and advocacy groups.

Currently, the Commission plans to publish draft standards for public comment in June 2008 and to end its work in June 2009.<sup>87</sup> The Commission will hold hearings in order to solicit public comment in June 2008. After the standards are finalized, the Commission will transmit them to the Attorney General of the United States, who will issue a final rule within a year of receiving the standards.<sup>88</sup> During that year, there will be another opportunity for public comment. Ninety days after the publication of the final standards by the Attorney General, they will be immediately applicable to the Federal Bureau of Prisons.<sup>89</sup>

The Commission anticipates significant comment and some opposition from the correctional and advocacy communities, particularly with regard to standards on supervision, training, oversight and discipline. The reality is that the standards will be perceived as going too far or not far enough, depending on the goals of the critic. However, the development of even these initial standards is an important first step and significant contribution to eliminating sexual violence in custody.

### Important Unresolved Issues Raised by PREA

Thus far the enactment and implementation of PREA have raised important issues which may or may not be resolved with the enactment of the standards.<sup>90</sup> While this article does not permit the space to identify and analyze each of those issues, I will "flag" a number of important unresolved issues. For example:

1. Has the Prison Litigation Reform Act (PLRA)<sup>91</sup> created a situation where serious problems remain concealed until they are too serious to deal with except through litigation?
2. Should claims of sexual violence be exempt from the exhaustion and physical injury requirements of PLRA?
3. Are fundamental challenges and changes to the institutional culture of prisons the best ways to address sexual violence?
4. How do we address the racial and gender implications of sexual violence in custody?
5. Can prisoners be victims too? If so, should we revisit the ban on the use of VAWA and VOCA<sup>92</sup> funding for persons in custody to address the needs of victimized men and women in custody?<sup>93</sup>
6. Should we prosecute women staff who abuse female and male inmates to the same degree and with the same vigor that we do with male staff or are women, regardless of their status as inmate or staff, always less powerful in sexual interactions in custodial settings?<sup>94</sup>
7. What are the legal and other implications of creating registries for those involved in sexual violence in custody, even in the absence of a crimi-

nal conviction?

8. What is a permissible continuum of sexual behavior in institutional settings?<sup>95</sup> Can there be consensual sex between inmates; can there be consensual sex between staff and inmates?<sup>96</sup>
9. Should the loss of sexual autonomy be a necessary corollary of imprisonment?<sup>97</sup>
10. Could conjugal and family visiting programs like those established in other countries help prevent sexual violence in custody?<sup>98</sup>
11. Given that we now know that prisoners engage both voluntarily and involuntarily in high-risk behaviors that affect the communities they return to, should we invest in preventive measures such as condom distribution in prisons?<sup>99</sup>
12. Are credible grievance systems that have assurances of confidentiality and protection from retaliation sufficient to inform prison administrators of problems or is resorting to external accountability systems—inspector generals, ombudsmen, oversight committees—the most effective way to intervene in institutional abuse issues?

These are all questions that are being debated and are trying to be resolved in some fashion during this process of implementing PREA. The discourse, resolution or tabling of these issues has the potential to both advance and retrench the legal and societal response to sexual violence in custody.

## Conclusion

The enactment of the Prison Rape Elimination Act has already affected correctional and societal responses to sexual violence in custodial settings. The data collection has created important visibility for the issue and spurred media, advocacy and governmental oversight over agency responses to sexual violence in custody. The training and technical assistance efforts by NIC and BJA have increased the capacity of agencies to respond appropriately to sexual violence in custody. Federal grants have also seeded important state efforts to prevent sexual violence and improve agencies' response to sexual violence complaints and victims of sexual violence in custody. Pending research also has the potential to identify risk factors for vulnerability and propensity for sexual violence in custody. This research may engender the development of new tools to prevent sexual predation. It may also illuminate a more complete catalog of sexual behavior in institutional setting and identify modification to policies—conjugal and family visiting, abuse prevention, survivor services, and HIV/AIDS education—that may more accurately define and address sexual behavior in institutional settings.

Finally, the standards have the potential to create a floor for appropriate and constitutional responses to sexual violence in custody, leaving jurisdictions free to provide greater services and protection. These standards will make our domestic policies more congruent with international norms and treaties.<sup>100</sup> Perhaps most importantly, credible implementation of the act will send the message to prisoners, families and society that sexual predation of any kind is neither a collateral con-

sequence<sup>101</sup> nor part of the penalty<sup>102</sup> of imprisonment.

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<sup>1</sup> Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601-15609 (2003).

<sup>2</sup> See *Prison Rape Reduction Act of 2003: Hearing on H.R. 1707 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 4-5 (2003) (letter from Prison Fellowship Ministries (PFM) with coalition signatures from organizations such as Human Rights Watch, Stop Prisoner Rape, the Christian Coalition, and the Religious Action Center of Reform Judaism) [hereinafter *Hearing on Prison Rape Reduction Act of 2003*]; see also HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) [hereinafter NO ESCAPE].

<sup>3</sup> See PREA § 15602(3)(1) (establishing a zero tolerance standard for the incidence of prison rape in prisons in the United States).

<sup>4</sup> *Id.* § 15602(4)(a).

<sup>5</sup> *Id.* § 15605(6)(a).

<sup>6</sup> *Id.* § 15604(5).

<sup>7</sup> *Id.* § 15605(6)(a).

<sup>8</sup> *Id.* § 15606(7).

<sup>9</sup> *Id.* § 15607(8)(c)(2).

<sup>10</sup> See NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN IN STATE PRISONS, 1800-1935, at 97-98 (Northeastern 1985). Rafter gives a first-person account of the especially poor situation of women prisoners in the South, detailing their living conditions, which includes the constant supervision by male corrections officers. *Id.* She details an account of Molly Forsha, who was convicted of murder in the mid - 1870s, and gave birth to twins while incarcerated at Nevada State Prison at Carson City - allegedly as a result of sexual activity with the prison warden. *Id.* at 98. Rafter also discusses the opening of the Indiana Women's Reformatory by Charles and Rhoda Coffin in 1873. *Id.* at 29-33. The Coffins had observed that the conditions endured by women prisoners when housed with male offenders were abhorrent, and often resulted in women being forced to engage in sexual activity at the whims of their jailers. This was due largely to the fact that the male corrections officers held the keys to the women's cells. The Coffins' Reformatory, as a result, was the first one to employ an entirely female staff. *Id.* at 29-31; see also ESTELLE B. FREEDMAN, THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICAN, 1830-1930, at 59 (University of Michigan Press 1984).

<sup>11</sup> See generally WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) [hereinafter ALL TOO FAMILIAR]; see also WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, NO WHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE (1998), available at <http://www.hrw.org/reports98/women/>; NO ESCAPE, *supra* note 2, at 4-5; AMNESTY INT'L, "NOT PART OF MY SENTENCE:" VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 5 (1999); AMNESTY INT'L, USA: THE FINDINGS OF A VISIT TO VALLEY STATE PRISON FOR WOMEN, CALIFORNIA

(1999); AMNESTY INT'L, CHILDREN AND WOMEN ABUSED IN CORRECTIONAL FACILITIES (1998).<sup>12</sup> See Violence Against Women Act of 1999 (VAWA II), H.R. 357, 106th Cong. (1999); see also Press Release, Rep. John Conyers, Conyers Introduces Omnibus Bill to Stop Violence Against Women and Their Children (May 12, 1999), available at <http://www.house.gov/conyers/pr051299.htm>. The Custodial Sexual Assault Act is found at §§ 341-346 of the Violence Against Women Act of 1994 (VAWA I) (demonstrating that though introduced as part of VAWA I, legislation addressing sexual violence against incarcerated persons never gained enough support to be included in the legislation that ultimately passed).

<sup>13</sup> See generally VAWA II, H.R. 357, *supra* note 12; see also Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

<sup>14</sup> See WILLIAM SABOL, HEATHER COUTURE & PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2006, at 6 (2007) (noting the increase of prisoners under state and federal custodial jurisdiction from 2000-2006).

<sup>15</sup> See, e.g., *Hearing on Prison Rape Reduction Act of 2003*, *supra* note 2, at 2-3, 6-8 (prepared statement of the Hon. Robert C. Scott, Rep. in Congress from Virginia, and ranking Member, Subcomm. on Crime, Terrorism and Homeland Security).

<sup>16</sup> See SABOL, COUTURE & HARRISON, *supra* note 14, at 6.

<sup>17</sup> *Id.*

<sup>18</sup> See *Hearing on Prison Rape Reduction Act of 2003*, *supra* note 2, at 115-17 (prepared statement of Pat Nolan, President, Justice Fellowship) (describing the sexual victimization of John William King, a white burglar also involved in the racially motivated death of James Byrd, who was gang-raped by African-American prisoners after being placed in the "black" section of the prison).

<sup>19</sup> See ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 4 (2007) [hereinafter BECK, HARRISON & ADAMS 2006]. In 2006, whites made up 72% of the victims; blacks 16% and Hispanics 9%; among perpetrators, 49% were black, 39% were white and 10% were Hispanic. *Id.*

<sup>20</sup> See RAPE, ABUSE AND INCEST NATIONAL NETWORK, REPORTING RATES, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Mar. 26, 2008). (determining that "sexual assault is one of the most underreported crimes, with 60% still being left unreported and males are the least likely to report a sexual assault, though they make up approximately 10% of all victims"); see also U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL: DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 3 (2005) (noting that sexual abuse of female inmates is both underreported and alarmingly prevalent).

<sup>21</sup> See generally SABOL, COUTURE & HARRISON, *supra* note 14, at 7; see also MARC MAUER, RACE TO INCARCERATE 118-61 (2d ed. 2006) (discussing recent developments under the Bush Administration and updated statistics, graphs, and charts throughout, to illustrate the growth in the number of prisons and jails and the overreliance on imprisonment to stem problems of economic and social development); The Sentencing Project, <http://www.sentencingproject.org/IssueAreaHome.aspx?IssueI>

D=3 (last visited Mar. 17, 2008) "More than 60% of the people in prison are now racial and ethnic minorities. *Id.* For Black males in their twenties, 1 in every 8 is in prison or jail on any given day." *Id.*

<sup>22</sup> SABOL, COUTURE & HARRISON, *supra* note 14, at 8.

<sup>23</sup> See, e.g., STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, HUB SYSTEM: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2007, at i (2007), available at [http://www.docs.state.ny.us/Research/Reports/Hub\\_Report\\_2007.pdf](http://www.docs.state.ny.us/Research/Reports/Hub_Report_2007.pdf) (finding that as of January 1, 2007, New York's inmate population was 20.5% white/non-Hispanic, 51.1% African American and 26.3% Hispanic); see also DATA ANALYSIS UNIT, ESTIMATES AND STATISTICAL ANALYSIS SECTION, OFFENDER INFORMATION SERVICES, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA PRISONERS AND PAROLEES 2006: SUMMARY STATISTICS ON ADULT FELON PRISONERS AND PAROLEES, CIVIL NARCOTIC ADDICTS AND OUTPATIENTS AND OTHER POPULATIONS 23 (2007), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/CalPris/CALPRISd2006.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf) (observing that in 2006, California's inmate population was 27.6% white/non-Hispanic, 28.8% African American, and 37.8% Hispanic); FLORIDA DEPARTMENT OF CORRECTIONS, 2006-2007 ANNUAL REPORT: INMATE POPULATION AS OF JUNE 30, 2007, at 67 (2007), available at <http://www.dc.state.fl.us/pub/annual/0607/PDFs/imPop.pdf> (finding that as of June 30, 2007, Florida's inmate population was 46.2% white/non-Hispanic, 50.2% African American and 3.6% Hispanic).

<sup>24</sup> Robert W. Dumond, The Impact and Recovery of Prisoner Rape, Paper presented at the National Conference "Not Part of the Penalty:" Ending Prisoner Rape (Oct. 19, 2001); see also WILBERT RIDEAU, *The Sexual Jungle, in* LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 90-91 (Wilbert Rideau and Ron Wikberg eds. 1992).

<sup>25</sup> See ALL TOO FAMILIAR, *supra* note 11, at 4-5; see also U.S. GEN'L ACCOUNTING OFFICE: WOMEN IN PRISON, SEXUAL MISCONDUCT BY CORRECTIONAL STAFF: REPORT TO THE HONORABLE ELEANOR HOLMES NORTON, HOUSE OF REPRESENTATIVES 7-8 (1999) (reporting that the full extent of staff sexual misconduct is unknown and underreported nationally due to the fear of retaliation and vulnerability felt by female inmates, and that jurisdictions do not have readily available comprehensive data on the number, nature, and outcome of sexual misconduct allegations); see also *Hearing before the National Prison Rape Elimination Commission: "Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?"* (Aug. 3, 2006) (testimony of Necole Brown), available at [http://nprec.us/docs/detroit\\_survivor\\_brown.pdf](http://nprec.us/docs/detroit_survivor_brown.pdf).

<sup>26</sup> See *Prison Rape Reduction Act of 2002: Hearing on S. 2619 Before the Sub. Comm. on the Judiciary*, 107th Cong. 2-3 (2002) (statement of Wendy Patten, U.S. Advocacy Director, Human Rights Watch), available at <http://www.hrw.org/reports/2001/prison/rapebill-statement.pdf> (discussing the organization's report, NO ESCAPE: MALE RAPE IN U.S. PRISONS, and proposing several changes to the legislation, none of which included addressing sexual abuse of women prisoners).

<sup>27</sup> See, e.g., *id.* at 8-9 (testimony of Linda Bruntmyer) (describing the victimization of her son Rodney who was incarcerated at age 16, sentenced to eight years in adult prison for setting a

dumpster on fire, became a victim of prison rape and eventually hanged himself while in prison due to shame and hopelessness); *see also id.* at 46-52 (statement of Lara Stemple, Executive Director, Stop Prison Rape) (providing three victim survivor stories from three inmates, two of whom were men); *id.* at 14 (statement of Robert W. Dumond, Clinical Mental Health Counselor, and Member, Board of Advisors, Stop Prison Rape, Hudson, New Hampshire) (discussing two studies of Midwestern prisons conducted by Cindy Struckman-Johnson and her colleagues which found that some male prisoners experience 100 incidents of victimization a day, and also noting that of the 15 empirical studies available on the matter only 2 included women).

<sup>28</sup> *See* BECK, HARRISON & ADAMS 2006, *supra* note 19, at 7.

<sup>29</sup> *See generally* PREA, 42 U.S.C. §§ 15601-15609 (2003).

<sup>30</sup> *See, e.g.,* Alexei Barrionuevo, *Enron's Skilling is Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006, available at <http://www.nytimes.com/2006/10/24/business/24enron.html?th&emc=th>; Brooke A. Masters, *Martha Stewart Sentenced to 5 Months in Prison*, WASH. POST, July 16, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A54591-2004Jul16.html>; *Priest Found Guilty of Molestation*, CNN.com, Jan. 18, 2002, available at <http://archives.cnn.com/2002/LAW/01/18/priest.verdict/index.html>; *Inmate Testifies Why He Killed Molester Priest*, N.Y. TIMES, Jan. 24, 2006, available at [http://www.nytimes.com/2006/01/24/national/24priest.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/01/24/national/24priest.html?_r=1&oref=slogin).

<sup>31</sup> *See* NO ESCAPE, *supra* note 2, at 63-67; *see also* STOP PRISONER RAPE, THE PROBLEM OF PRISON RAPE 1 (October 2007), available at <http://www.spr.org/en/factsheets/Problem%20of%20Prisoner%20Rape.pdf> (finding that the criminally inexperienced, women, the mentally ill, and first time offenders are at greater risk for exploitation).

<sup>32</sup> *See Hearing on Prison Rape Reduction Act of 2003, supra* note 2, at 44 (prepared statement of Pat Nolan, President, Justice Fellowship) (discussing the harms of prison rape both in and outside of prison and supporting the passage of H.R. 1707, the Prison Rape Reduction Act).

<sup>33</sup> *See, e.g., id.* at 51-52 (prepared statement of Michael J. Horowitz, Senior Fellow, Hudson Institute); *id.* at 4-5 (letter from Prison Fellowship Ministries (PFM) with coalition signatures).

<sup>34</sup> *See id.* at 144-46 (letter from Prison Fellowship Ministries (PFM) with Coalition signatures including those of Human Rights Watch and Stop Prisoner Rape).

<sup>35</sup> *See* Alexander v. Sandoval, 532 U.S. 275, 291 (2003) (holding that, in the absence of explicit authorization by Congress, no private right of action is created simply by statute).

<sup>36</sup> PREA, 42 U.S.C. § 15602(3)(7) (2003).

<sup>37</sup> *See* 149 CONG. REC. S9659 (daily ed. July 21, 2003); 149 CONG. REC. H7764 (daily ed. July 25, 2003). The speed of passage and the bi-partisan support for the Prison Rape Elimination Act, when compared to the lack of support for the Custodial Sexual Abuse Act of 1998—which sought to address staff sexual abuse against primarily women inmates—supports and reinforces gendered notions of the acceptability of violence against women.

<sup>38</sup> *See Hearing on Prison Rape Reduction Act of 2003, supra* note 2, at 21-24 (testimony of Mr. Charles J. Kehoe, President, American Correctional Association); *id.* at 144-46 (letter from

Reginald A. Wilkinson, Ed.D., President, Association of State Correctional Administrators and Director, Ohio Department of Rehabilitation and Correction).

<sup>39</sup> *See, e.g.,* Women Prisoners of the Dist. of Columbia Dep't of Corrections v. Dist. of Columbia, 968 F. Supp. 744 (D.D.C. 1997) (Brenda V. Smith was a litigator in this case); *Everson v. Michigan Dep't of Corrections*, 391 F.3d 737 (6th Cir. 2005) (Deborah LaBelle was a litigator in this case); HUMAN RIGHTS WATCH, MODERN CAPITAL OF HUMAN RIGHTS?: ABUSES IN THE STATE OF GEORGIA 99-119 (1996) (discussing the problem of sexual abuse in Georgia's women's prisons authored by The Women's Right Division of Human Rights Watch which at the time was directed by Dorothy Thomas); *Darbyshire v. Extraditions Int'l, Inc.*, 02-N-718 (D. Colo. 2002). This case was filed by the American Civil Liberties Union, National Prison Project while litigator Elizabeth Alexander was the Director of the Program. The case settled in 2003.

<sup>40</sup> *See* NO ESCAPE, *supra* note 2, at 4, n.2 (noting that the focus of the report is on male victims rather than female victims of prison rape while citing two Human Rights Watch reports on sexual misconduct in U.S. women's prisons).

<sup>41</sup> In fact, PREA came around the same time as landmark cases such as *Roper v. Simmons*, 543 U.S. 551 (2005), which held that it is unconstitutional to impose the death penalty as a punishment for crimes committed while under the age of 18, and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded persons violates the Eight Amendment prohibition against cruel and unusual punishment); *see also* Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-199, 122 Stat. 657 (2008) (passed in both houses of Congress on March 11, 2008 and signed by President Bush on April 8, 2008).

<sup>42</sup> PREA, 42 U.S.C. § 15607(c)(2) (2003).

<sup>43</sup> *See Hearing on Prison Rape Reduction Act of 2003, supra* note 2, at 30-31 (letter from Frank A. Hall, Director, The Eagle Group).

<sup>44</sup> *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003 (2005) [hereinafter DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003]; *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, IMPLEMENTING THE PRISON RAPE ELIMINATION ACT OF 2003, at 2 (2004).

<sup>45</sup> *See* DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003, *supra* note 44, at 1-2 (stating that the credibility of the self-administered questionnaires are suspicious due to the broad definition of sexual assault and underreporting).

<sup>46</sup> *Id.* at 2 (quoting that, "BJS intends to operationalize this definition by disaggregating sexual assault into three categories of inmate-on-inmate sexual violence and all incidents of staff sexual misconduct").

<sup>47</sup> *Id.* (focusing on defining sexual violence as: ". . . the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury").

<sup>48</sup> *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORKSHOP ON IMPLEMENTATION OF THE PRISON RAPE ELIMINATION ACT OF 2003 (2003); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORKSHOP ON INMATE SELF-REPORT OF SEXUAL ASSAULT VICTIMIZATION (2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORKSHOP ON

PRISON RAPE ELIMINATION ACT OF 2003: PRESENTING THE NATIONAL INMATE (2006).

<sup>49</sup> See generally CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MORBIDITY AND MORTALITY WEEKLY REPORT 55:15, HIV TRANSMISSION AMONG MALE INMATES IN A STATE PRISON SYSTEM - GEORGIA, 1992-2005, at 421-28 (2006); see also Theodore M. Hammett, *HIV/AIDS and Other Infectious Diseases among Correctional Inmates*, 96 AM. J. OF PUB. HEALTH 974 (June 2006); Steven D. Pinkerton et. al, *Model Based Estimates of HIV Acquisition due to Prison Rape*, 87 THE PRISON JOURNAL 295, 295-310 (2007); THEODORE M. HAMMETT ET. AL., U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, NATIONAL SURVEY OF INFECTIOUS DISEASES IN CORRECTIONAL FACILITIES: HIV AND SEXUALLY TRANSMITTED DISEASES 1 (2007).

<sup>50</sup> See NATIONAL RATE OF STATE AND TERRITORIAL AIDS DIRECTORS, STAGGERING RATES AMONG AFRICAN AMERICAN WOMEN, MSM AND THE INCARCERATED (Nov. 2005), available at <http://www.thebody.com/content/art6867.html>.2008 (discussing the increasing and disproportionate impact of HIV/AIDS on African-American women, men who have sex with men, and the incarcerated).

<sup>51</sup> DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003, *supra* note 44, at 3.

<sup>52</sup> See ALLEN BECK & TIMOTHY HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2004, at 1-11 (2005) [hereinafter BECK & HUGHES 2004].

<sup>53</sup> See *id.* at 5. Staff sexual misconduct rates were as follows: 11.34/1000 in state and federal facilities, 3.22/1000 in private and local facilities. *Id.* This is three times the adult rate. Youth-on-youth sexual violence rates were as follows: 7.31/1000 in local private facilities, 6.75/1000 in state facilities. *Id.* This is six times the rate at state adult facilities and seven times the rate of local jails. *Id.*

<sup>54</sup> *Id.* (breaking down allegations by place and incident; 42% of allegations occurred in prison, 23% in local and private facilities, 21% were in jails and 11% in juvenile facilities; 42% of the cases were staff sexual misconduct, 37% were inmate-on-inmate, 11% staff harassment and 10% abusive inmate-on-inmate sexual contact).

<sup>55</sup> *Id.* at 13 (citing that Alaska, Maine, New Hampshire and North Dakota reported zero allegations of sexual violence).

<sup>56</sup> See Justice for All: *Male Prisoner Rape* (KMOX Radio, St. Louis, Apr. 1, 2007); see also *Captive Victims* (KMOV- News 4 St. Louis); *Hearing before the Prisoner Rape Elimination Commission* (Dec. 5, 2007) (testimony of Sandra Matheson, Director of the State Office of Victim/Witness Assistance), available at <http://nprec.us/docs3/TestimonyMatheson.pdf> (discussing an ongoing case involving a correctional office indicted on 54 charges of sexually assaulting 14 inmates in a New Hampshire correctional facility).

<sup>57</sup> See BECK & HUGHES 2004, *supra* note 52, at 8 (reporting that in State prisons, 69% of victims of staff sexual misconduct were male, while 67% of perpetrators were female).

<sup>58</sup> SABOL, COUTURE & HARRISON, *supra* note 14, at 6.

<sup>59</sup> See BECK & HUGHES 2004, *supra* note 52, at 8 (finding that in local jails 70% of victims were female; 65% of perpetrators, male; in State-operated juvenile facilities, 69% of victims were

male; 47% of perpetrators, female; in local/private operated juvenile facilities, 63% of the victims and 64% of the perpetrators were male).

<sup>60</sup> See BECK, HARRISON & ADAMS 2006, *supra* note 19, at 6 (noting that the sexual relationship “appeared to be willing” in 57% of incidents of staff sexual misconduct and harassment). To address concerns about the reporting and interpretation of data in the 2005 survey, BJS changed the item related to the nature of the incidents in 2006. *Id.* The option “Romantic” was replaced by “Sexual relationship between inmate and staff appeared to be willing.”

<sup>61</sup> *Id.* at 3-4.

<sup>62</sup> ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2007, at 2 (2007) [hereinafter BECK, HARRISON & ADAMS 2007].

<sup>63</sup> See BECKS, HARRISON & ADAMS 2006, *supra* note 19, at 3 (analyzing allegations of sexual violence and rates per thousand inmates by type of facility).

<sup>64</sup> See BECKS, HARRISON & ADAMS 2007, *supra* note 63, at 2.

<sup>65</sup> The report of inmates only included state and federal inmates and the correctional report included state and federal as well as local jail reports.

<sup>66</sup> See BECK, HARRISON & ADAMS 2007, *supra* note 63, at 1-2.

<sup>67</sup> PREA, 42 U.S.C. § 15604(b) (2003).

<sup>68</sup> See generally *Hearing before the Review Panel on Prison Rape* (2006), available at [http://www.ojp.usdoj.gov/fedregister/fr\\_2006-10-25.pdf](http://www.ojp.usdoj.gov/fedregister/fr_2006-10-25.pdf); see also *Hearing of the Review Panel on Prison Rape* (2008), available at [http://www.ojp.usdoj.gov/fedregister/fr\\_2008-02-19.pdf](http://www.ojp.usdoj.gov/fedregister/fr_2008-02-19.pdf).

<sup>69</sup> See BECK, HARRISON & ADAMS 2007, *supra* note 63, at 2 (determining that Texas, Indiana, Nebraska and Florida had the highest rates while California and the Federal Bureau of Prisons had the lowest).

<sup>70</sup> See generally STOP PRISONER RAPE, PREA UPDATE, STOP PRISONER RAPE'S PERIODIC REPORT ON THE PRISON RAPE ELIMINATION ACT, SPECIAL REPORT ON NIJ RESEARCH TRAVESTY (2006) (criticizing the Fleischer report as “flawed, sloppy, and irresponsible”).

<sup>71</sup> PREA § 15604(a).

<sup>72</sup> See The National Institute of Corrections/Washington College of Law Project on Addressing Prison Rape (NIC/WCL Project), Participant Database, under NIC cooperative agreements 01P18G108 through 07S24GJQ1 (on file with author). This database is representative of the project training groups which are representative of almost all 50 states.

<sup>73</sup> *Id.*

<sup>74</sup> See PREA § 15605(a) (stating that the purpose of the grants is to ensure that “budgetary circumstances. . . do not compromise efforts to protect inmates” and “to provide funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape).

<sup>75</sup> See Email from Julius Dupree, BJA Policy Advisor, to Brenda V. Smith, Program Director for the National Institute of Corrections Project on Addressing Prison Rape (June 25, 2007, 1:25p EST) (on file with author) (Alabama, Delaware, Florida, Kansas, California, Kentucky, Montana, Texas, Pennsylvania, Ohio, Oregon, Michigan, New Jersey, Rhode Island, Iowa, Wyoming, Virginia, Vermont and Wisconsin).

<sup>76</sup> See *id.* (Colorado, Delaware, Florida, Idaho, Iowa, Ohio

DYS, Pennsylvania, Tennessee, Vermont, Wisconsin, California, Kentucky, Maryland, Missouri, Montana, North Carolina and New Hampshire).

<sup>77</sup> See *id.* (Alabama, Colorado, Idaho, Maryland, Pennsylvania, and Wyoming).

<sup>78</sup> See *id.* (Arkansas, California, Florida, Kansas, Minnesota, Montana, North Carolina, Puerto Rico, Virginia, Wyoming, and Ohio).

<sup>79</sup> See *id.* (Kansas, Kentucky, Minnesota, Nebraska, New Hampshire, Ohio, Vermont, California, Michigan, and Rhode Island).

<sup>80</sup> See *id.* (Virginia, Colorado, Vermont, Delaware, Pennsylvania, Tennessee, Nebraska, New Hampshire, Ohio, Oklahoma, and Wisconsin).

<sup>81</sup> See *id.* (Louisiana, Kentucky, Ohio, Oregon, Rhode Island, and Wyoming).

<sup>82</sup> See *id.* (New Jersey, North Carolina, Michigan, and Rhode Island).

<sup>83</sup> See PREA, 42 U.S.C. § 15606(g)(1) (2003) (delineating the Commission's powers to hold hearings, call witnesses, and receive such evidence as it considers necessary to carry out its duties).

<sup>84</sup> See generally NATIONAL ASSOCIATION OF PUBLICATION ADMINISTRATION, HIGH-LEVEL WORK PLAN: STUDIES IN SUPPORT OF THE PRISON RAPE ELIMINATION ACT OF 2003 (2006) (on file with author).

<sup>85</sup> See National Prison Rape Elimination Commission, Standard Development Process (November 2007), available at <http://nprec.us/Press/media%20kit/NPREC%20Standards%20Process.pdf> (draft of standards to date are on file with author).

<sup>86</sup> See PREA § 15606(7)(c)(3)(A) (providing that the standards should be issued no later than 2 years after the date of the initial meeting of the commission).

<sup>87</sup> See Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-199, 122 Stat. 657 (2008) ("Section 7(d)(3)(A) of the Prison Rape Elimination Act of 2003 (42 U.S.C. 15606(d)(3)(A)) is amended by striking '3 years' and inserting '5 years.'").

<sup>88</sup> See PREA § 15607(a)(1).

<sup>89</sup> See *id.* § 15607(a)(4).

<sup>90</sup> See Brenda V. Smith, *Behind Bars: The Impact of Incarceration on Women and Their Families*, 29 WOMEN'S RTS. L. REP. (forthcoming 2008).

<sup>91</sup> See Prison Litigation Reform Act, 42 U.S.C. § 1997e (2000) (aiming at deterring frivolous prisoner lawsuits and requiring the exhaustion of administrative remedies and physical injuries).

<sup>92</sup> See Violence Against Women Act of 1994 (VAWA I), Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C.), *reauthorized in* Victims of Trafficking and Violence Protection Act of 2000 (Victims Protection Act), Pub. L. No. 106-386, 114 Stat. 1462 (2000) (codified as amended in scattered sections of 42 U.S.C., 22 U.S.C. §§ 7101-7710); see also Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 113 n.14 (2002) ("The Victims Protection Act is divided into three main sections: A) The Trafficking Victims Protection Act of 2000; B) VAWA II; and C) Miscellaneous Provisions."); Victims of Crime Act of 2002, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

<sup>93</sup> See Brenda V. Smith, *Sexual Abuse of Women in Prison: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 592

(discussing VAWA I and VAWA II laws that prohibited the use of funds for any persons in custody, meaning that "the significant number of women in prison with histories of physical and sexual abuse both prior and during imprisonment are ineligible for services funded by VAWA II").

<sup>94</sup> See generally Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Violence in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 276-90 (2008) (describing the differential treatment of female staff perpetrators of sexual violence in custody).

<sup>95</sup> See Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 225 (2006) [hereinafter Smith, *Rethinking Prison Sex*] (discussing the continuum of sexual expression in correctional environments the main concern of which is whether the state has an ability to regulate that expression); see also Brenda V. Smith, *Continuum of Sexual Behavior in Institutional Settings*, developed under NIC Cooperative Agreement 06S20GJJ1 (PowerPoint presentation on file with author) (outlining the continuum of sexual behavior in prisons).

<sup>96</sup> See Smith, *Rethinking Prison Sex*, *supra* note 96, at 201 (noting that there "is an inherent imbalance of power between staff and inmates [where] [c]orrectional staff control every aspect of the prisoner and the prison experience: housing, recreation, discipline, communication with the outside, and even the length of an inmate's sentence").

<sup>97</sup> See *id.* at 225 (indicating that one loses control over one's personhood in prison, including sexual autonomy as part of the punishment).

<sup>98</sup> See *id.* at 231 (arguing that conjugal and family visits give greater opportunities for prisoners' sexual expression).

<sup>99</sup> See *id.* at 229 (noting that "the rate of infection for hepatitis and HIV . . . among the prison population is three times that of the general population, and affects female inmates at a higher rate than males").

<sup>100</sup> See *Basic Principles for the Treatment of Prisoners*, U.N. Doc. A/RES/45/111, adopted Dec. 14, 1990, available at <http://www.un.org/documents/ga/res/45/a45r111.htm>; see also International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR Res. (No. 2200A), entered into force Mar. 23, 1976, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, entered into force June 26, 1987, available at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm).

<sup>101</sup> See generally Donald Braman, *Families and Incarceration*, in INVISIBLE PUNISHMENT, THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney Lind eds. 2003) (discussing some of the collateral consequences of imprisonment and the effect of these consequences on individuals and families).

<sup>102</sup> See *Farmer v Brennan*, 511 U.S. 825, 834 (1994) (stating that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))).

\* Brenda V. Smith is a Professor of Law at American University's Washington College of Law and is the Program Director for the National Institute of Corrections Project on Addressing Prison Rape ([www.wcl.american.edu/nic](http://www.wcl.american.edu/nic)) at the Washington College of Law. Professor Smith is also a commissioner on the National Prison Rape Elimination Commission ([www.nprec.us](http://www.nprec.us)).

# PROSECUTING SEXUAL VIOLENCE IN CORRECTIONAL SETTINGS:

## EXAMINING PROSECUTORS' PERCEPTIONS<sup>†</sup>

Brenda V. Smith\* and Jaime M. Yarussi\*\*

### Introduction

The Prison Rape Elimination Act of 2003<sup>1</sup> (PREA) is the first piece of federal legislation, which expressly and exclusively addresses sexual abuse of persons in custody. Notwithstanding passage of the Act, there is clear belief, echoed by correctional leaders, that prosecutors are reluctant at best, and unwilling at worst, to prosecute cases of sexual violence in correctional settings. In order to gather information on prosecutor interest in and capacity to prosecute these cases, the National Institute of Corrections Project on Addressing Prison Rape at the Washington College of Law the (the NIC/WCL Project) collected data from state and federal prosecutors.

This article draws on that research and data to examine the perception that prosecutors are unwilling to prosecute cases of sexual violence in custody, discusses barriers to prosecution identified by prosecutors regarding investigating and prosecuting allegations of sexual abuse of persons under correctional supervision, and recommends tools to overcome those barriers.

### Background and Methodology

#### Background

In 2000, the NIC/WCL Project began training high-level correctional administrators on identifying, addressing, and investigating allegations of staff sexual misconduct with offenders. Each year eight training teams from different states fielded three-person teams composed of key correctional decision makers for the state or agency, e.g., sheriffs, wardens, commissioners, and heads of human resources, investigations and training. Relatively quickly, correctional leaders acknowledged that staff sexual misconduct was an important safety issue that agencies needed to address. However, strengthening investigations and sanctions remained challenging. While investigators and correctional administrators knew they had much work to do to improve investigations, they complained that prosecutors were unwilling to take cases to trial. As a result, often their only tool was termination of the employee in strong cases and allowing the employee to resign in others.<sup>2</sup>

After hearing for some time that investigations were fruitless because of a lack of prosecutorial interest in sexual violence against persons under custodial supervision, the NIC/WCL Project required each three-person team that attended its investigative training to include a state or local prosecutor. They believed this inclusion would create collaboration and

help each—corrections leaders and prosecutors—understand the other's challenges in addressing sexual violence in custody. Segments of the training, *Investigating Allegations of Staff Sexual Misconduct with Offenders*, were specifically designed to identify the barriers to prosecuting cases of sexual abuse of individuals under correctional supervision and strategies for overcoming those barriers.<sup>3</sup>

While training eight prosecutors a year for each of the state teams was helpful to the states, the NIC/WCL Project sought to have a larger impact. Seeking to address the lack of information on prosecuting sexual violence in custody, the NIC/WCL Project sought, and was granted, funding from the National Institute of Corrections (NIC) to work with prosecutors to develop a report addressing the existing relationships between law enforcement, correctional professionals, and prosecutors in addressing and prosecuting cases of prison rape.

#### Methodology

The NIC/WCL Project used three methods to compile information for the report. First, it conducted a literature review in order to identify previously identified barriers to prosecuting cases of sexual abuse of individuals in custody. Second, a NIC/WCL Project consultant conducted telephone and in-person, one-on-one interviews of prosecutors from February to May of 2006. Finally, the Project conducted a series of focus groups with federal and state/local prosecutors.

#### Literature Review

The NIC/WCL Project reviewed five kinds of resources: (1) case law; (2) statutes; (3) government reports; (4) reports by advocacy groups; and (5) news stories. The literature review provided background on sexual abuse of individuals in custody and validated barriers that prosecutors later identified in interviews and focus groups. The literature review also assisted in drafting questions to be asked during interviews of individual prosecutors and during focus groups of federal and state/local prosecutors.

#### Interviews

An NIC/WCL Project consultant conducted both telephone and face-to-face interviews with state/local and federal prosecutors from around the country. Eight formal interviews and twelve informal interviews were conducted. The interviewees were selected based on the following criteria: (1) jurisdiction; (2) experience prosecuting sex cases; (3) experience prosecuting prison cases; and (4) referrals by other legal and correc-

tional professionals in the field.

Interview participants were asked the following questions:

1. What is your experience in the area of prisons (prosecutions, sexual abuse, contract facilities)?
2. Why are allegations of sexual abuse of prisoners rarely prosecuted?
3. What barriers exist to prosecuting these cases?
4. What can be done to lift the barriers and improve the likelihood of prosecuting these cases?
5. What is the response of judges and juries regarding the sexual abuse of prisoners?
6. What about cases involving inmate-on-inmate sexual violence - are these cases successfully prosecuted?

### *Focus Groups*

After holding a series of “breakout sessions” with prosecutors during NIC/WCL Project training sessions, it was apparent that group discussions with prosecutors would yield rich information on this subject. In the interest of reaching a greater population of prosecutors, the NIC/WCL Project held focus groups with federal and state/local prosecutors. The focus groups also generated discussions and encouraged the exchange of ideas between prosecutors, which could not be accomplished through one-on-one interviews. Twenty-seven prosecutors attended the focus group meetings—seven federal and twenty state and local prosecutors.<sup>4</sup>

### Federal Focus Group

The federal focus group consisted of seven federal prosecutors, two federal investigators and one federal victim services coordinator. The NIC/ WCL Project extended invitations to individuals based on recommendations from former prosecutors and the United States Department of Justice (DOJ). During the first session of the meeting, prosecutors identified their experience with prosecuting cases from correctional agencies with a focus on sexual assault and abuse. During the second session, prosecutors addressed issues of barriers to federal prosecution and tools available to overcome those barriers.

### State Focus Group

The state focus group consisted of nine state and local prosecutors. The NIC/WCL Project extended invitations to individuals based on recommendations from correctional practitioners and past participants of NIC/WCL Project trainings. Specifically, the NIC/WCL Project sent a request to its listserv for contact information of prosecutors who had either prosecuted these cases or were particularly helpful in getting these cases heard. The NIC/WCL Project received over twenty responses from correctional professionals across the country. In extending the final invitations, the NIC/WCL Project considered geo-

graphic location and prosecutorial success. While all of the prosecutors who received invitations were interested in the Project, many could not attend the focus group because of scheduling conflicts. Issues addressed during the state prosecutors’ focus group mirrored those from the federal prosecutors’ meeting. Findings from the study are detailed below.

## **The Perception that Prosecutors Are Unwilling to Prosecute Cases of Sexual Violence in Custody**

The perception that prosecutors are either reluctant or unwilling to prosecute cases of sexual violence in custody is well-founded. Both government reports<sup>5</sup> and testimony by current<sup>6</sup> and former prosecutors<sup>7</sup> reveal that these cases present significant challenges in the current prosecution environment. First, these cases are not high profile, high value cases; they do not increase the stature of the prosecutor within his office and the community at large. In fact, prosecuting these cases could significantly weaken a prosecutor’s standing in the community by making her appear to be soft on criminals. Additionally, in many jurisdictions correctional staff are sworn peace officers who, as alleged sexual offenders, are the same individuals that prosecutors must rely on to testify in their other criminal cases.

Second, unsympathetic victims, delayed reports of the assault, lack of physical evidence, poor investigations, and conflicting testimony in these cases make them high risk cases. Prosecutors often measure their success by their wins.<sup>8</sup> Sexual assault cases are notoriously hard to win.<sup>9</sup> Custodial sexual abuse cases are even more difficult and expose prosecutors to the possibility of expending valuable resources on a case that may not have a high likelihood of prosecutorial success – either a plea or conviction.

Third, prosecutors often see their role as securing significant sentences for hardened criminals. Some may even believe that being assaulted, physically or sexually, is a part of the penalty for the crime. However, the more informed view is that prosecutors must ensure that individuals who are sentenced to imprisonment are in safe and secure environments. Either way, prosecutors may be reluctant to pursue prison sexual assault cases because they see their job as done after securing the conviction or because they do not view crimes that occur in confinement as part of their purview.<sup>10</sup>

## **Barriers to Prosecuting Prison Sexual Assault Cases**

### **Differences between Administrative and Criminal Cases**

One of the major barriers identified by both state and federal prosecutors is the difference in standards of proof required for discipline in administrative proceedings and the burden of proof that prosecutors must meet in criminal proceedings. In administrative proceedings, the standard of proof required by the person seeking the administrative action is generally “preponderance of the evidence.”<sup>11</sup> In criminal cases, prosecutors will only secure convictions if they prove each

element of an offense “beyond a reasonable doubt.”<sup>12</sup> Both Inspector General Glenn Fine and Senator Jeff Sessions discussed the lack of prosecutions in custodial sexual abuse cases in their testimony before the National Prison Rape Elimination Commission (NPREC).<sup>13</sup> They both noted the importance of prosecutions, yet acknowledged the difficulty in bringing these cases.<sup>14</sup> Each raised the standard of proof as one of the major difficulties in prosecuting prison sexual assault cases.<sup>15</sup>

### *Staff Sexual Abuse of Offenders*

During focus groups held with state and federal prosecutors, attendees pointed out that proceedings to impose administrative sanctions often preceded criminal prosecutions in staff sexual misconduct cases. They agreed that this timing often creates a problem for criminal prosecutions.<sup>16</sup>

First, the burden of proof in an administrative proceeding is lower. If a staff member is successful in the administrative proceeding, it often implicitly discourages additional action in the criminal matter, given the lower burden of proof in administrative cases. Second, investigations that are conducted for purposes of the administrative proceedings can often taint later criminal prosecutions, particularly if the suspect employee is compelled to testify under threat of losing employment. Case law makes clear that, employee testimony secured under threat of firing is compelled and cannot be used in a later criminal prosecution.<sup>17</sup> Finally, often correctional staff are allowed to resign, an administrative sanction, in lieu of being criminally prosecuted for sexual abuse with persons in custody. Prosecutors generally recognize that with the burden of proof so high for a criminal case, administrative sanctions will be the most likely outcome in many cases and thus recommend harsher administrative penalties as a substitute for prosecution.<sup>18</sup>

While this may seem to be an appropriate solution, it creates a number of problems. In particular, staff who resign or are even fired are often rehired in other correctional environments, potentially importing their predatory behavior with even more vulnerable populations. Moreover, in the absence of a criminal conviction, it is difficult to flag predatory staff. Agency fears of employee lawsuits for libel or slander,<sup>19</sup> mean that in practice employers provide little information other than the dates of employment for past employees, giving little notice to others of the reason for termination. Finally, the resignation creates a sense among employers and prosecutors that the matter is resolved. Given the high burden of proof in criminal cases, many prosecutors see this as a just result, failing to realize that prosecution accomplishes other goals – a public recognition that sexual abuse of offenders rises to the level of a crime, that prisoners are victims who deserve their day in court as well, and that no one is above the law.

### *Inmate-on-Inmate Sexual Abuse*

Most prosecutors, federal and state, who were interviewed and attended focus group meetings, had not tried inmate-on-inmate sexual abuse cases. Federal investigators and prosecutors noted that they may not have seen inmate-on-inmate cases because investigation of those incidents in Federal Bureau of Prison (BOP) facilities are handled by the Federal Bureau of Investigations (FBI). Both federal and state prosecu-

tors agreed though, that a more likely scenario is that the incidents of inmate-on-inmate sexual abuse are not being reported or are handled administratively. While federal prosecutors stated that they would prosecute a forcible rape case if one was brought to them, none who participated in the focus groups or individuals interviewed had ever done so.<sup>20</sup>

### **“Consensual” v. Forced Sex**

Another barrier to prosecuting cases of sexual violence in custody is the issue of consent.<sup>21</sup> The defense of consent is a major factor in the decision to prosecute these cases, according to both federal and state prosecutors. This is true whether the case involves staff sexual abuse of inmates or inmate-on-inmate abuse.

### *Staff Sexual Abuse of Offenders*

All fifty states, the District of Columbia, and the federal government prohibit staff sexual abuse of offenders.<sup>22</sup> Twenty-five states and the District of Columbia specifically provide that inmates cannot consent to sex with staff.<sup>23</sup> The large majority of states recognize that staff have tremendous control over every aspect of an offender’s custody. That imbalance of power negates consent. However, two states, Nevada and Delaware, have laws which recognize that inmates can consent to sex with staff. In Delaware and Nevada, inmates can be prosecuted for consensual sex with staff members.<sup>24</sup>

Even though statutes, were enacted to address the issue of inmate consent by creating separate crimes for this offense, prosecutors still find it difficult to prosecute these cases. Both state and federal prosecutors noted that while it was easier for juries to understand the abuse of power issue, juries have problems accepting the credibility of inmates. Juries perceived inmates as liars with a bias against corrections staff, as well as having a financial motive for making the allegations. Additionally, prosecutors reported that juries often viewed both male and female inmates as seducers of correctional staff.<sup>25</sup> Often, both male and female inmates have histories of work in the sex industry, and histories of physical and sexual victimization.<sup>26</sup> These histories make them more vulnerable to sexual abuse and at the same time more willing to use sex to bargain for better treatment.<sup>27</sup> For example, in a 2005 Bureau of Justice Statistics (BJS) publication on correctional authorities’ reports of sexual violence in custody, correctional agencies classified two-thirds of all staff sexual abuse of inmates as romanti; in 2007, they classified fifty-seven percent of staff sexual abuse of inmates as “appeared willing.”<sup>28</sup>

### *Inmate-on-Inmate Sexual Abuse*

Inmate-on-inmate sex in correctional settings presents a different barrier to prosecution. In correctional settings, there is a continuum of sexual behavior between inmates that goes from rape to completely consensual sex. Between those ends of the spectrum are coerced and strategic sex.<sup>29</sup> Complicating matters, consensual sex today can become forced, coerced or strategic at some other point. In other words, the behavior and the motivation of the parties are not static and often change. This flux in the conduct creates tremendous bar-

riers to prosecution both in the community and in prison. One federal prosecutor stated that she would be unlikely to prosecute a case of inmate-on-inmate sexual abuse unless there was physical evidence of violence such as injuries or eyewitness testimony.<sup>30</sup> Prosecutors reported less interest in a case where “consent” is an available defense unless there was also evidence of additional crimes, such as the presence of contraband or the threat of violence.

While consensual sex between inmates may be a conduct code violation punishable administratively, it is generally not a crime. Even in those places where it is a crime,<sup>31</sup> it is not a high priority for prosecutors. If one offender claims that the sex was consensual, prosecutors complain that they become “he said, she said” cases involving two inmates, both convicted offenders with clear issues of credibility.

### **Deficiencies in Criminal Laws Prohibiting the Sexual Abuse of Individuals in Custody**

Prior to 1990, most state and federal jurisdictions did not have laws which specifically prohibited the sexual abuse of individuals under correctional supervision by correctional staff. As a result, few corrections staff could be prosecuted for the sexual abuse of persons in custody. Today, each of the fifty states and the federal government have passed laws making it a crime for correctional staff members to engage in any sexual conduct with a person in custody.<sup>32</sup>

Even after this conduct was criminalized, however, sexual abuse of persons in custody by corrections staff carried relatively lenient sentences compared to sexual assault statutes covering rape in the community.<sup>33</sup> This was especially true under federal law, where prior to 2006, sexual abuse of a ward was a misdemeanor.<sup>34</sup> Not surprisingly, federal prosecutors cited low penalties as the primary reason for not prosecuting custodial sexual abuse cases.<sup>35</sup> Recent amendments to state and federal laws have substantially increased the penalties for sexual abuse of offenders, but it is difficult to determine the effect of these enhancements on prosecution, particularly in the federal system where the changes are so recent and prosecution statistics for these cases have not been studied.<sup>36</sup>

#### *Federal Law*

In April 2005, the Office of Inspector General (OIG) issued a report which found federal laws prohibiting sexual abuse of persons in custody deficient in two respects. First, while the federal law<sup>37</sup> criminalized all sexual relations or contact between prison staff and offenders, those acts were classified as misdemeanors, and thus punishable by a maximum sentence of one year, unless the conduct involved force or overt threats. Second, the OIG report noted that the federal laws did not apply to employees of contract facilities,<sup>38</sup> further hampering OIG and federal prosecutors in “obtaining prosecutions” of sexual abuse in those facilities.<sup>39</sup> Compounding the problem was the fact that state prosecutors often had limited resources which they could focus on prosecuting sexual abuse in correctional facilities at the state level. This lack of resources fore-

closed them from prosecuting cases that occurred in private contract facilities which often housed federal inmates.

OIG recommended that federal law be amended to correct these deficiencies. Amendments were passed and became effective on January 5, 2006, making sexual abuse of an offender by corrections staff, absent force or overt threats, a felony punishable by up to five years imprisonment. The amendment also expanded federal jurisdiction to include sexual abuse of federal prisoners housed in private correctional facilities. Another piece of legislation, The Adam Walsh Child Protection and Safety Act, also passed in 2006. This Act increased penalties for the sexual abuse of a minor or ward to fifteen years.<sup>40</sup>

The new legislation should result in more cases involving allegations of sexual abuse in BOP facilities being investigated<sup>41</sup> and presented to United States Attorney’s Offices (USAOs) for prosecution. However, the likelihood of full prosecution on the merits after a case is presented remains to be seen. Still, prosecutors faced with limited resources must consider investing time and resources in cases where victim/witness reliability is an issue and where potential defendants are law enforcement officers who are community members without criminal records. Prosecutors are also concerned about jury and judge appeal for the reasons identified above. The combination of these two factors creates a perceived and real risk that prosecutions will fail. Additionally, sex offender registration requirements, while providing stronger penalties,<sup>42</sup> also makes judges and juries more reluctant to convict these law enforcement defendants in the absence of exceptionally strong evidence.<sup>43</sup>

#### *State Law*

While all states have criminalized, in some form, the sexual abuse of persons in custody, these laws are not uniform and vary widely. State prosecutors report that often state statutes still do not cover custodial sexual abuse in a number of settings--parole and probation for example.<sup>44</sup> Some states allow consent as a defense in staff abuse of inmates<sup>45</sup> and still others impose minimal sanctions.<sup>46</sup>

In some states, prosecutors voiced frustration with their statutory scheme that only made prosecution of sex offenses of persons in custody a misdemeanor. With low maximum penalties, i.e., misdemeanor status, prosecutors believed it signaled that the offense was not serious, or at least not a priority. Others felt it gave them far less bargaining power in plea negotiations. Moreover, in many states, corrections officers cannot be terminated simply because they have a misdemeanor conviction.<sup>47</sup>

Some state prosecutors pointed out that other tools such as revoking peace officer certifications or licenses may help. Additionally, they felt that sex offender registration could act as a bargaining chip because fewer people would risk going to trial if they knew they might be required to register as a sex offender if convicted. Ultimately however, state prosecutors agreed with their federal counterparts that, especially in cases of staff sexual misconduct, mandatory sex offender registration

could hinder successful prosecutions because agencies are more likely to keep incidents in house and because defendants are more likely to go to trial.

### **Lack of Prosecutorial Experience**

#### *Trying Sex Abuse Cases*

Prosecutors face a number of difficulties proving allegations of sexual abuse of persons under correctional supervision. Prosecutors recognize that sex crimes are among the most difficult cases to prosecute regardless of the status of the victim. Many prosecutors and investigators interviewed for this article articulated the unique difficulties in prosecuting allegations of sexual abuse or assault, whether or not those crimes occurred in institutional settings. They noted that these cases are difficult to prosecute because they rely on many aspects of a good investigation to corroborate the victims' reports including: proper processing of crime scenes; collection and preservation of evidence; knowledge of physical, medical and scientific evidence; prompt reporting and cooperation from the victim; proper interviewing of victims and witnesses; and corroboration of the victim's testimony by other witnesses or physical evidence. Unfortunately, these ingredients are often missing in institutional investigations of custodial sexual abuse.

Prosecutors believe that obtaining a thorough and prompt investigation is more difficult in the corrections environment. This difficulty is compounded by the lack of training that correctional investigators receive in responding to sexual assaults in custody.

Additionally, most states lack staff or units who primarily prosecute sex cases. These cases are often assigned to prosecutors who must take any case that comes to them. Prosecutors who lack experience trying sexual assault cases may not fully understand the dynamics of sexual violence, which is important at every stage of the investigation and prosecution from the first interview with the victim, to crafting opening statements, direct examinations, and closing arguments. Moreover, understanding the dynamics of sexual violence and a jury's possible reaction to the victim or circumstances of a particular case, can inform prosecutors' decisions about cases. Familiarity with forensic evidence, like DNA, and special rules of evidence that apply in sexual assault cases, such as rape shield laws, are also important for successful prosecutions.

One former federal prosecutor illustrated the need for experience and training by describing a case that he tried and lost involving the sexual abuse of a fourteen-year old girl by a corrections official at a halfway house. The prosecutor said that at the time of the trial he was surprised at the loss because he thought the case was strong, but realized in hindsight that his lack of experience trying sexual assault cases led him to misjudge the strength of his evidence and how the jury would view the credibility of the victim.<sup>48</sup>

State prosecutors reported that sex crimes in general require a very specialized knowledge. Even seasoned prosecutors expressed concern that prosecutors know little about corrections institutions making prosecuting sex crimes an even more daunting task.<sup>49</sup> These cases, according to state prosecutors, require prosecutors to learn an entirely new culture. In

some ways, prosecuting sexual abuse of an offender is at odds with prosecutors' culture and belief systems. State prosecutors noted that they spend most of their career sending people to prison, and it is a shift in culture and way of thinking to advocate for offenders by prosecuting their abusers.<sup>50</sup>

#### *Trying Cases from Correctional Settings*

Prosecutors and investigators noted that prosecutors are not sufficiently knowledgeable about prisons, prison culture or correctional practices. Federal investigators also felt that prosecutors did not have sufficient knowledge of issues such as the coercive influence of contraband on sex and security in the institution, and admittedly, many prosecutors and investigators have never been inside a correctional facility prior to their involvement in these cases.

One prosecutor, who has seen many cases from her state prison system, said that it took prosecutors in her office some time just to understand the prison's record keeping system. She said that every time they prepared for trial and assured defense counsel and the judge that all documentation from the prison had been provided in discovery, they learned of new documents. Finally, her office learned that the prison kept two sets of records, one for the prison and a second to provide to prosecutors and police. She said that in some cases, they also described crimes in a third set of documents created and maintained by the intelligence branch of the prison. The prosecutor said that until all of the document problems were resolved with the prison, the prosecutors had trouble meeting their discovery obligations in these cases.

#### *Lack of Understanding About the Correctional Environment*

Some corrections administrators and investigators believe that prosecutors do not have a full appreciation of the impact of sexual abuse on inmates.<sup>51</sup> Sexual abuse of persons in custody violates constitutional rights, creates psychological and emotional trauma,<sup>52</sup> may result in disciplinary actions against the victim, and undermines the safety and security of the institution.<sup>53</sup>

Sexual abuse of persons in custody also undermines the system of security of the institutions because often it is not limited to sexual abuse. Nearly half of the subjects in federal staff sexual misconduct cases also smuggled contraband into prisons for the offenders with whom they had sexual relationships.<sup>54</sup> Many of these staff members helped offenders conceal contraband by alerting the offenders to unannounced searches or by storing contraband with the staff's possessions.<sup>55</sup> This quid pro quo relationship for the purpose of engaging in sexual conduct with an inmate compromises safety barriers and subjects the remaining prison population and correctional staff to substantial risk.

### **Witness Credibility**

Credibility of witnesses is paramount in any sexual assault case. The credibility of an inmate witness in cases of sexual abuse in correctional settings is immediately suspect because of his status as an offender.

Both state and federal prosecutors have reported that in cases where the only evidence is the victim's report with no corroboration—the case is virtually untriable. Credibility issues that are not supported by physical evidence, corroborated by correctional staff, or have multiple victim incidents become a case of “he said, she said.”<sup>56</sup> According to prosecutors, the risk of trying these cases is great. The high likelihood of an acquittal may offset the deterrent effects of investigating these cases as well as discourage prompt reporting of sexual assaults for fear of retribution following an acquittal at trial.

Multiple interviews of victims that generally happen in the correctional setting can also have an impact on whether prosecutors accept a case. Inconsistencies in statements and the victim's credibility in general led one federal prosecutor to believe a victim was lying.<sup>57</sup> That prosecutor indicated that there are many cases of sex between staff and offenders that are not presented to prosecutors because there was often no evidence. In order to corroborate the victim's story, prosecutors want physical evidence and contemporaneous reporting, or the knowledge that the staff member had assaulted more than one offender.<sup>58</sup>

Federal prosecutors also agreed that if there is no physical evidence or non-inmate proof of the abuse, they are less likely to take the case generally because of credibility issues with the victim.<sup>59</sup> Prosecutors admitted that even if they do prosecute, witnesses who are incarcerated are often immediately impeached with past convictions. One prosecutor felt that jurors assess the credibility of a witness from a correctional setting the same way they assess the credibility of any witness, but because they are felons, they are presumed to lack credibility by many jurors and indeed jury instructions direct that jurors may consider previous convictions in assessing credibility.<sup>60</sup>

with your victim; and (7) creative tools for prosecution.

Finally, prosecutors and investigators need to understand that investigating and prosecuting custodial sexual abuse cases are important. These prosecutions are essential to maintaining safe, secure and humane institutions and communities. Custodial sexual abuse closely correlates with other issues such as contraband, coercion and use of force. In order to protect other staff and inmates in these environments, it is important to prosecute these cases.

### **Build Relationships with Others in the Field**

In order to overcome barriers to prosecuting these cases, it is important for correctional officials, investigators and prosecutors to understand each other's roles and challenges. In order to build these relationships, focus group participants recommended forming agency task forces, composed of investigators, prosecutors, correctional staff, law enforcement and victim services.

Specific to federal prosecutions, focus group participants recommended having an investigative agent housed in the U.S. Attorney's Office in order to reduce problems prosecutors have identified in regards to resources—staff time and cost for the prosecutor's office. For state systems, using outside law enforcement can help gain credibility. Many agencies recommend using third-party investigative units in state prisons and local jails. Establishing an investigative protocol that includes outside law enforcement, who often have special sexual assault units, adds credibility to the case because they often bring special skills and resources and are not perceived as allied with correctional agencies.

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*Both investigators and prosecutors pointed out that sex cases in prisons do not “sell.” Often, only the introduction of other violations committed by staff members or inmate defendants result in convictions.*

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## **Recommendations for Improving Prosecutions of Correctional Sex Abuse Cases**

### **Train Prosecutors on the Dynamics of Sexual Abuse in Correctional Settings**

Training prosecutors on techniques for prosecuting custodial sexual abuse cases is critical. Additionally, while it is important to train prosecutors, it is essential to take a team approach and include federal and state level investigators, law enforcement, facility administrators and correctional staff, and victim advocates to have a collaborative effort in understanding the dynamics of prison rape.

The Civil Rights Division of the Department of Justice recommends that U.S. Attorneys team with them in order to train prosecutors on the unique techniques used in sex crimes cases such as the use of a grand jury, interview techniques, and the benefits of having an OIG investigator involved—techniques that are not used in other cases. They suggested curricula that included: (1) correctional culture; (2) prosecuting a sex crime; (3) security implications; (4) understanding sexuality in a correctional setting; (5) corroboration and alternative evidence to DNA; (6) helping judges and juries to sympathize

### **Amend State and Federal Criminal Law**

Prosecutors have noted deficiencies in both federal and state criminal law in this area. First, prosecutors recommend stronger penalties. Prosecutors feel that misdemeanor sanctions for these offenses are inappropriate for the crime and limit their bargaining power; staff will not accept a plea and inmate defendants will only receive limited penalties in addition to current sentences. On the other hand, especially where correctional officers are concerned, jurors may be reluctant to convict staff members of a felony for sexually abusing inmates.

Additionally, laws need to be amended to cover all personnel in all correctional settings, and provide that inmate consent is not a defense to sexual abuse. Furthermore, correctional administrators should sanction behavior that may not be criminal, but which is sexually abusive – such as inappropriate viewing or photographing of inmates.

### **Utilize a Variety of Laws as Tools for Prosecuting Sexual Abuse**

Both investigators and prosecutors pointed out that sex cases in prisons do not “sell.” Often, only the introduction of other violations—such as contraband, bribery or malfeasance in office—committed by staff members or inmate defendants

result in convictions. Prosecutors should be encouraged to use all of the tools available to them when prosecuting sexual abuse of persons in custody. Mandatory reporting, obstruction of justice, malfeasance in office, statutory rape, sexual assault and conspiracy are all legal tools which are available to prosecute custodial sexual abuse and surrounding circumstances. In addition, prosecutors could look to loss of license and sex offender registration, as ways to either secure pleas or impose additional sanctions, which ensure that the staff defendant does not secure employment in other institutional settings.

### **Develop Special Prosecution Units for Sexual Abuse Cases**

In general, federal prosecutors rotate through a variety of assignments, while state prosecutors often prosecute whatever case they are assigned. Federal and state prosecutors recommend having dedicated staff who are familiar with sex cases or having allegations of sexual abuse of a person in custody referred to specialized sex crimes or civil rights units<sup>61</sup> where they exist. At a minimum, there should be a designated prosecutor in every jurisdiction who is trained and prepared to prosecute these crimes when they occur. Historically, the types of experience and support provided by specialized units has improved the rate of successful prosecution for crimes once considered difficult to prosecute, such as domestic violence, sexual assault, and crimes against children.

### **Increase Resources for Prosecution of Sexual Abuse**

Federal prosecutors have suggested a resource shift would be most helpful for them. To begin to elevate this issue, federal prosecutors have suggested that an OIG agent be assigned to each USAO, and funds to prosecute cases of sexual violence in institutions be increased. While federal prosecutors recognize that there are staff and budgetary limits, they suggest that moving the resources, both funding and personnel, to offices that have more of these cases, would improve prosecution outcomes.

State prosecutors have stated that the only way to prosecute these cases with any expertise would require an increase of resources. In addition to needed financial support and manpower, state and local prosecutors called for some clarity on the responsibility of prosecuting these cases—are they state cases, federal cases, local cases and who pays for prosecution and who investigates.

### **Change the Culture of Prosecutors and Judges Regarding Sexual Abuse in Correctional Settings**

Prosecutors agreed that a cultural shift would elevate this issue on the political agenda of many elected prosecutors as well as appointed and elected judges.<sup>62</sup> Investigators and corrections officials report that the likelihood that a particular case will be prosecuted often has a lot to do with the perception of the individual prosecutor and his or her office about the importance of these cases, especially in relation to the case prosecution priorities in her jurisdiction.

The Attorney General, United States Attorneys, and

the heads of state and local prosecutors' offices must send the message to their prosecution staff that sexual abuse of persons in custody will be prosecuted vigorously, and they must provide them with the resources and training to do it.

## **Conclusion**

Prosecutors believe that, in addition to training and resources to improve investigations and prosecutions of allegations, decision makers must have the political will to change prosecutorial and investigative responses to custodial sexual violence. Prosecutors requested that policy makers at the highest levels of government put their authority behind this issue because where the interest of such persons lie, so go the resources. Organizations like Human Rights Watch,<sup>63</sup> The Commission on Safety and Abuse in America's Prisons,<sup>64</sup> and a myriad witnesses testifying before the NPREC have echoed this sentiment.<sup>65</sup>

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<sup>1</sup> Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601-15609 (2003).

<sup>2</sup> See generally The National Institute of Corrections/Washington College of Law Project on Addressing Prison Rape (NIC/WCL Project), Addressing Staff Sexual Misconduct with Offenders (March 2006), Investigating Allegations of Staff Sexual Misconduct with Offenders (March 2005, 2004), Responding to Inmate – on – Inmate Sexual Violence (March 2007), and Addressing Sexual Abuse of Youth in Custody (July 2007, Nov. 2005), under National Institute of Corrections (NIC) cooperative agreements 01P18G108 through 07S24GJQ1.

<sup>3</sup> See NIC/WCL Project, Investigating Allegations of Staff Sexual Misconduct with Offenders, *Prosecutor Break Out Sessions* (July 9-14, 2006), under NIC Cooperative Agreements 06S20GJJ1 (meeting notes on file with author) [hereinafter 2006 Prosecutor Breakout Sessions]; NIC/WCL Project, Investigating Allegations of Staff Sexual Misconduct with Offenders, *Prosecutor Break Out Sessions* (July 15-20, 2007), under NIC Cooperative Agreement 07S24GJQ1 (meeting notes on file with author) [hereinafter 2007 Prosecutor Breakout ses-

sion].

<sup>4</sup> See NIC/WCL Project, Improving Prosecutions of Allegations of Sexual Abuse in Correctional Settings, *A Meeting with Federal Prosecutors* (Oct. 13, 2006), under NIC Cooperative Agreements 06S20GJJ1 (attendance list on file with author) [hereinafter Federal Meeting]; NIC/WCL Project, Improving Prosecutions of Allegations of Sexual Abuse in Correctional Settings, *A Meeting with State Prosecutors* (Oct. 27, 2006), under NIC Cooperative Agreements 06S20GJJ1 (attendance list on file with author) [hereinafter State Meeting].

<sup>5</sup> See U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL: DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 3 (2005) [hereinafter OIG REPORT] (noting that sexual abuse of female inmates is both underreported and alarmingly prevalent).

<sup>6</sup> See The Honorable Kim Worthy, Prosecuting Attorney for Wayne County, Michigan at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (August 3, 2006), available at [http://nprec.us/docs/detroit\\_testimony\\_worthy.pdf](http://nprec.us/docs/detroit_testimony_worthy.pdf) [hereinafter NPREC Worthy Testimony] (elaborating on why Wayne County is unable to continue to prosecute inmate sexual abuse cases); see also The Honorable Gregory Miller, United States Attorney for the Northern District of Florida at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (August 3, 2006), available at [http://nprec.us/docs/detroit\\_issues\\_miller.pdf](http://nprec.us/docs/detroit_issues_miller.pdf) (discussing the many issues which make it difficult for prosecuting sexual assault within prisons).

<sup>7</sup> See Senator Jeff Sessions, Address at the *Public Hearing Before the National Prison Rape Elimination Commission: The Cost of Victimization: Why Our Nation Must Confront Prison Rape* (June 14, 2005), available at [http://nprec.us/docs/SenatorJeffSessionsRemarks\\_Vol\\_1.pdf](http://nprec.us/docs/SenatorJeffSessionsRemarks_Vol_1.pdf) [hereinafter NPREC Sessions Testimony] (encouraging the criminal justice system to take the problems of incarcerated sexual abuse seriously).

<sup>8</sup> See generally Mary De Ming Fan, *Disciplining Criminal Justice: The Peril and Promise of Numbers*, 26 YALE L. & POL. R. 2 (2007) (explaining that the seemingly favorable statistics regarding criminal justice prosecutions do not necessarily signify success).

<sup>9</sup> See Rape, Abuse and Incest National Network, Reporting Rates, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Mar. 26, 2008) (finding that if a sexual assault is reported there is a 50.8% chance of an arrest; if there is an arrest made, there is an 80% chance of prosecution; and if there is a prosecution there is a 58% chance of a conviction). Factoring in unreported rapes, only 6% of sexual assault perpetrators will spend time incarcerated—15 of 16 perpetrators walk free. *Id.*

<sup>10</sup> See NPREC Worthy Testimony, *supra* note 6 (explaining that in the wake of budgetary constraints, prosecution of crimes between inmates is not a priority for Wayne County).

<sup>11</sup> See *Steadman v. S.E.C.*, 450 U.S. 91 (1981) (finding that in

an administrative proceeding, matters in issue need only be established by a preponderance of the evidence).

<sup>12</sup> See *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (finding that the standard of proof beyond a reasonable doubt “is an ancient and honored aspect of our criminal justice system”).

<sup>13</sup> See NPREC Sessions Testimony, *supra* note 7; see also Glenn Fine, Inspector General, Address at the *Public Hearing Before the NPREC: The Cost of Victimization: Why Our Nation Must Confront Prison Rape* (June 14, 2005), available at [http://www.nprec.us/docs/InspectorGeneralGlennFine\\_Vol\\_1.pdf](http://www.nprec.us/docs/InspectorGeneralGlennFine_Vol_1.pdf) (admonishing that the laws criminalizing staff sexual relations with federal inmates are not sufficient).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *Garrity v. State of New Jersey*, 385 U.S. 493 (1967) (discussing employees’ rights against criminal self-incrimination).

<sup>18</sup> See Federal Meeting, *supra* note 4 (discussing that while investigators in general agreed with the need to increase administrative penalties, they complained that more often than not, those were met with opposition by unions).

<sup>19</sup> See *Robinson v. Robinson*, No. 05-CV-01433, 2006 WL 726296 (D. Colo. Mar. 20, 2006) (issues included: malicious prosecution, defamation, 14th Amendment Due Process); *Corona v. Lunn*, No. 00-CIV-7330, 2002 WL 550963 (S.D.N.Y. Apr. 11, 2002) (issues included: false arrest and malicious prosecution).

<sup>20</sup> See Federal Meeting, *supra* note 4 (noting the lack of experience in prosecuted forcible prison rape cases).

<sup>21</sup> See *id.*; see also State Meeting, *supra* note 4 (discussing and indentifying consent as one of the most difficult issues in prosecuting prison rape).

<sup>22</sup> Brenda V. Smith, Fifty State Survey of State Criminal Laws, *Prohibiting the Sexual Abuse of Individuals Under Custodial Supervision* (January 2008), under NIC Cooperative Agreement 07S27GJT7 [hereinafter 50 State Survey].

<sup>23</sup> *Id.*; see, e.g., CAL. PENAL CODE § 289.6 (2001) (“Consent by a confined person or parolee to sexual activity proscribed by this section is not a defense to a criminal prosecution for violation of this section.”); FLA. STAT. ANN. § 944.35 (2006) (“The consent of the inmate or offender supervised by the department in the community to any act of sexual misconduct may not be raised as a defense to a prosecution under this paragraph.”); WIS. STAT. ANN. § 940.225 (West 2005) (“Consent is not an issue in alleged violations . . .”).

<sup>24</sup> See 50 State Survey, *supra* note 22; see, e.g., DEL. CODE ANN. tit. 11, § 1259 (1995) (“A person is guilty of sexual relations in a detention facility when, being a person in custody at a detention facility or being an employee working at a detention facility, the person engages in sexual intercourse or deviate sexual intercourse on the premises of a detention facility.”); NEV. REV. STAT. ANN. § 212.187 (1997) (“A prisoner who is in lawful custody or confinement, other than in the custody of the Division of Parole and Probation of the Department of Public Safety or residential confinement, and who voluntarily engages in sexual conduct with another person is guilty of a category D felony.”);

see also *Phillips v. Bird*, Dept. of Corrs. of the State of Del., 2003 U.S. Dist. LEXIS 22418 (D. Del. Dec. 1, 2003).

<sup>25</sup> See Federal Meeting, *supra* note 4; State Meeting, *supra* note 4; see also *Carrigan v. Davis*, 70 F. Supp. 2d 448 (D. Del. 1999).

<sup>26</sup> See generally CAROLINE HARLOW, BUREAU OF JUSTICE STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf> (detailing the statistical results of prior sexual abuse in state and federal prisons).

<sup>27</sup> See DC Rape Crisis Center, Effects of Sexual Abuse: Internal, <http://dcrcc.org/effects.htm> (last visited Feb. 6, 2008) (discussing the internal effects of sexual abuse as including: depression, low self-esteem, anger or control issues, anxiety, shame, guilt); Angela Browne & A.J. Sabree, NIC/WCL Project, Responding to Inmate-on-Inmate Sexual Violence, *Presentation on the Impact of Victimization* (March 2007), available at [http://www.wcl.american.edu/nic/conference\\_march\\_07/modules/11\\_impact\\_of\\_past\\_victimization.pdf?rd=1](http://www.wcl.american.edu/nic/conference_march_07/modules/11_impact_of_past_victimization.pdf?rd=1) (noting the links between incarceration and victimization); Brenda V. Smith, NIC/WCL Project, *Continuum of Sexual Behavior in Institutional Settings* (2006), under NIC Cooperative Agreement 06S20GJJ1 (PowerPoint presentation on file with author) [hereinafter Smith, *Continuum of Sexual Behavior*] (illustrating that strategic sex or sex as a bargaining tool is used).

<sup>28</sup> See ALLEN BECK & TIMOTHY HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 9 (2005) [hereinafter BECK & HUGHES 2004]; see ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 6 (2007) [hereinafter BECK, HARRISON & ADAMS 2006].

<sup>29</sup> See Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 225 (2006) [hereinafter Smith, *Rethinking Prison Sex*] (discussing the continuum of sexual expression in correctional environments the main concern of which is whether the state has an ability to regulate that expression); see also Smith, *Continuum of Sexual Behavior*, *supra* note 27 (analyzing (through a visual) the limits placed on prisoners' ability to sexual express themselves).

<sup>30</sup> See Federal Meeting, *supra* note 4.

<sup>31</sup> See generally *U.S. v. Brewer*, 363 F. Supp. 606 (M.D. Pa. 1973); *People v. Frazier*, 64 Cal. Rptr. 447 (1967); *People v. Coulter*, 288 N.W.2d 448 (Mich. Ct. App. 1980) (holding the state sodomy law constitutional as applied to sex in prison); *George v. Lane*, No. 82 C 7084, 1987 U.S. Dist. LEXIS 3659 (N.D. Ill. Apr. 30, 1987) (finding that prison regulations prohibiting consensual sex are constitutional); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Croom v. Wagner*, No. 06-1431, 2006 U.S. Dist. LEXIS 64915 (E.D. Pa. Sept. 11, 2006); *Barnes v. Ozmint*, 3:04-21836-CMC-JRM, 2005 U.S. Dist. LEXIS 38173 (D.S.C. Nov. 7, 2005); *People v. Rollins*, 569 N.E.2d 1251 (Ill. App. 1991); *U.S. v. Robert White* (Criminal Action

No. F130-05, 2006).

<sup>32</sup> See 50 State Survey, *supra* note 22.

<sup>33</sup> See, THE NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, INVESTIGATING STAFF SEXUAL MISCONDUCT WITH OFFENDERS TRAINING MATERIALS: IN THE NEWS : CRIMINAL CONVICTIONS CHART STAFF SEXUAL MISCONDUCT WITH OFFENDERS (2007) (illustrating that prosecutions and the sentence received by staff in sexual misconduct cases are relatively low); see also, Rape Abuse and Incest National Network, Reporting Rates, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited March 30, 2008) (providing statistics regarding the reporting and prosecution of sexual assaults).

<sup>34</sup> See 18 U.S.C. §§ 2243(b), 2244(a)(4), 2244(b) (2006) (raising the penalty for sexual abuse of a ward from misdemeanor to felony punishable levels).

<sup>35</sup> OIG REPORT, *supra* note 5, at 8.

<sup>36</sup> See Interview with Federal Prosecutor (Feb. 28, 2006) [hereinafter FP Interview] (stating that “[t]here have not been enough cases since the penalties were enhanced, to make any type of meaningful judgment about the impact the amended law will make on the rate of prosecutions); see also OFFICE OF THE INSPECTOR GENERAL, TRAINING: INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH OFFENDER (June 2006), under NIC cooperative agreement 06S21GJL7.

<sup>37</sup> 18 U.S.C. §§ 2241, 2243-2244.

<sup>38</sup> OIG REPORT, *supra* note 5, at 18.

<sup>39</sup> *Id.* at 19.

<sup>40</sup> See Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat 587 (2006) (codified in scattered sections of 18 U.S.C.).

<sup>41</sup> Federal investigators are concerned that these amendments may decrease prosecutions due to the increased severity of the sentences. See generally OFFICE OF THE INSPECTOR GENERAL TRAINING: INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH OFFENDER (June 2006), under NIC cooperative agreement 06S21GJL7.

<sup>42</sup> See *Smith v. Doe*, 538 U.S. 84, 101 (2003) (holding that “[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Ac’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant”).

<sup>43</sup> See Federal Meeting, *supra* note 4.

<sup>44</sup> See State Meeting, *supra* note 4; see also Brenda V. Smith & Jaime M. Yarussi, NIC/WCL Project, Breaking the Code of Silence, A Correction Officers’ Handbook on Identifying and Addressing Sexual Misconducts 4 (June 2007) [hereinafter CO HANDBOOK] (highlighting that agencies include but are not limited to: jails, lock-ups, prisons, community facilities for adults or juveniles, juvenile detention centers, immigration detention facilities and community corrections agencies including probation, parole, half-way homes, electronic or home monitoring,

work release, pre-release centers or pre-trial release and contract facilities). Personnel includes but is not limited to: correctional officers, administrators and staff, volunteers, medical and mental health personnel, contract employees and maintenance and food service workers. *Id.*; see also 50 State Survey, *supra* note 22.

<sup>45</sup> See 50 State Survey, *supra* note 22; see also DEL. CODE ANN. tit. 11, § 1259 (2008); NEV. REV. STAT. ANN. § 212.187 (LexisNexis 2007).

<sup>46</sup> See 50 State Survey, *supra* note 22 (indicating that while the

<sup>46</sup> See 50 State Survey, *supra* note 22 (indicating that while the vast majority of states define staff sexual misconduct as a felony, some also still only charge it as a misdemeanor or define the crime as a graduated sanction allowing the prosecutor to charge either a misdemeanor or a felony depending on the facts of the case).

<sup>47</sup> See State Meeting, *supra* note 4.

<sup>48</sup> NIC/WCL Project, The Role of Prosecutors in Cases of Staff Sexual Conduct with Offenders, *Investigating Allegations of Staff Sexual Misconduct with Offenders* (July 2005), available at [http://www.wcl.american.edu/nic/Training/Curriculum/July\\_2005/Prosecution.ppt?rd=1](http://www.wcl.american.edu/nic/Training/Curriculum/July_2005/Prosecution.ppt?rd=1) (“On the day of her testimony, the victim dressed provocatively and giggled nervously. Because of the prosecutor’s lack of experience he had not instructed her on how to dress for court, did not ask her questions on direct examination that would help her to explain to the jury why she was giggling and not crying and that in general he felt that he had misjudged the amount of time it would take to prepare her to testify.”).

<sup>49</sup> See State Meeting, *supra* note 4.

<sup>50</sup> *Id.*

<sup>51</sup> See Federal Meeting, *supra* note 4; 2006 Prosecutor Breakout Sessions, *supra* note 3; 2007 Prosecutor Breakout Sessions, *supra* note 3.

<sup>52</sup> See generally WOMEN’S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996); WOMEN’S RIGHT’S PROJECT, HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE (1998), available at <http://www.hrw.org/reports98/women/>; HUMAN RIGHTS WATCH REPORT, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) [hereinafter NO ESCAPE]; AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE,” VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999); AMNESTY INT’L, USA: THE FINDINGS OF A VISIT TO VALLEY STATE PRISON FOR WOMEN, CALIFORNIA (1999); AMNESTY INT’L, CHILDREN AND WOMEN ABUSED IN CORRECTIONAL FACILITIES (1998).

<sup>53</sup> OIG REPORT, *supra* note 5, at 7-8; see also CO HANDBOOK, *supra* note 44, at 8.

<sup>54</sup> See Federal Meeting, *supra* note 4.

<sup>55</sup> OIG REPORT, *supra* note 5, at 7; see also Chitra Subramanyam, *FCI Guard Sentenced for Sex Act*, TALLAHASSEE DEMOCRAT, Aug. 29, 2006 (noting that in a case in the Federal District Court in Tallahassee, Florida, Bureau of Prison guards were charged with and found guilty of crimes arising out of trading contraband for sex with at least ten offenders). In this same case, an OIG agent was shot and killed at the Federal Correctional Institution in Tallahassee as he and another law enforcement agent were in the process of arresting one of the guards. *Id.* This is an indication of how such activities can lead

to corruption and violence in correctional settings.

<sup>56</sup> See Federal Meeting, *supra* note 4; State Meeting, *supra* note 4.

<sup>57</sup> See FP Interview, *supra* note 36 (noting that initially the inmate was believed, but that after a thorough investigation it was determined that she was lying). The prosecutor said that the inmate never admitted to lying, but that a “huge amount” of information, including inconsistencies in her statements as well as statements of other prisoners that discredited her version of events and her credibility, generally led prosecutors to believe the inmate was lying. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See Federal Meeting, *supra* note 4.

<sup>60</sup> See FP Interview, *supra* note 36 (stating that because they are felons by virtue of their status as a prisoner, you need to corroborate their testimony).

<sup>61</sup> See Federal Meeting, *supra* note 4 (discussing Washington, DC’s prosecution unit and how some specialize in sex crimes). Prosecutors noted that because of the difficulty prosecuting sex crimes, many prosecutors’ offices have specialized sex crimes units or at least one or two veteran sex crimes prosecutors who handle these cases. *Id.* In addition, while state and local prosecutor’s offices are more likely to have experience trying these cases, the depth of that experience depends on the number and types of cases that occur in their districts and the resources they are able to devote to those cases. *Id.*; see also Gina DeBottis, Chief Prosecutor, Special Prosecution Unit, Texas at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (Aug. 3, 2006), available at [http://nprec.us/docs/detroit\\_issues\\_debottis.pdf](http://nprec.us/docs/detroit_issues_debottis.pdf) (describing the special sex crimes prosecution unit in Texas and their experience with prison sex cases).

<sup>62</sup> CO HANDBOOK, *supra* note 44, at 7.

<sup>63</sup> See NO ESCAPE, *supra* note 52, at 68-75.

<sup>64</sup> See generally JOHN J. GIBBONS AND NICHOLAS DE B. KATZENBACH, VERA INSTITUTE OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS (2006), available at <http://www.wcl.american.edu/nic/documents/4.VERACommisionReport.pdf?rd=1> (reporting on the violence and abuse in U.S. jail and prisons).

<sup>65</sup> See generally National Prison Rape Elimination Commission Hearings, available at <http://nprec.us/proceedings.htm> (listing the nationwide public hearings which discuss the elimination of prison rape).

\* Brenda V. Smith is a Professor of Law at American University’s Washington College of Law and is the Program Director for the National Institute of Corrections Project on Addressing Prison Rape ([www.wcl.american.edu/nic](http://www.wcl.american.edu/nic)) at the Washington College of Law. Additionally, Professor Smith is a commissioner on the National Prison Rape Elimination Commission ([www.nprec.us](http://www.nprec.us)).

\*\* Jaime M. Yarussi is the Program Coordinator for the National Institute of Corrections Project on Addressing Prison Rape ([www.wcl.american.edu/nic](http://www.wcl.american.edu/nic)) at the Washington College of Law.

# THE VIOLENCE AGAINST WOMEN ACT: DENYING NEEDED RESOURCES BASED ON CRIMINAL HISTORY

Jaime M. Yarussi\*

“After the first rape, he was returned to the general population. There, he was repeatedly beaten and forced to perform oral sex and raped. He wrote for help again. In his grievance, he wrote a letter, ‘I have been sexually and physically assaulted several times by several inmates. I’m afraid to go to sleep, to shower or just about anything else. I am afraid that when I am doing these things, I might die at any time.’”

*Testimony of Ms. Linda Bruntmyer on behalf of her son Rodney before the National Prison Rape Elimination Commission on June 14, 2005.*<sup>1</sup>

## Introduction

In 1994, Congress passed the Violence Against Women Act (VAWA)<sup>2</sup> giving national attention to the issue of violence against women at the hands of both intimates and non-intimates.<sup>3</sup> VAWA has been reauthorized twice since its initial passage and currently addresses domestic violence, sexual assault and physical violence.<sup>4</sup> It has also become the largest funding source for victim<sup>5</sup> services such as mental health care and crisis intervention. More specifically, VAWA furthered the attention needed for services for sexual assault victims<sup>6</sup> and enhanced the financial means of non-governmental entities such as crisis centers to treat victims of abuse— both physical and sexual.<sup>7</sup> However, neither in its initial signing nor in either the 2000 or 2005 reauthorizations, has VAWA provided for services for violence perpetrated against incarcerated persons.

This article aims to discuss the Violence Against Women Act (VAWA) and the Victims of Crime Act (VOCA) in regards to funding for mental health treatment and crisis services for incarcerated survivors and victims of sexual violence. It will begin by illustrating the need for services because of inmates’ likely history of victimization and draws conclusions regarding the impact that denying VAWA/ VOCA resources may have on the recovery of incarcerated victims.

## Sexual Assault Statistics

In America, someone is sexually assaulted every two minutes; one in six American women and one in thirty-three men are victims of sexual assault.<sup>8</sup> About eighty percent of rape victims are under the age of thirty.<sup>9</sup> In 2006, there were 272,350 cases of rape, attempted rape or sexual assault reported.<sup>10</sup> According to the 2005 Crime Victims Survey and the National Center for Policy Analysis, sixty percent of sexual assaults go unreported.<sup>11</sup> The same report stated that men were less likely to report a sexual assault even though it is estimated they make up to ten percent of all victims.<sup>12</sup> Of the rapes, attempted rapes and sexual assaults reported in 2005, seventy-three percent of

sexual violence was perpetrated by someone the victim *knew*— thirty-eight percent by a friend or acquaintance, twenty-eight percent by an intimate partner and seven percent by a family member.<sup>13</sup>

One out of four girls and one out of six boys are sexually abused before the age of eighteen.<sup>14</sup> Children who are survivors of sexual abuse can have trouble coping with life’s obstacles. They demonstrate delinquent behaviors such as drinking or drug addiction<sup>15</sup> and develop psychological problems<sup>16</sup> that are sometimes left untreated, causing them to act out their abusive experiences against others.<sup>17</sup> These children may also have disproportionate contact with the criminal justice system beginning, for some, in childhood and continuing into adulthood.<sup>18</sup>

## Victimization Histories of Offenders under Correctional Supervision

In 1997, the United States Census Bureau conducted a study to determine the national average of victimization of state prisoners.<sup>19</sup> They found that 72.8% of incarcerated women experienced physical abuse and thirty-nine percent experienced sexual abuse.<sup>20</sup> They also found that 73.5% of incarcerated men experienced physical abuse and six percent experienced sexual abuse.<sup>21</sup> In a study done in Bedford Hills Women’s Prison, participating women were asked overall about physical and/or sexual assault over their lifespan; eighty-two percent reported childhood victimization and ninety-two percent reported severe violence as an adult.<sup>22</sup> The picture for men is not much different. A study of incarcerated men found that forty percent experienced childhood sexual abuse.<sup>23</sup>

In 1999, the Bureau of Justice Statistics (BJS) studied the abuse histories of inmates and probationers.<sup>24</sup> This study revealed that nineteen percent of state prisoners, ten percent of federal prisoners, and sixteen percent of men and women in local jails or on active probation reported physical or sexual abuse.<sup>25</sup> Among state prisoners, sixty-one percent of abused men and thirty-four percent of abused women were serving time for a violent offense.<sup>26</sup> Nineteen percent of men who reported abuse before prison were serving sentences for sexual assault;<sup>27</sup> sixteen percent of male prisoners and fourteen percent of female prisoners who reported abuse had committed homicide.<sup>28</sup>

Illegal drug use and alcohol consumption were also among issues for abused prisoners in the 1999 BJS study. An estimated seventy-six percent of men and eighty percent of women who reported abuse used illegal drugs regularly.<sup>29</sup> Drug and alcohol use were more common among inmates that reported having been previously victimized; seventy-six percent of abused men and eighty percent of abused women reported using drugs regularly and many reported having used alcohol or illegal drugs at the time of their offense.<sup>30</sup> Of the abused women surveyed, forty-six percent committed their current offense under the influence of illegal drugs and thirty-three percent

were under the influence of alcohol.<sup>31</sup>

Based on this data, there are obvious links between victimization and criminality. Clearly, people under correctional supervision have higher rates of victimization in their past, higher propensities to use drugs and/or alcohol and less ability to recognize boundary violations—either perpetrated by or against them.

### **Sexual Abuse of Offenders while under Correctional Supervision: A Known Problem**

Sexual abuse while under correctional supervision, for some offenders, may simply be an extension of their past victimization.<sup>32</sup> Throughout the history of the correctional system, offenders, both male and female, have been subjected to sexual assault and abuse by staff members and other offenders;<sup>33</sup> government reports have also documented this abuse and misconduct.<sup>34</sup>

Each year this country's correctional system houses (prisons and jails) and monitors (community corrections) approximately 7,280,414 men and women;<sup>35</sup> once under correctional supervision,<sup>36</sup> these men and women can be subjected to sexual victimization. In 2003, Congress passed the Prison Rape Elimination Act (PREA).<sup>37</sup> PREA "provide[s] for the analysis of the incidence and effects of prison rape in Federal, State and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape."<sup>38</sup>

Among other things, PREA requires BJS to develop a reliable data collection method and to collect data on the incidence of prison rape in adult prisons, jails and community correctional facilities as well as corresponding juvenile facilities.<sup>39</sup> BJS began collecting data in 2004,<sup>40</sup> and by 2006, the survey of sexual violence reported by correctional authorities found that there were 6,528 reported allegations of sexual violence in state and local correctional facilities, a twenty-one percent rise since the 2004 collection.<sup>41</sup> In 2006, approximately thirty-six percent of all reported allegations involved staff while only slightly fewer allegations, thirty-four percent, involved inmate-on-inmate sexual violence.<sup>42</sup>

In 2007, the BJS completed the first national inmate survey.<sup>43</sup> This was the first self-administered survey that collected reports of sexual victimization directly from inmates.<sup>44</sup> BJS found that 4.5% or approximately 60,500 inmates in state and federal prisons reported sexual victimization; incidents of staff sexual misconduct were about one and half times greater than inmate-on-inmate sexual violence.<sup>45</sup> Among the 146 prison facilities in the BJS inmate survey of 2007, fourteen had incident rates of non-consensual sex that exceeded 300 incidents per 1,000 inmates.<sup>46</sup> PREA, when enacted, estimated that thirteen percent of inmates in the United States are sexually assaulted in prison.<sup>47</sup> The data collected by the BJS supports this estimate.

The effect of sexual victimization in prisons and jails can be more devastating than sexual assault in the community due to the unique nature of the correctional setting.<sup>48</sup> Being confined within prison or jail walls can increase the impact on victims. In situations of "captivity," perpetrators become the

most important people in the lives of their victims—in the most serious of cases, inmates may be coerced, threatened and/or intimidated into long-term sexual slavery in order to survive.<sup>49</sup> This means that offenders experience repeated trauma. The primary victimization issues in correctional settings when compared with the community include: (1) more likely to experience physical trauma; (2) systemic infliction of psychological trauma; (3) retaliation and/or retribution; (4) lack of autonomy and safety; and (5) general distrust in the reporting structure/investigative process.<sup>50</sup>

Unlike victims in the community, inmates who are sexually assaulted are not eligible for crime victim compensation or the mental health services ultimately funded by grants given to states under compensation funds.<sup>51</sup> Offenders who are sexually assaulted often face their abusers every day, much like victims of child abuse and domestic violence, but lack advocates and support services, such as crisis centers, which are largely funded by VAWA and VOCA and do not provide services for incarcerated persons.<sup>52</sup>

### **The Violence Against Women Act (VAWA) and Victims of Crime Act (VOCA)**

With the passage of PREA, sexual assault in correctional settings was acknowledged at the national level as a problem within our correctional system.<sup>53</sup> However, that is the very population left out of both VAWA and VOCA. The introductory quote to this article describes an incarcerated boy who was a non-violent offender, but was repeatedly victimized while incarcerated. The only difference between him and those generally classified as a "victim" of sexual abuse is that his victimization took place during his incarceration. Men and women in United States prisons are among the most disenfranchised members of our society and experience a number of collateral consequences of their imprisonment. Many are unable to vote, get welfare benefits for their children, or secure Section 8 housing.<sup>54</sup> More specific to our subject, prisoners are not allowed to seek crisis intervention in the community as survivors of sexual victimization if the program is funded under federal spending bills such as VAWA and VOCA.

### **The Violence Against Women Act (VAWA)**

In 1990, Congress passed VAWA, federal legislation that comprehensively addressed issues concerning violence against women. While violence against women had previously been discussed by the United States Senate, it did not gain traction until the involvement of advocacy groups such as the Family Violence Prevention Fund (FVPPF) and the National Task Force to End Sexual and Domestic Violence Against Women. President Clinton signed the Violence Against Women Act (known later as VAWA I) into law in August 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>55</sup>

VAWA provisions were set to expire in 2000, and in 1999, Congress began its reauthorization efforts. During the 1999 reauthorization,<sup>56</sup> the Prevention of Custodial Sexual Assault by Correctional Staff Act was introduced into legislation to address abuse of persons in custody. The Act pushed for

a registry of staff perpetrators and the withholding of Federal law enforcement funds for failure to enact legislation criminalizing staff sexual misconduct with inmates.<sup>57</sup> While the Violence Against Women Act of 2000 (known as VAWA II) passed, the Prevention of Custodial Sexual Assault by Correctional Staff Act was eliminated during the bill amendment process.

Despite attempts to create a more comprehensive bill in 2000, the reauthorization generally continued existing programs, added some improvements and increased funding to programs already in existence.<sup>58</sup> When VAWA was reauthorized in 2005,<sup>59</sup> any mention of custodial sexual assault was again left out, even though it was well after the passage of PREA.<sup>60</sup> While VAWA was initially meant to prevent perpetrators of violence from gaining access to funds used for victim services, it also prohibits persons in custody who are victimized from using the funds, which means a significant number of people who are sexually assaulted during imprisonment are ineligible for crisis intervention.<sup>61</sup> The fact remains that whether a sexual assault happens inside or outside of prison walls, the needs of a victim/survivor remain the same—immediate medical attention and ongoing mental health/crisis intervention are imperative to surviving the assault in the long term.

If a violent act is perpetrated against someone, it should not matter the physical locality of that victimization. While theoretically VAWA is set up to ensure that batterers who are incarcerated for abusive conduct do not get access to funds needed to support their victims, it disregards the fact that even if an abuser is sent to jail or prison and is then victimized, he is a victim separate and apart from the crime they perpetrated and should have equal access to intervention resources.

By leaving incarcerated victims out of VAWA, the spirit of the act is not recognized. Purportedly, VAWA seeks to recognize marginalized people who have little access to appropriate legal, medical and mental health care when facing abuse.

While certainly some people who are incarcerated could have been abusive in the past or can be incarcerated for violent offenses, a person's past behavior should not supersede the fact that the same person could also become a victim once incarcerated. The fact remains that many people who are incarcerated were victims of some form of abuse; it stands to reason that they moved across the spectrum and completed the cycle—victim, victimizer, victim. At no point in time does being a victimizer preclude you from being victimized. Thus, the services provided to incarcerated victims need to be the same as services provided to victims in the community.

### **The Victims of Crime Act (VOCA)**

VOCA<sup>62</sup> was originally signed into law in 1984 to support victim compensation and victim assistance programs across the nation. Directly related to incarcerated victims, VOCA grantees cannot use grant funds to offer rehabilitative services to perpetrators of crime,<sup>63</sup> even if the perpetrator becomes a victim while incarcerated.

If an incarcerated victim were eligible, however, the requirements to receive compensation set forth under VOCA are directly at odds with a correctional environment. Eligibility requirements under VOCA, although varying slightly from state to state, are that victims<sup>64</sup> are generally required to:

1. Report the crime promptly to law enforcement.<sup>65</sup>
2. Cooperate in the investigation and prosecution of the crime.
3. Be innocent of any criminal activity or misconduct leading to the victim's injury or death.
4. File a timely application<sup>66</sup> with the compensation program in the state where the crime occurred and provide any information requested.

All of these things are severe barriers for people who are incarcerated because in order to cooperate in an investigation and file a timely application for compensation, a person needs to report the crime in the first place. Victims rarely report cases of sexual assault in the community,<sup>67</sup> and it is no different for people who are incarcerated.<sup>68</sup> This lack of reporting can be for a number of reasons, including lack of trust in the staff or investigative process, poor grievance procedures, fear of retaliation, fear of punishment, shame and/or not knowing they are being sexually violated or belief that they deserve the abuse.

The final requirement under VOCA is that a person be innocent of criminal activity leading up to the injury. These are simply standards that we freely accept in the community that we do not apply in correctional settings. In the community, if a woman was raped and she happened to be dressed provocatively, we do not blame her for her assault; if a teenager submits to sex with a family member because she needs new shoes, we do not place blame on her; if a foreign-born woman is sold into the sex trade, we do not label her a prostitute. In each of these cases, the victims would be eligible for VOCA funding to support them through their recovery.

However, when we apply those similar situations to a correctional setting, we get very different results. An inmate who dresses provocatively and is sexually assaulted is often blamed for the assault, a first-time offender who is sexually assaulted because he borrows a cigarette and owes a favor should have known better, and when a man is sold for sex from one gang to another for protective purposes, we wonder why he did not fight back. The scenarios are the same – rape, strategic sex and coerced sex.<sup>69</sup> In a community setting, we place no blame and freely give resources, yet, in a correctional setting, we wonder what a person did to deserve it and what they did to contribute to their victimization. The very essence of that blame directly relates to a measure of “involvement” in the victimization, which VOCA then relies on to decide if a person was innocent of criminal activity and allot funds accordingly.

### **Denial of Resources to Incarcerated Persons: A Real World Example**

In 2005, the state of New Hampshire prosecuted Douglas Tower for the sexual assault of twelve women housed in the Shea Farm Halfway House.<sup>70</sup> Tower used a pattern of coercion and threats to convince the women to submit to his demands. The first of twelve cases went to trial in January of 2007. During that trial, the victim testified for almost one full day.<sup>71</sup> Tower was ultimately found guilty of two counts of aggravated felonious sexual assault and four counts of felonious sexual assault.<sup>72</sup> He was sentenced to twenty to forty years in prison and is not eligible for parole until 2027.<sup>73</sup> While the sen-

tence was a victory, the lasting effects of the incident on the women he abused cannot be measured. One of the essential facts that surfaced during the case was that the victims did not want to talk with the New Hampshire Department of Corrections mental health staff. Instead, they wanted to see crisis counselors in the community because they had lost trust in the system to protect or advocate for them.<sup>74</sup> The victims filed a claim for services with the state's Crime Victim Compensation Program to pay for counseling, but because of the existing rule against funding to people who are incarcerated, their claims were denied.<sup>75</sup>

The question then remains, "Why should we care if incarcerated victims receive services funded under VAWA and/or VOCA?" The answer is simple. Just because someone is currently incarcerated does not mean he will always be. What happens during incarceration can be directly linked to an offender's success once back in the community. Having mental health care they can trust not only affects their ability to recover from a sexual assault, but it may also decrease the likelihood of their reoffending and the propensity for them to victimize another in the same way they may have been victimized. It is no secret that certain communities are adversely affected by the increased use of incarceration, with African-American communities and lower socio-economic groups being hit the hardest. If nothing else, services as provided for under VOCA when applied to an incarcerated person, may equate to increased safety and stability in these communities for the future.

### What Really Happens: Mental Health Care for Incarcerated Victims of Sexual Assault

To this point, we have outlined the victimization histories and correlation to criminality for incarcerated persons. We have laid out empirical evidence that sexual abuse during incarceration is a problem as addressed by PREA. We have outlined the history and flaws of both VAWA and VOCA, the major funding sources of affordable and reliable mental health care and crisis intervention for people who are victims of sexual abuse. So, taken together, it seems as though the bottom line is that incarcerated persons are in need of the very resources and funds they are prohibited from accessing. But do rape crisis providers take the same position? The short answer is no.

In an August 2006 survey of sexual assault offices,<sup>76</sup> states were asked to answer the following questions in regards to serving incarcerated populations:

1. Do/would your services extend to incarcerated victims of sexual assault?
2. Do/would you help victims who are now in the community (such as in halfway houses or on parole) who were sexually abused while incarcerated?
3. Are the services you provide to incarcerated per-

- sons dependent on status (felony vs. misdemeanor offender) or facility (prison vs. halfway house)?
4. Is funding from the Violence Against Women Act used in any of your services for incarcerated or formerly incarcerated persons?

Thirty-five states responded to the questions, some from multiple local crisis centers. Thirty-three of those states had at least one crisis center in the state that would serve incarcerated victims of sexual assault,<sup>77</sup> and fifteen of those states received either VAWA or VOCA funding during that calendar year which could have been used to provide services to incarcerated victims.<sup>78</sup>

Some states that do not use their VAWA/VOCA funding for support of incarcerated victims, such as Iowa and Rhode Island, have reached agreements with the Department of Corrections to receive part of their PREA grant funding.<sup>79</sup> These states have built partnerships which allow rape crisis services to extend to incarcerated individuals who are sexually abused. Other crisis centers take the position that since the VAWA/VOCA funding they receive does not specifically go to incarcerated victims, but instead funds a staff position that may or may not serve incarcerated victims, there is no conflict with the rule.<sup>80</sup> Finally, since VOCA/VAWA are only small funding sources and must be met in-kind by state entities, crisis centers receiving additional state funding take the stance that they are not in a position to turn away victims based on where the victimization occurred.<sup>81</sup>

By and large, rape crisis centers reported that they would serve incarcerated persons under two conditions: (1) they were not incarcerated for sexual abuse of any nature; and (2) the safety of the crisis intervention staff was not in question. For crisis intervention providers, it seems as though a person's status as a victim far outweighs a person's status as an inmate.

### Conclusion

Where does this leave an incarcerated person who has been sexually assaulted? The answers are somewhat unclear, but what is obvious is this: (1) people who are under correctional supervision, by and large, have victimization histories of some kind; (2) incarcerated victims are in need of consistent mental health care; (3) incarcerated persons do not have the means or ability to seek private mental health care and do not always trust correctional mental health staff; and (4) as it stands, federally funded programs and non-profits that inmates could access for mental health care are not suppose to serve them if the program receives funding under VAWA and VOCA.

Among all the data and facts about sexual abuse and victimization, it remains constant that incarcerated victims are more in need of the services outlined under VAWA and VOCA than almost any other group. Both VAWA and VOCA are good pieces of legislation on the surface. They both established and funded treatment for sexual victimization

during a time when it was important for victims of these crimes to have advocates and compensation. However, there needs to be comparable funding for crisis services for incarcerated victims. There are two options: both bills, VAWA and VOCA could be amended to acknowledge the passage of PREA and fund services for incarcerated victims or, as an extension of PREA, a matching funding bill for incarcerated victims could be passed by Congress.

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<sup>1</sup> See NATIONAL PRISON RAPE ELIMINATION COMMISSION HEARING, THE COST OF VICTIMIZATION: WHY OUR NATION MUST CONFRONT PRISON RAPE (June 14, 2005) (testimony of Ms. Linda Bruntmyer), available at [http://www.nprec.us/docs/PersonalAccounts\\_Bruntmyer.pdf](http://www.nprec.us/docs/PersonalAccounts_Bruntmyer.pdf). Ms. Bruntmyer testified on behalf of her son as a personal account from a survivor at one of the first National Prison Rape Elimination Commission hearings. She testified regarding her son's sexual abuse while incarcerated in an adult prison at the age of 16; her son after suffering sexual abuse at the hands of other inmates committed suicide by hanging himself in his cell in 1996.

<sup>2</sup> Violence Against Women Act (VAWA) of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (2004) (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.).

<sup>3</sup> *Id.*

<sup>4</sup> See generally Violence Against Women Act Reauthorization of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of 42 U.S.C.) (broadening the scope of VAWA to address stalking, dating violence, child maltreatment and elder abuse).

<sup>5</sup> See DC Rape Crisis Center, New Volunteer Training (2002) (on file with author) (noting that most rape crisis counselors refer to a person as a "victim" only immediately after the assault; after that, they are referred to as a "survivor."). This is because they regained power by choosing how they deal with an assault. *Id.* This article will refer to people as survivors of sexual assault and victims of sexual assault interchangeably.

<sup>6</sup> See Violence Against Women Act Reauthorization of 2005 § 3(a) (defining sexual assault victims as either female or male). VAWA contains a non-exclusivity clause which states that nothing in the title of the Act should be construed to prohibit male victims of domestic violence, dating violence, sexual assault and stalking from receiving benefits and services under the title. *Id.*

<sup>7</sup> *Id.* §2 (recognizing that Title XI Department of Justice Reauthorization made appropriations for fiscal year 2006 to 2009).

<sup>8</sup> See Rape Abuse and Incest National Network, Statistics, <http://www.rainn.org/statistics/index.html> (last visited Mar. 30, 2008) (providing statistics about victims, rapists, sexual assault reporting, and sexual assault numbers).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Rape Abuse and Incest National Network, Reporting Rates, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Mar. 30, 2008) (providing statistics regarding the reporting and prosecution of sexual assaults).

<sup>12</sup> *Id.*

<sup>13</sup> See Rape Abuse and Incest National Network, The Offenders, <http://www.rainn.org/get-information/statistics/sexual-assault-offenders> (last visited Mar. 30, 2008) (explaining the difference in victim-offender relationships between females and males, with females reporting more assaults by a friend or acquaintance than victimized males).

<sup>14</sup> See Lois Timnick, 22% in Survey were Child Abuse Victims, L.A. TIMES, Aug. 25, 1985, at A1 (referencing nationwide L.A. Times poll on the extent of child molestation).

<sup>15</sup> See D.C. Rape Crisis Center, Sexual Assault Facts, <http://dcrcc.org/assault-facts.htm> (last visited on Mar. 30, 2008) (outlining the numbers and facts about drug and alcohol use by survivors of sexual assault noting that they have higher rates of drug and alcohol consumption and related problems than people who do not experience sexual assault).

<sup>16</sup> See *id.* (asserting that a survivor of sexual assault is nine times more likely to attempt suicide than a person not assaulted); see also DC Rape Crisis Center, Effects of Sexual Abuse: Internal, <http://dcrcc.org/effects.htm> (last visited Mar. 30, 2008) (discussing the internal effects of sexual abuse as including: depression, low self-esteem, anger or control issues, anxiety, shame, guilt).

<sup>17</sup> See CENTER FOR SEX OFFENDER MANAGEMENT: A PROJECT OF THE OFFICE OF JUSTICE PROGRAMS, MYTHS AND FACTS ABOUT SEX OFFENDERS (2000), available at <http://www.csom.org/pubs/mythsfacts.html> (finding that child molesters had a thirteen percent reconviction rate for sexual offenses and a thirty-seven percent reconviction rate for new, non-sex offenses over a five year period; rapists had a nineteen percent reconviction rate for sexual offenses and a forty-six percent reconviction rate for new, non-sexual offenses over a five year period). Additionally, among adult sex offenders, thirty percent have past histories of sexual victimization. *Id.*

<sup>18</sup> Because of the sensitive nature and consent and assent issues, national data regarding sexual abuse of youth and their contact with the criminal justice system is an area that lacks data. However, the Bureau of Justice Statistics (BJS) is expected to put out data on that very issue in mid-2008. Until then, we can only make generalized conclusions about the victimization histories of youth in custody based on what we know to be true about their adult counterparts. See NATIONAL INSTITUTE OF JUSTICE, CHILDHOOD VICTIMIZATION AND RISK FOR ALCOHOL AND DRUG ARRESTS 2 (1995) (observing that child maltreatment was a significant predictor of delinquency); see also NATIONAL INSTITUTE OF CORRECTIONS (NIC/WCL) PROJECT ON ADDRESSING PRISON RAPE AT THE WASHINGTON COLLEGE OF LAW, RESPONDING TO INMATE ON INMATE SEXUAL VIOLENCE TRAINING MATERIALS: IMPACT OF PAST VICTIMIZATION (2007) (illustrating the implications of childhood sexual abuse and victimization histories on people who are incarcerated).

<sup>19</sup> See ANGELA BROWNE & A.J. SABREE, NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, RESPONDING TO INMATE ON INMATE SEXUAL VIOLENCE: PRESENTATION ON THE IMPACT OF VICTIMIZATION 1, 30 (Mar. 2007), available at [http://www.wcl.american.edu/nic/conference\\_march\\_07/modules/11\\_impact\\_of\\_past\\_victimization.pdf?rd=1](http://www.wcl.american.edu/nic/conference_march_07/modules/11_impact_of_past_victimization.pdf?rd=1) (analyzing data from 14, 285 inmates in state prisons).

<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.*

<sup>22</sup> See Angela Browne, Brenda A. Miller & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L. J.L. & PSYCHIATRY 301 (1999).

<sup>23</sup> See Karen M. Fondacaro, John C. Holt & Thomas A. Powell, *Psychological Impact of Childhood Sexual Abuse on Male Inmates: The Importance of Perception*, 23 CHILD ABUSE & NEGLECT, 361, 361-69 (1999) (examining the link between childhood sexual abuse and adult criminality).

<sup>24</sup> See CAROLINE HARLOW, BUREAU OF JUSTICE STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf> (highlighting significant differences between male and female inmates in abuse history).

<sup>25</sup> *Id.* at 1.

<sup>26</sup> See *id.* at 3 (associating past abuse with current violent criminality—namely homicide and sexual assault).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Harlow, *supra* note 24 (finding higher incidences of prior abuse among inmates than the general population).

<sup>33</sup> See JEAN HARRIS, THEY ALWAYS CALL US LADIES: STORIES FROM PRISON 115-16 (Scribner ed. 1988); JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME AND JUSTICE (Wadsworth Publishing Company 2001); Christopher Man & John Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for Deliberate Indifference*, 92 J. CRIM. L. & CRIMINOLOGY 127 (2002); Richard Vetstein, *Rape and AIDS in Prison: A Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863 (1997); James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 (1999); Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most Open Secret*, 18 YALE L. & POL'Y REV. 195 (1999).

<sup>34</sup> See U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS INFORMATION CENTER, SEXUAL MISCONDUCT IN PRISONS: LAW, AGENCY RESPONSE AND PREVENTION (1996), available at <http://www.nicic.org/pubs/1996/013508.pdf>; GOVERNMENT ACCOUNTABILITY OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (1999), avail-

able at <http://www.gao.gov/archive/1999/gg99104.pdf>; GOVERNMENT ACCOUNTABILITY OFFICE, WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS (1999), available at <http://www.gao.gov/new.items/gg00022.pdf>; OFFICE OF THE INSPECTOR GENERAL, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES (2005), available at <http://www.usdoj.gov/oig/special/0504/final.pdf>; ALLEN BECK & TIMOTHY HUGHES, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2004 (2005), available at <http://www.ojp.gov/bjs/pub/pdf/svrca04.pdf>.

<sup>35</sup> See WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2006 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (citing that the number of inmates in the custody of State and Federal Prisons and local jails reached 2,245,189); LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2006 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf> (citing that the number of adults on probation or parole reached 5,035,225). These two statistics combine to equal the number cited in the text. Because it is possible that people were held in prisons or jails as well as paroled in the same year, there may be some overlap between the two statistics.

<sup>36</sup> See BRENDA V. SMITH & JAIME M. YARUSSI, NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, BREAKING THE CODE OF SILENCE: A CORRECTION OFFICERS' HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL MISCONDUCTS 4 (June 2007), available at <http://nicic.org/Downloads/PDF/Library/022473.pdf> (providing that correctional settings include but are not limited to: prisons, jails, lock-ups, juvenile facilities, immigration detention centers, court holding facilities, home/ electronic monitoring, halfway houses, parole and/or probation).

<sup>37</sup> Prison Rape Elimination Act (PREA) of 2003, 42 U.S.C. §§ 15601-15609 (2003).

<sup>38</sup> *Id.* § 15601.

<sup>39</sup> *Id.* § 15603.

<sup>40</sup> BUREAU OF JUSTICE STATISTICS, DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003 (June 2004), available at June 2004, <http://ojp.usdoj.gov/bjs/pub/pdf/dcprea03.pdf>.

<sup>41</sup> See ALLEN BECK & TIMOTHY HUGHES, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 1 (2005), available at [www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf) [hereinafter BECK & HUGHES 2004] (reporting that in 2004, there were 5,386 cases of sexual abuse reported by correctional authorities); ALLEN BECK AND PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005, at 1 (2006), available at [www.ojp.usdoj.gov/bjs/pub/press/svrca05pr.pdf](http://www.ojp.usdoj.gov/bjs/pub/press/svrca05pr.pdf) [hereinafter BECK & HARRISON 2005] (reporting that in 2005, there were 6,241 cases of sexual abuse reported by correctional authori-

ties); ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 2 (2007) *available at* [www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf) [hereinafter BECK, HARRISON & ADAMS 2006] (reporting that in 2006, there were 6,528 cases of sexual abuse reported by correctional authorities).

<sup>42</sup> BECK, HARRISON & ADAMS 2006, *supra* note 41, at 2. This increase could be due to adoption of uniform definitions, better data collection and/or better and more trusted reporting structures.

<sup>43</sup> See ALLEN BECK AND PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 (2007) (noting that this survey was not administered in jails or community facilities such as halfway houses, group homes, and/or work release centers).

<sup>44</sup> *Id.* (noting that past surveys of administrative records were not thought to provide reliable data on sexual violence because they were limited to incidents reported specifically to correctional authorities).

<sup>45</sup> *Id.* at 1.

<sup>46</sup> *Id.* at 5 (finding that states with rates above 300 incidents/1000 inmates were: Nebraska, Florida, New York, Utah, Indiana, Louisiana, Alabama, Wisconsin, California (2 facilities) and Texas (4 facilities)).

<sup>47</sup> PREA, 42 U.S.C. § 15602 (2003).

<sup>48</sup> See Robert W. Dumond, *The Impact and Recovery of Prisoner Rape*, Paper Presented at the "Not Part of the Penalty": Ending Prisoner Rape Conference 10 (2001) (explaining the effect of sexual victimization in correctional settings).

<sup>49</sup> See *id.* at 11 (describing the impact that incarcerations have on victims of sexual abuse).

<sup>50</sup> *Id.* at 11-12 (illustrating the differences between recovering from sexual assault in the community versus while incarcerated).

<sup>51</sup> See generally Victims of Crime Act, Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.) (providing funding for physical injuries, lost wages and funeral expenses to crime victims).

<sup>52</sup> *Id.*

<sup>53</sup> PREA, 42 U.S.C. § 15601 (2003).

<sup>54</sup> See INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 18-19 (Marc Mauer & Meda Chesney-Lind eds., 2002) (likening the nature of inmate disenfranchisement to "internal exile" and "the mark of Cain" (citation omitted)).

<sup>55</sup> See FAMILY VIOLENCE PREVENTION FUND, HISTORY OF THE VIOLENCE AGAINST WOMEN ACT (2008), *available at*

<http://www.endabuse.org/vawa/display.php?DocID=34005> (summarizing the history of VAWA).

<sup>56</sup> See Violence Against Women Act (VAWA II) of 1999, H.R. 357, 106th Cong. (1999); *see also* Press Release, Rep. John Conyers, Jr., Conyers Introduces Omnibus Bill to Stop Violence Against Women and Their Children (May 12, 1999), *available at* <http://www.house.gov/conyers/pr051299.htm>. The Custodial Sexual Assault Act is found at §§ 341-346 of VAWA I.

<sup>57</sup> VAWA II, H.R. 357.

<sup>58</sup> See *id.* (describing the main components of the Act and the modifications that were made in 2000 Changes in VAWA II including: a reauthorization of 3.3 million dollars in funding and providing STOP grants and funding for shelter services for victims). Additionally, the Act created seven new programs including programs for: civil legal assistance, transitional housing, supervised visitation centers, full faith and credit programs between states, battered immigrant women, victims of dating violence and services for disabled or older women. *Id.*

<sup>59</sup> Violence Against Women Act Reauthorization of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

<sup>60</sup> See PREA, 42 U.S.C. § 15601 (2003) (indicating that at least thirteen percent of inmates in the United States were victims of sexual assault).

<sup>61</sup> See VAWA I, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.) (failing to recognize incarcerated individuals as potential victims of sexual assault).

<sup>62</sup> Victims of Crime Act (VOCA) of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

<sup>63</sup> See VOCA Victim Assistance Grant Program, 67 Fed. Reg. 56,444 (Sept. 3, 2002) (authorizing the Department of Justice to pass regulations to set up a grant program to compensate victims of violence). The Attorney General makes funds available to assist victims of abuse pursuant to the Victims of Crime Act Victims Assistant Grant Program, which states that "[s]ubgrantees cannot use VOCA funds to offer rehabilitative services to perpetrators or offenders. Likewise VOCA funds cannot support services to incarcerated individuals, even when the services pertain to the victimization of that individual." *Id.* at 56, 546.

<sup>64</sup> See National Association of Crime Survivors' Compensation Boards, FAQ: Eligibility Requirements, <http://www.nacvcb.org/faq/1.html> (last visited Mar. 30, 2008) (noting that, in general, innocent survivors of most violent crimes, including survivors of assault, rape, domestic violence, child abuse, drunk driving and other crimes involving personal injury, are eligible to apply for crime survivor compensation benefits).

<sup>65</sup> See *id.* (commenting that most states have a seventy-two hour reporting requirement).

<sup>66</sup> See *id.* (observing that most states require that the application be filed within one year from the date of the crime, but a few states have shorter or longer periods).

<sup>67</sup> See RAPE, ABUSE AND INCEST NATIONAL NETWORK, REPORTING RATES, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Mar. 26, 2008). Sexual assault is one of the most underreported crimes, with 60% still being left unreported. Males are the least likely to report a sexual assault, though they make up approximately 10% of all victims.

<sup>68</sup> See BECK AND HARRISON 2007, *supra* note 43, at 1 (reporting inmates sexual violence rates of 4.5% in 2007); BECK, HARRISON & ADAMS 2006, *supra* note 41, at 3 (reporting correctional authorities reported sexual violence rates of 2.91% in 2006). Differences in the numbers between inmate reports and correctional authorities reporting illustrates that inmates are not reporting to staff that sexual abuse is happening.

<sup>69</sup> See Brenda V. Smith, *Continuum of Sexual Behavior in Institutional Settings*, Developed under NIC Cooperative Agreement 06S20GJJ1 (PowerPoint presentation on file with author) (outlining the continuum of sexual behavior in prisons).

<sup>70</sup> See *Ex-prison Officer Faces Rape Charges*, PORTSMOUTH HERALD, Jan. 26, 2007, available at <http://archive.seacoastonline.com/news/01262007/nhnews-ph-nh-prison.trial.html>; Beverly Wang, *Guards Accuser Cross Examined*, THE UNION LEADER, Jan. 27, 2007, at A3; *Former Corrections Officer Says He Didn't Rape Inmate*, WCAX NEWS, Jan. 31, 2007; *Former Halfway House Guard Guilty of Inmate Rape*, THE BOSTON HERALD, Feb. 2, 2008; Annmarie Timmons, *Ex-guard Gets 20-40 in Rape*, CONCORD MONITOR, Apr. 19, 2007, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070419/REPOSITORY/704190372/1043/NEWS01>.

<sup>71</sup> See *Medical and Mental Health Care, Community Corrections Settings and Oversight: Hearing on Special Topics in Preventing and Responding to Prison Rape Before the Nat'l Prison Rape Elimination Comm'n* (Dec. 5, 2007) (testimony of Sandra Matheson, Dir. of State Office of Victim/Witness Assistance); see also Letter from Sandra Matheson, Director of State Office of Victim/Witness Assistance to Chairman and Commission Members of the National Prison Rape Elimination Commission (Dec. 5, 2007), available at <http://nprec.us/docs3/TestimonyMatheson.pdf> (providing a full analysis of the testimony given regarding the acts taken by Tower to coerce and manipulate his survivors).

<sup>72</sup> See Timmons, *supra* note 70 (noting that, at the time of his conviction, Tower was still facing trials for accusations of

sexual assault on twelve more female inmates).

<sup>73</sup> See Letter from Sandra Matheson, *supra* note 71, at 3 (explaining the flow of the Tower trial in New Hampshire).

<sup>74</sup> See *id.* at 4 (explaining how Matheson worked with prisoners to provide them with crisis counseling).

<sup>75</sup> *Id.*

<sup>76</sup> See NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, *Survey of Sexual Assault Services for Individuals under Correctional Supervision* (2006) Developed under NIC Cooperation Agreement 06S20GJJ1 (on file with the author) [hereinafter *Survey on Sexual Assault*] (noting that some of these states have state run coalitions that were able to answer our questions, however, some agencies were not direct service providers and forwarded our request to their local agencies for response). A list of all state sexual assault offices was obtained by Rape, Assault and Incest National Network (RAINN) as the most comprehensive list of sexual assault service centers throughout the country.

<sup>77</sup> See *id.* (stating that the two states responding to the survey that noted they would not serve incarcerated victims of sexual assault were Arizona and Texas).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; PREA, 42 U.S.C. § 15605 (2003). Many of these grants were given as part of the grant programs to Protect Inmates and Safeguard Communities under the US Department of Justice Bureau of Justice Assistance.

<sup>80</sup> *Survey of Sexual Assault*, *supra* note 76.

<sup>81</sup> *Id.*

\* Jaime M. Yarussi has a Masters of Science from the American University School of Public Affairs. She is currently the Program Coordinator for the National Institute of Corrections Project on Addressing Prison Rape ([www.wcl.american.edu/nic](http://www.wcl.american.edu/nic)) at the Washington College of Law. Ms. Yarussi has also been a rape crisis counselor for over five years.

# REMOVING THE STIGMA OF PRISON RAPE AND SEXUAL ASSAULT: THE FIRST STEP TO PROVIDING HIV TREATMENT TO PRISONERS

James Radford\*

## Introduction

Since the AIDS pandemic began, there have been significant changes in treatment, perceptions and epidemiological data. Although it clearly is a virus that affects everyone, it has made some significant shifts in the populations that it is most directly affecting. Probably the most significant change has been in regards to a life living with the virus. Living with AIDS is no longer viewed as a death sentence—at least in the United States and other countries which have relatively fair and equitable access to treatment. AIDS has morphed into something of a chronic illness—still formidable but yet possible to manage (perhaps akin to diabetes). However, the challenges still facing someone living with HIV are significant. The costs of the medications are prohibitive and the side effects can be significant. In addition, there is still considerable stigma surrounding the virus. With HIV, unlike almost any other health condition, there seems to be an element of a puritanical “well, you deserved this.” Now, imagine having to deal with HIV and all of its issues in prison. All of the difficulties and stigma are compounded, to say the least.

About a year and a half ago, I worked as a criminal defense attorney for Legal Aid Society in New York City. During my tenure at Legal Aid, I defended parolees at administrative hearings. The Parole division was a unique assignment in that, unlike at the criminal court, all client meetings were held at Riker’s Island Jail, or on rarer occasions, at another facility such as the federal jail or a mental health facility. A parolee could be facing charges that were legal (new felony or misdemeanor charges), fact-based (such as failure to report to your parole officer or a violation of curfew) or a mixture of both. Although the hearing was administrative in nature, the parolee, who had been released to the streets, faced a return, either to finish out his sentence (the worst case scenario) or to serve some allotted time that was based on a categorical determination.<sup>1</sup> Although parolees are not given “additional” time on their sentence, the time they are given could be substantial if the parolees still had a great amount of their sentence remaining. If the parolee had been given life sentence the risk of a lengthy imprisonment was substantial, to say the least.<sup>2</sup> Further compounding the sense of frustration is the fact that judges overhearing the cases were actually employees of the New York State Board of Parole. Despite the fact that the parole judges were supposed to be “independent,” the judges were under a great deal of pressure to administer sentences that would reflect a “tough on crime” attitude. Indeed, it was not unheard of for judges to be disciplined by the New York State parole board for decisions that were “too liberal.” Often this “too liberal” approach involved placing too many individuals in substance abuse or mental health treatment instead of a sentence of time.

Just as in criminal court, attorneys pick up new clients through one or two arraignment shifts a week. Although the

number of clients an attorney represented at arraignments could vary, an attorney would generally receive somewhere between six to ten new clients every arraignment shift. Similar to criminal court as well, a great many pled out, although some were placed in the aforementioned treatment facilities. Others went on to an administrative hearing where they had the opportunity to call witnesses, testify on the stand, and mount a vigorous and zealous defense. This was often an uphill battle, as many had to overcome the general rule of parole, which seemed to be “guilty until proven innocent.”

Client meetings were held in an interview room which consisted of five cubicle-type areas containing a seat on each side and bars in between. These were not private, as they were open on both sides to other inmates and attorneys. Most clients were very open about what they discussed with their attorneys. However, there were two subjects that were often whispered or written down: sex offenses and the nature of the client’s HIV status. As we shall see, both of these issues, themselves already stigmatizing to the inmates, intertwine with an even greater stigma of having been sexually assaulted or raped in prison, and make identification and treatment of HIV extremely challenging.

In order to have a greater discussion of the issues, it is important to develop an understanding of how stigma works. Only after then can we begin to imagine the difficulties faced when discussing the public implications of HIV testing, prevention strategies and HIV/AIDS treatment in an incarcerated setting, and the effects that this stigma will have on those issues.

## The Concept of Stigma

There are a number of different ways to conceptualize stigma. Some believe that stigmatization occurs when a “particular trait of a person was understood by both the stigmatized person and others in a social group to ‘spoil’ the identity of the possessor.”<sup>3</sup> Others disagree. One author, Erving Goffman, who heavily influenced the concept of stigma, argued the thesis that stigma should be defined in social terms—that it was not simply the characteristic or trait, but the shared understanding between the possessor of the trait (in this case, HIV positive or victim of sexual assault) and the “normal” that makes possession of the trait damaging.<sup>4</sup> Lawrence Gostin, co-director of the Georgetown/Johns Hopkins Program on Law and Public Health, describes Goffman’s theory as follows:

Stigma has been understood as a social relation between a stigmatized and a “normal” person, based on the shared belief that some part of the stigmatized person’s identity is, as Erving Goffman put it, “spoiled.” A person who feels stigmatized shares others’ negative view of his condition to some degree.<sup>5</sup>

This concept of being spoiled is particularly relevant to incarcerated settings, since an individual who feels stigmatized may not have any outlets where he could discuss these feelings. In addition, because jail is a twenty-four hour experience, it only stands to reason that inmates would be unable to escape the general population's negative view of any stigmatizing mark. The dynamics of placing a stigmatizing mark on an individual is described in the following passage:

It is the dramatic essence of the stigmatizing process that a label marking the deviant status is applied, and this marking process typically has devastating consequences for emotions, thoughts, and behavior. Many words have been applied to the resulting status of the deviant person. He or she is flawed, blemished, discredited, spoiled, or stigmatized.<sup>6</sup>

The concept of marking in stigma, mentioned above, is esoteric in nature and difficult to quantify because:

The mark may or may not be physical: it may be embedded in behavior...or group membership. It may also be possible to conceal it. The mark is potentially discrediting and commonly becomes so when it is linked through attributional processes to causal dispositions, and these dispositions are seen as deviant.<sup>7</sup>

In addition, in my experience there are a number of factors that may affect the perception of stigma, most notably:

- Concealability—Is the condition hidden or obvious? To what extent is visibility controllable?
- Course—What pattern of change over time is usually shown by the condition? What is its ultimate outcome?
- Disruptiveness—Does it block or hamper interaction or communication?
- Aesthetic qualities—To what extent does the mark make the possessor repellent, ugly, or upsetting?
- Origin—Under what circumstances did the condition originate? Was anyone responsible for it and what was he trying to do?
- Peril—What kind of danger is posed by the mark and how imminent or serious is it?

It is important to note that stigmatization occurs on two separate, but inter-related levels. First, stigmatization generates at the societal level. The characteristics of societal stigmatization are defined in the following formulation:

In our conceptualization, stigma exists when the following interrelated components converge. In the first component, people distinguish and label human differences. In the second, dominant cultural beliefs link

labeled persons to undesirable characteristics—to negative stereotypes. In the third, labeled persons are placed into distinct categories so as to accomplish some degree of separation of “us” from “them.” In the fourth, labeled persons experience status loss and discrimination that lead to unequal outcomes. Stigmatization is entirely contingent on access to social, economic and political power that allows the identification of differentness, the construction of stereotypes, the separation of labeled persons into distinct categories and the full execution of disapproval, rejection, exclusion and discrimination. Thus we apply the term stigma when elements of labeling, stereotyping, separation, status loss and discrimination co-occur in a power situation that allows them to unfold.<sup>8</sup>

The second level when stigmatization occurs is to the individual. In the case of sexually assaulted or HIV positive inmates, this process first begins when they are sexually assaulted, are coerced into a sexual relationship, or both.<sup>9</sup> This is when the individual first encounters the public's views of his situation (i.e., being a victim of sexual assault) or suffering from an illness, or the “orthodox” view of the stigma, which is made up of four beliefs...that the public is ignorant about the disease, intolerant in its attitudes toward those who have it, prone to discriminatory practices against them, and therefore responsible for most of the problems associated with disease identity.<sup>10</sup> In other words, the individual

begins to personalize the stigma and incorporate all of their own experiences with the stigmatized condition into their view of their own condition. Because he holds to the four tenets listed above, he is unlikely to seek medical or mental health assistance.

At this point, the individual has the choice to accept or reject the orthodox view of his condition. He may choose to accept the orthodox view as factually true at face value, or “accept the reality and force” of the society's view.<sup>11</sup> This choice has important implications:

Accepting the stigma predisposes people to hide their condition and attempt to pass, in the class response described by [Erving] Goffman. The management of stigma becomes a major preoccupation, playing out through often elaborate strategies of concealment and the avoidance of occasions on which the secret could be uncovered. People who reject the stigma, by contrast, tend to adopt resistance strategies . . .<sup>12</sup>

Concealing a stigma would seem to reduce the chances that harm would come to an individual due to his status; however, it is unclear how successful an inmate would be at keeping the information a secret from the general population. Whether he chooses to report the rape will hinge greatly on which strategy he adopts. However, individuals who choose to conceal their stigma suffer the “daily harms of the chronic hid-

den distress.”<sup>13</sup> Thus, it seems that inmates suffer more than just the initial harm of the condition or illness. They also suffer the harm or the threat of discrimination or other reprisals due to this condition, and physical, emotional and psychological harm due to the concealment of this condition.

## A Stigma's Effects

Upon being sexually assaulted or coerced an inmate has a number of immediate physical concerns to which he must attend. In an ideal situation, this would involve seeking medical treatment as soon as possible. However, he may not seek medical attention because of the stigma of being sexually assaulted, knowing that seeking medical treatment will likely result in a “report” of the rape. It is possible, because of the shame and stigma of the assault, the inmate may “treat” himself and fail to make any report of the assault. This refusal to come forward may expose the inmate to a number of short and long-term health risks.

In the short-term, the inmate will not receive any medical care for any injuries nor will he be referred to the appropriate mental health professional. In addition, any possible evidence that could be used to prosecute the sexual assault will not be preserved.<sup>14</sup> In the long-term, failure to report a sexual assault could expose the inmate to repeated assaults, either by the same or different perpetrator or perpetrators. Once an inmate has been sexually assaulted, he is viewed by the general prison population as having been “turned out” and faces increased chances of being assaulted by the same or different perpetrators.<sup>15</sup> The general population views him through a stigmatized lens—he has lost his manhood or masculinity.

## Medical Concerns

Unless the perpetrator used a condom, both he and the victim are at risk of contracting any sexually transmitted disease (“STD”) that the other may have, with the recipient of the anal sex being at far greater risk. Unfortunately, my experiences with most prisons and jails do not provide their inmates with condoms. The reasons for this seems specious at best - they maintain that either (1) the inmates in their jail or prison do not engage in consensual sex or (2) passing out condoms or other means of protection will only encourage sexual behavior in the jail or prison.<sup>16</sup> Although it is highly unlikely that somebody would use a condom during a sexual assault, it is important to have them available to inmates for obvious reasons, as they are extremely effective in limiting the spread of HIV and to a lesser extent, other sexually transmitted diseases. Having condoms available for all inmates would reduce the rates of HIV positive inmates dramatically. Furthermore, despite the protests of the Department of Corrections, there is a great deal of consensual sex that occurs in prison. Making condoms available is not an implicit approval of that fact any more than needle exchange programs are an endorsement of

heroin use. It simply adheres to the main tenet in harm reduction, which is to meet people where they are. Allowing inmates to have access to condoms and other safe sex material would merely promote safety and reduce the rates of STD and HIV infection.

## Statistics

The most recent reports on HIV in the prison system are helpful, yet somewhat misleading. However, they are instructive in illustrating the minimum number of those affected with HIV and AIDS residing in the federal and state justice systems. In 2004, 1.8% of the prison population was HIV-infected.<sup>17</sup> When broken down, a gender disparity is evident.

At the end of 2004, 2.6% of incarcerated women were HIV positive, in contrast to only 1.8% of men.<sup>18</sup>

In 2005, little changed in regards to the numbers. The percentage of infected inmates in the general population dropped slightly, with only 1.7% of the incarcerated population having HIV.<sup>19</sup> Again, a disparity existed with regards to gender; 1.7% of the men were HIV positive, in contrast to 2.35 of women.<sup>20</sup> As one can see, there was little change in the overall percentages.<sup>21</sup>

However, in 2004, only twenty states required testing at admission or while in prison.<sup>22</sup> Forty-eight states test inmates if they “have HIV-related symptoms or if the inmates request a test.”<sup>23</sup> If an inmate was involved in a situation where he could have been exposed to HIV, the number dropped slightly, with only forty-one states and the Federal system testing inmates for HIV.<sup>24</sup> Most tellingly, only eighteen states and the Federal system test all incoming inmates<sup>25</sup> and only three test inmates at the time of release.<sup>26</sup>

Aside from the stigma of being sexually assaulted in jail, there are a number of gaps in the federal testing system that give rise to a many public health questions. First, thirty-two states fail to test an inmate upon arrival, thus eliminating an opportunity for a baseline. This is not only unsafe, as it fails to identify HIV positive individuals, but it is also a missed opportunity for providing care. Unfortunately, for many individuals, the prison setting is the inmate’s only chance for a health intervention to occur.<sup>27</sup> Furthermore, testing only “high-risk” groups or only when an inmate makes a request is foolhardy at best. Almost any individual in incarceration is “high-risk.” Despite the willful ignorance and disavowal of the prison system of the prevalence of consensual sex in jail and prison, a great deal of consensual sex happens without the protection of condoms. These ostrich-like policies of “if I cannot see it, it is not happening” or alternatively, “if we pass out safe sex materials, such as condoms, we are encouraging it” is dangerous and conducive to the spread of HIV and other sexually transmitted diseases.<sup>28</sup>

## Rape and Transmission of HIV

Further compounding the situation is the stigma of

being raped (or in a sexually coercive relationship). The rape itself stigmatizes the individual who is now in fear of yet another stigmatizing marker, an HIV diagnosis. Obviously, should the victim come forward, he would receive a drug regimen that inhibits the spread of HIV as well as tested for other STDs.<sup>29</sup> The inmate can receive treatment even if he fails to identify the perpetrator or perpetrators. However, should he come forward with the identity of who assaulted him, the opportunity exists not only for prosecution of the crime, but to test the perpetrator(s) as well.

Obviously, many will not come forward because of the stigma of being raped as well as to avoid being identified as a “snitch.” This is why routine testing is essential. Furthermore, it is highly possible that an individual will come forward and blame the injuries on some other altercation. If there is any suspicion of sexual assault, an HIV test should be administered. Relying on the inmate to report a traumatic and stigmatizing event is not enough.

## Recommendations and Conclusions

People often assume that testing is cost-prohibitive and must be done by a medical professional. Neither assumption is true – test such as OraSure and Oraquick make for cheap, quick and easy testing and allow someone without medical training to administer the procedure. Secondly, by testing individuals frequently throughout their stay in the prison, the medical staff may pick up HIV infections that testers missed at the time of admission, assuming that testing occurs. It is very possible that an individual, upon admission, would test negative but actually be HIV positive if it is too early in the infection for a test to register positive. Again, regular testing is the key. Even an inmate that comes forward with a sexual assault would have to be tested again, since the initial test could occur in the window period.

There are obvious reasons why the jail or prison facility would want to identify an individual who was HIV positive, both at entry and after a sexual assault. Indeed, I would argue that inmates should be routinely tested at medical exams. This would not only serve a public health purpose but allow the medical staff to have confidential and frank discussions with the inmate about sexual health.<sup>30</sup> It would allow for the medical staff to have an honest conversation about risk factors, both within the prison or jail and upon release. It is not uncommon for people who are high-risk to avoid testing completely—they just “do not want to know.” Furthermore, it allows the inmate to receive appropriate treatment within the facility and to be referred to similar treatment upon release. With HIV treatment, the maxim “the earlier the better” applies. For example, one New York procedure requires inmates to report back that they were receiving care and the proper medications,<sup>31</sup> but it was not uncommon for an individual who was on parole to be locked up and then switched to a medicinal regimen that he had already failed on, simply

because an alternative study was unavailable at the jail. Thus, it stands to reason that the individual would stand to gain the most from being informed of the infection as early as possible.

This will allow for them to consider appropriate treatment options.

The prison system must strive to identify HIV at inception in order to gain headway in the treatment and prevention of the disease. By taking steps to remove the stigma from prison rape and sexual assault, more victims will step forward and report, enabling the prisons to clearly see the HIV problems presented before them and to affirmatively deal with the disease. The prisons, however, must make policy changes in order to usher in a more fundamental understanding of prison rape. A victim of rape or sexual assault should never have to hide his victimization from authority and fail to receive diagnosis and treatment of HIV, regardless of whether he is behind bars or living among society.

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<sup>1</sup> For example, if the parolees underlying offense was a drug offense, they were considered a Category 2 defendant. Under NY statutory law, for their first two violations, a category 2 defendant would receive a mandatory sentence to a boot-camp styled drug treatment program that lasted for 90 days upon arrival (meaning the total time incarcerated, with time spent waiting for a hearing and then time spent being moved to the boot camp, could last from 4-6 months). Upon their third sentence, the parolee was now considered a Category 4 and would receive jail time of anywhere from 4 to 12 months (or the remainder of their sentence up to 12 months).

<sup>2</sup> It shouldn't be assumed that someone who had three years to life was a violent offender. I worked in New York State, where the extremely harsh Rockefeller drug laws continue to wreak havoc on individuals' lives and make a mockery of the state judicial system. It is true that a crime such as murder could place someone on parole for life; however some drug offenses could also garner lifetime parole. I once defended a twenty-one year old junior at NYU who received three years to life for selling fifty ecstasy tablets. His rap sheet contained no violent offenses.

<sup>3</sup> Scott Burris, *Disease Stigma in U.S. Public Health Law*, 30 J.L. MED. & ETHICS 179, 179 (2002).

<sup>4</sup> See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

<sup>5</sup> Lawrence O. Gostin et al., *The Law and The Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 92 (1999) (citations omitted).

<sup>6</sup> Alex Geisinger, *Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm And Its Legal Implications*, 76 NEB. L. REV. 452, 476 (1997) (quoting EDWARD E. JONES ET AL., *SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS*, 4-7 (1984)).

<sup>7</sup> *Id.*

<sup>8</sup> Burris, *supra* note 3, at 180-81 (citing Bruce G. Link and Jo C Phelan, *On Stigma and its Public Health Implications*. Paper presented at Stigma and Global Health: Developing a Research Agenda, a conference convened by the Fogarty International Center of the National Institutes of Health, Bethesda, Maryland, Sept. 5-7, 2001).

<sup>9</sup> Since we are discussing stigma, there are stigmas both to sexual assault and to HIV, so it certainly stands to reason that to be sexually assaulted and to be HIV positive would expose an individual to dual instances of stigma. For the purpose of this beginning discussion, however, I am referring to the stigma of being raped.

<sup>10</sup> Burris, *supra* note 3, at 181.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> This is assuming that the prison or jail staff takes appropriate action. Unfortunately, this is not always the case.

<sup>15</sup> Steven D. Pinkerton, Carol L. Galletly, & David W. Seal, *Model-Based Estimates of HIV Acquisition Due to Prison Rape*, 87 THE PRISON J. 295, 297 (2007).

<sup>16</sup> This knowledge was gained through my firsthand experience as a Legal Aid attorney.

<sup>17</sup> LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS BULLETIN: HIV IN PRISONS, 2004, at 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp04.pdf> [hereinafter MARUSCHAK, HIV IN PRISONS, 2004].

<sup>18</sup> *Id.*

<sup>19</sup> LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS BULLETIN: HIV IN PRISONS, 2005, at 1 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp05.pdf> [hereinafter MARUSCHAK, HIV IN PRISONS, 2005].

<sup>20</sup> *Id.*

<sup>21</sup> It's interesting and instructive, however, to read the numbers a different way. Taking the numbers at face value, there are a total of 22,480 HIV-infected prisoners and 5,620 confirmed AIDS-infected prisoners. The state-federal split is dramatic, with 20,888 residing in the state system, while only 1,592 reside in the federal system. Women make up a smaller portion of the total (though they have a higher percentage) with only 2,036 cases total. *Id.* When using the percentages, the numbers sound much smaller (it's all a matter of framing). When looking at the total number of HIV positive individuals and realizing that there is no sexual protection available in the prisons, the potential for an epidemic is obvious.

<sup>22</sup> MARUSCHAK, HIV IN PRISONS, 2004, *supra* note 19, at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> Prior to law school, I ran a street outreach program in Rhode Island. Although the program passed out condoms

and such to any individual we encountered, the primary focus was on intravenous drug users, homeless and sex workers with a special focus on youth. Obviously, there was a great deal of overlap between those three groups. Because of a lack of inpatient beds throughout the state, for many individuals the best chance for detoxification is prison.

<sup>28</sup> STDs and HIV go hand in hand. On one hand, unlike HIV, some individuals will show symptoms for some STDs, such as chlamydia or gonorrhea. This is likely to send them to the infirmary. However, a great percentage of men and a larger percentage of women do not have any primary symptoms whatsoever. What this does is twofold. First, the individual does not receive treatment for the STD. In the case of the aforementioned bacterial infections, this is a one-time treatment. Secondly, undiagnosed STDs manifest in the body and expose it to HIV, either through lesions or open sores or the general breakdown of the immune system.

<sup>29</sup> It is important that this is administered within the first seventy-two hours, as the closer in time to the incident that medical staff administers medication, the better the chances for successful treatment.

<sup>30</sup> Assuming of course, that only the people who needed to know had knowledge that an inmate was HIV positive. That does not include guards. The only people who "need to know" would be the inmate and the appropriate medical staff. All others should use universal precautions. This would alleviate the inmate's fears that the stigmatizing condition would be revealed and lead to isolation, discrimination, bodily harm or death.

<sup>31</sup> Of course, I have no way of knowing if this was the case nor should this comment be taken as an endorsement of New York procedures. However, I did make it a point of asking about their health care.

*\* James Radford earned his Juris Doctorate from Northeastern University School of Law. After obtaining his law degree, he worked as a staff attorney for the Legal Aid society where he represented individuals who violated their parole at administrative hearings. Mr. Radford was also responsible for negotiating plea bargains, advocating for alternatives to incarceration, conducting investigations into pending violation charges and preparing for and conducting hearings. As Harm Reduction Coordinator for AIDS Care Ocean State, Mr. Radford designed and implemented a new needle exchange program in Rhode Island. He worked with the state Department of Health to affect legislative change regarding harm reduction issues and developed innovative education and preventative oriented street outreach program for high-risk youth. Mr. Radford also worked cooperatively with local city and state governments on advocacy issues for at risk adolescents and designed, implemented and taught street outreach curriculum to over 60 youth workers.*

# SIZE DOESN'T MATTER: THE IMPACT OF SMALL GANGS IN MONTGOMERY COUNTY, MARYLAND

Jeffrey T. Wennar\*

## Introduction

"They aren't a real gang." How many times have we heard the community, politicians, educators and even the police say that about a group that has come to public attention because of a crime or series of crimes attributed to them. A misconception that continues to prevail among law-abiding citizens is that a gang has to be what they see in the media, a nationally recognized entity. There are those who believe that unless the Crips, Bloods, MS-13 or Latin Kings are present then there is no "real" gang activity in their community. For those that grew-up in the 1960's and remember the Academy Award winning film *West Side Story* as a first introduction to gangs in America, the memory will be of local gangs, the Jets and the Sharks, trying to carve out a geographic territory in an urban environment.

This article addresses three local Montgomery County, Maryland gangs. For two of the gangs, Shoot em up/Hotboyz and 54Mob, it focuses on a single day. With the remaining gang, 38Mob, events from late 2006 through June 2007, will be explored. Common among all three gangs is a local vs. national presence, a suburban environment and violent behavior.

The existence of local gangs is a national phenomenon. Gangs can be all of one race or ethnicity, or mixed composed of members from different racial and/or ethnic backgrounds. The three gangs that this article discusses are black. The East Coast of the United States is seeing an increase in black gangs and black gang activity. Some of these gangs are identifying themselves as being associated with the Bloods or Crips. Some, like the ones discussed in this article, are local. But, as we see with the first gang discussed, these gangs show some knowledge and movement towards a national affiliation.

The State of Maryland defines a criminal gang as: "a group or any association of three or more persons: (1) that forms to engage in criminal activity, including acts by juveniles that would be crimes if committed by adults, for the purposes of pecuniary gain or to create an atmosphere of fear and intimidation either collectively or with knowledge of the acts of the members of the group; and (2) whose members have a common identifying sign, symbol or name."<sup>1</sup>

## 54Mob

The 54Mob is a local gang originating in the Scotland area of Bethesda. Law enforcement can trace the gang back approximately twenty years. The name comes from the last two numbers of the local zip code, 20854. 54Mob uses the colors red and black. They have a specific hand sign. Their graffiti has been found in the Scotland community and elsewhere throughout Montgomery County. Members have been known to tag notebooks and papers. There are concerns that this local group may soon align with the 9 Trey Gangster Bloods. Police have linked the 54Mob to narcotics violations, robberies and

assaults. Members of the Scotland community deny that there is a gang known as the 54Mob.

Montgomery County Public School students had just returned from Christmas break on January 3, 2007. As the school day ended at Churchill High School, Montgomery County Police and Fire & Rescue personnel were dispatched to the school for a fight in progress. As units arrived on the scene they observed numerous students standing around. The school's security had separated some students who had sustained injuries. After the students had been treated, all individuals involved were returned to the school for investigative purposes.

Investigation by the police determined that the fight involved Aaron W., Chase F., Arthur P. and Kevin H. The fight began inside the building by the school store. This confrontation was the result of a previous fight where Arthur P.'s older brother Randy P. was charged for assaulting Deangelo B. On this day, Chase F. walked-up and punched Deangelo B. in the face. A verbal argument ensued and someone suggested the fight be taken outside.

Once outside Chase F. punched Kevin H. in the face. A school security officer intervened between Kevin H. and Chase F. as Arthur P., Khiry L. and Aaron W. perpetuated the fight by yelling and egging the fighters on. The school security officer managed to get Kevin H. and Chase F. to the ground. However, the officer was then attacked by both Aaron W. and Arthur P. Aaron W. kicked the officer twice in the head as Kevin H. continued to yell encouragement to keep the fight going. During this incident the school was locked down under a Code Blue.

This incident was a continuation of a fight that had occurred at Churchill involving the same students on November 10, 2006. On November 20, 2006, mediation was conducted where the parents, students, staff and police were all involved. At the mediation, both sides agreed to a peace.

Pursuant to the Maryland statute,<sup>2</sup> the individuals were charged with second degree assault. Their charging documents were forwarded to the Department of Juvenile Services. The Department is mandated with conducting an intake hearing, and, after that hearing, either handling the cases informally or sending forward an authorization to the State's Attorney's Office allowing that office to file a Petition alleging delinquency. The Department opted to handle the cases informally. Therefore, the court was never involved and no ongoing supervision or programs were available to these individuals.

## Shoot em up/Hotboyz

On February 24, 2007, at approximately 7:19 p.m., two individuals, Dominic C. and Tracey D., were at Wheaton Plaza in Wheaton, Maryland. While at Wheaton Plaza, Dominic C. and Tracey D. were observed by an individual who,

upon seeing Dominic C. and Tracey D., then called D.M. and told him that “Blou” was at the Mall and to round everyone-up. D.M. was able to round-up Carl T., Sephar J-S., Alexander T., Ony G. and Alasan T. They all went to the Wheaton Plaza in D.M.’s jeep. As Dominic C. and Tracey D. were crossing the pedestrian footbridge from the Mall to the bus transfer station they were observed by this group of boys. The group chased Dominic C. and Tracey D. down the stairs into the bus bay. Dominic C. and Tracey D. were attacked by the group. During the fight, Alasan T. pulled out a knife and proceeded to stab both Dominic C. and Tracey D. Dominic C. suffered life threatening puncture wounds to his lung, and he was admitted to the hospital for treatment. Tracey D. had a puncture wound to his back and he was treated and released from the hospital.

Investigation revealed that Dominic C., who attended Wheaton High School, is a member of a rival gang called Pitch Black. Members of Shoot em up/Hotboyz, who attended Kennedy High School, believed that Dominic C. broke into a house that one of their members, Dumisani T. (known as D.J.) lived in. There was a great deal of vandalism inside the house and the name “Blou” was written on the wall. Dominic C.’s street name is “Blou.”

All of the attackers escaped and made their way to D.M.’s house where they discussed the attack that had occurred at the METRO station. While at D.M.’s house, Alasan T. admitted to having stabbed both Dominic C. and Tracey D.

The group then went to the Bel Pre Road area of Wheaton. At that location they met with Ilan G. and Roger G. (brothers of Ony G.), Gilbert O. and Guyton O. (brothers), Wesley R., Pernell R., and Dumisani T. As they stood around talking Pernell R., Wesley R. and Dumisani T. attempted to enter a car that was in the parking lot. The owner of the car was in an apartment at a party. He, and a number of the other party goers, exited the apartment and confronted the group. En mass the group attacked the owner of the car, Rivera, knocking him to the ground, kicking and striking him and dragging him over ten yards and then the group fled. This attack occurred at approximately 8:00 p.m.

Police and fire & rescue personnel arrived on the scene. Rivera was transported to the hospital when it was discovered he had been stabbed. The puncture wound damaged his lung. He was then transferred to a shock trauma center and hospitalized.

Police stopped Pernell R., Carl T. and Dumisani T. a short distance from the incident. Pernell R. and Dumisani T. were identified in a show-up as having broken into the car. Over the course of the next seventy-two hours, all of these individuals were identified and arrested. The majority provided statements to the police addressing their involvement and the involvement of others. From their own statements, and statements from witnesses, it was determined that Roger G. had armed himself with a knife, and had bragged to the group when they returned to his house that he stabbed the victim, Rivera. His purpose in arming himself was the belief that “Blou” was on his way to attack the group.

The State’s Attorney’s Office was notified early on February 26th about both stabbings. The Montgomery County

State’s Attorney’s Office has the only dedicated gang unit in the State of Maryland. Gang prosecutors were immediately assigned to the cases and to the ongoing investigations. Gang prosecutors were able to help with the writing of search warrants and were available for Bond Hearings. The oldest person charged, Alasan T., is seventeen, the youngest, Ilan G. is twelve. With the exception of the twelve year old, all of the individuals were charged as adults pursuant to State Law.<sup>3</sup> Because the charges involved juveniles, the State was mandated to hold a Preliminary Hearing within fifteen days<sup>4</sup> as opposed to an adult where the State has thirty days to conduct a Preliminary Hearing.<sup>5</sup> The State began to experience witness problems by time Pernell R.’s case was scheduled for trial. Witness problems are not unusual in gang cases, and are not uncommon when there are multiple defendants with multiple court dates. With the exception of Pernell R., all of the others pled guilty to being involved in the criminal acts.

Shoot em up/Hotboyz came to the attention of law enforcement as a result of these February 24th incidents. As a condition of probation, those members placed on probation were ordered to have no contact with gangs and/or gang members. Pitch Black has also been an ongoing problem in the first and fourth police districts. Members have been involved in strong armed robberies, assaults and burglaries.

### 38Mob

The 38Mob named themselves after the 3800 block of Castle Boulevard in the Silver Spring district of Montgomery County.

On January 19, 2007, Detective Oaks of the Montgomery County Police Department, Special Investigations Division made arrangements to meet with David C. in order to purchase PCP. The two had met a week earlier, and Detective Oaks had made a similar purchase of PCP at that time. At approximately 2:15 p.m., Detective Oaks parked his undercover police vehicle in a parking lot at Green Castle and Turbridge Road, a location agreed upon by David C. Shortly thereafter, David C. arrived with another individual later identified at Marquis T. Both subjects entered the vehicle, David C. in the front right seat and Marquis T. in the rear right seat. For the officer’s safety, the transaction was being recorded with an electronic recording device. This device also allowed other narcotics officers, who were providing cover for Detective Oaks, to monitor the transaction and provide assistance if required.

Approximately ten minutes after David C. and Marquis T. entered the vehicle, an altercation ensued between the Detective and David C. The Detective believed that David C. was attempting to sell him fake PCP. David C. became angry when confronted with this deceit. David C. then advised Detective Oaks that his boy Marquis T. had a “hammer.” Within seconds of making this comment Detective Oaks began to repeatedly yell “get that gun out of my face.” Detective Oaks began to yell for help and struggle with both subjects. As he struggled with the subjects, Detective Oaks was shot twice

and the subjects then fled.

David C. was apprehended a short distance from the car, and eventually admitted that he knew Marquis T. had brought the gun to the drug transaction. Marquis T. was shot by police prior to being taken into custody and he died from his wounds.

The police and State's Attorney's Office began to look at David C. and Marquis T., and the individuals they associated with. As this investigation broadened, their association with the 38Mob became evident. Police had been aware of the 38Mob for some time. Until this attempted murder of a police officer, the 38Mob had been involved with strong armed street robberies, drug dealings and burglaries. Through extensive crime analysis and the physical job of re-reading police event reports, a pattern of criminal activity has been attributed to members of the 38Mob.

## Conclusion

Are they real? Do they meet the criteria established by the Legislature? The short answer is yes to both questions. The more important questions are why do these gangs exist and how should their existence be addressed.

It has become evident to law enforcement throughout the United States, and particularly in Montgomery County, that we can not prosecute our way out of criminal street gang activity. There are three components that must be considered and must comprehensively be applied together to the gang problem. They are intervention, prevention and suppression.

With regard to the crimes committed, once the police have concluded their investigation and suspects have been arrested, then those individuals should be prosecuted. This is the traditional suppression approach and that approach involves the police and prosecutors office initially, and may involve the Department of Corrections and the Department of Parole and Probation eventually. An additional piece to this approach regards the re-entry of the criminal into society. Unless programs are established in our penal institutions that address education, job skills, anger management, peer choices, and a host of other specialized programs to deal with substance abuse, domestic violence and the ability to make good decisions, then we will continue to see the revolving door that our justice system has become. If an individual is not prepared through education and job training then that individual stands a very good chance of recidivating and returning to jail.

Prior to any crime ever being committed by an individual, an assessment has to be made of the potential of an individual for criminal conduct. That assessment would include who that individual has been with when stopped by the police or who that individual has associated with during negative school behavior. In an attempt to put the individual back on a path of behavior that is accepted by society, services have to be offered to that individual and his/her family in

order to intervene in the behavior trend. This is the intervention piece that can be implemented by governmental agencies, other than law enforcement, community activists, or the faith based community.

The prevention component would involve gang awareness programs in communities struggling with gang activity or gang presence. This component would offer warning signs to parents, teachers and community leaders so that they would know what to look for in their children, students and neighborhoods. As soon as the warning signs begin to be exhibited, the intervention piece could be applied. The application of early prevention and intervention could possibly reduce the need for suppression. The community and local government must address the need for after school and summer programs. Studies continue to show that there is an increase in juvenile crime from 2:00 p.m. until approximately 9:00 p.m. Structured programs that provide options for minors have been shown to work. Whether it is a sports program, arts, music or a study group, society must implement and provide these alternative resources to minors. Likewise, summer programs that provide structure for minors are a positive alternative to minors running the streets without supervision.

Our country is never going to totally eradicate gangs. Gangs have been in the United States since before the country was founded. However, if all facets of the community acknowledge that there is a gang problem, identify those at risk for being targeted by gangs, make a commitment to providing long-term resources for intervention, prevention and suppression activities, then there will be a significant reduction in gang related crime and gang related activity.

<sup>1</sup> MD. CODE ANN., CRIM. LAW § 9-801(c) (2008).

<sup>2</sup> MD. CODE ANN., CTS. & JUD. PROC., subtitle 8A (2008).

<sup>3</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (d)(1).

<sup>4</sup> MD. CODE ANN., CRIM. PROC. § 4-202.1 (b)(1)(ii).

<sup>5</sup> MD. CT. R. 4-221(b) (2008).

*\* Jeffrey T. Wennar has been practicing law since 1979. In August 2001, he joined the Montgomery County State's Attorney's Office as the Gang Prosecutor. In 1993, Governor Schaefer appointed Mr. Wennar to the Governor's Executive Advisory Council requesting him to study gangs in Maryland. In 1995, he was recognized by Federal Bureau of Investigation Director, Louis Freeh, for his successful prosecution of the Hester drug gang. He has had numerous articles published in the Journal of Gang Research. Mr. Wennar is a member of the Executive Board of the Mid-Atlantic Gang Investigators Network and is the Legislative Chair for the National Alliance of Gang Investigators Associations. Mr. Wennar is currently an Adjunct Professor at American University. He has been an Associate Professor at the University of Maryland University College and at Montgomery College.*

# SUPREME COURT WATCH: RECENT DECISIONS AND UPCOMING CRIMINAL CASES FOR THE 2008-2009 DOCKET

Emily Pasternak\*

## *Watson v. United States*

128 S.Ct. 579

Decided December 10, 2007

### Question Presented:

Where a defendant receives a gun in exchange for drugs, has he “used” the gun “during and in relation to . . . [a] drug trafficking crime within the meaning of the federal drug law 18 U.S.C. Section 924(c)(1)(A)?

### Facts:

18 U.S.C. Section 924(c)(1)(A) sets a mandatory minimum sentence for a defendant who, “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.” The statute does not define the term “uses,” and the breadth of the term is what gives rise to this case.

Michael Watson told a government informant that he wanted to buy a gun. The informant suggested that Watson pay in narcotics. Watson exchanged twenty-four doses of OxyContin for a .50 caliber semiautomatic pistol and was arrested. A federal grand jury indicted him for distributing a controlled substance and for “using” the pistol during and in relation to that crime, in violation of Section 924(c)(1)(A). Watson pled guilty to both charges but reserved the right to challenge the factual basis for a Section 924(c)(1)(A) conviction.

The Fifth Circuit Court of Appeals, following Circuit precedent, affirmed the decision of the District Court that Watson had “used” the firearm. The Supreme Court granted certiorari to resolve a conflict among the circuit courts.

### Decision:

Justice Souter wrote the majority opinion in this unanimous judgment, holding that a person does not “use” a firearm under 18 U.S.C. Section 924(c)(1)(A) when he receives it in trade for drugs. The Supreme Court has addressed the meaning of the term “uses” twice before, in *Smith v. United States*, 508 U.S. 223 (1993) and in *Bailey v. United States*, 516 U.S. 137 (1995).

In *Smith*, the issue raised was the converse of the issue raised in this case. The Court held that “a criminal who trades his firearm for drugs ‘uses’ it during and in relation to a drug trafficking offense within the meaning of Section 924(c)(a).”

In *Bailey*, the issue was whether possessing a firearm near the scene of drug crime is “used” under Section 924(c)(1). The Court held that the mere possession of a gun does not amount to “using” the gun under the statute. In both decisions the Court used the ordinary and natural meaning of the verb “to use.”

In making its decision, the *Watson* Court stated that, “[t]he Government may say that a person ‘uses’ a firearm

simply by receiving it in a barter transaction, but no one else would.” The Court cited previous decisions to support its interpretation of the term “uses.” In *United States v. Stewart*, the Court held that “[w]hen a person pays a cashier a dollar for a cup of coffee in the courthouse cafeteria, the customer has not used the coffee. He has only used the dollar bill.” 246 F.3d 728, 731 (C.A.D.C. 2001). Therefore, when Watson handed over the drugs for the pistol, the informant “used” the pistol, but “regular speech would not say that Watson himself used the pistol in the trade.”

Justice Ginsburg concurred in judgment.

## *Kimbrough v. United States*

128 S.Ct. 558

Decided December 10, 2007

### Questions Presented:

(1) When imposing a sentence for distributing crack cocaine, may a District Court judge consider the impact of the 100-to-1 crack/powder ratio and the Sentencing Commission’s view that the ratio leads to exaggerated sentences for crimes involving crack cocaine?

(2) May a District Court judge, in an effort to avoid a sentencing disparity, impose a sentence that is below the range recommended by the 100-to-1 crack/powder ratio in the Guidelines?

### Facts:

In September 2004, petitioner Derrick Kimbrough was indicted in the United States District Court for the Eastern District of Virginia and charged with four offenses: (1) conspiracy to distribute crack and powder cocaine; (2) possession with intent to distribute more than fifty grams of crack cocaine; (3) possession with intent to distribute powder cocaine; and (4) possession of a firearm in furtherance of a drug-trafficking offense. Kimbrough pled guilty to all four charges.

Even though crack cocaine and powder cocaine are chemically similar, they are treated very differently for sentencing purposes. Based on assumptions that crack cocaine was more dangerous than powder, the Sentencing Commission, following the Congressional Act of 1986, adopted a 100-to-1 ratio that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine. “The 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs.” The Commission has since sought, unsuccessfully, to eliminate the disparity in the Guidelines between crack and powder cocaine.

In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the mandatory sentencing guidelines system violated the Sixth Amendment. *Booker* rendered the guide-

lines “effectively advisory.” The statute, 18 U.S.C. Section 3553, “as modified by Booker, contains an overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary’ to accomplish the goals of sentencing” and lists several factors for a court to consider.

According to the Guidelines, Kimbrough should have been subjected to an aggregate sentence of fifteen years to life in prison. However, the District Court believed that this sentence would have been greater than necessary and “commented that the case exemplified the ‘disproportionate and unjust effect that crack cocaine guidelines have in sentencing.’”

The District Court chose to sentence Kimbrough as if he had been charged, not with possession of crack cocaine, but with an equivalent amount of powder cocaine.

As a result, the guideline range fell from “228 to 270 months” to the lesser range of “97 to 106 months.”

Deciding that the statutory minimum sentence was “clearly long enough” to accomplish the objectives listed in the statute, Section 3553(a), the court sentenced Kimbrough to fifteen years, or 180 months, in prison plus five years of supervised release. The prison sentence consisted of 120 months for each of the three drug counts, to run concurrently, plus 60 months for the firearm count to run consecutively.

The Fourth Circuit Court of Appeals vacated the sentence according to precedent that a sentence “outside the guidelines range is *per se* unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.” *United States v. Eura*, 440 F.3d 625 (C.A.4 2006).

The Supreme Court granted certiorari to determine “whether the crack/powder disparity adopted in the United States Sentencing Guidelines has been rendered ‘advisory’ by [their] decision in *Booker*,” a question that has divided the Courts of Appeals.

#### Decision:

Justice Ginsburg delivered the Court’s 7-2 decision holding that the sentence imposed on Kimbrough should survive appellate review because although the District Court assigned him a sentence outside of the guidelines, it was not an abuse of discretion because the sentence was reasonable and would achieve the purpose of Section 3553(a).

The Government argued that the Guidelines adopting the 100-to-1 ratio are an exception to the “general freedom that sentencing courts have to apply the Section 3553(a) factors” because the ratio is a “specific policy determination that Congress has directed sentencing courts to observe.”

The Court rejected the Government’s argument, holding that while the Commission’s recommendation of a sentence range reflects a rough approximation of sentences that might achieve Section 3553(a)’s objectives, the sentencing judge is familiar with the individual case and defendant and therefore, the judge is “in a superior position to find facts and judge their import under Section 3553(a).”

The Court further noted that the Commission itself has reported that the disparity between crack and powder

sentences results in “disproportionately harsher sanctions.” Therefore, the Court held that it is not an abuse of discretion for a district court to decide that the crack/powder disparity results in a sentence “greater than necessary” to achieve Section 3553(a)’s purpose for an individual defendant. Justice Scalia filed a concurring opinion.

Justice Thomas and Justice Alito filed dissenting opinions.

### *Logan v. United States*

128 S.Ct. 475

Decided December 4, 2007

#### Question Presented:

Does the “civil rights restored” exemption contained in 18 U.S.C. Section 921(a)(20) encompass, and therefore remove from the Armed Career Criminal Act’s reach, state-court convictions that at no time deprived the offender of civil rights?

#### Facts:

James Logan pled guilty in a United States District Court to being a felon in possession of a firearm, in violation of 18 U.S.C. Section 922(g)(1). Because of Logan’s record, which included three Wisconsin court convictions of misdemeanor battery, the District Court imposed a fifteen year to life sentence of imprisonment.

The minimum of fifteen years was mandated by the Armed Career Criminal Act (ACCA), 18 U.S.C. Section 924(e)(1), which offers guidelines to enhance sentences. However, the ACCA states that a prior conviction may be disregarded if the offender has had civil rights restored. The convictions that triggered Logan’s ACCA-enhanced sentence caused no loss of civil rights.

In District Court and the Court of Appeals, Logan argued that his Wisconsin misdemeanor convictions did not qualify as enhanceable offenses under the ACCA because they did not cause him to lose his civil rights. Logan reasoned that retained rights are equivalent to rights lost but later restored, and therefore the exception clause in Section 921(a)(20) covered his three state-court misdemeanor convictions. This would result in the reduction of Logan’s minimum sentence of fifteen years under the ACCA to a maximum sentence of ten years.

The District Court rejected Logan’s argument and the Court of Appeals affirmed the decision holding that “an offender whose civil rights have been neither diminished nor returned is not a person who ‘has had civil rights restored.’”

The Supreme Court granted certiorari to resolve a split among the Circuits as to whether Section 921(a)(20)’s exception for “civil rights restored” should be interpreted to include civil rights never lost.

#### Decision:

Justice Ginsburg delivered the opinion of the unanimous court holding that the Section 921(a)(20) exemption provision does not cover the case of an offender who retained civil rights at all times. The Court rejected Logan’s

argument that retention of rights must be treated as the legal equivalent to restoration of rights to prevent less serious offenders from receiving ACCA enhanced penalties while more serious offenders who have had civil rights restored may escape heightened punishment.

First, the Court examined the plain meaning of the word “restore” and found that it means “to give back something that had been taken away.” The Court noted that “[w]ords in a list are generally known by the company they keep.” The words accompanying “restore” in Section 921(a)(20) are “expunged,” “set aside,” and “pardoned.” Each term describes a way for the government to relieve the offender from some or all of the consequences of his conviction. “In contrast, a defendant who retains rights is simply left alone.”

Next the Court discussed the effect Logan’s interpretation of the statute would have. The Court explained that some states do not revoke any offender’s civil rights, and that under Logan’s interpretation of the statute, the most dangerous recidivists could fall under the Section 921(a)(20) exception.

Finally, the Court noted that the statutory language rejects Logan’s argument. Section 921(a)(20) reads “[a] person shall not be considered to have been convicted if the conviction . . . is an offense for which the person has been pardoned or has had civil rights restored (*if the law of the applicable jurisdiction provides or the loss of civil rights under such an offense*).” The Court emphasized that the parenthetical qualification shows that the phrase “civil rights restored” does not refer to a person whose civil rights were never revoked.

### *Gall v. United States*

128 S. Ct. 586  
Decided December 10, 2007

#### Question Presented:

May the Court of Appeals apply a “proportionality test” and require that a sentence that constitutes a substantial variance from the Sentencing Guidelines be justified by extraordinary circumstances?

#### Facts:

In early 2000, Brian Gall, while a student at the University of Iowa, became a member of an ecstasy distribution conspiracy. For seven months, he delivered ecstasy pills to co-conspirators, netting over \$30,000. Gall voluntarily left the conspiracy in September 2000. He did not sell any drugs after that time, and, after graduating in 2002, he entered the construction industry, where he has worked ever since. On April 28, 2004, Gall was indicted for participating in a conspiracy to distribute ecstasy, cocaine, and marijuana.

The District Court, considering Gall’s post-offense conduct, including his obtaining a college degree, the start of his own business, the support of his family and friends, lack of criminal history, and his age, sentenced Gall to probation for a term of thirty-six months.

The Court of Appeals for the Eighth Circuit reversed and remanded for resentencing. It held that a sentence outside of the range of the Sentencing Guidelines must be supported by a justification that “is proportional to the extent of the difference between the advisory range and the sentence imposed” and that such a variance must be supported by extraordinary circumstances. It held that neither of these requirements were met in the case at hand. First, it held that the difference between a sentence of probation and the minimum sentence suggested by the sentencing guidelines (thirty months imprisonment) was 100%. Next, it held that the District Judge made five errors in reasoning: (1) he gave “too much weight to Gall’s withdrawal from the conspiracy;” (2) he gave too much weight to studies showing impetuous behavior by those under the age of eighteen; (3) he did not “properly weigh” the seriousness of Gall’s offense; (4) he failed to consider “unwarranted” disparities caused by the sentence; and (5) he placed “too much emphasis on Gall’s post-offense rehabilitation.”

#### Decision:

Justice Stevens delivered the 7-2 opinion of the Court. The Court held that because the Sentencing Guidelines are now advisory in nature, “appellate review of sentencing decisions is limited to determining whether they are reasonable” under the abuse of discretion standard of review. The Court specifically rejected rules that require extraordinary circumstances to justify sentences outside of Guidelines range and rejected the use of mathematical formulas that use percentage of departure from the Guidelines as the standard for determining the strength of justification that must be made by the district court. It held that these approaches “come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”

The court held that the proper method of appellate review is for the appellate court to first make sure that the district court did not commit a procedural error (such as failing to calculate or improperly calculating the Sentencing Guidelines range, treating the Guidelines as mandatory, failing to consider the Section 3553(a) factors, or failing to adequately explain the chosen sentence), and to then consider the substantive reasonableness of the sentence under an abuse of discretion standard, taking into account the totality of the circumstances. The court concluded that the District Judge did not commit a significant procedural error, nor was the sentence he imposed on Gall unreasonable under the abuse of discretion standard. Justice Scalia filed a concurring opinion.

Justices Thomas and Alito filed dissenting opinions.

### *Allen v. Siebert*

128 S.Ct. 2  
Decided November 5, 2007

#### Question Presented:

Under the Antiterrorism and Effective Death Penalty Act, is the statute of limitations for a federal habeas

petition tolled when an untimely application for state post-conviction relief is filed?

**Facts:**

Daniel Siebert was convicted and sentenced to death in Alabama for murder. Siebert's conviction and sentence were affirmed on direct appeal. On August 25, 1992, Siebert filed a petition for post-conviction relief in Alabama State Court, and his petition was denied as untimely because it was filed after the statute of limitations had run. On September 14, 2001, Siebert filed a petition for a federal writ of habeas corpus in an Alabama District Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one-year statute of limitations for filing a federal habeas petition. However, the statute of limitations is paused, or tolled, while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."

**Decision:**

In a per curiam decision, the Supreme Court held that for an application for post-conviction relief to be "properly filed," it must be timely, and therefore, an untimely application does not toll the statute of limitations for the AEDPA. This holding relied on the Supreme Court decision in *Pace v. DiGuilmo*, 544 U.S. 408 (2005), holding that a state post-conviction petition rejected as untimely is not properly filed within the meaning of the AEDPA.

Although the District Court followed *Pace* and rejected Siebert's habeas petition, the Court of Appeals reversed, distinguishing *Pace* on the grounds that Rule 32.2(c) (the Alabama rule that rendered Siebert's application for post-conviction relief untimely), unlike the statute of limitations in *Pace*, "operates as an affirmative defense." The Supreme Court rejected this reasoning and stated, "[w]hen a post-conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of [the AEDPA]."

*Rita v. United States*

127 S.Ct. 2456  
Decided June 21, 2007

**Question Presented:**

May a Court of Appeals apply a presumption of reasonableness to a District Court sentence that reflects a proper application of the Sentencing Guidelines according to 18 U.S.C. Section 3553(a)(2)?

**Facts:**

Victor Rita committed perjury while testifying in front of a grand jury. The District Court concluded that the sentencing guideline range of thirty-three to forty-one months in prison under Section 3553(a)(2) was appropriate and sentenced him to thirty-three months in prison.

Rita appealed and argued that the sentence was

"unreasonable" because it was "greater than necessary to comply with the purposes of sentencing" under Section 3553(a)(2). The Fourth Circuit held that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable." The Supreme Court granted certiorari to resolve a conflict among the Circuits.

**Decision:**

Justice Breyer delivered the 8-1 majority decision of the Court affirming the Circuit Court's holding that a sentence based on the Guidelines is presumptively reasonable during appellate review.

The Court first pointed out that a presumption is not binding and does not lead to strong judicial deference. Instead, "the presumption reflects the fact that, by the time an appeals court is considering a with-in-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case." Therefore, when a judge sentences a defendant within the guidelines, he is consistent with the Commission's judgment in general.

Rita argued that, because the Guidelines change in the presence of special facts, such as brandishing a weapon, and because the judge would be determining these facts in many instances, the Guidelines violate the Sixth Amendment. The Court rejected Rita's argument, holding that the Sixth Amendment does "not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence."

Justice Scalia filed an opinion concurring in part and concurring in the judgment, in which Justice Thomas joined. Justice Souter filed a dissenting opinion.

QUESTIONS PRESENTED IN UPCOMING CASES GRANTED CERTIORARI

*Begay v. United States*

Docket: 06-11543  
Tenth Circuit Court of Appeals

**Question presented:**

Is a felony driving offense a "violent felony" for the purposes of the Armed Career Criminal Act?

*Irizarry v. United States*

Docket: 06-7517  
Eleventh Circuit Court of Appeals

**Question Presented:**

Must a judge give both the prosecution and the defense advance notice before imposing a criminal sentence that departs from the Federal Sentencing Guidelines?

*Snyder v. Louisiana*

Docket: 06-10119  
Louisiana Supreme Court

**Questions Presented:**

Did a prosecutor's reference to the O.J. Simpson murder trial prejudice an all-white jury against a black defendant who was eventually sentenced to death? Did the lower court ignore the import of *Miller-El* by failing to consider probative evidence of discriminatory intent, including the prosecutor's repeat references to the Simpson trial, the prosecutor's use of challenges to purge all African Americans from the jury, the disparate questioning of white and black prospective jurors, and the documented pattern of the prosecutor's office diluting minority presence in petit juries? Did the lower court err in holding that failure to raise a *Batson* objection can never result in prejudice under *Strickland v. Washington*?

*Baze v. Rees*

Docket: 07-6439  
Supreme Court of Kentucky

**Question Presented:**

Do lethal injections in capital cases create an unnecessary risk of pain and suffering in violation of the Eight Amendment's prohibition against cruel and unusual punishment?

*Greenlaw v. United States*

Docket: 07-330  
Eighth Circuit Court of Appeals

**Question Presented:**

May an appellate court, without a motion from the prosecution, increase a sentence when the district court misinterpreted the case law and sentenced the defendant to a term less than the mandatory minimum?

*United States v. Santos, Efrain, and Diaz*

Docket: 06-1005  
Seventh Circuit Court of Appeals

**Question presented:**

Under 19 U.S.C. Section 1956(a)(1), the federal money laundering statute, which makes it a crime to engage in a financial transaction using the proceeds from certain illegal activities with the intent of promoting these activities or concealing the proceeds, are proceeds the gross receipts from the illegal activities or only the profits?

*Kennedy v. Louisiana*

Docket: 07-343  
Louisiana Supreme Court

**Questions Presented:**

Does the Louisiana statute allowing the death penalty for the rape of a child under the age of twelve violate the Eight Amendment ban on cruel and unusual punishment?

*District of Columbia v. Heller*

Docket: 07-290  
D.C. Circuit Court of Appeals

**Question Presented:**

Do three District of Columbia firearms ordinances: D.C. Code Section 7-2502.02(a)(4), barring the registration of handguns; D.C. Code Section 22-4504(a), prohibiting carrying a pistol without a license; and D.C. Code section 7-2507.02, requiring that all lawfully owned firearms be kept unloaded and either disassembled or trigger locked, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

*Arave v. Hoffman*

Docket: 07-110  
Ninth Circuit Court of Appeals

**Question Presented:**

When a defendant who rejects a plea bargain because his attorney assured him he would not receive the death penalty is sentenced to death, has his attorney provided ineffective assistance of counsel under *Strickland v. Washington*?

\* Emily Pasternak is a second-year law student at American University Washington College of Law. She graduated from Northwestern University in 2006 with Bachelor of Arts degrees in Slavic Studies and International Studies. Currently Emily is a law clerk for The Honorable Russell F. Canan of the DC Superior Court. This past summer she studied International Criminal Law in The Hague. Extremely helpful to this compilation was Northwestern's Medill School of Journalism's US Supreme Court News Section, "On the Docket," which can be found at <http://docket.medill.northwestern.edu> as well as the Supreme Court Summaries prepared by Jedidiah Sorokin-Altman in the Fall 2007 issue of the Criminal Law Brief.

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## FIRST ANNUAL *CRIMINAL LAW BRIEF* SYMPOSIUM

On Saturday, April 5, 2008, the *Criminal Law Brief* hosted the first annual *Criminal Law Brief* Symposium at the Washington College of Law. The all day event provided a forum for students, faculty, and practitioners to debate and discuss recent trends and issues in criminal law. The symposium consisted of three panel discussions and an afternoon networking reception.

Laurita Denny ('07), founder and former editor-in-chief of the *Criminal Law Brief*, provided introductory remarks and moderated the first panel on corporate criminal liability (CCL). Panelists included Elizabeth Ainslie, Partner, Schnader Harrison Segal and Lewis LLP; John Hasnas, Associate Professor, Georgetown Business School; and Leo Wise, Senior Counsel to the Assistant Attorney General, U.S. Department of Justice. The panelists debated the practicality of CCL and discussed alternative ways to control corporate behavior.

After lunch, WCL Professor Brenda Smith moderated a panel on prison rape. Panelists included Anadora Moss, President, The Moss Group, Inc. and Mr. Arthur Wallenstein, Director, Montgomery County Department of Correction and Rehabilitation. Mr. Wallenstein discussed the methods he used to monitor and report sexual abuse in prisons, and he stressed the need for prison administrators and employees to receive ongoing training to handle cases of prison rape. Professor Smith talked about the Prison Rape Elimination Act (PREA) of 2003. Mrs. Moss, president of The Moss Group, Inc., a Washington, D.C. – based criminal justice consulting firm, discussed her work in assisting the National Institute of Corrections (NIC) to implement the activities of PREA.

Molly Gill, staff attorney at Families Against Mandatory Minimums, moderated the final panel on sentencing disparities between powder and crack cocaine. Panelists included Matthew Cohen, Assistant U.S. Attorney (Washington D. C.), Criminal Division; A. J. Kramer, Federal Public Defender of D. C.; Eric Sterling, President, Criminal Justice Policy Foundation; and Jennifer Stitt, Federal Legislative Director, Families Against Mandatory Minimums. Mr. Sterling outlined the Congressional history behind the 100-1 sentencing disparity, and he provided insights on why the 100-1 ratio survived for so long. Mr. Kramer shared his experiences working with criminal defendants affected by the disparities, and he talked about why he thought the disparities were ineffective. Ms. Stitt described the recent legislative development in Congress to remedy the disparity, as well as the details of future Congressional action. Finally, Mr. Cohen described the Department of Justice's perspective on the crack versus powder debate. A networking reception followed, allowing students and practitioners to interact.

Many thanks to the executive board and staff of the Criminal Law Brief for coordinating this event, as well as the Criminal Law Society and the Office of Special Events and Continuing Legal Education.

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