The Prison Rape Elimination Act and the Limits of Liberal Reform

By Lena Palacios | February 17, 2017

In 1996, the suicide of a young Texas man named Rodney Hulin, Jr., in the wake of multiple sexual assaults partially spurred Congress to unanimously pass the 2003 Prison Rape Elimination Act (PREA). The purpose of the nation’s first federal civil law addressing sexual violence behind bars was to call for nationwide data collection on the problem of prisoner rape and federal grants to help states combat it within prisons, jails, police lockups, youth facilities, immigration detention facilities, and community corrections.

While PREA was developed with good intentions by the National Prison Rape Elimination Commission (NPREC) in concert with prisoner rights’ advocates from across the country, and has been lauded by the American Civil Liberties Union and Just Detention International, it falls far short of what is needed to protect all prisoners, especially women, people of color, transgender individuals, and disabled people.

The new presidential administration and Congress would do well to consider the benefits and shortcomings of PREA, and may have the impetus to do so with Jeff Sessions, an original co-sponsor of the legislation, now in the position of Attorney General. The pro-law enforcement "Blue Lives Matter" mandate under Sessions,
however, is unlikely to include strengthening PREA’s enforcement provisions, investigating prison guards for rampant sexual violence against incarcerated people, or following through on progressive policing and prison reform.

Due to various Republican-led moves to delay and weaken PREA enforcement, it wasn’t until 2012 that the Department of Justice (DOJ) issued the final rule implementing the PREA standards that include protections for LGBT people, crisis services for survivors, and prisoner education on the right to be safe behind bars. Prisons are required to perform background checks on prospective staff, prevent juveniles from being housed with adult prisoners, provide external and anonymous channels for prisoners to report sexual abuse, and provide physical and mental health care to imprisoned survivors of sexual assault. PREA has caused a change in the way that prison rape is viewed by addressing not only forcible rape, but other forms of sexual abuse, whether perpetuated by prisoners or staff. Unfortunately, many of these standards (for example, standards that restrict cross-gender pat-down searches of female prisoners) will only be in full effect in 2017—a full 14 years after PREA was signed into law. In the meantime, rape continues unabated inside our nation’s correctional facilities.

The failure to implement PREA in ways that are consistent with NPREC’s initial recommendations has led to damaging results for Black and multiracial people [1], women of color [2], LGBTQ people, and disabled people who are more likely to be targeted for prison rape than white heterosexual men, nondisabled people, and cisgender people.

First, PREA’s enforcement provisions are virtually non-existent since compliance by corrections agencies is voluntary. The primary means by which PREA attempts to ensure compliance by the states is through a financial incentive. A state is at-risk of losing 5% of federal grant funding “for prison purposes” if it fails to certify that it is in full compliance with PREA. Additionally, as noted by the PREA Resource Center, there is no oversight with respect to a governor’s certification that their state is in compliance with PREA. Recent investigative reporting suggests that New Jersey’s prisons have a pervasive sexual abuse problem—and that officials look the other way when incarcerated people complain about it and that the state intentionally underreports its prevalence. Even factoring in sexual abuse charges filed against five corrections officers at the state’s only women’s prison last year and the more recent investigation into a correctional officer who was never charged for sexually abusing sixteen women for years, the department maintains its rate is low—well below the average of 4 percent of state and federal prisoners nationally. Meanwhile, the annual audit performed in compliance with PREA found the New Jersey corrections department met federal standards. New Jersey is not alone.

Second, the courts have allowed PREA to “become both sword and shield in the hands of detention officials” according to Professor of Law, Gabriel Arkles [3]. Since Congress never created a private right and remedy in a way that courts would recognize under Supreme Court precedent, many courts refuse to consider that PREA may be relevant to claims of incarcerated survivors of sexual abuse. This means that survivors can’t bring a lawsuit against individual correction officials or agencies that fail to comply with PREA standards. While courts disregard any favorable implications of PREA for survivors, “courts do entertain arguments from defendants who seek to use PREA to justify infringements on prisoners’ constitutional rights” [3].

PREA has provided an excuse for correctional staff to force unwanted penetrative exams on prisoners and to place more prisoners in solitary confinement. Courts have allowed prison officials to use PREA against prisoners in ways inconsistent with its legislative intent.
Courts have also interpreted PREA to limit incarcerated people’s access to the courts by first requiring that they exhaust all steps of an institution’s internal grievance system. This requirement further exacerbates the already serious barriers faced by survivors who want to bring their claims to court [3]. Incarcerated survivors of sexual assault often experience relentless intimidation, either by staff or other prisoners, and are often not believed because of their criminal histories. According to a 2012 DOJ report on sexual victimization in prison, incarcerated people who follow appropriate grievance procedures to report staff sexual misconduct faced staff retaliation and were punished 46.3 percent of the time.

Effectively turning the mandate of PREA on its head and shielding the perpetrators of state sanctioned sexual violence isn’t just limited to the courts. Transgender and gender non-conforming prisoners, in particular, have experienced unanticipated negative impacts from PREA, including being punished through new policies purportedly created to comply with PREA that punish consensual sex and forbid gender non-conforming behavior. PREA standards permit facilities to treat consensual sex as equivalent to sexual abuse and to prohibit sex of any kind between incarcerated people. PREA has given correctional authorities a potent weapon to selectively sanction incarcerated people for any sexual expression, including masturbation [5, 6]. This blanket prohibition against sex has resulted in discipline or criminal prosecution for prisoners who engage in consensual sex and has discouraged prisoners from reporting sexual violence. Transgender and gender non-conforming prisoners bear the brunt of these policies punishing gender and sexual expression [6].

In a recent Columbia Law School report, Chase Strangio, Staff Attorney with the ACLU, shares their experience representing trans and gender non-conforming prisoners: “In Idaho, for example, PREA has been used to restrict the gender expression of people in custody under the guise of ending sexual assault... I represented a transgender woman in a New York men’s prison who was disciplined after reporting a sexual assault perpetrated against her. The officials argued that her gender non-conformity was evidence that she had consented to the rape. Meanwhile, all corrections agencies continue to prohibit consensual sexual contact or touching of any kind.”

While PREA has effectively enforced penalties against prisoners for consensual sexual activity, there is no evidence that the new rules have reduced the gender-based and sexual violence against incarcerated people that is perpetuated most frequently by correctional staff. Yet, it is clear that the regulations have increased punishment of incarcerated people.

PREA has been a focal point of both mainstream feminist and trans politics. While passed with the aim of preventing sexual assault, according to Professor of Law Dean Spade, “abolitionist activists doing prisoner justice support work have pointed out that because some of the main tools the act uses are punishment tools, those tools have become just another part of the arsenal used by punishment systems to increase sentences, target prisoners of color and queer and trans prisoners, and expand imprisonment” [2]. Ultimately, individuals seeking to remedy prison conditions—whether policy-makers or advocates—should be aware of inadvertently strengthening the criminal punishment system. A case in point: prison reformers who have advocated for gender-responsive prisons and gender-specific rehabilitative programs for female-identified prisoners have unintentionally contributed to prison expansion.

The final rule issued by the Department of Justice to implement the PREA standards represents the start, not the end, of efforts to curb prison rape and sexual abuse.

Much more needs to be done to fully implement the standards and ensure meaningful and continual compliance monitoring. First, incarcerated people need legal rights to sue corrections agencies and officials,
in particular, a private right of action, to enforce the PREA regulations [3]. Relatedly, reforms need to include repeal of the exhaustion requirement that, as mentioned above, limits incarcerated people’s access to the courts.

Second, the DOJ should amend and extend regulations and fight against efforts to weaken PREA compliance. Strong action will be needed to monitor compliance and impose penalties when needed.

Third, the DOJ should amend the PREA regulations to require prisons to eliminate bans on consensual sex among incarcerated people [4]. Relatedly, work needs to occur at all levels of government to implement all the policy recommendations forwarded in the A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV report.

If we take seriously the warning issued by prison abolitionists such as Dean Spade, liberal legal reforms need to be advanced while we continue to remember that prisons are not safe spaces for anyone.

References:


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