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Violence and Silence: The Prison Rape Elimination Act and Beyond

Elizabeth Eggert

The #MeToo movement came to national attention in October of 2017. Activist Tarana Burke created the phrase in 2006 to support women of color who experienced sexual violence. However, the phrase did not become popular until after the revelation of Harvey Weinstein's abuses, when actress Alyssa Milano tweeted "If all the women who have been sexually harassed or assaulted wrote 'Me Too' as a status, we might give people a sense of the magnitude of the problem."¹

That a phrase coined by a black woman to support women of color was ignored until championed by a famous, conventionally attractive white woman working in Hollywood explicitly reveals whose voices the #MeToo movement privileges, and whose it ignores. In her tweet, Alyssa Milano specifically asked women to share stories of sexual assault; when Terry Crews, an actor and former NFL player, shared his story of being sexually assaulted by an agent at a Hollywood party, he was derided as "not brave" and accused of trying to "equate himself" with the supposed real victims of sexual abuse.² Although #MeToo claims to

support and advocate for all victims of sexual abuse, the movement has so far failed to adequately grapple with the multifaceted nature of pervasive sexual abuse in this country, especially with regards to the abuse of men and particularly those in prison.

In 1991, Kendall Spruce contracted HIV after being raped at knifepoint in an Arkansas state prison; he later stated that he was raped by at least 27 inmates in a nine month period.³ I open with this example to connect the following paper about prison sexual assault and legislation to the national conversation and activism surrounding societal sexual harassment and assault, and to ponder why prisoners have not been able to say #MeToo.

The Prison Rape Elimination Act of 2003 (PREA) was the first federal law passed with regards to sexual assault of prisoners. The bill was signed into law on September 4th, 2003 with a broad base of bipartisan support, and passed both the House and the Senate with unanimous consent. The bill was co-sponsored by then-senators Jeff Sessions (R-AL) and Ted Kennedy (D-MA), and it was supported by such diverse groups as Amnesty International, the NAACP, the National Association of Evangelicals, and the Salvation

¹ Nadia Khomami, "#MeToo: How a Hashtag Became a Rallying Cry Against Sexual Harassment," *The Guardian*, 20 October 2017, <https://www.theguardian.com/world/2017/oct/20/women-worldwide-use-hashtag-metoo-against-sexual-harassment>.

² Alanna Bennet, "Terry Crews is Not Going Down Without a Fight," *BuzzFeed News*, 15 March 2018,

https://www.buzzfeed.com/alannabennett/terry-crews-and-hollywood?utm_term=.pudrg9oBy#.it3nZP0Yy.

³ Carolyn Marshall, "Panel on Prison Rape Hears Victim's Chilling Accounts," *The New York Times*, 20 August 2005, <https://www.nytimes.com/2005/08/20/politics/panel-on-prison-rape-hears-victims-chilling-accounts.html>.

Army. I argue, however, that the law is both ineffective at combating the complex and pervasive issues of sexual assault in prisons and actively harmful towards prisoners. I support this claim by analyzing the motivations behind PREA, the flaws with the law itself, and the lack of enforcement or accountability.

The genesis of PREA was the publication of a report by Human Rights Watch (HRW) titled “No Escape: Male Prisoner Rape.” HRW had previously published reports on sexual violence in U.S. prisons including its initial report on the sexual abuse of female prisoners, but there had been “little traction” in Congress to pass legislation.⁴ While the public awareness of the problem of rape in prisons through studies, personal accounts, and newspaper stories had existed for at least a decade by that point, three important events created the conditions for passage of PREA: “(1) the increase in persons under custodial supervision, in particular, white men; (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.”⁵ However, previous attempts to address sexual abuse in prisons had failed. In particular, the Custodial Sexual Abuse Act (CSAA) of 1998 was removed from the Violence Against Women Act after

opposition from prison guards’ unions.⁶ These factors display the racist, sexist, and homophobic ideologies that created PREA.

Firstly, the increase in incarceration of white men led to concern that white men would be sexually assaulted by inmates of color. This reflects both a disregard for the well-being or protection of inmates of color, and a reiteration of the trope of men of color as sexually violent and aggressive.⁷ While data shows that male victims of sexual violence in prisons are often white and the perpetrators are men of color, especially African Americans, there are several important factors to keep in mind when interpreting this data. Men of color, especially black men, are disproportionately incarcerated, thereby making white men a minority in prison; any minority group in prison is subject to harassment.⁸ Additionally, sexual violence in prison is grossly underreported, which is due to several factors including the fear of retribution and the cultural norms of masculinity within the African American community which often prohibit black men from admitting they have been victimized.⁹

The fact that the catalyst for PREA was the sexual victimization of white men displays both racist and sexist ideologies. Congress did not pass any laws in response to reports of the sexual victimization of women because “society takes as a given that women will be

⁴ Brenda V. Smith, “The Prison Rape Elimination Act: Implementation and Unresolved Issues,” *American University Washington College of Law*, 2008, 10, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1029&context=clb>.

⁵ *Ibid.*

⁶ Jesse Lee Jackson, “Sexual Necropolitics and Prison Rape Elimination,” *Signs*, Vol. 39, No. 1, Women, Gender, and Prison: National and Global Perspectives (Autumn 2013), 197, <http://www.jstor.org/stable/pdf/10.1086/670812.pdf?refreqid=excelsior%3A6e24e5bf90550b66d6c6999ef21b465e>.

⁷ Smith, “Implementation and Unresolved Issues,” 10.

⁸ *Ibid.*

⁹ *Ibid.*

victimized both in the free world and in custody, [so] the image of male rape was much more disturbing to members of Congress.”¹⁰ This disregard for the sexual victimization of women is emphasized by the fact that the initial version of PREA only addressed male rape, entirely omitting women.¹¹ While the second version was amended to include staff sexual misconduct against inmates, which disproportionately affects female inmates, in addition to inmate-on-inmate rape, which disproportionately affects male inmates, “the unacceptability or perceived greater harm attached to male rape was a significant factor in the passage of PREA.”¹²

Several conservative religious organizations supported and encouraged the bill because of their concerns not about rape, but about homosexual sex. These groups included the National Association of Evangelicals, Prison Fellowship Ministries, Concerned Women for America, and the Salvation Army. The Salvation Army in particular has a history of homophobic and transphobic policies, a pattern of denying services to LGBT people, and has lobbied in support of discriminatory anti-LGBT laws.¹³ Until 2013, the Salvation Army’s website included the following position on homosexuality: “Scripture opposes homosexual practices by direct comment and

also by clearly implied disapproval. The Bible treats such practices as self-evidently abnormal...same-sex relationships which are genitally expressed are unacceptable according to the teaching of Scripture.”¹⁴ These organizations were especially concerned about “the spread of AIDS to ‘innocent’ defendants,” creating a dichotomy not between rapists and rape victims, but between “innocent heterosexual victims” and “predatory homosexual attackers.”¹⁵ Yet by listing organizations such as the Salvation Army as co-sponsors along with the NAACP or Amnesty International, the passing of PREA enabled these views and placed them as equally weighted concerns with the human rights issues surrounding sexual violence in prisons.

Beyond the bigotry that gave rise to PREA, there are several problems with the law itself. First, the name of the law misinforms the public on what its purposes actually are. The law was originally titled the less ambitious “Prison Rape Reduction Act” before it was signed into law in 2003.¹⁶ While the main purpose of the law is to gather information on the frequency and demographics of prison sexual assault, labeling the law as the Prison Rape *Elimination* Act assures lawmakers that this law alone is sufficient to completely eliminate

¹⁰ Ibid.

¹¹ Smith, “Implementation and Unresolved Issues,” 10.

¹² Ibid.

¹³ Zinnia Jones, “The Salvation Army’s History of Anti-LGBT Discrimination,” *The Huffington Post*, 11 November 2013, https://www.huffingtonpost.com/zinnia-jones/the-salvation-armys-histo_b_4422938.html.

¹⁴ Mark Oppenheimer, “Sounding Quiet Dissent About a Holiday Perennial,” *The New York Times*, 24 December 2011, <https://www.nytimes.com/2011/12/24/us/beliefs-salvation-army-hears-dissent-over-gay-views.html>.

¹⁵ Smith, “Implementation and Unresolved Issues,” 10.

¹⁶ David W. Frank, “Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration,” *Berkeley Journal of Gender, Law, and Justice*, 2014, 11, <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1322&context=bglj>.

the problem. In fact, even the prior, less aggressive title is inaccurate, as the law barely reduces prison rape, let alone eliminates it. Senator Dick Durbin of Illinois thanked then-senator Jeff Sessions, one of the co-sponsors of the bill, for his “leadership on this [bill] to eliminate sexual abuse in custody in the United States.”¹⁷ The name implicitly asserts that passing the law is the beginning and end of advocacy surrounding prison rape.¹⁸

PREA also fails to override harmful laws with regards to prison rape, such as California’s rape shield law. Rape shield laws are designed to protect victims of sexual assault from attacks by defense attorneys for their past sexual history. Rape shield laws either prevent or add an extra layer of oversight to this type of evidence because past sexual conduct is rarely relevant and “highly inflammatory and misleading to juries” as well as “embarrassing and prejudicial to complaining witnesses.”¹⁹ While these type of laws seem important for all sexual abuse victims, California’s rape shield law was amended in 1981 to deny any person access to the rape shield if the rape occurred while the victim was incarcerated in in a local detention or state carceral facility.²⁰ When

the California Legislature passed this law, statistics about the frequency of prison sexual assault were already fairly widespread; as such, “the inescapable implication is that the California Legislature knew prison rape was a regular occurrence when it passed the exclusionary amendment.”²¹

The reasons why the law was passed cannot be completely clear; however, there are several possible explanations. The most common perpetrators of sexual assault against women in prison are prison guards, who are unionized and have lobbying power.²² Additionally, this amendment may have reflected dismissive attitudes towards sexual assault in prisons, in that both lawmakers and the general public either do not care about prison sexual assault at all or think that prisoners get what they deserve. This aspect of the law ultimately disregards the humanity, and thus the human rights, of prisoners and particularly incarcerated women.

In both intent and enforcement, PREA is utterly toothless. Compliance with the law is not mandatory for state or local facilities. Facilities that do not comply with the law only lose five percent of their federal funding. Moreover, facilities are unlikely to lose even that much funding because state governors certify the compliance of their own states’ facilities; there is no external review to ensure facilities are in fact in compliance. Even if prisons are discovered to not be in compliance with the standards of the law, they will not lose funding if they promise to come into compliance with PREA, and no

¹⁷ Judiciary Committee, U.S. Senate, Hearing, 10/19/11

¹⁸ Robert Weisberg and David Mills, “Violence Silence: Why No One Really Cares About Prison Rape,” *Slate Magazine*, 2003, http://www.slate.com/articles/news_and_politics/jurisprudence/2003/10/violence_silence.html.

¹⁹ Tasha Hill, “Sexual Abuse in California Prisons: How the California Rape Shield Fails the Most Vulnerable Populations,” *UCLA Women’s Law Journal*, 2014, 90-91, <https://cloudfront.escholarship.org/dist/prd/content/qt5sw7f149/qt5sw7f149.pdf?t=nhtml9>.

²⁰ Hill, “Sexual Abuse in California Prisons,” 91.

²¹ *Ibid.*, 94.

²² *Ibid.*

timeline for this is set or enforced.²³ The non-enforcement of this already meager law reveals the extent to which the issue is still ignored; there are virtually no consequences for prisons not in compliance.

In addition to not ensuring compliance through meaningful sanctions, PREA does not adequately help states enact their own laws addressing sexual assault in prisons. One of the most difficult dimensions of the act “is the required development of compliant policies in the areas of inmate education, assault prevention, incident investigation, and statistical reporting.”²⁴ Many county and local level prisons and jails may not have “organizational units capable of overseeing the development and implementation of compliant policies” and therefore “have yet to undertake the development and implementation of PREA-specific policies thus leaving the issue altogether unaddressed.”²⁵ In order to secure grant funding necessary to adopt PREA standards, the facility must certify that it has already adopted the PREA standards, thus leaving smaller facilities without the necessary funds trapped in a catch-22.

At perhaps the most basic level, the very premise of the law is antithetical to eliminating prison sexual assault. One of the goals is to “increase the efficiency and effectiveness of Federal expenditures” and

“reduce the costs that prison rape imposes on interstate commerce.”²⁶ The aim of this goal is to improve prisons rather than prisoners’ lives. The law does not seek to dismantle the system of mass incarceration that leads to the routine sexual victimization of prisoners, but merely to streamline it. Increasing efficiency and effectiveness of prisons is a horrifying goal in the age of mass incarceration, and it is ludicrous to assume that this will improve any aspect of prisoners’ lives. Ultimately, PREA reveals that the United States is more interested in punishing prisoners than protecting them. Prisoners continue to say #MeToo, but we, and the state, aren’t listening.

²³ David W. Frank, “Abandoned,” 14.

²⁴ R. Alan Thompson, Lisa S. Nored, and Kelly Cheeseman Dial, “The Prison Rape Elimination Act (PREA): An Evaluation of Policy Compliance with Illustrative Excerpts,” *Criminal Justice Policy Review* Vol. 19, 2008, 417, <http://journals.sagepub.com/doi/pdf/10.1177/0887403408315442>.

²⁵ Ibid.

²⁶ United States Congress, “Prison Rape Elimination Act,” 2003, 3-4, <https://www.congress.gov/bill/108th-congress/senate-bill/1435?q=%7B%22search%22%3A%5B%22%5C%22prison+rape+elimination+act%5C%22%22%5D%7D&r=1>.

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