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**AN INSIDE JOB:
THE ROLE CORRECTIONAL OFFICIALS PLAY IN THE
OCCURRENCE OF SEXUAL ASSAULT IN U.S.
DETENTION CENTERS**

Kristine Schanbacher

The United States incarcerates more people than any other country in the world with approximately “2.3 million people incarcerated at any given time.”¹ Of the 2.3 million inmates, a distressing number experience sexual violence while incarcerated.² Due to significant barriers in reporting and investigating incidents of sexual assault, the estimated number of sexual assaults varies widely between different studies.³ For example, the Bureau of Justice Statistics 2011-2012 survey on sexual victimization in prisons and jails (“BJS 2011-2012 Survey”) indicates that 4% of state and federal prison inmates, approximately 80,600, “reported experiencing one or more incidents of sexual victimization by another inmate or facility staff in the past 12 months.”⁴ While one

¹ Lauren E. Glaze, *Correctional Populations in the United States, 2010*, <http://www.bjs.gov/content/pub/pdf/cpus10.pdf> (last visited July 26, 2014); see also Stop Prisoner Rape, *Stories From Inside: Prison Rape and the War on Drugs*, 1, 3 (2007), <http://www.justdetention.org/pdf/storiesfrominside032207.pdf>. It is important to note that the People’s Republic of China, “whose population is six and a half times that of the United States” has less people in prison than the United States. Honorable Juan R. Torruella, *Deja Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 177 (2011).

² STOP PRISONER RAPE, *supra* note 1, at 3. For the purposes of this article the term, “sexual violence” includes a broad range of unwanted sexual activity.

³ See Department of Justice, *National Standards to Prevent, Detect, and Respond to Prison Rape*, <http://www.gpo.gov/fdsys/pkg/FR-2012-06-20/pdf/2012-12427.pdf> (last visited Dec. 15, 2014) (“An increase in incidents reported to facility administrators might reflect an increased abuse, or it might just reflect inmates’ increased willingness to report abuse, due to the facility’s success at assuring inmates that reporting will yield positive outcomes and not result in retaliation. Likewise, an increase in substantiated incidents could mean either that a facility is failing to protect inmates, or else simply that it has improved its effectiveness at investigating allegations.”).

⁴ Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, U.S. DEP’T OF JUSTICE, 2013, <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (last visited May 23, 2014). The 2011-2012 Survey included 233 state and federal prisons and was restricted to confinement facilities in which “fewer than 50% of the inmates were regularly permitted to leave, unaccompanied by staff, for work, study, or treatment. Such facilities included prisons, penitentiaries, prison hospitals, prison farms, boot camps, and centers for reception, classification, or alcohol and drug treatment.” *Id.* The survey did not include “community-based facilities, such as halfway houses, group homes, and work release centers.” *Id.* The 2011-2012 Survey collected data via an audio computer-assisted self interview

study found that “20% of male inmates are sexually abused at some point during their incarceration,”⁵ other studies found that the rate of sexual abuse for female inmates at women’s institutions “varies dramatically from one facility to another, with one in four inmates being victimized at the worst prisons.”^{6 7} These bleak statistics demonstrate the pervasiveness of sexual assault in U.S. detention centers.⁸ This article examines how correctional officials⁹ play a role in the occurrence of sexual assault in U.S.

system, in which inmates, using a touch-screen, interacted with a computer-assisted questionnaire and followed audio instructions. A small number of inmates, 751, completed a short paper form. *Id.* Most of the inmates that completed the paper form were housed primarily in administrative or disciplinary segregation or were considered too violent to be interviewed. *Id.*

⁵ Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J OF SEX RESEARCH. 67, (1996); and Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383 (2000) (finding that 21 percent of inmates surveyed reported to have been forced or pressured into sex and 7 percent reported being raped in their current facility).

⁶ Melissa Rothstein and Lovisa Stannow, *Improving Prison Oversight to Address Sexual Violence in Detention*, <http://www.acslaw.org/files/Rothstein%20Stannow%20Issue%20Brief.pdf> (last visited August 16, 2014) (citing Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217, 220 (2000)).

⁷ The data collected by the Struckman-Johnson study, is heavily relied upon by academics and prison rape experts. *See Id.*; *The Basics About Sexual Abuse in U.S. Detention*, JUST DETENTION INT’L, <http://www.justdetention.org/en/factsheets/TheBasics.pdf> (last visited April 29, 2014); and Cheryl Bell, Martha Coven, John P. Cronan, Christian A. Garza, Janet Guggemos, & Laura Storto, *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL’Y REV. 195, 198 (1999). However, it is important to note that several studies contradict the findings of the Struckman-Johnson study. For example, in Christine Saum’s anonymous survey of 101 inmates, no inmates reported that they had been raped the year prior to the survey. *See* Christine A. Saum et. al. *Sex in Prison: Exploring the Myths and Realities*, 75 PRISON J. 413, 425 (1995). A study conducted by Peter Nacci and Thomas R. Kane, “found just one of the 330 sample members was forced to have sex and two (.6%) were forced to perform an unwanted sex act in prison.” *See* Peter L. Nacci and Thomas R. Hane, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, 47 FED. PROBATION 31, 31 (1983). One reason for the conflicting data is that different studies utilize varying definitions of what constitutes rape “from a broad definition including any unwanted sexual contact (the Struckman-Johnson study), to a more limited definition including only unwanted oral or anal sex (the Saum study).”

⁸ For purposes of this article, the term “detention centers” includes federal and state prisons, jails, immigration detention centers, and police-lock ups/holding facilities.

⁹ For purposes of this article, the term “correctional official” is intended to be inclusive and applicable to those who work at federal and state prisons, jails, immigration detention centers, and police-lock ups/holding facilities and have contact with inmates.

detention centers; how the current federal legal framework makes it difficult to hold correctional officials accountable for the occurrence of sexual assault; and recommendations to diminish the negative impact correctional officials have on the occurrence of sexual assault behind bars.

I. CORRECTIONAL OFFICIALS ROLE IN SEXUAL ASSAULT OCCURRENCES

Correctional officials cause and increase the occurrence of sexual assault in U.S. detention centers by: sexually victimizing inmates, actively and passively creating opportunities for sexual assault to occur, implementing dangerous housing assignments, failing to take remedial actions following incidents of sexual violence and utilizing deficient reporting systems.

A. How Correctional Officials Sexually Victimize Inmates.

In all 50 states, sexual contact between correctional officials and inmates is illegal.¹⁰ In fact, every state has criminalized sexual contact between correctional officials and inmates. This is because “the nature of prisons as ‘total institutions,’ [makes it] impossible for prisoners to voluntarily consent to sexual advances by staff members who exert complete control over their lives – and in some cases over their release from prison.”¹¹ Despite these laws, sexual assault committed by correctional officials is rampant.¹² In fact, between 2011 and 2012, 2.4% of state and federal prison inmates reported an incident of sexual misconduct involving a correctional official.¹³

¹⁰ Gary Hunter, *Sexual Abuse by Prison and Jail Staff Proves Persistent, Pandemic*, PRISON LEGAL NEWS (2009) [https://www.prisonlegalnews.org/\(S\(2k2z3c4514t02gug2ul2wlm\)\)/21225_displayArticle.aspx](https://www.prisonlegalnews.org/(S(2k2z3c4514t02gug2ul2wlm))/21225_displayArticle.aspx) (last visited April 29, 2014); see also Just Detention International, *Review of Applicable Federal and State Sex Offense Laws*, http://www.justdetention.org/en/state_by_state_laws.aspx (last visited Feb. 24, 2015); and Deborah M. Golden, *The Prison Litigation Reform Act—A Proposal For Closing the Loophole for Rapists*, 1, 2 (2009), http://www.savecoalition.org/pdfs/Rape_and_PLRA_white_paper.pdf (last visited July 27, 2014).

¹¹ Hunter, *supra* note 10.

¹² *Id.*

¹³ See Allen J. Beck et al., *supra* note 4, at 6. These findings were based off a survey that “was administered to 92,449 inmates age 18 or older, including 38,251 inmates in state and federal prisons, 52,926 in jails, 573 in ICE facilities, 539 in military facilities, and 160 in Indian country jails.” *Id.* at 8. The survey was also administered to juveniles ages 16 to 17 held in adult prisons and jails.”

“In the United States, sexual abuse by guards in women’s prisons is so notorious and widespread that it has been described as ‘an institutionalized component of punishment behind prison walls.’”¹⁴ Incarcerated women across the United States are subjected to a wide range of sexual abuse by correctional officials including: vaginal and anal rape,¹⁵ forced oral sex,¹⁶ forced digital penetration and coercion of sex for drugs,¹⁷ favors¹⁸ or protection.¹⁹ For example, Marilyn Shirley, a former inmate, testified before the National Prison Rape Elimination Commission that a correctional official raped her while a fellow official stood watch.²⁰

While sexual assault of incarcerated men by correctional officials is often under-reported as compared to sexual assault of

Id. Note, the BJS 2011-2012 Survey may not be representative of the entire United States incarcerated population, since only 92,976 inmates, adults and juveniles, were surveyed, whereas approximately 2.3 million people are incarcerated at any given time. *See Id.* at 8 and Stop Prisoner Rape, *supra* note 1, at 1. Thus, the survey utilized a relatively small sample size and the actual prevalence of sexual assault by correctional officials could vary greatly from the results that the study found.

¹⁴ Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 46 (2007).

¹⁵ In Illinois, “[a] Dwight Correctional Center prisoner referred to by the Chicago Tribune as Jane Doe was repeatedly forced to have sex with prison guards even though she had diminished lung capacity and was hooked up to an oxygen machine.” Hunter, *supra* note 10.

¹⁶ Robin McArdle was on a paint crew in prison, a guard drove her outside the work area and told her that if she did not give him oral sex, he would report her as an escapee. STOP PRISONER RAPE, *supra* note 1, at 14.

¹⁷ For example, in a Massachusetts prison, “guards extorted women’s consent to engage in sexual activity in exchange for cigarettes. The Department of Corrections investigation deemed this sex consensual in spite of state laws that criminalized prisoner/guard sex regardless of consent. The Department transferred the women to maximum security for breaking a prison rule against smoking. The guard, who had had sex with prisoners while on duty, kept his job.” Buchanan, *supra* note 14, at 68.

¹⁸ A King County, Washington guard “was charged on February 9, 2006 with engaging in sexual activity with two female prisoners in exchange for drugs, food and other favors.” Gary Hunter, *Guards Rape of Prisoners Rampant, No Solution in Sight*, http://www.justdetention.org/pdf/PrisonLegalNews_0806.pdf (last visited July 26, 2014).

¹⁹ Buchanan, *supra* note 14, at 46. Correctional officials in California sexually assaulted, beat and sold three female inmates as sex slaves for male prisoners during their stay at Alameda County—a federal penitentiary. *See* Bell, Coven, Cronan, Garza, Guggemos, and Storto, *supra* note 7, at 206. Furthermore, allegations of sexual abuse of female inmates have even extended beyond prison walls. “At the Women’s Community Correctional Center in Oahu, Hawaii, for example, inmates [stated] that guards ran a prostitution ring at a nearby hotel and used female inmates as call girls.” *Id.* at 203.

²⁰ STOP PRISONER RAPE, *supra* note 1, at 10. Marilyn Shirley was incarcerated for conspiracy to distribute drugs. *Id.*

incarcerated women, it continues to occur at an alarming rate.²¹ For instance, three female correctional officials were arrested and charged with multiple counts of sexual assault for having unwanted sex with male prisoners at Gouverneur Correctional Facility in New York.²² These three correctional officials orchestrated their misconduct so that at least one of them stood watch while another raped an inmate.²³ In another example of sexual abuse of incarcerated males, a former correctional official at the Federal Correctional Institution in Fairton, New Jersey, pled guilty to engaging in sex with a male inmate over a four-month period.²⁴ In a similar case, a guard at Morris County Prison in New Jersey was charged with sexual assault and official misconduct for pressuring a male prisoner into performing a sexual act.²⁵ Lastly, in another case, a gay inmate informed correctional officials that he was raped by another inmate. In response, three correctional officials gang raped the inmate with a nightstick.²⁶ During the assault, the three correctional officials laughed and said to the inmate, “shut up, faggot, you’re enjoying it.”²⁷

The overwhelming evidence of sexual assault of male and female inmates by correctional officials demonstrates that regardless of the illegality of sexual activity between correctional officials and inmates, correctional officials in the U.S. actively sexually assault both male and female inmates.

B. Correctional Officials actively and passively create opportunities for sexual assault.

Correctional officials allow sexual assault to occur by actively and passively creating opportunities for sexual assault to arise. Correctional officials actively create opportunities for sexual assault by intentionally placing inmates in vulnerable situations where they are more likely to be sexually assaulted, usually as a

²¹ Hunter, *supra* note 10.

²² *Id.*

²³ *Id.* Over the course of two years, one of the three correctional officials allegedly had sex with four male prisoners. *Id.* “She was charged with 16 counts of third-degree rape, third-degree sexual assault and official misconduct. [Another one of the correctional officials] was charged with 11 counts of third-degree rape, one count of criminal sexual act and one count of promoting prison contraband.” *Id.*

²⁴ Hunter, *supra* note 18, at 8.

²⁵ Hunter, *supra* note 10.

²⁶ Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL’Y REV. 1, 34 (2010) (citation omitted).

²⁷ *Id.*

form of punishment.²⁸ For example, Eddie Dillard, a prisoner at Corcoran State Prison in California, was transferred to the cell of Wayne Robertson—“a prisoner known by all as the ‘Booty Bandit’”—after he kicked a female correctional official.²⁹ “Not only was Robertson nearly twice Dillard’s weight, but he had earned his nickname through his habit of violently raping other prisoners.”³⁰ By the end of the day, “Robertson beat Dillard into submission and sodomized him. For the next two days, Dillard was raped repeatedly, until finally his cell door was opened and he ran out, refusing to return.”³¹

Correction officials also passively create environments ripe for incidents of sexual assault by failing to adequately patrol the detention center. While “correctional staff are generally supposed to make rounds at fifteen minute intervals,”³² correctional officials do not always abide by this schedule—sometimes because the prison, jail, etc., is significantly understaffed.³³ Furthermore, when correctional officials do make their rounds, they do not adequately seek out incidents of sexual assault, as “they often walk by prisoner’s cells without making an effort to see what is happening within them.”³⁴ The lack of adequate patrol was confirmed by Valerie Jenness, author of *Violence in California Correctional Facilities: an Empirical Examination of Assault*, in her statewide survey of California prisons, in which she “did not find a single

²⁸ Human Rights Watch Report, *NO ESCAPE: Male Rape in U.S. Prisons*, 1, 111-12 <http://news.findlaw.com/cnn/docs/hrw/hrwmalerape0401.pdf> (last visited July 27, 2014). A vivid example of a correctional official actively and successfully creating an opportunity for sexual violence can be heard at: <http://www.spr.org/en/survivortestimony/audio/Tom.mp3>. See also, Bob Egelko, *Former Prison Guard Sentenced*, S.F. GATE., Feb 7, 2003 (reporting convictions of two former guards who induced inmates to rape “convicted child molesters and rapists, as well as prisoners who would not cooperate with them”).

²⁹ HUMAN RIGHTS WATCH REPORT, *supra* note 28, at 111-12.

³⁰ *Id.* at 112.

³¹ *Id.* Furthermore, “[a] correctional officer who worked on the unit later told the *Los Angeles Times*: ‘everyone knew about Robertson. He had raped inmates before and he’s raped inmates since.’” *Id.*

³² *Id.* at 113.

³³ *Id.* Human Right’s Watch argues that “[p]aradoxically, lower numbers of correctional staff can lead to more ineffective monitoring by existing staff. Instead of redoubling their efforts to make up for their insufficient numbers, they are more likely to remain as much as possible outside of prisoner’s living areas, because fewer staff makes close monitoring more dangerous to those employees who do make the rounds of housing units. Being at a disadvantage, they also have a stronger incentive to pacify rather than challenge the more dangerous prisoners who may be exploiting others.” *Id.*

³⁴ *Id.*

incident [where] attempted rape was averted as a result of intervention by correctional officials.”³⁵

Moreover, another way correctional officials passively create opportunities for sexual assault is by failing to provide inmate orientation for first time offenders. The Human Rights Watch studied prisons in 37 states and found that inmates in the majority of states, “received no formal orientation regarding how they might avoid rape or what steps they should take if they were subject to or threatened with rape.”³⁶ Inmates that are not familiar with the “ins and outs of prison life” generally do not perceive when they are entering situations where they may be victimized.^{37 38} Thus, by failing to provide orientation for first time offenders, correctional officials fail to provide inmates with the opportunity to recognize and react to situations in which they are “being set up for victimization.”³⁹

Lastly, correctional officials passively allow sexual assault to occur by improperly responding to threats of sexual assault. In fact, when inmates inform correctional officials about threats of sexual assault, correctional officials routinely respond by telling inmates to “fight in order to protect themselves against sexual abuse.”⁴⁰ “In

³⁵ Buchanan, *supra* note 26, at 30-31 (citing Valerie Jenness, *Violence in California Correctional Facilities: an Empirical Examination of Assault* (2007)).

³⁶ HUMAN RIGHTS WATCH REPORT, *supra* note 28, at 110. In fact, only a few of the 37 states studied had orientation programs on how to avoid sexual abuse. *Id.* “The Virginia Department of Corrections, for example, told Human Rights Watch that all inmates receive orientation on how to avoid sexual aggression upon entering the prison system. The inmate handbook, which is provided to all prisoners, also includes a short section on ‘How to Avoid Homosexual Intimidation.’ It gives advice such as ‘don’t get into debt,’ and ‘don’t solicit or accept favors, property or drugs.’ Arkansas has a similar orientation program; it too includes such warnings.” *Id.* at 111. The Illinois Department of Corrections informed Human Rights Watch that it also has an orientation program on how to avoid sexual abuse. *Id.* Lastly, the North Carolina Department of Corrections, “told Human Rights Watch that incoming inmates were advised ‘about the risks of sexual assault and what steps they may take to prevent such assault and seek assistance from staff.’” *Id.*

³⁷ *Id.*

³⁸ See also, Christopher D. Man and John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. L. & CRIMINOLOGY 127, 171 (2002) (“For example, a basic rule of the prison is ‘nothing is free.’ If one inmate gives another candy or a cigarette, there is a high probability that something, often sexual gratification, will be demanded in return. New inmates do not know these rules, and may take the candy or cigarette, thinking the item is a gift for which nothing is expected in return.”).

³⁹ HUMAN RIGHTS WATCH REPORT, *supra* note 28, at 111.

⁴⁰ Buchanan, *supra* note 26, at 31. See Man and Cronan *supra* note 38, at 145. (“Prisoners are often told that it is essentially their fault if they failed to fight—

one case, when a prisoner asked a guard for protection [from sexual assault], the guard gave him a knife.”⁴¹ Another example of the inappropriate response of correctional officials to threats of sexual assault is the case of Roderick Johnson. Johnson, a young and openly gay man, asked to be placed in protective custody upon entering the prison, as he feared he would be a prime target for sexual assault.⁴² Correctional officials responded to Johnson by stating, “we don’t protect punks on this farm.”⁴³ Johnson was repeatedly raped over an 18-month period and, during this time, he asked to be transferred to protective custody nine times.⁴⁴ “Prison officials continually refused Johnson’s requests, even mocking him by telling him to ‘learn to fight’ or accept that he would continue to be raped.”⁴⁵

This ‘fight or prepare[] to be sexually assaulted’ response⁴⁶ is invariably against U.S. detention center rules. Further, it sends a clear message to all inmates that sexual assault is not only tolerated by correctional officials in United States prisons, but that sexual assault will inevitably occur unless inmates learn to protect themselves or leave the facility.

C. Dangerous Housing Assignments.

Though any inmate could become a victim of sexual assault, certain groups of inmates are particularly vulnerable. The inmates most vulnerable are: non-violent, first-time offenders new to prison life; young or youthful offenders;⁴⁷ gay,⁴⁸ bisexual or transgender offenders; those who are perceived to be gay, bisexual or gender

even if there are multiple attackers or the attackers are armed—and that they will have to deal with the problem on their own by fighting or agreeing to be a ‘punk.’”).

⁴¹ Buchanan, *supra* note 26, at 31.

⁴² Stop Prisoner Rape, *In the Shadows Sexual Violence in U.S. Detention Facilities*, 1, 15 (2006) http://www.justdetention.org/pdf/in_the_shadows.pdf (last visited August 9, 2014).

⁴³ *Id.*

⁴⁴ *Id.* Johnson was even “sold by prison gangs.” *Id.*

⁴⁵ *Id.*

⁴⁶ “As one prisoner lay in a hospital bed after a brutal rape and suicide attempt, one guard said in front of him: ‘[w]ell, he should have fought back if he didn’t want to get raped.’” Buchanan, *supra* note 26, at 30.

⁴⁷ “There [] appears to be widespread recognition among prison authorities that younger inmates are notably susceptible to prison rape. In the words of a correction official in a report to the state legislature, a young inmate’s chance of avoiding rape is ‘almost zero . . . He’ll get raped within the first twenty-four to forty-eight hours. That’s almost standard.” Man and Cronan, *supra* note 38, at 165.

⁴⁸ One study found that “homosexual inmates were almost five times more likely to be sexually assaulted than their heterosexual counterparts.” *See Id.* at 166.

variant; inmates with a physical disability, mental illness or developmental delay; inmates who have previously been sexually assaulted; and finally, those held in immigration detention centers.⁴⁹ ⁵⁰ “Also, inmates with particular offenses make them more likely targets for sexual assault. For example, if a prisoner is serving a sentence for crimes against minors or if he was a cooperating witness for the government...he [or she] faces an increased risk of sexual assault.”⁵¹ And “[t]he more vulnerable characteristics an inmate possesses, the more he is likely to be victimized.”⁵² Thus, many academics conclude that it is highly predictable which inmates will be targeted for sexual assault.⁵³

While some inmates possess characteristics that make them more likely to become a victim of sexual assault, other inmates possess characteristics that reveal they are likely to assume the role of the sexual aggressor.⁵⁴ Inmates who are likely to become sexual aggressors include those exhibiting violent tendencies outside of prison, those convicted of more serious offenses and those serving lengthy, or even life sentences.⁵⁵

“One of the most important tools available to correctional officials to prevent prisoner rape is the appropriate classification of detainees when they enter a facility, as well as a system for rapidly re-classifying them when an actual or potential problem arises.”⁵⁶ However, because there is no national, uniform system of housing classification for correctional facilities, the method for determining housing arraignments varies among correctional facilities.⁵⁷ Furthermore, “many state departments of correctional do not collect the data needed to assess an inmate’s risk of harming others”—including sexual assault.⁵⁸ Without a uniform, objective housing classification system or available data regarding an

⁴⁹ STOP PRISONER RAPE, *supra* note 42, at 1-2; Rothstein and Stannow, *supra* note 6, at 3; and Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 19, 125 (2011).

⁵⁰ “Inmates convicted of a non-violent drug offense typically possess characteristics that put them at great risk for abuse. They tend to be young, unschooled in the ways of prison life, and lacking the street smarts necessary to protect themselves from other detainees.” STOP PRISONER RAPE, *supra* note 1, at 1.

⁵¹ Thompson, *supra* note 49, at 125.

⁵² Man and Cronan, *supra* note 38, at 175.

⁵³ See *Id.*; see also HUMAN RIGHTS WATCH REPORT, *supra* note 28, at 52; Thompson, *supra* note 49, at 125; STOP PRISONER RAPE, *supra* note 1, at 35; and Rothstein and Stannow, *supra* note 6, at 3.

⁵⁴ Man and Cronan, *supra* note 38, at 157.

⁵⁵ *Id.* at 173.

⁵⁶ STOP PRISONER RAPE, *supra* note 42, at 9.

⁵⁷ *Id.*

⁵⁸ *Id.*

inmate's risk of harming others, correctional officials frequently ignore obvious characteristics of likely sexual perpetrators and potential victims when making housing decisions.⁵⁹

However, “[e]ven where a proper system of classifying inmates is in place, overcrowding has led many correctional officials to abandon their previous practice of at least segregating vulnerable prisoners from predators.”⁶⁰ For example, a 19-year-old University of Florida student with no prior criminal record was arrested for possession of approximately one ounce of marijuana and taken to the Alachua County Jail.⁶¹ Although he was young and had no prior criminal record, he was placed in a cell “with a 35-year-old career criminal awaiting trial for sexual battery” and was violently raped.⁶² “Jail and city officials acknowledged that the two should never have been placed in a cell together, and attributed the mistake to overcrowding and a flawed inmate classification system.”⁶³

Regardless of the reason why certain inmates are housed together—e.g. overcrowding, inadequate inmate classification systems, negligence and in some cases purposeful acts—by housing non-violent and violent inmates together, correctional officials create environments that clearly guarantee sexual assault.⁶⁴

D. Correctional Officials fail to take remedial actions following incidents of sexual assault.

Frequently, “when an inmate is sexually assaulted behind bars, there is a severe disconnect between the serious nature of what has occurred and the response of most detention facilities.”⁶⁵ After a correctional official is informed of an act of sexual assault, the correctional official should immediately take the sexually assaulted inmate to a doctor in order for the inmate to receive the necessary medical and mental health care, as well as for physical evidence of the sexual assault to be collected for a potential criminal prosecution.⁶⁶ Additionally, the correctional official should actively investigate the alleged sexual assault and collect any potential evidence.⁶⁷ Often, however, correctional officials fail to

⁵⁹ STOP PRISONER RAPE, *supra* note 1, at 35.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ STOP PRISONER RAPE, *supra* note 42, at 18.

⁶⁶ HUMAN RIGHTS WATCH REPORT, *supra* note 28, at 113.

⁶⁷ Man and Cronan, *supra* note 38, at 144.

provide victims of sexual assault with appropriate medical and mental health assistance needed, and fail to investigate, collect any evidence or write a report about the alleged sexual assault.⁶⁸

Moreover, correctional officials also fail to appropriately discipline or punish the sexual perpetrator.⁶⁹ In limited cases, when correctional officials do punish the sexual perpetrator, they are usually “placed in some form of disciplinary segregation for what may be a few weeks, but are often returned to the same area within the prison where the victim was housed.”⁷⁰ Furthermore, when the sexual perpetrator is a correctional official, the correctional official usually receives no punishment or is subject to “minor disciplinary actions, such as warnings or transfers to other facilities.”⁷¹

More often, correctional officials respond to incidents of sexual assault by placing the victim in protective custody.⁷² In fact, female inmates who become pregnant during their incarceration have been placed in “disciplinary segregation or the special housing unit for a relatively long period, ranging from several months to several years.”⁷³ While the placement of inmates in protective custody/administrative segregation “is ostensibly designed for [the] victims’ protection [c]onditions in protective custody, or ‘administrative segregation,’ can be so harsh that victims are deterred from reporting sexual assault.”⁷⁴ Additionally, many inmates are re-victimized while in protective custody/administrative segregation as they are placed in close proximity with inmates who are being punished for violence or sexual assault.⁷⁵

⁶⁸ *Id.* at 144-147. See also HUMAN RIGHTS WATCH REPORT, *supra* note 28, at 116.

⁶⁹ Man and Cronan, *supra* note 38, at 146-47.

⁷⁰ *Id.* at 147. Additionally, inmates who are sexual perpetrators are rarely criminally punished; “[n]ationwide, only a few prosecutions occur each year.” Buchanan, *supra* note 26, at 26.

⁷¹ Tanyika Brime, *We Can Do Better: The State of Custodial Misconduct by Correctional Staff in New York*, 15 CARDOZO J. L. & GENDER 303, 308 (2009).

⁷² Buchanan, *supra* note 26, at 26-7.

⁷³ See Brime, *supra* note 71, at 307-08 (examining the New York Department of Corrections).

⁷⁴ Buchanan, *supra* note 26, at 27. See also Man and Cronan, *supra* note 38, at 145 (“[n]umerous inmates have reported being raped while in protective custody, and that their rapists have threatened them while they were in protective custody”).

⁷⁵ *Id.* Protective custody does not mean that an inmate will be placed into solitary confinement. *Id.* Rather, protective custody often means that victims of sexual assault are placed in an area away from the general population, but in close proximity to other inmates who are being segregated from the general population for fighting and/or sexual assault. *Id.* See also Man and Cronan, *supra* note 38, at 145.

Thus, by failing to take proper remedial measures following incidents of sexual assault, correctional officials not only “cast considerable doubt on whether they take the problem of prisoner rape seriously,”⁷⁶ but they tacitly condone and tolerate the sexual assault of inmates.

E. Deficient Reporting Systems.

“[A]cknowledging that one has been the victim of a sexual assault poses significant difficulties for any victim. The victim may be overwhelmed by feelings of culpability. The actual reporting of the event may prove particularly challenging; [the] victim may be hesitant to relive the event in the course of the investigation...”⁷⁷ Though it is difficult for any victim to come forward about sexual assault, it is particularly difficult for inmates to come forward about sexual assault, as “[a]dministrative procedures and correctional officials’ behavior often aggravate the situation further.”⁷⁸

An inmate who reports sexual assault is usually “pressured to reveal the name of his/her assailant without any reasonable assurance of protection from retaliation” or that the report will remain confidential.⁷⁹ In fact, correctional officials often fail to keep inmate grievances, including inmate sexual assault reports confidential.⁸⁰ Far too frequently, correctional officials compel an inmate to identify his/her assailant in front of numerous others and then return the inmate back to their original housing unit.⁸¹ Such

⁷⁶ Man and Cronan, *supra* note 38, at 147. The case of Rodney Hulin is illustrative of the failure of correctional officials to take remedial measures following the report of sexual assault. Thompson, *supra* note 49, at 119. Rodney, at the age of 16:

Was sentenced to adult prison for setting a dumpster on fire . . .
 . . . In prison, he suffered repeated beatings and rapes. He sought assistance from the prison staff by writing a letter that stated, ‘I have been sexually and physically assaulted several times, by several inmates. I am afraid to go to sleep, to shower, and just about everything else. I am afraid that when I am doing these things, I might die at any minute. Please sir, help me.’

Id. Despite Rodney’s report of sexual assaults and plea for help, no correctional officials took any steps to help prevent Rodney from being sexually assaulted. And “[a]t the age of seventeen, Rodney hanged himself in his prison cell.”

⁷⁷ Thompson, *supra* note 49, at 130.

⁷⁸ STOP PRISONER RAPE, *supra* note 42, at 10.

⁷⁹ *Id.*

⁸⁰ Buchanan, *supra* note 14, at 64.

⁸¹ HUMAN RIGHTS WATCH REPORT, *supra* note 26, at 113. For example, in one case reported to the Human Rights Watch, a correctional official forced an

actions realistically put an inmate's life in danger, as the inmate may be subject to further abuse by the assailant in retaliation for reporting the assault or the inmate may be assaulted by other inmates for "snitching."⁸² Accordingly, the actions of correctional officials "demonstrate to prisoners, in a very effective way, that it is unwise to report rape [and other sexual assault]."⁸³

In addition to breaching confidentially, correctional officials also "notoriously disregard" institutional rules and procedures, typically by "refusing to provide prisoners with the required forms within the grievance time limit, claiming not to have received the complaint, or claiming to have lost it."⁸⁴ As a result, inmates are often unable to satisfy the formal procedural requirements for sexual assault claims, which then precludes them from seeking redress in their correctional facility and from receiving an independent assessment of their claim by a judge.⁸⁵ "In such an environment, it is no wonder that many [sexual] assaults go unreported."⁸⁶ Therefore, "due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment and lack of trust in staff [and the grievance process], victims are often reluctant to report incidents to correctional authorities," which leads to an underreporting of sexual assaults.⁸⁷

Thus, it is clear that correctional officials play a significant role in the ongoing occurrences of sexual assault and the exacerbation of the harm caused by sexual assault in U.S. detention centers.

II. CORRECTIONAL OFFICIALS CAN BE HELD ACCOUNTABLE FOR SEXUAL ASSAULT

The Prisoner Litigation Reform Act, the Eighth Amendment to the United States Constitution, and the Prison Rape Elimination Act, make up the main legal framework in which correctional

inmate to identify his assailant in front of approximately 20 other inmates and then placed the inmate back in general population. *See Id.* at 114.

⁸² STOP PRISONER RAPE, *supra* note 42, at 10 ("[a]ccording to Dr. Terry Kupers, a noted psychiatrist and expert on the psychological effects of prison abuse, by reporting sexual violence to an official or another prisoner, a victim violates a longstanding male prison code and invites retaliation from the perpetrator(s) and others who dislike snitches.").

⁸³ HUMAN RIGHTS WATCH REPORT, *supra* note 28, at 114.

⁸⁴ Buchanan, *supra* note 14, at 67.

⁸⁵ Rothstein and Stannow, *supra* note 6, at 3-4.

⁸⁶ Buchanan, *supra* note 14, at 67.

⁸⁷ STOP PRISONER RAPE, *supra* note 42, at 11. Due to the prevalence of underreporting, "[a]dministrative records alone cannot provide reliable estimates of sexual violence." *Id.*

officials may be held accountable for committing or allowing acts of sexual violence to occur.⁸⁸

A. The Prison Litigation Reform Act.

The Prison Litigation Reform Act (“PLRA”) was passed in 1996.⁸⁹ It was designed to limit frivolous lawsuits filed by inmates.⁹⁰ PLRA’s impact on inmate litigation “is hard to exaggerate . . . [in] 2001 filings by inmates were down 43% since their peak in 1995, notwithstanding a simultaneous 23% increase in the number of people incarcerated nationwide.”⁹¹ However, in addition to reducing frivolous lawsuits, the PLRA has significantly reduced all inmate litigation, including constitutionally meritorious claims—such as sexual assault claims.⁹² Accordingly, the PLRA has “greatly undermined the crucial oversight role played by courts

⁸⁸ *Id.* at 6. An inmate who has been sexually abused can file a claim in state court against the correctional official(s) for violating state law; however, government entities such as prisons or jails are generally not liable for the actions of their correctional officials with the one exception of “42 U.S.C. § 1983, which creates a cause of action for Constitutional torts.” Buchanan, *supra* note 14, at 75. Pursuant to 42 U.S.C. § 1983, an inmate can file his/her § 1983 claim in state court; however, the defendant then has the right to remove the case to federal court, which frequently occurs. *See* 42 U.S.C. § 1983 and The Journal of the DuPage County Bar Association, *Section 1983 Litigation In A Nutshell: Make A Case Out of It!* <http://www.dcbabrief.org/vol171004art2.html> (last visited July 27, 2014). This article focuses on federal civil litigation for inmate sexual assault claims.

⁸⁹ Just Detention International, *The Prison Litigation Reform Act Obstructs Justice for Survivors of Sexual Abuse in Detention*, <http://www.justdetention.org/en/factsheets/prlanew.pdf> (last visited August 9, 2014).

⁹⁰ Buchanan, *supra* note 14, at 71. “During the Senate debate over the bill, Senator Bob Dole cited a notorious prisoner lawsuit in which a prisoner complained that the prison served chunky, rather than creamy, peanut butter.” *Id.* Many other frivolous lawsuits “such as claims arising from an unsatisfactory prison haircut and a desire for a particular brand of sneakers, were also used during the PLRA debates as examples of the pressing need for special barriers to prisoner litigation.” *Id.*

⁹¹ Margo Schlanger, *Inmate Litigation*, 166 HARVARD L. REV. 1557, 1559-60 (2003).

⁹² *Id.* at 1557; *see also* *Addressing the Unintended Consequences of the Prison Litigation Reform Act (PLRA)*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/prisoners-rights/addressing-unintended-consequences-prison-litigation-reform-act-plra> (last visited July 27, 2014) (“Now that we have 11 years of experience with the PLRA, it is clear that the unintended consequences of the law have left victims of rape, religious rights violations, and other abuses, from having their constitutional claims heard in court.”).

in addressing sexual assault and other constitutional violations in correctional facilities.”⁹³

Two PLRA provisions are particularly problematic for inmates who are victims of sexual assault: (1) an exhaustion of all administrative remedies and (2) a showing of physical harm.⁹⁴ The first provision requires that before an inmate files a lawsuit, he or she must “complete the facility’s internal administrative grievance process.”⁹⁵ If an inmate misses one of the filing requirements in their facility or otherwise fails to fully satisfy the facility’s internal grievance process, “his or her right to sue is forever forfeited.”⁹⁶

⁹³ Stop Prisoner Rape, *PREA Update*, JUST DETENTION INTERNATIONAL, http://www.justdetention.org/pdf/PREA_Update_June_2008.pdf (last visited July 27, 2014).

⁹⁴ See JUST DETENTION INTERNATIONAL, *supra* note 89 and Jennifer Wedekind, *Prison Rape, the PREA, and the PLRA*, SOLITARY WATCH, <http://solitarywatch.com/2011/03/07/prison-rape-the-prea-and-the-plra/> (last visited August 9, 2014). The two of the four PLRA provisions not previously mentioned in this article are the filing fees provision and the three strikes provision. *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, ACLU, http://www.aclu.org/images/asset_upload_file79_25805.pdf (last visited August 9, 2014). The filing fees provision requires that all inmates must pay court-filing fees in full. See ACLU, *supra*. If an inmate does not have the money to pay the filing fee up front, the filing fee will not be waived; however, the inmate can pay the filing fee over time through monthly installments from their prison commissary account. *Id.* This non-waiver differs from other civil rights cases where a plaintiff who establishes poverty is generally not required to pay the filing fee. See JUST DETENTION INTERNATIONAL, *supra* note 89. The three strikes provision provides that once an inmate has had three lawsuits or appeals that have been found “frivolous,” “malicious,” or “failing to state a proper claim,” an inmate cannot file another lawsuit or appeal unless that inmate pays the entire court-filing fee up front. See ACLU, *supra*. The only exception to this provision is if the inmate will suffer serious physical harm in the immediate future. *Id.*

⁹⁵ JUST DETENTION INTERNATIONAL, *supra* note 89 (citing 42 U.S.C. §1997e(a)).

⁹⁶ Wedekind, *supra* note 94. The Human Rights Watch reported a case where “sixteen female inmates filed suit alleging systematic sexual abuse by prison staff, including forcible rape, coerced sexual activity, oral and anal sodomy, and forced pregnancies. The federal court hearing the case refused to address the merits, instead taking nearly five years to conclude that the women’s use of informal reporting procedures provided by the prison resulted in a failure to adequately exhaust all administrative remedies.” *Minix v. Pazera*, 2005 WL 1799538 at *4 (N.D. Ind. July 27, 2005), is another example of a meritorious sexual assault case barred by the PLRA. See *Reform the Prison Litigation Reform Act (PLRA)*, SAVE COALITION, http://www.savecoalition.org/pdfs/save_final_report.pdf (last visited August 9, 2014) (citing *Minix v. Pazera*, 2005 WL 1799538 at *4 (N.D. Ind. July 27, 2005)). In *Minix* a former juvenile inmate filed suit alleging that while he was incarcerated, correctional officials did not protect him from repeated sexual and physical assaults. 2005 WL 1799538 at *1-*2. The former juvenile inmate’s lawsuit was dismissed because the juvenile failed to exhaust his administrative remedies, which included filing a formal grievance within 48 hours of each

This provision was “intended to provide correctional officials with the opportunity to resolve complaints without court intervention.”⁹⁷ However, it prevents many inmates who have been sexually assaulted from seeking redress in the court system, as “it often means that prisoners must report their abuse to the very correctional officer who assaulted them, or who failed to put an end to the abuse by another inmate.”⁹⁸ Furthermore, “[s]exual assault often results in trauma that hinders the survivor’s ability to navigate the grievance process, particularly within the short deadlines many prisons impose.”⁹⁹ Lastly, this provision incentivizes correctional facilities to maintain unrealistic and confusing grievance procedures so that an inmate cannot complete the grievance process and therefore, cannot ever seek redress in court.¹⁰⁰

The second provision provides that an inmate cannot file a lawsuit for mental or emotional injury¹⁰¹ unless he or she can also prove “physical harm.”¹⁰² Though sexual violence may seem like an obvious ‘physical harm,’ until recently, this provision was “relied upon to dismiss claims by victims of sexual assault, who frequently ha[d] no proof of physical injury due to delay in reporting, lack of additional violence during the assault or inadequate prison medical providers, who often lack the resources or willingness to administer a rape kit.”¹⁰³ For example, in *Hancock v. Payne*, the court held that allegations of sexual battery

sexual assault, despite the fact the former juvenile inmate “feared reporting incidents to the staff, lest he guarantee more beatings by being labeled a snitch.” 2005 WL 1799538 at *4-*7.

⁹⁷ JUST DETENTION INTERNATIONAL, *supra* note 89.

⁹⁸ STOP PRISONER RAPE, *supra* note 42, at 20.

⁹⁹ Rothstein and Stannow, *supra* note 6, at 7 and *see* Minix v. Pazera, 2005 WL 1799538 at * 6 (N.D. Ind. July 27, 2005) (involving a grievance deadline of 48 hours).

¹⁰⁰ JUST DETENTION INTERNATIONAL, *supra* note 89.

¹⁰¹ “Courts are split on whether a claim for violation of constitutional rights is intrinsically a claim for mental or emotional injury in the absence of an allegation of a resulting physical injury (or injury to property).” ACLU, *supra* note 94.

¹⁰² *Id.* “The requirement of physical injury only applies to money damages, it does not apply to claims for injunctive and declaratory relief.” *Id.*

¹⁰³ Wedekind, *supra* note 94. A District Court for the Southern District of Mississippi used the physical harm provision of the PLRA to dismiss a sexual assault case holding the plaintiffs’ allegations that the defendant ‘sexually battered them by sodomy, and committed other related assaults’ were insufficient to satisfy the PLRA’s physical injury requirement . . . [and] the victim needed to do more than ‘make a claim of physical injury beyond the bare allegation of sexual assault,’ to meet the requirements . . .” Golden, *supra* note 10 at 14 (citing *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (S.D. Miss. Jan. 4, 2006).

by sodomy did not satisfy the physical injury requirement of the PLRA. 2006 WL 21751, *1, 1-3 (S.D. Miss., Jan. 4, 2006). However, in February 2013 the PLRA, 42 U.S.C. § 1997e(e), was amended to state that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).¹⁰⁴

Accordingly, while it is no longer necessary for courts to determine whether an inmate suffered a physical injury in a sexual assault case, an inmate will be barred from seeking redress in court, no matter how egregious the sexual assault, unless he or she is able to show “the commission of a sexual act,” which as discussed *supra* may be impossible due to the fact that correctional officials often fail to investigate, collect any evidence or write a report about the alleged sexual assault. Further, even if evidence exists which shows “the commission of a sexual assault” he or she must still satisfy the other provisions of the PLRA, including completion of the detention facility’s administrative grievance process.

B. The Eighth Amendment.

In *Farmer v. Brennan*, the United States Supreme Court established that sexual assault in prison violates the Eighth Amendment’s prohibition against cruel and unusual punishment, holding that, “[b]eing violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”¹⁰⁵ Accordingly, if an inmate who has been sexually assaulted satisfies the provisions of the PLRA, the inmate may file suit alleging an Eighth Amendment violation.

To bring a claim for an Eighth Amendment violation based on sexual assault, an inmate must satisfy a two-part test.¹⁰⁶ First, “the injury itself must be ‘objectively and sufficiently serious.’”¹⁰⁷ Second, the correctional official(s) must have “‘a sufficiently culpable state of mind’ defined as ‘deliberate indifference’ to inmate health or safety.”¹⁰⁸

The first part of the test should not be difficult to overcome, as sexual violence “plainly is a serious harm.”¹⁰⁹ However, the

¹⁰⁵ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

¹⁰⁶ Man & Cronan, *supra* note 38, 132-33.

¹⁰⁷ Bell, Coven, Cronan, Garza, Guggemos & Storto, *supra* note 7, at 212 (citing *Farmer*, 511 U.S. at 834.)

¹⁰⁸ *Id.*

¹⁰⁹ Man & Cronan, *supra* note 38, at 133.

second requirement of the test – “deliberate indifference” – is a much higher standard or proof. This is more difficult to demonstrate, as an inmate must show that a correctional official “kn[e]w of and disregard[ed] an excessive risk to inmate health or safety; the official [was] both aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and he [or she] must also [have] draw[n] the inference.”¹¹⁰ An inmate “need not show that a prison official acted or failed to act believing that harm actually befall an inmate; it is enough that the official acted or failed to act despite his [or her] knowledge of a substantial risk of serious harm.”¹¹¹ However, “[a] purely objective showing of deliberate indifference—negligence or gross negligence—is not enough.”¹¹²

Proving the requisite subjective intent of a correctional official can be a formidable requirement, as a correctional official can “defend against a prisoner’s Eighth Amendment sexual assault claim by pleading negligence or incompetence.”¹¹³ For example, if a correctional official knew of facts from which the inference could be drawn that an inmate was highly likely to be sexually assaulted by another inmate, but persuades the court that he/she failed to draw the inference, the correctional official will not be held liable for violation of the inmate’s Eighth Amendment right. Furthermore, even if the correctional official sexually assaults an inmate, if the correctional official “testifies that he/[she] thought the sex was consensual, it seems likely that he/[she] will escape liability for an Eighth Amendment violation.” Moreover, without written documentation of the sexual assault and disciplinary records of inmates and correctional officials, it is difficult for an inmate to establish the correctional official’s subjective intent, let alone refute the correctional official’s testimony on his/her thoughts and intentions.¹¹⁴ Thus, despite the validity of an inmate’s

¹¹⁰ *Farmer*, 511 U.S. at 837.

¹¹¹ *Id.* at 842.

¹¹² *Buchanan*, *supra* note 14, at 85.

¹¹³ *Id.* However, courts have held that deliberate indifference can be inferred from the circumstances when correctional officials: rape or sexually assault inmates, set inmates up to be raped or attacked by other inmates as a form of discipline, place an inmate in a cell with an HIV positive inmate who has a history of rape, and watch rape in progress without doing anything to stop it. *Man and Cronan*, *supra* note 38, at 140-141 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000); *LaMarca v. Turner*, 995 F.2d 1526, 1532 (11th Cir. 1993); and *Billman v. Indiana Dep’t of Corr.*, 56 F.3d 785, 788 (7th Cir. 1995)).

¹¹⁴ *See Buchanan*, *supra* note 14, at 86 (“negligent record keeping that typify prison grievance processes serve to immunize prisons from liability for custodial sexual assault”). However, in *Wilson v. Wright*, 998 F. Supp. 650 (E.D. Va. 1998) the corrections facility kept records of inmate violence and disciplinary

Eighth Amendment sexual assault claim, it remains difficult for an inmate to prevail on this type of a claim.

C. The Prison Rape Elimination Act.

On September 4, 2003, President Bush signed the Prison Rape Elimination Act (“PREA”) into law with the goal of reducing sexual assault in detention centers across the country.¹¹⁵ When first signed into law, the PREA provided for: “the gathering of national statistics about prisoner rape and the formation of a national commission to study the issue and develop standards for local, state and federal governments about how to address prison rape . . .”¹¹⁶

On June 23, 2009, the National Prison Rape Elimination Commission (“NPREC”), which was created by the PREA, “released its final report and proposed [national] standards to prevent, detect, respond to and monitor sexual abuse of incarcerated or detained individuals throughout the United States.”¹¹⁷ In its report, the NPREC addressed systematic problems underlying most incidents of sexual assault in U.S. detention centers, including—“staff training, inmate education, housing[,] and investigations in the aftermath of an assault.”¹¹⁸ In accordance with PREA, the United States Attorney General, Eric Holder, had until June 23, 2010, to adopt the NPREC’s national standards.¹¹⁹ Unfortunately, however, Holder missed the statutory deadline to

problems and “the court had no difficulty finding that a jury could conclude the prison official was deliberately indifferent” when he placed a 290 pound inmate who was convicted of abducting and raping a twelve year old boy and who “was classified as a high-risk prisoner” due to a history of violence and disciplinary problems in the prison—including a prior sexual assault of an inmate—with a 136 pound non-violent offender together in a cell. Man and Cronan, *supra* note 38, at 139. “Not surprisingly, the [136 pound] inmate was raped his first night in the cell.” *Id.* at 140.

¹¹⁵ Buchanan, *supra* note 35, at 11. “The bill received bi-partisan support, passed unanimously, and immediately received the signature of President George W. Bush enacting it into law.” Thompson, *supra* note 49, at 122.

¹¹⁶ STOP PRISONER RAPE, *supra* note 42, at 6.

¹¹⁷ Valerie Jenness and Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL’Y REV. 489, 490 (2011) and Prison Legal News, *Prison Rape Elimination Act Standards Finally in Effect, but Will They be Effective?*, <https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/> (last visited Feb. 24, 2015).

¹¹⁸ Rothstein and Stannow, *supra* note 6, at 1.

¹¹⁹ *Id.*

adopt NPREC's national standards.¹²⁰ On May 17, 2012, nearly two years after its statutory deadline, the United States Department of Justice issued its national standards to prevent, detect and respond to sexual assault in federal and state prisons, jails, youth detention facilities, police lock-ups and community correctional facilities.¹²¹ The standards "require all prisons and jails to tell inmates when they arrive that they have a right to be free of sexual abuse, and let them know how they can report it if something does happen."¹²² The standards also mandate "strong protections for lesbian, gay, bisexual and transgender inmates"; ban "routine pat-down searches of female adult inmates by male staff"; set "strict limitations on the housing of youth in adult facilities"; require "facilities [to] offer survivors access to rape crisis counselors", require at least two internal reporting avenues for incidents of sexual violence, such reporting avenues cannot impose a time limit on when an inmate may submit a grievance and require that all facilities undergo independent audits every three years.¹²³

On May 15, 2014, the governor of each state had to certify whether its facilities were in compliance with national standards.¹²⁴

¹²⁰ If the Attorney General would have adopted the standards by the statutory deadline, the NPREC's standards would have been "immediately binding on all federal detention facilities" and state officials would have had "one year to certify their compliance" or they would have lost "5% of their federal corrections-related funding." *Id.*

¹²¹ See 42 U.S.C § 15602; Just Detention International, *Federal Prison Rape Elimination Act On the Road the Justice*, <http://www.justdetention.org/en/FPREA.aspx> (last visited August 16, 2014) (citing Department of Justice, 28 C.F.R. § 115 (2012), Docket No. OAG-131 http://ojp.gov/programs/pdfs/prea_final_rule.pdf); and PRISON LEGAL NEWS, *supra* note 117. Note, "the standards do not apply to immigration detention facilities, despite evidence of rampant sexual abuse in these facilities and the clear intent of PREA." Just Detention International, *Federal Prison Rape Elimination Act On the Road the Justice*, <http://www.justdetention.org/en/FPREA.aspx> (last visited August 16, 2014). The national standards were published in the federal register on June 20, 2012 and some of the national standards became effective on August 20, 2012, while others do not go into effect until a later date. National PREA Resource Center, *Frequently Asked Questions*, <http://www.prearesourcecenter.org/faq> (last visited Aug. 17, 2014). The national standards do not provide a private cause of action for inmates, but a facility's failure to meet the national standards can be use as evidence that the facility is not meeting its constitutional obligations. *Id.*

¹²² Dara Lind, *After 11 years, States Are Finally Committing to Fight Prison Rape*, <http://www.vox.com/2014/5/20/5731152/states-prison-rape-PREA-certification-standards-11-years> (last visited Aug. 17, 2014).

¹²³ JUST DETENTION INTERNATIONAL, *supra* note 121 and DEPARTMENT OF JUSTICE *supra* note 3.

¹²⁴ Lind, *supra* note 122 and National PRE Resource Center, *Governor's Certification*, <http://www.prearesourcecenter.org/faq/governors-certification> (last visited Aug. 17, 2014) and *State's and Territories' Responses to the May 15, 2014 Prison Rape Elimination Act Deadline*,

Although the Department of Justice lacks a method to direct or enforce compliance with the national standards, if a state's facilities are not compliant with the national standards, the state loses 5% of its federal funding for the state's correctional facilities for each fiscal year.¹²⁵ However, the state may submit an assurance to the United States Attorney General that the 5% will be used solely to enable the state to achieve and certify full compliance with the national standards in future years.¹²⁶ As of May 15, 2014, only two states, New Hampshire and New Jersey, are in full compliance with the national standards. However, 41 states certified that they will comply with national standards or work towards compliance in the future.¹²⁷ The following seven states – Arizona, Florida, Idaho, Indiana, Nebraska, Texas and Utah – declined to provide an affirmation or certificate of compliance with the national standards. As a result, those states are subject to the 5% reduction in federal funding for the state's correctional facilities.¹²⁸

Thus, under the current legal framework, an inmate who has been sexually assaulted can seek redress for his/her injury by filing suit alleging an Eighth Amendment violation, so long as the inmate has fully satisfied the PLRA. However, both the PLRA and the Eighth Amendment present substantial obstacles for an inmate to overcome, making a successful claim difficult to achieve. Nevertheless, with a majority of states adopting or pledging to

<https://www.bja.gov/Programs/PREAcompliance.pdf> (last visited Aug. 24, 2014). Notably, the certification by the governor, “by its terms, does not encompass facilities under the operational control of counties, cities, or other municipalities.” Federal Register, *National Standards To Prevent, Detect, and Respond to Prison Rape*; Final Rule Vol. 77, No. 119 Rules and Regulations 37106, 37115.
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf> (last visited Aug. 18, 2014).

¹²⁵ Lind, *supra* note 122 and National PRE Resource Center, *Governor's Certification*, <http://www.prearesourcecenter.org/faq/governors-certification> (last visited Aug. 17, 2014) and *State's and Territories' Responses to the May 15, 2014 Prison Rape Elimination Act Deadline*, <https://www.bja.gov/Programs/PREAcompliance.pdf> (last visited Aug. 24, 2014). Notably, the certification by the governor, “by its terms, does not encompass facilities under the operational control of counties, cities, or other municipalities.” Federal Register, *National Standards To Prevent, Detect, and Respond to Prison Rape*; Final Rule Vol. 77, No. 119 Rules and Regulations 37106, 37115.
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf> (last visited Aug. 18, 2014).

¹²⁶ 42 U.S.C § 15607(e) and PRISON LEGAL NEWS, *supra* note 117.

¹²⁷ STATE'S AND TERRITORIES' RESPONSES TO THE MAY 15, 2014 PRISON RAPE ELIMINATION ACT DEADLINE, *supra* note 124.

¹²⁸ *Id.*

adopt the national standards, hope remains that the occurrence of future sexual assaults in U.S. detention centers will significantly decrease.

III. RECOMMENDATIONS TO DIMINISH THE NEGATIVE IMPACT CORRECTIONAL OFFICIALS HAVE ON THE OCCURRENCE OF SEXUAL ASSAULT

The national standards, though a monumental step towards reducing the occurrence of sexual assault in U.S. detention centers, do not go far enough. The national standards should be revised to include: a private right of action for non-compliance; more stringent screening/monitoring of correctional officials; and a national inmate risk assessment classification system. These suggested revisions to the national standards will likely limit the negative impact correctional officials have on the occurrence of sexual assault in U.S. detention centers and they will likely reduce the overall occurrence of sexual assault in U.S. detention centers.

A. A Private Right of Action.

As stated *supra*, the PREA does not require nationwide compliance with the national standards. Additionally, the PREA and the Department of Justice enact no mechanism to direct or enforce compliance with the national standards.¹²⁹ Rather, “[t]he primary means by which [the] PREA attempts to ensure compliance by the states is through a financial incentive.”¹³⁰ Currently, if a state does not comply with the national standards, the state risks losing 5% of its federal funding for the state’s correctional facilities for each fiscal year.¹³¹

Though losing 5% of its federal funds for its correctional facilities may seem like a significant financial incentive to ensure compliance, for some states, “the cost of compliance could exceed the 5% loss of federal prison-related grant funding they receive.”¹³² In fact, the Department of Justice estimated the average compliance cost per facility as “\$55,000 for prisons, \$50,000 for jails, \$24,000 for community confinement facilities, \$54,000 for

¹²⁹ PRISON LEGAL NEWS, *supra* note 117.

¹³⁰ *Id.*

¹³¹ 42 U.S.C § 15607(e) and PRISON LEGAL NEWS, *supra* note 117.

¹³² *Id.* “Notably, for PREA enforcement purposes, the potential loss of federal prison-related grant funding only applies to the states – it is not applicable to local corrections agencies, the federal Bureau of Prisons or other federal agencies that operate detention facilities, nor to private prison contractors.” *Id.*

juvenile facilities and \$16,000 for police lockups.”¹³³ Assuming full nationwide compliance of all covered U.S. detention centers, the Department of Justice estimates the total cost of implementing the national standards over the period 2012 to 2026 would be approximately \$6.9 billion.¹³⁴

While there are obvious moral and ethical costs of sexual assault in U.S. detention centers, such as life-long, life-altering trauma for victims, the Department of Justice also estimates that “[t]he total monetizable benefit to society of eliminating all prison rape and sexual abuse in the facilities covered by [PREA] is at least \$52 billion annually[.]”¹³⁵ Nevertheless, so long as the costs to implement the national standards outweigh the 5% penalty imposed for failure to comply, some states, such as Texas, will continue to decline to implement the national standards, arguing that the national standards are “too expensive and burdensome to follow.” As such, inmates will continue to become victims of sexual violence that could have been prevented if the national standards were followed.¹³⁶

To ensure that all states not only certify to implement the national standards, but also follow through with the implementation of those standards, the national standards should provide a private cause of action to inmates who are sexual assaulted due to the failure of a correctional facility to adopt or enforce the national standards.¹³⁷ Creating a private cause of action will not only help protect an inmate’s right to be free of sexual violence, but it will provide an additional financial incentive to encourage states to adopt and implement the national standards, as non-compliance and subsequent inmate lawsuits, along with the 5% federal funding penalty, would likely cost the state more than if it had complied with the national standards. As more states comply with the national standards, the occurrences of sexual assaults in correctional facilities nationwide will likely decrease.

Accordingly, the current 5% federal funding penalty for non-compliance is not a severe enough penalty alone to achieve full compliance of the national standards by all states. In order to ensure all states implement the national standards and thereby

¹³³ DEPARTMENT OF JUSTICE *supra* note 3.

¹³⁴ 42 U.S.C § 15607(e) and PRISON LEGAL NEWS, *supra* note 117.

¹³⁵ PRISON LEGAL NEWS, *supra* note 117.

¹³⁶ Carrie Johnson, *Prison Rape Law A Decade Old, But Most States Not In Compliance*, <http://www.npr.org/2014/06/06/319538761/prison-rape-law-a-decade-old-but-most-states-not-in-compliance> (last visited Aug. 24, 2014).

¹³⁷ See Human Rights Defense Center, DOJ Proposed Rulemaking for PREA Standards, Docket No. OAG-131, <https://www.prisonlegalnews.org/news/publications/hrdc-comments-prea-standards-april-2011/> (last visited Dec. 15, 2014).

strengthen the objective of the national standards to reduce sexual assault nationwide, the national standards should provide a private cause of action for inmates who are sexually assaulted due to a correction facility's non-compliance with the standards in addition to the current 5% federal funding penalty for non-compliance.

B. Screening/Monitoring of Correctional Officials.

In order to reduce the occurrence of correctional officials committing or allowing sexual violence, correctional officials all across the country must be properly screened.¹³⁸ Under the national standards, prior to hiring a new employee, agencies¹³⁹ must conduct a criminal background check, including making "its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse".¹⁴⁰ Additionally, the agency must conduct background checks on existing employees and contractors at least every five years.¹⁴¹

While the national standards require criminal background checks, the national standards fail to mandate mental health screening for correctional officials. The national standards should require mental health screening and a criminal background check for "[a]pplicants for employment involving inmate contact"¹⁴² so that individuals with any propensity or history of sexual assault are screened from working with inmates in correctional facilities.

¹³⁸ Though some advocate hiring only female prison guards to staff women's prisons as a method to reduce the occurrence of sexual abuse in women's prisons, courts differ as to whether they will uphold such discriminatory hiring practices. *Compare Breiner v. Nevada Department of Corrections*, 610 F.3d 1202 (9th Cir. 2010) (holding that the Nevada Department of Corrections' violated Title VII of the Civil Rights Act of 1964 which prohibits discrimination based on sex and other criteria by excluding males from working certain positions at female prisons) with *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 747-61 (6th Cir. 2004) (holding that hiring only female guards in women's prisons to prevent sexual abuse and promote rehabilitation of female inmates qualifies as a permissible exception under Title VII of the Civil Rights Act of 1964, which permits overt discrimination if disparate treatment is based on a bona fide occupational qualification).

¹³⁹ Agency is defined as "the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents". 28 C.F.R. § 115.5 (2012).

¹⁴⁰ 28 C.F.R. § 115.17 (2012).

¹⁴¹ *Id.*

¹⁴² Stop Prisoner Rape, *In Our Experience: Recommendations by Prisoner Rape Survivors to the National Prison Rape Elimination Commission*, 1, 6 (2007), <http://www.justdetention.org/pdf/InOurExperience.pdf> (last visited Aug. 17, 2014).

Furthermore, correctional facilities should conduct annual background checks on their correctional officials, “[o]therwise, [under the national standards] if staff engages in criminal sexual misconduct after being hired, which is not brought to the attention of the agency they work for, they could continue working in a correctional setting for up to 5 years before the misconduct is discovered[.]”¹⁴³

As a further method to reduce the risk of sexual assault by a correctional official, the national standards should require that “[c]orrections personnel who use sexualized language, including homophobic and sexist terminology, or who engage in other offensive or discriminatory behavior toward inmates, should be properly reprimanded after the first instance. If the behavior continues, the official should be terminated.”¹⁴⁴ If this disciplinary framework were implemented, it would likely prevent harmful behavior of correctional officials from spiraling into a potential sexual assault.

Frequent screening and monitoring of correctional officials will hopefully give U.S. detention centers the opportunity to detect a problem before it escalates into sexual assault. However, proper screening is not possible without access to sufficient data. While there is a national database of *convicted sex offenders*, there is no such database for correctional officials who have previously sexually assaulted inmates, as most correctional officials are not criminally prosecuted.¹⁴⁵ Thus, the national standards should develop a national database for tracking correctional officials who have sexually assaulted inmates. Such a system, searchable and accessible only to authorized personnel in correctional facilities,¹⁴⁶ would enable detention facilities to further monitor their own employee’s records. The creation of a database like this would also improve the effectiveness of the screening process for applicants

¹⁴³ PRISON LEGAL NEWS, *supra* note 117.

¹⁴⁴ STOP PRISONER RAPE, *supra* note 131 at 6.

¹⁴⁵ “Even in the cases of complaints of sexual abuse filed by inmates and substantiated by staff, few correctional officials are prosecuted.” STOP PRISONER RAPE, *supra* note 42, at 19. Between 2009 and 2011 correctional authorities reported detailed data on 1,257 incidents of substantiated incidents of staff sexual misconduct and harassment. Allen Beck and Ramona R. Rantala, *Sexual Victimization Reported by Adult Correctional Authorities, 2009–11*, <http://www.bjs.gov/content/pub/pdf/svraca0911.pdf> 1, 11 (last visited Aug. 17, 2014). “These incidents involved an estimated 1,393 inmate victims and 1,286 staff perpetrators.” *Id.* However, only 38% of the incidents were referred for prosecution and the staff member was convicted in only .9% of those cases. *Id.* at 16.

¹⁴⁶ STOP PRISONER RAPE, *supra* note 131 at 6.

who have been previously employed by other detention centers.¹⁴⁷ As a result, more effective screening of correctional officials would likely reduce the occurrence of passive or active sexual assault by correctional officials, as facilities would have a record of correctional officials who have sexually assaulted inmates or assisted in the sexual assault, and would be screened from working in other correctional facilities.

C. Housing Classification.

Lastly, certain characteristics, such as an inmate's age, sexual orientation, level of respective offense and length of sentence can be used to predict which inmates may be targeted for sexual assault over others, and which inmates are more likely to be sexual assault aggressors.¹⁴⁸ To reduce the occurrence of sexual assault, inmates who exhibit characteristics of a potential sexual assault aggressor should not be housed with inmates who exhibit characteristics of a sexual assault victim.

To help separate those with a risk of being sexually assaulted from those inmates who are likely to perpetrate a sexual assault, the national standards provide that during an inmate's intake process or upon transfer to another facility, and periodically through an inmate's confinement, inmates must be screened "for their risk of being sexually abused by other inmates or sexually abusive toward other inmates."¹⁴⁹ The assessment screening is to include, at a minimum:

- (1) Whether the inmate has a mental, physical, or developmental disability;
- (2) The age of the inmate;

¹⁴⁷ It is important to note that a national certification system exists for peace/police officers in the majority of states. See The International Association of Directors of Law Enforcement Standards and Training, *Model Minimum Standards*, <http://www.iadlest.org/Projects/ModelStandards.aspx> (last visited August 17, 2014). Without certification, an individual cannot serve as a peace/police officer in that state. *Id.* Additionally, there is a national registry of certificate/license revocation actions relating to officer misconduct. See National Decertification Index, <https://www.iadlest.org/Projects/NDI20.aspx> (last visited April 29, 2014). The records, provided by participating state government agencies, are contained on the National Decertification Index ("NDI"). *Id.* The NDI currently contains 17,967 actions reported by 37 states. *Id.* The NDI could serve as a model for the database on correctional officials who have sexually assaulted inmates.

¹⁴⁸ STOP PRISONER RAPE, *supra* note 42, at 1-2; Rothstein and Stannow, *supra* note 6, at 3; and Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 19, 125 (2011). Man and Cronan, *supra* note 38, at 171-175.

¹⁴⁹ 28 C.F.C. § 115.41, 115.241, and 115.341.

(3) The physical build of the inmate; (4) Whether the inmate has previously been incarcerated; (5) Whether the inmate's criminal history is exclusively nonviolent; (6) Whether the inmate has prior convictions for sex offenses against an adult or child; (7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming; (8) Whether the inmate has previously experienced sexual victimization; (9) The inmate's own perception of vulnerability; and (10) Whether the inmate is detained solely for civil immigration purposes.¹⁵⁰

While these 10 factors will undoubtedly help U.S. correctional facilities identify those inmates who are at risk of being sexually assaulted and those who are at risk of perpetrating sexual assault, there is no national risk assessment or instrument in operation to help detention centers apply the 10 factors.¹⁵¹ In fact, the Department of Justice chose not to include a national risk assessment platform in the national standards, as "the cost of the validation process is often prohibitive for small agencies" and it is the Department of Justice's position "that all staff, with appropriate training, can complete the risk assessment for incoming inmates."¹⁵² Without a uniform assessment plan, one correctional facility may evaluate an inmate's risk of sexual assault victimization or perpetration entirely differently than another correctional facility. Thus, to ensure the assessment screening is carried out uniformly and objectively across all U.S. detention centers, the PREA should implement an electronic national risk assessment tool in which correctional officials can enter an inmate's information for the 10 screening factors, and the proposed program then calculates the inmate's risk of sexual assault victimization and perpetration.

The proposed electronic national risk assessment tool should also be able to store the risk assessment data obtained by correctional facilities. Currently, there is no system to collect or use the risk assessment data obtained by the individual detention centers.¹⁵³ With this proposed national database on inmate risk assessment, a correctional official could access an inmate's risk history from the entire time the inmate has been in a detention

¹⁵⁰ *Id.*

¹⁵¹ 28 C.F.R. § 115 and National PREA Resource Center, *supra* note 121.

¹⁵² National PREA Resource Center, *Screening*, <http://www.prearesourcecenter.org/faq/screening> (last visited Feb. 24, 2015).

¹⁵³ 28 C.F.R. § 115.41.

center, regardless of whether that inmate was incarcerated in another state or federal detention center. Access to this type of information would enable correctional officials to make more informed housing determinations, particularly if an inmate was transferred from one detention center and little information was provided about the inmate's risk for sexual assault victimization or perpetration. Accordingly, this proposed electronic national risk assessment tool and database would enable correctional officials to make more informed, objective, and likely safer housing assignments, which would further decrease the negative impact correctional officials currently have on the occurrence of sexual assault.

Thus, while the passage of the national standards is a significant step in reducing the negative impact correctional officials have on the occurrence of sexual assault in U.S. detention centers, the development of the national standards alone does not reach far enough. Therefore, to further increase its reach and objective goals, the national standards should be revised to include the following: a private cause of action for inmates who are sexually assaulted due to a state facility's failure to comply with the national standards; stringent criminal and mental screening/monitoring of correctional officials, a national database that tracks correctional officials who have sexually assaulted inmates and a national inmate risk assessment classification system with a national database that tracks inmate sexual assault victimization and perpetration risk information.

CONCLUSION

“Sexual abuse is a grim reality of prison life that subjects inmates to horrifying punishments that far exceed their sentences.”¹⁵⁴ Victims of sexual violence suffer severe physical and psychological harm. “In addition to physical injuries, many survivors contract HIV and other sexually transmitted diseases, are impregnated against their will and suffer long term emotional harm.”¹⁵⁵ Further, sexual assault in U.S. detention centers is not only morally harmful to society, but also monetarily harmful, as eliminating sexual assault in all correctional facilities covered by the PREA would save “at least \$52 billion annually[.]”¹⁵⁶ Tragically, however, correctional officials significantly contribute to the occurrence of sexual assault in U.S. detention centers.

¹⁵⁴ Man and Cronan, *supra* note 38, at 185.

¹⁵⁵ STOP PRISONER RAPE, *supra* note 1, at 1.

¹⁵⁶ PRISON LEGAL NEWS, *supra* note 117.

Furthermore, the current legal framework for inmates to seek redress in court for sexual assault claims against correctional officials is cumbersome, and successful claims are slim. Thus, for the majority of sexual assault cases against correctional officials, it is unrealistic to rely on the court system as a feasible remedy for the injustice perpetrated on the inmate. However, with the implementation of the national standards and the suggested revisions to the national standards, there is hope that the rate of sexual assault in U.S. detention centers will significantly decrease. Nevertheless, until the national standards are revised and all U.S. detention centers make it a priority to abide by the national standards, a staggering number of inmates will continue to be victims of sexual assault at the hands of correctional officials, and they will “remain voiceless in the face of continued victimization.”¹⁵⁷

¹⁵⁷ Thompson, *supra* note 49, at 176.