MAKING JUSTICE AVAILABLE FOR VICTIMS OF SEXUAL MISCONDUCT WITHIN THE PRISON SYSTEM

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Trigger Warning: This Note includes graphic descriptions of sexual violence. Please engage in self-care as you read.

INTRODUCTION

Survivors of sexual misconduct, especially within confinement, must go to incredible lengths to see justice.[1] Incarcerated victims are regularly denied recovery and reparations, and perpetrators are often permitted to escape without civil or criminal liability.[2] Take Jane Doe, who, during her eight-month stay at Rikers Island, a New York City jail, between 2015 and 2016, filed a sexual abuse complaint against a Rikers guard, informing the Inspector General's office that he was handing out cigarettes to incarcerated women in exchange for oral sex.[3] The Inspector General's office did not respond to Jane, so she assumed that the office did not take her complaint seriously because she did not have hard evidence.[4] Later in her time at Rikers, Jane was brutally sexually assaulted by another Rikers guard, Jose Cosme.[5] Cosme, outweighing her by over two hundred pounds, pushed her face against a plexiglass wall in an office, raped her, took a phone call while still physically inside her, pushed her to the floor, and pulled her hair to force her into performing oral sex.[6] Cosme ejaculated on her breasts, and once back in her cell after the assault, Jane used her uniform white T-shirt to wipe it off.[7] She then called for medical help and told the nurse what had happened.[8] Without examining Jane, a doctor dismissed her story as merely a panic attack and sent her back to her cell.[9] The entire medical consultation lasted less than ten minutes.[10] Afterwards, Jane ripped up the dirtied T-shirt and mailed one piece of it to her sister and another to her friend.[11]

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[1] *See generally* Hannah Belitz, *A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, HARV. C.R.-C.L.L. L. REV. 291 (2018).

[2] *See* Deborah M. Golden, *The Prison Litigation Reform Act — A Proposal For Closing the Loophole For Rapists*, 1 ADVANCE 95, 95 (June 2006) ("Most Americans would be shocked to know that in this country, a rape victim might not be able to bring a suit for money damages against her or his attacker when that attacker is an employee of the state, specifically an employee of a prison or jail.").

[3] The Intercept published this article online, detailing many accounts of sexual abuse at Rikers Jail and including quotes and statistics that demonstrate the pervasiveness of the issue and how it even affects female visitors to the jail. As The Intercept reported in 2015, female visitors there are also regularly subjected to invasive–and unlawful–strip searches. But no matter how widespread, sexual abuse at Rikers is rarely criminally prosecuted–and internal investigations, when they happen, seldom result in the discipline or dismissal of those accused of misconduct. More often, the city settles with victims before their allegations can be tested in court or placed under public scrutiny.

Alice Speri, *Rape Victim Who Smuggled DNA Evidence Out of Rikers Wins Settlement*, THE INTERCEPT (Feb. 11, 2019, 1:44 PM), https://theintercept.com/2019/02/11/rikers-island-sexual-assault-rape/.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

Jane reported the assault, and two weeks later, investigators took her back to the office where she was raped, and they videotaped her sharing the story.[12] Jane told them that she had the DNA as proof and that it was safe, far away from Rikers.[13] Her rapist, Cosme, pleaded guilty to a felony charge of sexual abuse.[14] As a result, he was fired from his job, put on probation for ten years, and required to register as a sex offender—but he served no prison time.[15] Later, another Rikers officer, Leonard McNeil, coerced Jane Doe into a sexual relationship.[16] McNeil would call her into his station without following the facility protocol, force her to work for him as a sanitation worker, and become jealous and angry if she worked for other guards.[17] Jane Doe later accused McNeil "of arranging for Cosme to rape her after Cosme discovered that they had a sexual relationship[,] . . . but she had no physical evidence against McNeil, and he was never prosecuted or disciplined."[18] Jane shared several other stories from her time at Rikers, including one in which she had witnessed guards retaliate against another incarcerated woman who had made allegations of rape against a different male correctional officer.[19] The woman filed a complaint and gave her underwear as proof to the Department of Corrections staff, but they discarded that evidence and dismissed her complaint.[20]

People convicted of crimes are not afforded their full constitutional rights, which is reflected in the laws regulating prison safety, high rates of sexual misconduct in prison, and the limited and arduous routes for justice provided for incarcerated victims.[21] Incarcerated persons are currently limited to bringing claims to federal or state court under 42 U.S.C. § 1983 ("Section 1983"), which allows anyone who has suffered a deprivation of a civil right or protection of federal law to file suit against the offending state actor.[22] However, 42 U.S.C. § 1997(e), the Prison Litigation Reform Act

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* (alteration in original).

[19] *Id.*

[20] *Id*.

[21] *See* Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301-09 (2003); *see* Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013); *see* U.S. CONST. amend. VIII; *see also infra* Parts II and III.

[22] The language of the statute as made effective in 1996:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or another person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

("PLRA"), severely restricts the scope of Section 1983 in its application to incarcerated persons.[23] All cases brought by incarcerated individuals regarding prison conditions are subject to the statutory obstacles imposed by the PLRA.[24] Courts have also interpreted the PLRA to limit the types of recovery available to those who are incarcerated.[25] If a court finds that the alleged conduct violated a constitutional right, incarcerated plaintiffs may only recover nominal and/or punitive damages[26] and may only receive compensatory damages upon a showing of a "physical injury" or "sexual act (as defined in section 2246 of title 18)."[27] However, subject to the several statutory hurdles imposed by the PLRA,[28] imprisoned survivors of sexual abuse have cognizable constitutional claims under the Fourth, Eighth, and Fourteenth Amendments of the U.S. Constitution.[29] This Note focuses on claims brought under the Eighth Amendment, which prohibits cruel and unusual punishment, because this specific constitutional protection supports the proposal put forward.[30]

The Prison Rape Elimination Act of 2003 ("PREA")[31] was enacted by Congress to create zero-tolerance policies for sexual assault in prison.[32] Among other provisions, the PREA mandates data collection and analysis of prison rape[33] and the allocation of federal funds "to prevent and prosecute prisoner rape."[34] The PREA also required the United States Attorney General to promulgate "a final rule adopting national standards for the detection,

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1996).

23 *See* 42 U.S.C. § 1997(e).

24 42 U.S.C. § 1997(e)(h) ("As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.").

25 Belitz, *supra* note 1, at 297 (citing Logan v. Hall, 604 F.App'x 838, 840 (11th Cir. 2015); Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003); Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002) (citation omitted)).

26 *See Thompson*, 284 F.3d at 418 ("Section 1997(e)(e) does not limit the availability of nominal damages for the violation of a constitutional right or of punitive damages.").

27 42 U.S.C. § 1997(e)(e); *see Calhoun*, 319 F.3d at 941 (finding that "not every psychological discomfort a prisoner endures amounts to a constitutional violation[,]" and explaining that compensatory damages are "for" an injury, which can only be mental *or* emotional according to 42 U.S.C. § 1997(e)(e)).

28 *See* 42 U.S.C. § 1997(e); *see also* Belitz, *supra* note 1, at 297.

29 Belitz, *supra* note 1, at 299.

30 *See* U.S. CONST. amend. VIII; *see infra* Part IV.

31 Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301-09 (2003).

32 34 U.S.C. § 30302.

33 34 U.S.C. § 30303.

34 34 U.S.C. § 30305.

prevention, reduction, and punishment of prison rape[,]"[35] which was published in 2012.[36] However, the PREA is severely lacking in enforcement mechanisms for corrections agencies.[37] Consequentially, "[w]hile the PREA has effectively enforced penalties against prisoners for consensual sexual activity, there is no evidence that the new rules have reduced the gender-based and sexual violence against incarcerated people that is perpetrated most frequently by correctional staff."[38] Notably, the PREA did not create a private right and remedy for noncompliance, and there has been no indication that Congress will implement these measures for such violations.[39] Moreover, courts often decline to consider the PREA in any plaintiffs' complaints and "disregard any favorable implications the PREA could have on the constitutional claims of imprisoned survivors of sexual abuse."[40]

Congress is working towards addressing the issue of prison rape and providing legal resources for incarcerated victims through amendments to the problematic provisions of the Prison Litigation Reform Act[41] and through the implementation of the Prison Rape Elimination Act.[42] While these are productive steps for the safety of the nation's incarcerated individuals, the current laws remain exceedingly restrictive and preclude many victims of sexual misconduct from achieving justice.[43] To protect these victims more effectively, Congress should amend the Prison Rape Elimination Act to

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35 34 U.S.C. § 30307 (alteration in original).

36 *See* Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

37 *See* 34 U.S.C. §§ 30301-09; *see infra* Part III.

38 Lena Palacious, *The Prison Elimination Act and the Limits of Liberal Reform*, GENDER POL'Y REP. (Feb. 17, 2017), https://genderpolicyreport.umn.edu/the-prison-rape-elimination-act-and-the-limits-of-liberal-reform/ (alteration in original).

39 *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress. . . . The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.") (alterations in original) (citations omitted)); *see also* 34 U.S.C. §§ 30301-09.

40 Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 811 (2014) ("One of the most striking aspects of case law involving PREA is that many courts refuse to acknowledge that PREA could have any relevance to claims of survivors of sexual abuse in detention.").

41 *See* John Boston, *25 Years of the Prison Litigation Reform Act*, PRISON LEGAL NEWS (Aug. 1, 2021), https://www.prisonlegalnews.org/news/2021/aug/1/25-years-prison-litigation-reform-act/ (discussing the PLRA, "taking stock of what it has wrought[,]" and pointing out some recent amendments, including those regarding *in forma pauperis* and the physical injury requirement, allowing damage recovery for specified types of sexual assault).

42 See *Prison Rape Elimination Act (PREA) News*, BUREAU JUST. ASSISTANCE, https://bja.ojp.gov/program/prison-rape-elimination-act-prea/news (last modified Dec. 22, 2021), for recent news regarding the PREA, including the release of the PREA Auditor Handbook, awards of grant funding, and the PREA amendment enacted under the Justice for All Reauthorization Act of 2016.

43 *See* Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013); *see* Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301-09 (2003); *see also infra* Parts II and III.

create a private cause of action.[44] The PREA was enacted with the overarching goal of "adopting national standards to prevent, detect, and respond to prison rape."[45] In furtherance of the PREA's intent, this Note proposes that the PREA amendment should include three specific claims available for incarcerated persons to bring to federal court: (1) failure to provide a safe confinement space through sexual misconduct prevention policies; (2) failure to provide sufficient procedures for the reporting and investigation of claims; and (3) failure to provide rehabilitative services for victims.[46] This proposed amendment to the PREA is supported by the Eighth Amendment's constitutional protection against cruel and unusual punishment,[47] prohibiting "penal measures and conditions which violate civilized standards and concepts of humanity and decency[.]"[48] Incarcerated people's claims of sexual assault by prison officials or prison officials' deliberate indifference to the substantial risk of sexual assault "constitute a challenge to the inmate's conditions of confinement."[49]

Under this amended law, a finding of one or more of these failures would constitute a valid claim under the PREA and, therefore, such a claim could be brought in federal or state court while remaining subject to the other requirements of the PLRA.[50] This Note posits that this proposed amendment by Congress would more effectively enforce the PREA by holding facilities and staff responsible for violations and that it is necessary to ensure the protection and rehabilitation of incarcerated victims.[51]

Part I of this Note will discuss the issue of sexual misconduct in prison generally, including rates of reporting, consequences for victims, and relationships between prisoners and between corrections officers and prisoners.[52] Part II will describe the relevant legal frameworks, including federal definitions of sexual assault and rape, the Eighth Amendment Prohibition of Cruel and Unusual Punishment, the PLRA, and the PREA.[53] Part III will detail three specific issues that this Note's proposal seeks to reform in alignment with the aforementioned suggested claims: insufficient

[44] *See infra* Part IV.

[45] Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

[46] *See infra* Part IV.

[47] U.S. CONST. amend. VIII.

[48] Carrigan v. Davis, 70 F. Supp. 2d 448, 452 (D. Del 1999) (alteration in original) (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976)) (holding that sexual intercourse between an incarcerated person and officer constitutes a per se violation of the incarcerated person's Eighth Amendment rights).

[49] *Id.* ("Accordingly, such claims are analyzed under the deliberate difference standard of the Eighth Amendment.").

[50] *See* Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013); *see also infra* Part VI.

[51] *See infra* Part VI, Section C.

[52] *See infra* Part I.

[53] *See infra* Part II.

prevention, procedures for reporting and subsequent investigations, and rehabilitation of incarcerated persons.[54] With each of these three claims as a Section, Part III will provide illustrative case law to demonstrate where the current law falls short and discuss why these failures are problematic.[55] Lastly, Part IV will conclude with a detailed analysis of why Congress should amend the PREA to include a private cause of action with these three available claims.[56] Part IV will also briefly explore how the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")[57] effectively protects the First Amendment-guaranteed freedom of religious exercise of persons confined to institutions, which can be analogized to this proposed amendment's protection of Eighth Amendment rights.[58] To conclude, Part IV will address: the constitutionality of this amendment, distinguishing it from the RLUIPA and the Religious Freedom Restoration Act ("RFRA");[59] the conservative arguments this legislation may face;[60] and how this proposal would benefit both incarcerated individuals and the general population—finally providing those within the prison system the sufficiently humane and efficient protection and justice that all people deserve.[61]

I. THE EPIDEMIC OF SEXUAL MISCONDUCT IN PRISON

Sexual misconduct in prison is a highly prevalent and damaging epidemic.[62] The United States prison system is atypical in several ways, including an incarceration rate that is "five to ten times higher than those of other industrialized democracies."[63] Importantly, there is also "no independent national agency that monitors prison conditions and enforces

54 *See infra* Part III.

55 *Id.*

56 *See infra* Part IV.

57 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

58 *See id.*; *see* U.S. CONST. amend. I; *see infra* Part IV.

59 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-bb4 (1993); *see infra* Part IV.

60 *See infra* Part IV, Section B.

61 *See infra* Part IV, Section C.

62 *See* Joanne Mariner, *No Escape: Male Rape in U.S. Prisons*, HUM. RTS. WATCH 85 (Apr. 2001), https://www.prearesourcecenter.org/sites/default/files/library/noescapemalerapeinusprisons.pdf. "The staggering numbers of people filling the country's prisons and jails mean that what happens in these institutions is necessarily a consequence to society, for most prisoners do, finally, return to the communities from which they came." *Id.* at 27.

63 David Fathi, *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH (June 16, 2009), https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states ("Human Rights Watch is not aware of any other country in which national legislation singles out prisoners for a unique set of barriers to vindicating their legal rights in court.") (citation omitted)) ("The United States has the world's highest per capita rate of incarceration, with 760 incarcerated persons for every 100,000 residents." Contrastingly, England and Wales have rates of 151 per 100,000, "Canada (116), and Sweden (74).") (citation omitted)).

minimal standards of health, safety, and humane treatment."[64] The most recent report from the Bureau of Justice Statistics ("BJS") indicates that from 2015 to 2018, the overall rate of sexual misconduct allegations in prisons increased by eight percent—from 12.5 per 1,000 prisoners to 13.5 per 1,000 prisoners.[65] Prison staff perpetrated about fifty-five percent of the 27,826 allegations of sexual misconduct.[66] The PREA cites experts who conservatively estimate that the number of incarcerated persons sexually assaulted in the prior twenty years exceeds one million.[67] The likelihood of an incarcerated person being subject to sexual abuse is about thirty times higher than that of a non-incarcerated person.[68] Further, although more than half of the reported sexual abuse allegations were against prison staff, staff perpetrators rarely face prosecution.[69] Roughly one-third of accused staff are permitted to resign before the investigation closes, "meaning there [is] no public record of what exactly transpired and nothing preventing them from getting another similar job at another facility."[70]

These numbers also exclude the many victims who never reported their experiences of sexual misconduct.[71] Incarcerated people are often afraid to report due to fear of retaliation by their perpetrator or by others in their facility who object to "snitching."[72] Interviews with prison officials after reporting an incident have been described as "amount[ing] to hazing and harassment."[73] Sexual victimization in prison has been overlooked in public discourse and by legislative bodies, and the issue rarely makes headline

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[64] *Id.* (citation omitted) (explaining that the few independent monitoring systems in the US are "generally underresourced and lacking in real power") ("By contrast, in Great Britain, independent oversight of prison conditions is provided by Her Majesty's Inspectorate of Prisons. In 46 European states, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment supplements monitoring by national bodies.") (citation omitted)).

[65] AMY D. LAUGER & LAURA M. MARUSCHAK, PREA DATA COLLECTION ACTIVITIES, 2021(BUREAU JUST. STAT., (June 2021).

[66] *Id.*

[67] Prison Rape Elimination Act, 34 U.S.C. § 30301 (2003).

[68] Belitz, *supra* note 1, at 297 (citation omitted).

[69] *See* Joaquin Sapien, *Guards May Be Responsible for Half of Prison Sexual Assaults*, PROPUBLICA (Jan. 23, 2014, 1:47 PM), https://www.propublica.org/article/guards-may-be-responsible-for-half-of-prison-sexual-assaults [https://perma.cc/2RWB-PWS5]. For several accounts of prison staff who received minimal punishment, if any at all, for committing crimes of sexual assault, see Derek Gilna, *Five Years after Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/.

[70] Sapien, *supra* note 69.

[71] *See* Hallie Martyniuk, *Understanding Rape in Prison*, PA. COAL. AGAINST RAPE, https://www.pcar.org/sites/default/files/resource-pdfs/7_understanding_rape_in_prison_low_res.pdf (last visited Feb. 17, 2022).

[72] *Id.*

[73] Chandra Bozelko, *Why We Let Prison Rape Go On*, N.Y. TIMES (Apr. 17, 2015), https://www.nytimes.com/2015/04/18/opinion/why-we-let-prison-rape-go-on.html.

news;[74] in the public eye, it has not been considered an issue worthy of action.[75]

Incarcerated individuals who are routinely targeted for sexual assault include those who are "young, small in size, physically weak, white, gay, first offender[s], possessing 'feminine' characteristics such as long hair or a high voice; unassertive, unaggressive, shy, intellectual, not street-smart, or 'passive'; or having been convicted of a sexual offense against a minor."[76] Sexual misconduct occurs both between prisoners and between correctional officers and prisoners.[77] In addition to the PREA, many courts and academics have consistently recognized that incarcerated people are not capable of providing consent to sexual conduct with prison officials.[78] Several states, including New York, have codified this recognition in their legal codes, deeming incarcerated people legally incapable of consent.[79]

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[74] Hollie McKay, *Inside the Shadowy, Unspoken World of Prison Rape*, FOX NEWS (Jan. 13, 2020, 5:15 PM), https://www.foxnews.com/us/prison-rape-shadowy-unspoken-world.

[75] *See* Sage Martin, *The Prison Rape Elimination Act: Sword or Shield?*, 56 TULSA L. REV. 283, 284 (2021) ("Prison rape is routinely portrayed in popular culture as something that inevitably accompanies being in jail or prison.")

[76] Mariner, *supra* note 62, at 51 ("Prisoners with any one of these characteristics typically face an increased risk of sexual abuse, while prisoners with several overlapping characteristics are much more likely than other prisoners to be targeted for abuse.").

[77] *See* Laura M. Maruschak & Emily D. Buehler, *Sexual Victimization Reported by Juvenile Justice Authorities, 2013-2018*, BUREAU JUST. STAT. (June 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/svrjja1318.pdf ("About half (52%) of allegations of sexual victimizations reported in all juvenile facilities from 2013 to 2018 were perpetrated by staff and about half (48%) by youth."); *see* Emily D. Buehler, *Sexual Victimization Reported by Adult Correctional Authorities, 2016-2018*, BUREAU OF JUST. STAT. (June 2021), https://bjs.ojp.gov/content/pub/pdf/svraca1618.pdf ("Of the 1,673 substantiated incidents of sexual victimization in 2018, about 58% were perpetrated by other inmates and 42% by staff.").

[78] *See* Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.6 (2012); *see* Wood v. Beauclair, 692 F.3d 1041 (9th Cir. 2012) ("[B]ecause of the enormous power imbalance between prisoners and prison guards, labeling a prisoner's decision to engage in sexual conduct in prison as 'consent' is a dubious proposition.") ("Out-of-circuit courts have recognized that prisoners are incapable of consenting to sexual relationships with a prison official.") (citations omitted)); *see* Carrigan v. Davis, 70 F. Supp. 2d 448, 452-453 (D. Del 1999) (holding that "as a matter of law . . . the consent defense is unavailable" to a prison guard who engages in a sexual act with a prisoner); *see* Martyniuk, *supra* note 71, at 21 ("While some sexual relations between correctional staff and inmates occur absent any form of threat, bribe, or coercion, these remain problematic as well. The power correctional staff holds over all inmates makes any true consent impossible."). Contrastingly, for a discussion of cases that have held that consent is available, and thus, that the "consensual sexual relations between a prisoner and a prison guard do not give rise to an Eighth Amendment violation[,]" see *Wood*, 692 F.3d at 1048 (alteration in original) (citations omitted).

[79] Jackson M. Jones, *Power, Control, Cigarettes, and Gum: Whether an Inmate's Consent to Engage in a Relationship with a Correctional Officer Can Be a Defense to the Inmate's Allegation of a Civil Rights Violation under the Eighth Amendment*, 19 SUFFOLK J. TRIAL APP. ADVOC. 275, 293-294 (2014) (citing MASS. GEN. LAWS ch. 268, § 21A (2013); IND. CODE § 35-44.1-3-10(d) (2014); MINN. STAT. § 609.344 (2013); MISS. CODE ANN. § 97-3-104 (2013); OR. REV. STAT. § 163.452 (2013)). In New York, the law deems that consent is an element of every enumerated sex offense, and a person is incapable of consent when:

Sexual assault encompasses any sexual contact or behavior that occurs without explicit consent by the victim.[80] Rape, more specifically, is defined as "the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the victim."[81] The term sexual misconduct typically includes a broad range of inappropriate and unwelcome sexual behaviors.[82] Rape and other forms of sexual misconduct, regardless of the location, have severe adverse effects on the survivor, including reactions of fear, shame, anger, anxiety attacks, nightmares, and flashbacks.[83] "For inmates, these symptoms are exacerbated by absence of privacy, lack of control over their environments, and often, by the continuing presence in the prison of the person who raped them."[84] Incarcerated people are exposed to higher rates of human immunodeficiency virus ("HIV"), other harmful sexually transmitted diseases, and pregnancy risks, and they very often do not have access to immediate rape crisis counseling and medical care.[85] These victims rarely receive adequate treatment, if any, for the pervasive physical and psychological effects of sexual assault.[86] Lastly, incarcerated victims are much less likely to integrate into the community following their release and are at high risk of becoming homeless or requiring government assistance.[87]

II. LEGAL FRAMEWORK

A. Eighth Amendment Prohibition of Cruel and Unusual

> [H]e or she is . . . committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital, . . . in a state correctional facility in which the victim is confined at the time of the offense[,] . . . committed to the care and custody of a local correctional facility[,] . . . [or] detained or otherwise in the custody of a police officer, peace officer, or other law enforcement official[.]

N.Y. Penal Chapter 40, Part 3, Title H, Article 130.05 (20201-08-13) (alterations in original).

[80] *Sexual Assault*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/articles/sexual-assault (last visited Feb. 17, 2022).

[81] *An Updated Definition of Rape*, U.S. DEP'T JUST. (Jan. 6, 2012), https://www.justice.gov/archives/opa/blog/updated-definition-rape.

[82] *Defining Sexual Misconduct, Title IX*, WILLIAMS COLL. (Nov. 2021), https://titleix.williams.edu/defining-sexual-misconduct.

[83] *Effects of Sexual Violence*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/effects-sexual-violence (last visited Feb. 17, 2022).

[84] *Sexual Abuse in Prison: A Global Human Rights Crisis*, JUST DETENTION INT'L 2, https://justdetention.org/wp-content/uploads/2015/11/International_Summary_English.pdf (last visited Feb. 17, 2022).

[85] *See id.*

[86] *See id.*

[87] Prison Rape Elimination Act, 34 U.S.C. § 30301 (2003) ("Prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released–as 600,000 inmates are each year.").

Punishment

The Eighth Amendment protects all persons, including those convicted of crimes, from cruel and unusual punishment, which encompasses sexual assault and deliberate indifference to the substantial risk of sexual assault.[88] The Fourteenth Amendment prohibits states from abridging "the privileges or immunities of citizens of the United States" and from depriving "any person of life, liberty, or property, without due process of law[.]"[89] It also incorporates the protections of the Eighth Amendment, thereby providing protection against cruel and unusual punishment for people in state and local prisons and jails.[90]

Conditions within a prison are subject to scrutiny under the Eighth Amendment, which reads, "'[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,' [and] manifests 'an intention to limit the power of those entrusted with the criminal law function of government.'"[91] The Supreme Court has opined many times on what constitutes "cruel and unusual punishments" and "ha[s] held repugnant to the Eighth Amendment punishments which are incompatible with the 'evolving standards of decency that mark the progress of a maturing society,'[92] . . . or which 'involve the unnecessary and wanton infliction of pain[.]'"[93] The Court's evaluation of Eighth Amendment claims generally turns on answering the question of whether prison officials applied force in "a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[94]

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[88] Farmer v. Brennan, 511 U.S. 825 (1994) ("[H]aving stripped [incarcerated persons] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.") (citations omitted)) ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'") (citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981))); U.S. CONST. amend. VIII.

[89] U.S. CONST. amend XIV, § 1.

[90] *See* Jones v. Mississippi, 141 S.Ct. 1307, 1314 (2021) ("Ratified in 1868, the Fourteenth Amendment incorporates the Cruel and Unusual Punishments Clause against the States."); *see also* Tyson Timbs v. Indiana, 139 U.S. 682, 684 (2019) (holding that the Eighth Amendment's Excessive Fines Clause is an incorporated protection under the Due Process Clause) ("The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States Bill of Rights protections 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.") (alterations omitted) (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010))).

[91] Whitley v. Albers, 475 U.S. 319, 475 (1986) (alteration in original) (quoting U.S. CONST. amend. VIII) (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)) ("The Cruel and Unusual Punishments Clause 'was designed to protect those convicted of crimes[.]'") (citation omitted)).

[92] Estelle v. Gamble, 429 U.S. 97, 103 (1976) (quoting Trop v. Dulles, 356 U.S. 101) (citing Gregg v. Georgia, 428 U.S. 153, 172-173 (joint opinion) (1910); Weems v. United States, 218 U.S. 378 (1910)).

[93] *Estelle*, 429 U.S. at 103 (quoting *Gregg*, 428 U.S. at 173) (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 329 U.S. 463 (1947)).

[94] *Whitley*, 475 U.S. at 475 (citation omitted).

However, despite these constitutional standards for punishment, prison staff are still allowed to use certain levels of force inside the facility that the outside world would not permit.[95] Most courts will only find that an assault impermissibly violated an incarcerated person's constitutional rights if the person was physically attacked; verbal threats or harassment will not count as a constitutional violation.[96] Further, even if a perpetrator does apply physical force, the doctrine of qualified immunity provides an affirmative defense that shields government officials from liability under Section 1983 for "civil damages arising from actions within the scope of an official's duties and in 'objective' good faith[,]"[97] as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[98] Qualified immunity allows prison staff and supervisors to get away with violence under the pretext of its flexible definition and places an even more challenging burden of proof on incarcerated plaintiffs—plaintiffs who have already overcome the barriers that prevent them from bringing a legal claim at all.[99]

Even more problematically, "for deliberate indifference claims under the Eighth Amendment against a prison supervisor, the plaintiff must plead and prove that the supervisor had subjective knowledge of a substantial risk of serious harm to an inmate and disregarded it[.]"[100] In the hallmark case of *Farmer v. Brennan*, an incarcerated, transgender woman, petitioner Farmer, identified as female and was described as having "overtly feminine characteristics[;]" yet, the government categorized and treated her as male.[101] Despite her particular vulnerability to sexual attack and "previous segregation at a different federal prison because of safety concerns," Farmer was transferred by the respondents, federal prison officials, to a maximum-security, all-male facility known to contain more violent offenders, where she

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[95] *See* COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER'S MANUAL 742 (11th ed. 2017), *available at* https://jlm.law.columbia.edu/files/2017/05/36.-Ch.-24.pdf ("Actions that would be unlawful outside of prison may be allowed as 'lawful force' in prison. For example, prison officers may use lawful force against prisoners to maintain order and to make sure rules are obeyed.") (citing N.Y. CORRECT. LAW § 137(5) (McKinney 2003 & Supp. 2009))).

[96] *See id.* at 738 ("Outside prison, most threats, unwanted touching, and uses of force are torts and therefore illegal. But in prison, tort law allows (or 'privileges') prison staff to use some force that would not be allowed outside. . . Courts will generally only find that an assault violated your rights . . . if you were physically attacked.") (alterations in original)).

[97] Harlow v. Fitzgerald, 457 U.S. 800, 820 n.34 (1982).

[98] *Id.* at 818 ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'") (citation omitted)).

[99] *See id.* at 800.

[100] Tangreti v. Bachmann, No. 19-3712, 2 (2d Cir. 2020) (alteration in original) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

[101] *Farmer*, 511 U.S. at 852 (alteration in original).

was left with the general population.[102] Less than two weeks later, Farmer "was brutally beaten and raped by another inmate" in her cell.[103] She "alleged that respondents had acted with 'deliberate indifference' to [her] safety in violation of the Eighth Amendment."[104] The U.S. Supreme Court held that prison officials only violate the Eighth Amendment upon meeting two requirements: "the deprivation alleged is, objectively, 'sufficiently serious,' and the official has acted with [subjectively,] 'deliberate indifference' to inmate health or safety."[105]

This legal standard for evaluating alleged Eighth Amendment violations is also used in the context of claims involving sexual misconduct, as seen in *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*.[106] After a three-week trial, the U.S. District Court for the District of Columbia found that the physical assaults committed by prison employees against incarcerated women, in combination with "vulgar sexual remarks of prison officers, the lack of privacy within [their] cells[,] and the refusal of some male guards to announce their presence in the living areas of women prisoners constitute[d] a violation of the Eighth Amendment since they mutually heighten the psychological injury of women prisoners."[107] Furthermore, the court found "[t]here is a substantial risk of injury when officers make sexual remarks in an environment where sexual assaults of women prisoners by officers are well known and inadequately addressed."[108] These claims "demonstrated a deprivation which amounts to a wanton and unnecessary infliction of pain[,]" thus fulfilling the objective prong of the Eighth Amendment analysis.[109] In this case, the court also found the defendants to be deliberately indifferent—setting a crucial precedent—because they "fail[ed] to properly train their employees in the area of sexual harassment of women prisoners," and the inadequacy of this knowledge was "likely to result in the violation of constitutional rights[.]"[110]

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[102] *Id.* at 825.

[103] *Id.*

[104] *Id.* (alteration in original) (". . . because they knew that the penitentiary had a violent environment and a history of inmate assaults and that petitioner would be particularly vulnerable to sexual attack."). Farmer sued in federal court, seeking damages and an injunction against future incarceration in any prison, *id.* The Court remanded the case for determination of whether prison officials would have liability under the standards articulated, *id.* at 827.

[105] *Id.* at 826 (alteration in original) (citation omitted); *see also* Wilson v. Seiter, 501 U.S. 294, 298 (1991) ("[P]risoners claiming that conditions of confinement constituted cruel and unusual punishment were required to show deliberate indifference on part of prison officials.") (alteration in original)).

[106] *See* Women Prisoners of the D.C. Dep't of Corr., v. D.C., 877 F.Supp. 634 (D.D.C. 1994).

[107] *Id.* at 665 (alterations in original).

[108] *Id.* (alteration in original).

[109] *Id.* at 664 (alteration in original); *see* U.S. CONST. amend. VIII.

[110] *Women Prisoners of the D.C. Dep't of Corr.*, 877 F.Supp. at 667 (alterations in original).

Courts have interpreted "deliberate indifference" to "describe[] a state of mind more blameworthy than negligence."[111] One may equate this standard of deliberate indifference to that of recklessness.[112] Per the test adopted in *Farmer v. Brennan*, "an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm would actually befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[113] Further, a court may conclude that a prison official was aware of a substantial risk merely because the risk would be evident to a reasonable person.[114] In *Farmer*, the Supreme Court also noted that, in cases concerning a petitioner without a demonstrable physical injury, a subjective deliberate indifference test "does not require a prisoner seeking a 'remedy for unsafe conditions [to] await a tragic event [such as an] actua[l] assaul[t] before obtaining relief."[115]

However, for an incarcerated person to "obtain injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm," deliberate indifference must be determined in light of the prison authorities' "attitudes and conduct at the time suit is brought and persisting thereafter."[116] In other words, to establish eligibility for an injunction, the plaintiff must demonstrate that the violation is ongoing by providing evidence that defendant-officials were "knowingly and unreasonably disregarding an objectively intolerable risk of harm" at the time of filing this suit[117] and that this inferred disregard has and will continue throughout "the remainder of the litigation and into the future." [118]

These cases mentioned above are essential in analyzing the Eighth Amendment claims brought by incarcerated victims. In sum, to put forward a valid claim that this constitutional right against cruel and unusual punishment was violated, victims must show that a prison official sexually assaulted them or that the acting prison official(s) acted with "deliberate indifference" to their "sufficiently serious" deprivation of rights[119]—in

111 Farmer v. Brennan, 511 U.S. 825, 835 (1994) (alteration in original) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

112 *Id.* at 836 ("We have since read *Estelle* for the proposition that Eighth Amendment liability requires 'more than ordinary lack of due care for the prisoner's interests of safety.'") (quoting Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084 (1986))); *see* Estelle v. Gamble, 429 U.S. 97, 103 (1976).

113 *Farmer*, 511 U.S. at 842 (citations omitted).

114 *Id.* ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.") (quoting Cf. LaFave & Scott § 3.7, p. 335)).

115 *Id.* at 845 (citation omitted).

116 *Id.* (citation omitted).

117 *Id.* at 846.

118 *Id.*

119 *Id.* at 825.

addition to the further challenging burdens discussed in the case law of this Section.[120]

B. Prison Litigation Reform Act

The Prison Litigation Reform Act, passed by Congress in 1996, imposes several conditions that incarcerated people must meet before filing civil lawsuits under Section 1983 in federal court.[121] Congress's intention in drafting the PLRA was to end frivolous prisoner lawsuits.[122] The PLRA makes "these cases harder to bring, harder to win, and harder to settle."[123] Although there are others, this Note will address only the most applicable of the PLRA's provisions: exhaustion of administrative remedies, filing fees, three strikes, and physical injury.[124] First, incarcerated plaintiffs must demonstrate that they have "exhausted" all "administrative remedies" available in their facility.[125] Even if a facility's state has "failed . . . to adopt or adhere to" any grievance procedures, an incarcerated person must still demonstrate such exhaustion.[126] Second, all court filing fees are required to be paid in full.[127] While non-imprisoned indigent people can waive federal filing fees by filing lawsuits *in forma pauperis*, the PLRA makes incarcerated people ineligible for this waiver.[128] An indigent incarcerated person who does not have the money upfront is required "to pay an initial fee of twenty percent of the greater of the prisoner's average balance or the average deposits to the account for the preceding six months."[129] Therefore, this also

120 *See supra* Part II, Section A.

121 Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013); *see also* 42 U.S.C. § 1983 (1996).

122 Belitz, *supra* note 1, at 291 (citation omitted).

123 Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html.

124 *See* 42 U.S.C. § 1997(e).

125 42 U.S.C. § 1997(e)(a).

126 42 U.S.C. § 1997(e)(b).

127 28 U.S.C. § 1915(b); *see Know Your Rights: The Prison Litigation Reform Act (PLRA)*, AM. C.L. UNION, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf (last visited Feb. 17, 2023) (citing 28 U.S.C. § 1915(b)) ("If you do not have the money up front, you can pay the filing fee over time through monthly installments from your prison commissary account, but the filing fee will not be waived."); *see Prison Litigation Reform Act: Filing Fees*, *Corrections Law* for Jails, Prisons and Detention Facilities, AELE L. LIBR. CASE SUMMARIES, https://www.aele.org/law/Digests/jail183.html (last visited Mar. 27, 2022) (providing case summaries related to prisoners' payment of legal fees).

128 28 U.S.C. § 1915(a-b); *see* Fenster & Schlanger, *supra* note 123 ("[T]he PLRA makes incarcerated people, who make $0.14 to $0.63 per hour on average, ineligible for this waiver, meaning they must pay the $350 federal filing fee.") (alteration in original)); *see* Wex Definitions Team, *in forma pauperis*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/in_forma_pauperis (last updated Jan. 2023) ("In forma pauperis is a Latin term meaning '*in the manner of a pauper.*' A suit brought in forma pauperis allows a poor person to bring suit without incurring the costs of the suit.").

129 *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 127 (citing 28 U.S.C. § 1915(b)).

requires the "facility holding the prisoner to cooperate administratively in the process for assessing the court's statutory fee."[130] Third, an incarcerated person's lawsuit or appeal may be dismissed because a judge decided it was frivolous, malicious, or does not contain a proper claim.[131] If that happens three or more times, the incarcerated person can only file another claim if they pay the entire court filing fee upfront, unless they are "under imminent danger of serious physical injury."[132]

Last, and most salient to this Note, the PLRA sets a physical injury requirement: an incarcerated person bringing a civil action must demonstrate a threshold showing of a "physical injury" or the "commission of a sexual act (as defined in [S]ection 2246 of [T]itle 18)" before they may file suit for mental or emotional injury suffered while in custody.[133] Section 2246 of Title 18 defines "sexual act" generally as: contact between genitals; contact between the mouth and genitals; penetration of anal or genital openings with any object "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or the intentional touching, not through the clothing," of the genitals of another person, only if that person is under sixteen years old, with the same intent requirements.[134] For reference throughout this Note, the phrase "physical injury requirement" refers to the PLRA's requirement to show physical injury *or* commission of a sexual act.[135] If an incarcerated person does not meet the physical injury requirement, they may file suit for only injunctive or declaratory relief, not monetary damages.[136] Courts have consistently differed in their evaluations of what constitutes harm to indicate physical injury, making it difficult for incarcerated victims to seek reliable relief.[137]

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130 *Id.*

131 42 U.S.C. § 1997(e)(c).

132 28 U.S.C. § 1915(g); *see Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 127 (citing 28 U.S.C. § 1915(g)) (referring to this provision as the "three strikes" rule).

133 42 U.S.C. § 1997(e)(e) (alterations in original). *See* Belitz, *supra* note 1, at 294. The "sexual act" provision was not included in the original PLRA, and only in 2013, in conjunction with the Violence Against Women Act, Congress added the "commission of a sexual act" to § 1997(e)(e).

134 18 U.S.C. § 2246(2) (2022).

135 42 U.S.C. § 1997(e)(e).

136 *Id.*; *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 127 (citation omitted).

137 *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 127. *See Gomez v. Chandler,* 163 F.3d 921 (5th Cir. 1999) (allegations of cuts and abrasions satisfy physical injury requirement); *Linder v. Goord*, 196 F.3d 132 (2d Cir. 1999) (intrusive body searches qualify as physical injury); *compare to Herman v. Holiday*, 238 F.3d 660 (5th Cir. 2001) (claims of "physical health problems" by prisoners exposed to asbestos does not specify a physical injury which would permit recovery for emotional or mental damages due to fear caused by increased risk of developing asbestos-related disease); *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999) (confinement in filthy cell where exposed to mentally ill patients not physical injury).

C. Prison Rape Elimination Act

The Prison Rape Elimination Act was enacted with bipartisan support and signed into law in 2003 by President George W. Bush.[138] The PREA's goal "is to eradicate prisoner rape in all types of correctional facilities in the country."[139] Its major provisions include a "zero-tolerance standard" for prisoner sexual assault and rape;[140] collection and publication of data on prison rape by an established commission of experts (the "Commission"), who are required to provide the U.S. Attorney General with one set of "recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape[;]"[141] the subsequent enforcement of a final rule, published by the Attorney General, adopting such national standards;[142] and the Attorney General's awarding of grant funds to States to assist their "efforts to protect inmates (particularly from prison rape) and to safeguard the communities to which inmates return."[143] Additionally, the PREA mandates that the Bureau of Justice Statistics of the Department of Justice conduct annual "statistical review and analysis of the incidence and effects of prison rape," with the Review Panel on Prison Rape overseeing the project.[144] The PREA applies to any "organization responsible for the accreditation of Federal, State, local or private prisons, jails, or other penal facilities."[145]

However, the PREA's national proposed standards, recommended to the Attorney General by the Commission, were not published in the Federal Register until 2012, and the enforcement procedures included in the Act are blatantly insufficient.[146] The PREA mandates the assigned authority to complete an assessment of compliance with the adopted standards "on a regular basis"—without any greater specificity.[147] For each fiscal year, to receive the full amount receivable "for prison purposes" under a grant

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[138] *Prison Rape Elimination Act (PREA) Overview*, BUREAU JUST. ASSISTANCE, https://bja.ojp.gov/program/prison-rape-elimination-act-prea/overview (last modified Feb. 2, 2023).

[139] *Id.*

[140] Prison Rape Elimination Act, 34 U.S.C. § 30302(1) (2003).

[141] 34 U.S.C. § 30306 (alteration in original) (The Commission was ordered to be composed of nine members appointed by the government and to "carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States[.]") (alteration in original)).

[142] 34 U.S.C. § 30302(3); 34 U.S.C. § 30307.

[143] 34 U.S.C. § 30305 ("The purpose of grants under this section shall be to provide funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape.").

[144] 34 U.S.C. § 30303 (The Review Panel on Prison Rape was established within the Department of Justice and is composed of three members appointed by the Attorney General.).

[145] 34 U.S.C. § 30308.

[146] *See* Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

[147] 34 U.S.C. § 30307.

program covered by the PREA, a state must submit either proof of compliance with the national standards or merely "an assurance that the [s]tate intends to adopt and achieve full compliance" to the Attorney General.[148] If not, the only penalty is that the state's grant under the PREA will be reduced by five percent.[149] Further, in drafting the final rule adopting national standards, the Department of Justice ("DOJ") had to consider "the current fiscal climate," in which there were budgetary constraints throughout the government.[150] The PREA's Executive Summary says that the DOJ aimed to minimize the financial impact of the standards on states,[151] noting that in "recognizing the unique characteristics of individual facilities, agencies, and inmate populations, the Department has endeavored to afford discretion and flexibility to agencies to the extent feasible."[152] This concession reflects the lack of importance placed on protecting incarcerated persons under federal or state care from sexual misconduct, indicating that the budget is more important.[153] Again, the standards apply to all "facilities operated by, or on behalf of, State and local governments and the Department of Justice."[154] Although the final list of rules is over one hundred pages,[155] this Note focuses on rules that apply most directly to the following conditions: safety of confinement spaces, procedures for reporting and investigating sexual misconduct, and rehabilitative resources for incarcerated victims.[156]

III. FAILURES IN ENFORCEMENT OF THE PREA

Despite the PREA's published national standards, there are significant barriers to justice for victims of sexual misconduct within the prison

[148] *Id*. (alteration in original). Note that in 2016, this assurance option was amended to sunset on Dec. 16, 2022, but governors could still submit an emergency assurance until 2024 to receive DOJ grant funds. *PREA Amendment Justice for All Reauthorizing Act of 2016 Fact Sheet,* BUREAU OF JUST. ASSISTANCE, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jfara-fact-sheet_updated-2017.03.01.pdf (last updated Sept. 17, 2019).

[149] 34 U.S.C. § 30307.

[150] *National Standards to Prevent, Detect, and Respond to Prison Rape, Executive Summary*, DEP'T JUST. 2 (May 16, 2012), http://www.ncdsv.org/images/DOJ_ExecSummNationalStandardsPreventDetectRespondPrisonRape_5-16-2012.pdf. Note that the PREA also ordered the Commission and the Attorney General not to propose or establish a national standard "that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 34 U.S.C. §§ 30306-07.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 3; Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

[155] *See* 28 C.F.R. § 115.

[156] *See infra* Part III.

system.[157] As this Part will detail, and Part IV's proposal will continue to address, the primary obstacle is facilities that fail to provide safe confinement spaces through sexual misconduct prevention policies, lack reporting or investigation procedures for incidents, and deprive incarcerated victims of rehabilitative services.[158] Without this private cause of action available to incarcerated people, the United States will not achieve the PREA's intended zero-tolerance standard.[159] Since the PREA does not provide this avenue for justice, a finding of failure to enforce the standards outlined in the PREA's final publication does not yet substantiate an incarcerated person's claim.[160] They still must file through the Prison Litigation Reform Act and meet its strict requirements,[161] which is unlikely to occur.[162]

A. Prevention

For the purpose of preventing sexual abuse and harassment,[163] the PREA's final rule's national standards include, but are not limited to, orders for agencies to: have a written policy mandating zero tolerance;[164] employ or designate a PREA coordinator to oversee agency efforts;[165] make "best efforts" to execute "a staffing plan that provides for adequate levels of staffing, and where applicable, video monitoring[;]"[166] not hire or promote anyone who has engaged in sexual abuse (not including sexual harassment) in the past;[167] and objectively screen prisoners for risk of sexual abuse and use this information in making assignments within facilities.[168] Lastly, the rules require that agencies train employees on various relevant topics, including its zero-tolerance policy, incarcerated people's rights, and how to interact appropriately with prisoners.[169] However, as case law demonstrates, these virtually unenforceable standards do not secure adequate facility efforts to prevent sexual misconduct.[170]

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157 *See* Palacious, *supra* note 38.

158 *See infra* Part IV.

159 *See* Prison Rape Elimination Act, 34 U.S.C. § 30302 (2003); *see infra* Part IV.

160 *See* 28 C.F.R. § 115.

161 *See* Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013).

162 *See* Fenster & Schlanger, *supra* note 123; *see supra* Part II, Section B.

163 *National Standards to Prevent, Detect, and Respond to Prison Rape*, *supra* note 150.

164 28 C.F.R. § 115.11.

165 *Id.*

166 28 C.F.R. § 115.13 (alteration in original).

167 28 C.F.R. § 115.17.

168 28 C.F.R. § 115.41; *National Standards to Prevent, Detect, and Respond to Prison Rape*, *supra* note 150.

169 28 C.F.R. § 115.31.

170 *See infra* Part III, Sections A-C.

Meeting the standard set in *Farmer v. Brennan* has proven challenging for incarcerated persons for whom the PREA has not afforded adequate protection.[171] When filing claims based on insufficient prevention, plaintiffs must typically show that a defendant prison official had a culpable state of mind,[172] meaning that the official was deliberately indifferent, per the test adopted in *Farmer*,[173] as previously discussed in Part II.[174] For example, in *Rudd v. Tatum*, incarcerated women raped by the same prison guard, William Strawn, brought a claim against a supervisory defendant, in part alleging deliberate indifference because he failed to create any agency policies to prevent sexual assault.[175] The plaintiffs testified that Strawn pressured them to perform sexual favors, asked them to expose their breasts to him, and raped them.[176] The U.S. District Court for the Northern District of Florida held that this supervisory defendant was not liable for failing to create policies to prevent those actions because Strawn's criminal behavior was so evidently wrong; Strawn's knowledge or lack thereof on the PREA was irrelevant.[177] Another legal critique noted that "[t]his ruling pretended that [the] PREA requires only that agencies and facilities clarify [with their staff] whether 'ambiguous' conduct might constitute sexual abuse, ignoring the comprehensive findings about ways to prevent deliberate rape."[178]

In *Jenkins v. Hennepin*, the U.S. District Court for the District of Minnesota decided a prison sexual assault case in favor of the defendants, which included the county, the supervisor of the jail's nursing staff, and two detention deputies.[179] Philander Jenkins, the incarcerated plaintiff, alleged that he had a verbal altercation with these two deputies, after which they sexually assaulted him.[180] In court, Jenkins claimed that the county holding him was deliberately indifferent by failing to implement a prevention policy for sexual assault at the facility even though they were aware of the PREA.[181] The facility had established a policy regarding the use of force, but not

171 For supportive case law, *see* Arkles, *supra* note 40, at 811-14; *see also* Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301-09 (2003).

172 For supportive case law, *see* Arkles, *supra* note 40, at 811-14.

173 *See* Farmer v. Brennan*,* 511 U.S. 825 (1994).

174 *See supra* Part II, Section A.

175 Rudd v. Tatum, No. 5:11-CV-373-RS-CJK, 2013 WL 4017333 (N.D. Fla. Aug. 7, 2013); Arkles, *supra* note 40, at 814 (citation omitted).

176 *Rudd*, 2013 WL 4017333 at 5-6.

177 Arkles, *supra* note 40, at 814 (citing *Rudd*, 2013 WL 4017333 at 6.).

178 *Id.* (alterations in original) (citation omitted).

179 Jenkins v. County of Hennepin, Minn., 2009 WL 3202376, 1 (D.Minn. 2009).

180 *Id.*

181 *Id.* ("In other words, Jenkins claims that, notwithstanding the County's policies regarding the use of force, he was sexually assaulted because the ADC had no established *rape* policy, and as a result his due-process rights were violated.").

specifically of rape.[182] Here, Jenkins also failed to meet the objective burden, despite the testimony that the facility was "generally aware" of the requirements of the PREA, so the claims were dismissed.[183] The court granted the defendants summary judgment because Jenkins did not offer "sufficient evidence that they consciously understood the risk of rape and deliberately chose not to create a policy."[184]

Lastly, in *Surratt v. Walker,* the plaintiff, Brandy Surratt, alleged that a prison guard sexually assaulted her—after he had assaulted other incarcerated persons in the same facility, which had already been reported to prison officials.[185] Surratt posited that the prison officials were deliberately indifferent to this risk because they had "specific knowledge from past complaints against the officer . . . [and] general knowledge from PREA and other sources."[186] However, the U.S. District Court for the Central District of Illinois still granted summary judgment for the defendants, reasoning that these complaints were unsubstantiated and that general knowledge of PREA did not prove deliberate indifference.[187]

The cases mentioned above demonstrate how the PREA regulations, which do not yet grant incarcerated people any specific rights and are not clearly established in law, do not ensure that facilities enact and carry out adequate prevention policies.[188] Although the PREA standards mandate that facilities create zero-tolerance policies and procedures for enforcement, if they do not carry out such prevention planning, they are not held accountable for this failure.[189]

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[182] *Id.*

[183] *Id.* at 3

> [Jenkins] has proffered no evidence indicating that the County's policymakers were aware of a history of rapes at the ADC, such that the need for a rape policy was 'obvious.' [. . . .] [H]e has proffered very little in the way of evidence at all, relying on nothing more than his statement to authorities following the alleged rape and the testimony of a detention sergeant who was generally aware of the Prison Rape Elimination Act. Without any evidence that County policymakers knew, or should have known, about rape problems at the ADC, Jenkin's claim simply cannot stand.

Id. (alterations in original)).

[184] Arkles, *supra* note 40, at 813 (citation omitted); *Jenkins*, 2009 WL 3202376, at 3.

[185] Arkles, *supra* note 40, at 825 (alteration in original) (citing 08-01228, 2011 WL 1231312 at 3 (C.D. III. Mar. 29, 2011)).

[186] *Id.* (alteration in original) (citing 08-01228, 2011 WL 1231312 at 3, 5 (C.D. III. Mar. 29, 2011)).

[187] *Id.* (citing 08-01228, 2011 WL 1231312 at 3 (C.D. III. Mar. 29, 2011)).

[188] *See supra* Part III, Section A; *see* Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301-09 (2003).

[189] *See supra* Part III, Section A; *see* 34 U.S.C. §§ 30301-09.

B. Reporting and Investigating

As of March 2023, and as explained in Part II of this Note, incarcerated survivors of sexual assault who aim to bring related civil claims are required to fulfill the elements in the PLRA.[190] The PLRA's exhaustion requirement is particularly problematic, considering the generally unavailable and insufficiently safe procedures for incarcerated people to report such claims, and similarly lacking procedures for investigating and handling the claims brought to administrations.[191] An affirmative defense, failure to exhaust, is available to defendants and prohibits incarcerated persons from bringing federal claims "until such administrative remedies as are available are exhausted."[192] When a court finds that an incarcerated person has failed to exhaust administrative remedies, that person's unexhausted claims must be dismissed.[193] Some circuits even "apply a 'total exhaustion' rule, under which no part of the suit may proceed if any single claim in the action is not properly exhausted."[194] The standards of exhaustion vary, as incarcerated people are required to comply with their specific facility's requirements: "[t]he level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."[195] Failure to comply precisely with the facility's procedural requirements, which is often very challenging, will result in a procedural default of the claim.[196]

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190 *See* Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013); *see supra* Part II.

191 Fathi, *supra* note 63. One basic problem with the PLRA's exhaustion requirement is that prison officials are typically responsible for designing the grievance system that incarcerated persons are required to exhaust prior to filing suit.

> This creates obvious incentives for prison officials to design grievance systems with short deadlines, multiple steps, and numerous technical requirements. . . . One recent case ruled that a prisoner whose complaint was that he was threatened and physically assaulted by a corrections officer failed to exhaust because he did not first discuss the issue with the officer who had allegedly assaulted him.

Id. (citing Sanders v. Bachus, 2008 WL 54228571, at 5 (W.D. Mich. 2008)).

192 42 U.S.C. § 1997(e)(a); *see* Fuqua v. Ryan, 890 F.3d 838, 844 (9th Cir. 2018) (addressing that the exhaustion requirement is an affirmative defense for which the burden lies with the defendants to plead and prove).

193 Jones v. Bock, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.") (citation omitted)).

194 *Id.* at 206 (citations omitted) ("Other circuits reject total exhaustion altogether, instead dismissing only unexhausted claims and considering the rest on the merits.") (citation omitted)).

195 *Id.* at 218 (alteration in original).

196 Spruill v. Gillis, 372 F.3d 218, 227-32 (3d Cir. 2004). Each incarcerated person's case must be evaluated individually, in part because a prisoner is not expected to exhaust unavailable administrative remedies, and a remedy may be available "officially on the books [of the facility]" but "not capable of use to obtain relief." Ross v. Blake, 578 U.S. 632, 643 (2016) (alteration in original) (citation omitted). The Supreme Court has identified three such situations: officers are "unable or consistently unwilling to

The PLRA's statutory exhaustion requirement is partly why it is essential for correctional agencies to have explicit, transparent, and publicized reporting and investigating procedures.[197] The PREA provides a unique standard for this exhaustion requirement; aimed at ensuring that allegations are appropriately heard and evaluated, it directs facilities to follow specific guidelines for creating administrative remedy procedures addressing prisoners' claims of sexual abuse.[198] This PREA standard enumerates those particular requirements, including "establish[ed] procedures for the filing of an emergency grievance alleging that a resident is subject to a substantial risk of imminent sexual abuse[,]"[199] no time limit on when prisoners may submit complaints;[200] and ensuring that grievances may be submitted "without submitting it to a staff member who is the subject of the complaint[.]"[201] However, this regulation does not explicitly direct administrations on how to implement these standards, nor does it guide them on its legal and practical implications.[202]

A common issue in correctional agencies is that these procedures for administrative remedies are unnecessarily complex, challenging, and almost impossible to exhaust.[203] Importantly, there is nothing in this standard of the PREA that discusses making this information accessible and available to the facility population.[204] Further, the PLRA explicitly states that a plaintiff's facility's failure to adopt administrative remedies does not excuse the exhaustion requirement.[205] The PREA even exempts agencies from the orders regarding specific procedural requirements if the agencies do "not have administrative procedures to address inmate grievances regarding

provide any relief to aggrieved inmates;" an administrative scheme is "so opaque that it becomes, practically speaking, incapable of use;" prison administrators prevent "inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation[,]" *id*. at 644 (alteration in original).

197 *See* 42 U.S.C. § 1997(e).

198 Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.52 (2012).

199 28 C.F.R. § 115.52 (f)(1) (alterations in original).

200 28 C.F.R. § 115.252(b)(1).

201 28 C.F.R. § 115.252(c)(1) (alteration in original).

202 *See* 28 C.F.R. § 115.252.

203 *See Human Rights Watch Comments on the National Standards to Prevent, Detect, and Respond to Prison Rape, proposed by the Dept. of Just. On Feb 3, 2011*, HUM. RTS. WATCH, https://www.hrw.org/sites/default/files/related_material/Human%20Rights%20Watch%20Comments%20on%20Prison%20Rape%20Standards.pdf (last visited Feb. 18, 2022) ("All too often, the procedures for administrative remedies are needlessly complex and burdensome and have extremely short deadlines. . . . The smallest mistake can preclude the inmate from having her day in court.") (alteration in original)); *see also* Fathi, *supra* note 63 ("But under the PLRA, it is common for courts to conclude that prisoners have failed to exhaust because they made minor technical errors in the grievance process.").

204 28 C.F.R. §115.52.

205 Prison Litigation Reform Act, 42 U.S.C. § 1997(e)(b) (2013).

sexual abuse."[206] In plain terms, even if an incarcerated person's facility does not have any procedure for reporting—and because such lack of procedure is legally permissible—the plaintiff still carries the burden of showing that they exhausted all available options.[207]

Regardless of these issues, there are some essential purported guarantees included in the final rule, in addition to the ones aforementioned, such as the provisions of "multiple internal ways for inmates to privately report"[208] and acceptance of all "reports made verbally, in writing, anonymously and from third parties[.]"[209] The PREA also requires that, upon receiving a report, agencies ensure that "an administrative or criminal investigation is completed for all allegations of sexual abuse and harassment[,][210] and a policy is in place to govern the conduct of those investigations.[211] Lastly, the PREA orders that agencies "follow a uniform evidence protocol[,]"[212] offer all victims access to forensic medical examinations,[213] and "attempt to make available to the victim a victim advocate from a rape crisis center."[214]

In the case of *Allen v. Simon*—an example of insufficient agency procedures for the reporting and investigation of sexual misconduct—an incarcerated man, Gregory K. Allen, Jr., was sexually assaulted by his cellmate, Ellis.[215] Allen asserted that Ellis used other convicted persons and the defendant Corrections Officer to watch him and prevent him from reporting what happened.[216] After three days, he could finally tell a responding guard that he needed help, but no help came; Allen and Ellis remained in the cell together, and Ellis proceeded to rape him at knifepoint.[217]

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206 28 C.F.R. § 115.252(a).

207 *See* 42 U.S.C. § 1997(e)(b).

208 28 C.F.R. § 115.51(a) (alteration in original) ("The agency shall provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.").

209 28 C.F.R. § 115.51(e) (alteration in original).

210 28 C.F.R. § 115.22(a) (alteration in original).

211 28 C.F.R. § 115.22(e).

212 28 C.F.R. § 115.21(a) (alteration in original) ("To the extent the agency is responsible for investigating allegations of sexual abuse, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.").

213 28 C.F.R. § 115.21(c) ("The agency shall offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate.").

214 28 C.F.R. § 115.21(d). Note that the language used here—"shall attempt"—allows for a dangerously broad reading of this important requirement. *Id.*

215 Allen v. Simon, No. 4:20CV106-JMV 2, 2022 WL 374804 (N.D. Miss. Feb. 7, 2022).

216 *Id.*

217 *Id.*

Days later, Allen went to the medical unit and told a nurse, Nurse Brown, that he had been raped.[218] Brown visually examined Allen and, because she did not believe him, she did not collect physical evidence, take him to an outside facility for examination, nor perform testing for sexually transmitted diseases.[219] Following this exam, Allen met with two other defendants, who "told him that they believed the sexual encounter between him and Ellis was consensual."[220] Allen was then transferred to another cell and met with PREA investigators, none of whom believed that he was raped, telling him in various ways "that he was lying, that the encounter was consensual, that it was his fault, and that he would likely be assaulted for reporting Ellis."[221]

In his Eighth Amendment claims, Allen alleged that the investigators and staff failed to follow the facility's policy or the PREA guidelines.[222] The U.S. District Court for the Northern District of Mississippi dismissed Allen's case, opining that his allegations were insufficient because the PREA does not provide a private cause of action, and a prison may not be held liable under the PLRA for failing to follow its procedures.[223] Allen's allegations were "dismissed for failure to state a claim upon which relief could be granted."[224] The court's opinion failed to acknowledge the applicable provisions of the PREA, nor did it provide any form of an order for the prison to comply with such procedures going forward.[225] Allen was not granted the proper investigation, protection, or respect that the PREA, and more fundamentally, justice, demanded because of the PREA's current lack of a private cause of action and, therefore, an enforcement mechanism.[226]

Moreover, aside from the legal implications of filing a grievance, it is crucial to recognize the turpitudinous consequences that incarcerated people may face if they report such insufficiencies and incidences: particularly retaliation, commonly in the forms of continued abusive behaviors and forced segregation.[227] Strawberry Hampton and Denashio Tester, two transgender women who were cellmates incarcerated in Illinois, threatened to report their shared experiences of sexual abuse by facility staff members, and they

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[218] *Id.* at 3.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.* at 9 (citations omitted); *see* Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301-09 (2003); *see* 42 U.S.C. § 1983 (1996).

[224] Allen v. Simon, No. 4:20CV106-JMV 2, 9 2022 WL 374804 (N.D. Miss. Feb. 7, 2022).

[225] *See id.*

[226] *See id.*

[227] *See* Martyniuk, *supra* note 71.

experienced such consequences.[228] The night Hampton and Tester threatened to report, they were pulled out of their cell by sixteen officers, who brutally beat them.[229] When Hampton filed a PREA complaint about this abuse with mental health staff at the facility, the internal affairs officer told her that if she dropped it, she and Tester could remain cellmates, but if not, she would be "'buried in segregation,' where she would not be fed or allowed to shower."[230] Hampton still refused to drop her complaint and was put in segregation for three months, where she was continually sexually and physically harassed.[231] Hampton eventually received a letter from the warden stating that her PREA allegations were unsubstantiated because she had no evidence or witnesses.[232] Hampton found legal counsel and endured a lengthy trial in which she prevailed and received a settlement.[233] Despite this, she remains in segregation, continues to suffer sexual abuse, and has been denied access to mental health treatment.[234] The fear of retaliation—like Hampton and many others have suffered—keeps survivors and witnesses of violence from coming forward and reporting.[235]

Since the DOJ published the PREA's national standards in the Federal Register in 2012,[236] the level of reporting has grown dramatically, but the number of incidents determined to be unfounded has also grown alongside them.[237] The executive director of Just Detention International, a leading advocacy organization with the mission of curbing prison rape, has stated that "[c]orrections officials often start with the assumption that a report is false, particularly when it's against a colleague[.]"[238] In addition to the elevated doubt, scrutiny, risk of retaliation, and unreasonably high legal standards placed upon their reports, many incarcerated victims face other obstacles in coming forward that are similar to those of victims in the civilian community: shame, self-blame, and a belief that the incident wasn't significant enough to

228 Victoria Law, *#MeToo Behind Bars: When the Sexual Assaulter Holds the Keys to Your Cell*, TRUTHOUT (Mar. 18, 2018), https://truthout.org/articles/metoo-behind-bars-when-the-sexual-assaulter-holds-the-keys-to-your-cell/.

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*; *see supra* Part I.

236 *See* Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

237 Alysia Santo, *Prison Rape Allegations Are on the Rise*, THE MARSHALL PROJECT (July 25, 2018), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise.

238 *Id.* (alterations in original).

report.[239] The DOJ performs a yearly analysis of violent crime, and in its 2020 report, it found that only 22.9% of rapes and sexual assaults are reported to the police.[240] The conditions of incarceration and prison heighten all of these threats and fears; survivors of sexual misconduct are detained either alongside their abusers, or their abuser has the ultimate control of the power wielded as a facility staff member—including the key to their freedom.[241] The enforcement of PREA standards for reporting and investigating sexual misconduct is essential to preserve the mental and physical safety of incarcerated people, as well as their Eighth Amendment protections.[242]

C. Rehabilitative Services

Under the PREA standards, facilities are required to "provide inmates with access to outside victim advocates for emotional support services related to sexual abuse[,]"[243] and at least attempt to enter into agreements with community service providers to offer such services.[244] The PREA standards also state that facilities must provide: "medical and mental health evaluation and, as appropriate, treatment to all inmates who have been victimized by sexual abuse[;]"[245] pregnancy tests;[246] and "tests for sexually transmitted infections as medically appropriate."[247]

In *Bowens v. Employees of the Department of Corrections*, an incarcerated plaintiff, Montez M. Bowen, asserted Eighth Amendment claims alleging that he was repeatedly sexually abused by correctional officers and denied access to mental health treatment.[248] Bowen's complaint pointed to the PREA's policies regarding access to mental health care, but

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239 Cameron Kimble, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. JUST. (Oct. 4, 2018), https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported.

240 Rachel E. Morgan & Alexandra Thompson, *Criminal Victimization, 2020*, BUREAU JUST. STAT 7 (Oct. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cv20.pdf.

241 *See* Law, *supra* note 228; *see also* Mariner, *supra* note 62, at 99 ("Prisoners' natural reticence regarding rape is strongly reinforced by their fear of facing retaliation if they 'snitch.' . . . . [P]risoners' failure to report abuses is directly related to the prison authorities' inadequate response to reports of abuse.") (alterations in original)).

242 *See supra* Part III, Section B.

243 Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.53(a) (2012).

244 28 C.F.R. § 115.53(c).

245 28 C.F.R. § 115.83(a) (alteration in original). Note the subsequent limitation: "The facility shall provide such victims with medical and mental health services *consistent with the community level of care*." 28 C.F.R. § 115.83(c) (alteration in original) (emphasis added).

246 28 C.F.R. § 115.83(d) ("Inmate victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.").

247 28 C.F.R. § 115.83(f).

248 Bowens v. Employees of the Dep't of Corr., No. CV 14-2689, 2016 WL 3269580, 1 (E.D. Pa. 2016).

his claims were dismissed with prejudice because the PREA does not provide a private cause of action.[249]

As discussed in Part I of this Note, regardless of the setting, experiencing sexual misconduct is traumatic, but being subjected to it during incarceration can be especially devastating because of many factors: a total loss of control; increased safety risks; and limited access to support, medical and mental health care, and other rehabilitative services.[250] Many incarcerated survivors develop "anxiety, depression, post-traumatic stress disorder, rape trauma syndrome, and suicidal ideation."[251] According to one study of state prison facilities, seventy-three percent of female prisoners and fifty-five percent of male prisoners were diagnosed with or treated for a mental illness in a twelve-month period.[252] Further, upon release, brutalized individuals are more likely to commit crimes, and they are less likely to integrate successfully into the community and maintain stable employment.[253] Without proper rehabilitative care, the many people who have been victims of sexual misconduct during incarceration are not given the resources to heal, and the criminogenic nature of prison is reinforced.[254]

IV. PROPOSAL FOR THE PREA TO CREATE A PRIVATE CAUSE OF ACTION

Congress should amend the Prison Rape Elimination Act to include a private cause of action, enabling incarcerated persons, as private individuals, to seek and obtain judicial remedies for violations of the PREA, against both their perpetrators and the facilities in which they are held, who may fraudulently claim to comply with the PREA's standards. Congress should do so by offering three specific available claims in alignment with the primary issues previously discussed in Part III: (1) failure to provide a safe confinement space through sexual misconduct prevention policies; (2) failure

[249] *Id.* at 3.

[250] Colette Marcellin & Evelyn F. McCoy, *Preventing and Addressing Sexual Violence in Correctional Facilities*, URBAN INST. (May 2021), https://www.urban.org/sites/default/files/publication/104230/preventing-and-addressing-sexual-violence-in-correctional-facilities.pdf.

[251] *Id.*

[252] Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, BUREAU JUST. STAT. (Sept. 2006), https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf.

[253] Prison Rape Elimination Act, 34 U.S.C. § 30301 (2003) ("They are thus more likely to become homeless and/or require government assistance.").

[254] *See* Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, LOY. CRIM. JUST. & CRIMINOLOGY: FAC. PUBL'N & OTHER WORKS, 2 (July 2017), https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer ("At the individual level, there is also some evidence that incarceration itself is criminogenic, meaning that spending time in jail or prison actually increases a person's risk of engaging in crime in the future.") (citations omitted)).

to provide sufficient procedures for the reporting and investigation of claims; and (3) failure to provide rehabilitative services for victims.[255]

The Religious Land Use and Institutionalized Persons Act of 2000 serves as an example of a private cause of action available to incarcerated persons, protecting their First Amendment right to religious freedom,[256] and this proposal would follow similarly. If implemented, incarcerated victims of sexual misconduct could seek judicial remedies based on violations of the PREA. Congress relied on its Commerce and Spending Clause powers to pass the RLUIPA, which orders that "any state or local government accepting federal financial assistance is prohibited from imposing substantial burdens on the religious exercise of individuals who are confined to an 'institution.'"[257] The RLUIPA provides for a private cause of action, authorizing persons to assert violations of the Act as a claim or defense to obtain "appropriate relief against a government."[258] However, importantly, in *Sossamon v. Texas*, the Supreme Court held that appropriate relief "does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can 'be certain that the State in fact consents' to such a suit."[259] As a result, the petitioner's claims for monetary relief were barred by the doctrine of sovereign immunity.[260] Therefore, to avoid this issue with the proposed private cause of action amendment to the PREA, Congress must also include an unambiguous waiver of sovereign immunity extended to monetary claims and other types of relief, and "[t]he State's consent to suit

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255 *See supra* Part III.

256 *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2012)

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution — (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc.

257 *The Religious Freedom Restoration Act: A Primer*, CONG. RSCH. SERV. (Apr. 3, 2020), https://crsreports.congress.gov/product/pdf/IF/IF11490; *see* 42 U.S.C. §§ 2000cc–2000cc-5; *see also* Holt v. Hobbs, 574 U.S. 352 (2015) (holding that the State Department's grooming policy substantially burdened the Muslim's prisoner's exercise of religion).

258 42 U.S.C. § 2000-cc-2 ("A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."). Note that this does not contemplate recovering damages from individuals.

259 Sossamon v. Texas, 563 U.S. 277, 285-86 (2011) (citing College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999)).

260 *Id*. at 1653. Sovereign immunity is similar to qualified immunity; it is state immunity under the Eleventh Amendment, barring suits against states in state and federal courts. Alden v. Maine, 527 U.S. 706 (1999) ("States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution.")

must be 'unequivocally expressed' in the relevant statute's text."[261] By including this waiver, Congress would also empower plaintiffs to potentially recover monetary damages against states under the PREA, unlike the RLUIPA.[262]

Since the Supreme Court has not explicitly addressed this issue, the case law is unclear regarding whether the RLUIPA permits suits against officials in their individual capacities.[263] Assuming the private cause of action does not provide for such liability, the defense of qualified immunity is unavailable to defendants because it is an official capacity action; thus, the lawsuit is against the state rather than the individual.[264] This would also be the case for the proposed amendment to the PREA. However, if plaintiffs pursue claims against defendant officials for personal liability in their individual capacities, they could still also proceed under Section 1983.[265] For those claims, though, defendants may still be entitled to the affirmative defense of qualified immunity, which would provide another obstacle for plaintiffs.[266]

There is still significant and controversial change that needs to be implemented in the pursuit of justice for incarcerated persons.[267] This proposed amendment would not affect the application of the other provisions of the PLRA, so, unfortunately, incarcerated persons would still be required to exhaust all administrative remedies and pay court filing fees.[268] Further, it is likely they would still not be able to recover compensatory damages in the absence of the showing of a resulting physical injury or the commission

261 *Sossamon*, 563 U.S. at 277 (alteration in original) (citation omitted) ("Congress, by using phrase 'appropriate relief,' did not clearly manifest its intent to include damages remedy[.]").

262 See *id.* to distinguish between this proposed amendment to the PREA and the arguments.

263 Smith v. Allen, 502 F.3d 1255 (11th Cir. 2007) (citations omitted) (acknowledging the circuit split and holding that the RLUIPA's provision for "recovery only extends to an action brought against state officials in their official capacities[.]").

264 Kentucky v. Graham, 473 U.S. 159, 167 (1985) ("The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.").

265 42 U.S.C. § 1983 (1996).

266 *See Kentucky*, 473 U.S. at 167; *see* Harlow v. Fitzgerald, 457 U.S. 800 (1982). One would hope that the increased enforcement of the PREA would result in more judicial findings that the Act is comprised of clearly established rights that a reasonable person would know, and thus, qualified immunity would be less available as an affirmative defense in the context of PREA violations.

267 *See* Ram Subramanian, Lauren-Brooke Eisen, Taryn Merkl, Leily Arzy, Hernandez Stroud, Taylor King, Jackie Fielding, & Alia Nahra, *A Federal Agenda for Criminal Justice Reform*, BRENNAN CTR. JUST. (Dec. 9, 2020), https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform ("From policing to prisons, the Biden administration and Congress must act to make our systems of public safety less punitive and more equitable.") ("[This document] outlines an affirmative agenda that would help slash America's high incarceration rate, shrink the wide reach of the justice system, help ensure that people in the system are treated humanely, assist people in rehabilitation and reentry, and reduce racial disparities in the process[.]") (alterations in original)).

268 *See* Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013); *see also supra* Part II, Section B.

of a "sexual act" as limited by definition in Section 2246 of Title 18;[269] they would be limited to claims of injunctive and declaratory relief.[270] This Note supplementarily argues that the "PLRA should not be construed to require physical harm as a predicate for the recovery of full compensatory damages"[271] under the PREA. However, that topic is another separate but related issue of great substance for Congress to address in future legal reform.[272]

The proposed amendment to the PREA would be a monumental step forward, as it would significantly broaden the range of permissible cases under the PLRA to include that outside of Title 18's limited definition of a "sexual act."[273] If incarcerated persons were empowered to bring claims with such violations of the PREA, they would receive remedies for the safety they were deprived of while in federal care, and facilities would be more incentivized to enforce the PREA's policies of prevention because of this added liability.[274] Higher levels of enforcement of the PREA's standards regarding appropriate reporting and investigative methods resulting from this amendment would also be extremely impactful.[275] This would likely provide for more accurate reporting statistics collected by the DOJ, a safer space for victimized people in confinement, and a decrease in sexual misconduct of all kinds.[276] Lastly, ensuring that incarcerated victims receive proper rehabilitative care would decrease recidivism, thereby working towards breaking this nation's violent cycle of mass incarceration.[277]

269 42 U.S.C. § 1997(e)(e); *see supra* Part II, Section B.

270 18 U.S.C § 2246(2) (2022); *see* 42 U.S.C. § 1997(e); *see supra* Part II, Section B.

271 This argument has also been applied to the RLUIPA, which shares a challenge seen in many cases of sexual misconduct: non-physical or invisible injury is statutorily recognizable. Jennifer D. Larson, *RLUIPA, Distress, and Damages*, 74 U. CHI. L. REV. 1443, 1444 (2007) ("Because violations of the right to freely exercise one's religion seldom cause physical injury, it is not clear whether or when prisoners suing under RLUIPA may recover compensatory damages when their statutory rights are violated.") ("This Comment argues that PLRA should not be construed to require physical harm as a predicate for the recovery of full compensatory damages *under RLUIPA*.") (emphasis added)).

272 *See id*.

273 *See* 18 U.S.C § 2246(2); *see* 42 U.S.C. § 1997(e).

274 *See supra* Part III, Section A.

275 *See supra* Part III, Section B.

276 *Id.*

277 *See Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, DEP'T JUST. (Mar. 6, 2017), https://www.justice.gov/archives/prison-reform ("By focusing on evidence-based rehabilitation strategies, these reforms touch virtually every aspect of the federal prison system[.]") (alteration in original)); *see* Prison Rape Elimination Act, 34 U.S.C. § 30301(14) (2003); *see supra* Part III, Part C.

A. Constitutionality

This Note's proposed amendment to the PREA, like the RFRA[278] and the RLUIPA,[279] would undoubtedly be challenged with claims of unconstitutionality.[280] However, this amendment is constitutional under the Spending Clause,[281] Commerce Clause,[282] and Sections One[283] and Five[284] of the Fourteenth Amendment.

i. Spending Clause

First, under the Spending Clause, Congress has the power to require states to comply with federal directives as a condition of receiving federal funds, but "exercise of the power is subject to certain restrictions, including that it must be in pursuit of 'the general welfare.'"[285] Congress must also condition states' receipt of federal funds unambiguously,[286] require such funds to relate "to the federal interest in particular national projects or programs[,]"[287] and assure that such funds are not so significant as to amount to coercion.[288] Lastly, the conditions of those funds should not violate any other constitutional provision.[289] The PREA was already ruled constitutional when Congress passed it, and this proposed amendment would not alter the manner of funds, as compliance by corrections agencies would still be voluntary and not coercive.[290] The amendment would only burden facilities

278 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-bb4 (1993).

279 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

280 See Larson, *supra* note 271, for a discussion of constitutional challenges to and of the PLRA, the RLUIPA, and the RFRA; see City of Boerne v. Flores, 521 U.S. 507, 508 (1997), for the invalidating challenge to the RFRA; see Sossamon v. Texas, 563 U.S. 277 (2011), for a challenge to the RLUIPA.

281 *See* U.S. CONST. art. I, § 8, cl. 1; *see infra* Section IV, Part A(i).

282 *See* U.S. CONST. art. I, § 8, cl. 3; *see infra* Section IV, Part A(ii).

283 *See* U.S. CONST. amend. XIV, § 1; *see infra* Section IV, Part A(iii).

284 *See* U.S. CONST. amend. XIV. § 5; *see infra* Section IV, Part A(iii).

285 South Dakota v. Dole, 483 U.S. 203 (1987). "The Constitution empowers Congress to 'lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defense and general Welfare of the United States.'" *Id.* at 206 (quoting Art. I § 8, cl. 1). "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Id.* at 207 (citation omitted).

286 *Id.* at 203 (citations omitted). "[I]f Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation[.]" *Id.* at 207 (alterations in original) (citation omitted).

287 *Id.* at 207 (alteration in original) (citation omitted).

288 *See id.* at 211 ("Our decisions have recognized that in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'") (citation omitted)).

289 *Id.* at 208 ("Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.") (citations omitted)).

290 *See* Prison Rape Elimination Act, 34 U.S.C. § 30307(e)(2) (2003).

and employees who already claim to comply with the Act, who are aware that they are at risk of losing five percent of federal grant funding if they fail to certify as such.[291] Instead of audits every three years as the only measure of this financial incentive, this amendment would increase accountability by allowing incarcerated people to report violations by correctional staff. [292] Further, this accountability would support federal interests because increased rehabilitation and decreased sexual victimization in prison will notably benefit the public good.[293]

ii. Commerce Clause

This proposed amendment is also constitutional under the Commerce Clause, which gives Congress the power to regulate interstate and foreign commerce.[294] In the text of the PREA, Congress asserts that "the effectiveness and efficiency of these federally funded grant programs are compromised by the failure of State officials to adopt policies and procedures that reduce the incidence of prison rape[.]"[295] This specific PREA section goes on to detail several key findings, including that high rates of prison rape have a significant effect on interstate commerce because it substantially increases the following: the costs of administering prison systems; the levels of violence within prisons; physical and mental health care expenditures, both inside and outside of prison systems, by substantially increasing rates and spread of HIV, AIDS, tuberculosis, hepatitis B and C, post-traumatic stress disorder, depression, suicide, and several other diseases; "the risks of recidivism, civil strife, and violent crime" by victims of prison rape; and "interracial tensions and strife within prisons and, upon release of perpetrators and victims, in the community at large."[296] Just as these findings justified the PREA under the Commerce Clause in 2003, they would justify

[291] *See id.*; *see also* Palacious, *supra* note 38 ("The primary means by which PREA attempts to ensure compliance by the states is through a financial incentive. A state is at-risk of losing 5% of federal grant funding 'for prison purposes' if it fails to certify that it is in full compliance with PREA.").

[292] *See* Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.401 (2012) (requiring all covered confinement facilities to be audited at least once during every three-year cycle).

[293] The high incidence of prison sexual misconduct also increases the costs of administering prison systems, the public risk of sexually transmitted diseases, the rates of serious mental illnesses among all incarcerated people, and subsequent increased medical costs, and the risk of violence and recidivism. 34 U.S.C. § 30301 (detailing several findings that support the conclusion that sexual victimization in prison endangers and harms the public welfare); *see infra* Part IV, Section C.

[294] *See* U.S. CONST. art. 1, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]") (alteration in original)).

[295] 34 U.S.C. § 30301(14) (alteration in original).

[296] 34 U.S.C. § 30301(14)-(15).

this proposed amendment, which would further reduce these consequences, thus benefitting interstate commerce.[297]

iii. Fourteenth Amendment

Lastly, and likely most controversially, this amendment is constitutional under the Fourteenth Amendment's Sections One[298] and Five.[299] Section One includes the Due Process Clause, which restricts states from "depriv[ing] any person of life, liberty, or property, without due process of law; [or denying] to any person within its jurisdiction the equal protection of the laws."[300] Likewise, the Equal Protection Clause requires states to provide incarcerated people equal protection of the laws, "protecting them against unequal treatment on the basis of race, sex, and creed."[301] Section Five, which contains the Enforcement Clause, gives Congress the authority to, by appropriate legislation, prevent or remedy such violations of rights already recognized by the courts but not to create new rights or expand existing ones.[302] "Ratified in 1868, the Fourteenth Amendment incorporates the Cruel and Unusual Punishments Clause against the States."[303]

As clarified in *City of Boerne v. Flores*, Congress's power to enforce constitutional rights is confined to only preventative or remedial actions.[304] Changing the substance of a constitutional right exceeds Congress's enumerated enforcement power.[305] Justice Kennedy, in the *Boerne* majority opinion, wrote, "[t]here must be a congruence and proportionality between

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297 *See* 34 U.S.C. § 30302(9) (This listed purpose of the PREA is to "reduce the costs that prison rape imposes on interstate commerce."); *see also* 34 U.S.C. § 30301(14-15); *see also* U.S. CONST. art. 1, § 8, cl. 3.

298 U.S. CONST. amend. XIV, § 1.

299 U.S. CONST. amend. XIV, § 5.

300 U.S. CONST. amend. XIV, § 1 (alterations in original).

301 *Prisoners' Rights,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/prisoners%27_rights (last visited Dec. 7, 2022).

302 U.S. CONST. amend. XIV, § 5; City of Boerne v. Flores, 521 U.S. 507, 508 (1997) ("Although Congress certainly can enact legislation enforcing the constitutional right to the free exercise of religion, . . . its § 5 power 'to enforce' is only preventative or 'remedial,' South Carolina v. Katzenbach, 383 U.S. 301, 326, 86 S.Ct. 803, 817-818, 15 L.Ed.2d 769") (citation omitted)).

303 Jones v. Mississippi, 141 S.Ct. 1307, 1314 (2021).

304 *City of Boerne*, 521 U.S. at 508 (citation omitted).

305 *Id.*

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.

Id. at 519 (alteration in original).

the injury to be prevented or remedied and the means adopted to that end."[306] This finding invalidated the RFRA which was enacted before the RLUIPA, because it "contradict[ed] vital principles necessary to maintain separation of powers and the federal-state balance."[307] However, Justice Kennedy, writing for the Court, articulated an essential shortcoming of the RFRA, by which this proposal to the PREA can be distinguished.[308] The RFRA's most serious flaw was that it was "so out of proportion to a supposed remedial or preventative object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior. It appear[ed], instead, to attempt a substantive change in constitutional protections, proscribing state conduct that the Fourteenth Amendment itself does not prohibit."[309] Justice Kennedy's opinion continued to detail how the RFRA was not congruent or proportional.[310]

Critics of this Note's proposed amendment to PREA will argue that it similarly exceeds Congress's enforcement power and the precedent set by *City of Boerne v. Flores*.[311] However, this amendment is distinguishable from the RFRA in several ways, and to craft it successfully, Congress must include a number of considerations to respect this precedent and the importance of separation of powers and federal-state balance.[312] First, extensive research demonstrates the pervasive issue of sexual misconduct in prison, as detailed throughout this Note.[313] This amendment would be much more clearly "responsive to, or designed to prevent, unconstitutional behavior,"[314] since it is clear that there is a widespread pattern of sexual misconduct in prisons and jails in this country.[315] Such supportive

306 *Id.* at 508 (alteration in original) ("Lacking such a connection, legislation may become substantive in operation and effect. The need to distinguish between remedy and substance is supported by the Fourteenth Amendment's history and this Court's case law.") (citations omitted)).

307 *Id.* at 508 (alteration in original).

308 *See id.*

309 *Id.* at 509 (alterations in original).

310 *Id.* (discussing sweeping coverage, intrusion, application to every government agency and official, no termination mechanism, requirement of strict scrutiny test, and more).

311 *See id.* at 507.

312 See *id.* to read the relevant precedent and such considerations applied to the RFRA. "While preventative rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 530 (citation omitted).

313 *See* Prison Rape Elimination Act, 34 U.S.C. § 30301 (2003) (one example of such research, included as "[f]indings" within the PREA).

314 *See City of Boerne*, 521 U.S. at 509. Contrastingly, the above quoted language was used to describe the RFRA's most serious shortcoming, *id.*

315 34 U.S.C. § 30301 ("Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been assaulted in the past 20 years likely exceeds 1,000,000."); *see supra* Parts I and III.

information, including statistics and case law reflecting a legislative pattern of depriving incarcerated victims of justice, should be presented alongside, or even in the text of, the amendment.[316] Next, unlike the RFRA, this amendment would not be "proscribing state conduct that the Fourteenth Amendment itself does not prohibit[,]"[317] since incarcerated people have the constitutional rights to be free from sexual assault and live in safe conditions.[318] As mentioned previously, the principle of sovereign immunity would not be disregarded because the amendment must include an unambiguous waiver of sovereign immunity extended to monetary claims and other types of relief, and "[t]he State's consent to suit must be 'unequivocally expressed' in the relevant statute's text."[319] In order to bring a claim of a PREA violation to court, victims would still have to meet the pre-existing requirements set out in the PLRA, so Congress would not be granting any new or extended rights.[320] Indeed, in this case, Congress would prevent and remedy these rights of incarcerated victims, which, under *City of Boerne v. Flores*, is permissible.[321]

B. Opposition

The PREA passed through Congress and was approved by the President without difficulty, but that ease required significant compromises from its

316 *See City of Boerne*, 521 U.S. at 508.

317 *See id.* at 509 (alteration in original) (The RFRA's "sweeping coverage ensures its intrusion at every level of the government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

318 *See* Farmer v. Brennan, 511 U.S. 825 (1994) (holding that deliberate indifference to the substantial risk of sexual assault violates prisoners' Eighth Amendment constitutional right against cruel and unusual punishments)

> Prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must protect prisoners from violence at the hands of other prisoners. However, a constitutional violation occurs only where the deprivation alleged is, objectively, 'sufficiently serious,' . . . and the official has acted with 'deliberate indifference to inmate health or safety.'

Id. (alteration in original) (citing Wilson v. Seiter, 501 U.S. 294, 298, (1991)). *See also* 34 U.S.C. § 30301(13) ("The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution . . . . States that do not take basic steps to abate prison rape by adopting standards . . . demonstrate such indifference.") (alterations in original)); *see also* Bearchild v. Cobban, 947 F.3d 1130, 1130 (9th Cir. 2020) (holding that "any act constituting sexual assault was by definition both excessive and unnecessary and that showing of sexual assault satisfied requirement for inmate to show that prison guard acted maliciously and sadistically for purpose of causing harm[.]") (alteration in original)).

319 Sossamon v. Texas, 563 U.S. 277, 1654 (2011) (citation omitted).

320 *See* Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013). Such requirements include but are not limited to exhaustion of administrative remedies, filing fees, physical injury, and three strikes provision, *id.*

321 *See City of Boerne*, 521 U.S. at 508.

authors and supporters.[322] The two most notable compromises were the removal of the Act's ability to create a private cause of action and the abandonment of any explicit protection of the Eighth Amendment right against cruel and unusual punishment, which together "effectively eliminated the PREA's metaphorical legal teeth."[323] Republican-led moves delayed and weakened the PREA's legal development, causing the DOJ to release the final rule implementing the PREA standards only in 2012, nine years after the unanimous passing of the Act.[324]

Pat Nolan, a former California state legislator and PREA commissioner, agreed with the conservative critique that financial penalties for not complying with federal law should not be shifted to states.[325] He argued that "[t]here are so many ways states could take money supposedly meant for one thing and use it for something else. The DOJ isn't set up to understand the arcane budget processes of 50 states."[326] Also, states with non-unified correctional systems will have more difficulty ensuring that all facilities comply with the PREA standards.[327] "Wardens have complete authority over their prisons . . . one could be doing a good job, and 40 miles away another prison could be doing a terrible job—it all depends on the warden."[328] Other opponents, such as former-Vice President Mike Pence, have complained that the PREA had "too much red tape," was "counterproductive," "unnecessarily cumbersome," and "appear[ed] to have been created in a vacuum with little regard for input from those who daily operate state prisons and local jails."[329] To understand where these ideas, and more generally, indifference about prison rape, originate, public perception of the impacts of incarceration must be examined.[330] Prison rape has become normalized in social settings as a

322 Martin, *supra* note 75, at 285 (citation omitted).

323 *Id.* (citations omitted).

324 Palacious, *supra* note 38.

325 Alice Popovici, *The Battle Over PREA*, CRIME REP. (May 14, 2015), https://thecrimereport.org/2015/05/14/2015-05-the-battle-over-prea/ (alteration in original).

326 *Id.* (alteration in original).

327 *Id.*

328 *Id.* (alteration in original).

329 Dana Liebelson, *These 7 GOP Governors are Refusing to Crack Down on Prison Rape. Now the Obama Administration Is Calling Them Out.*, MOTHERJONES (May 28, 2014), https://www.motherjones.com/politics/2014/05/states-not-complying-prison-rape-elimination-act/ (alteration in original).

330 *See* Jo Yurcaba, *For Survivors of Prison Rape, Saying 'Me Too' Isn't an Option*, REWIRE NEWS GROUP (Jan. 8, 2018, 4:28 PM), https://rewirenewsgroup.com/article/2018/01/08/survivors-prison-rape-saying-isnt-option/ ("Prisons and jails haven't faced much public outrage for widespread sexual abuse problems partially because people just don't know how bad things are.") ("The speed with which legislation like PREA are implemented and whether staff perpetrators are held accountable depends largely on public outrage at the stories of prison abuse survivors."); *see* Prison Rape Elimination Act of 2003, 34 U.S.C. § 30301(12) (2003) ("Members of the public and government officials are largely

regular topic of comedy or drama in ordinary television, an accepted natural condition, perhaps even a natural consequence of incarceration, and a cause and population not worth the financial burden of fully addressing.[331] Further, there is a widespread misconception about incarcerated people: an "othering" comprised of myths, negative stereotypes, and geographic distance from the free population.[332] This cultural view on sexual abuse in prison allows critics of the PREA to distance themselves from the people their decisions affect the most: victims of sexual misconduct within imprisonment.[333]

C. Community Impact

As this Note has explained, Congress passing this proposed amendment to the PREA would open avenues to justice for many incarcerated people, increase enforcement in conforming facilities, and benefit the general community.[334] Strengthening the enforcement of the PREA's standards with the addition of this proposed private cause of action would minimize the significant costs and dangers associated with prison rape.[335]

In addressing how this proposed amendment and the subsequent reduction of sexual misconduct within the prison system would benefit the nation, it is essential to rearticulate some of the *consequences* of prison rape.[336] Sexually transmitted diseases have far greater infection rates within prison than in the general U.S. population, and "[p]rison rape undermines the public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims."[337] Those who have suffered from sexual violence while imprisoned are less likely to integrate into the community successfully upon release and have high recidivism rates, which also compromises public safety and welfare.[338] Additionally, "[t]he high incidence of prison rape undermines the effectiveness and efficiency of United States Government expenditures through grant programs such as

unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates.").

331 *See* Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 12 (2010) ("The dominant pop-cultural narrative portrays prison rape as 'what happens to white boys unfortunate enough to wind up behind bars despite the odds.'") (citation omitted)).

332 Yurcaba, *supra* note 330 (quoting Lerner Kinglake of Just Detention International).

333 *See* 34 U.S.C. §§ 30301-09.

334 *See supra* Section III.

335 *See National Standards to Prevent, Detect, and Respond to Prison Rape, supra* note 150. For findings on the dangers and costs of prison rape, *see* 34 U.S.C. § 30301.

336 *See* 34 U.S.C. § 30301; *see supra* Part I.

337 34 U.S.C. § 30301(7).

338 34 U.S.C. § 30301 ("Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison. They are thus more likely to become homeless and/or require government assistance.").

those dealing with health care; . . . disease prevention; crime prevention; . . . race relations; poverty; unemployment and homelessness."[339]

The DOJ performed a regulatory impact assessment ("RIA") to conduct a "'break-even analysis,' by first estimating the monetary value of preventing various types of prison sexual abuse (from incidents involving violence to inappropriate touching)."[340] Next, using those estimated values, the RIA "calculate[ed] the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of full nationwide compliance."[341] The RIA "conclude[d] that the break-even point would be reached if the standards reduced the annual number of victims of prison rape by . . . less than 1 percent of the total number of victims in prisons, jails, and juvenile facilities."[342] The DOJ expected "that the standards, if fully adopted and complied with, would achieve at least this level of reduction in the prevalence of sexual abuse, and thus the benefits of the rule justify the costs of full nationwide compliance."[343] Moreover, upon considering the non-quantifiable benefits, including the values of equity, fairness, and human dignity, in the cost-benefit analysis, the benefits of truly and effectively implementing the PREA would largely exceed the costs and would be received by incarcerated people, staff, the government, and society at large.[344]

V. CONCLUSION

"Sexual violence, against any victim, is an assault on human dignity and an affront to American values."[345] The Prison Rape Elimination Act's national standards were released to "prevent, detect, and respond to sexual abuse."[346] Despite these articulated goals and the emphasis on a zero-tolerance policy for prison rape,[347] the legal system has repeatedly failed

339 34 U.S.C. § 30301(14) (The effectiveness and efficiency of these federally funded grant programs are compromised by the failure of State officials to adopt policies and procedures that reduce the incidence of prison rape[.]") (alteration in original)).

340 *National Standards to Prevent, Detect, and Respond to Prison Rape*, *supra* note 150, at 10.

341 *Id.*

342 *Id.*

343 *Id.* at 11.

344 *Id.* ("Finally, non-quantifiable benefits will accrue to society at large, by ensuring that inmates re-entering the community are less traumatized and better equipped to support their community.").

345 Press Release, Office of the Press Secretary, The White House, Presidential Memorandum – Implementing the Prison Rape Elimination Act (May 17, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act.

346 *Justice Department Releases Final Rule to Prevent, Detect, and Respond to Prison Rape*, DEP'T JUST. (May 17, 2012), https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape.

347 Prison Rape Elimination Act, 34 U.S.C. § 30302 (2003).

incarcerated victims of sexual misconduct—even those who have the immense bravery and tenacity to bring their allegations to litigation.[348]

Individuals in prison must overcome extraordinary hurdles in pursuing justice, adequate protection, and humane treatment.[349] This Note discussed the extensive burdens imposed by the Prison Litigation Reform Act on the civil suits that incarcerated persons may bring in state or federal courts regarding sexual misconduct and prison conditions,[350] as well as the immunity, both judicially and socially, that too often shields the government and its officials from liability of their actions or indifference.[351] The cases presented in this Note are only some examples of unfortunate circumstances in which the Prison Rape Elimination Act has fallen short.[352] To meaningfully advance the PREA's intent,[353] Congress should amend the Act to include a private cause of action specific to three enumerated available claims: (1) failure to provide a safe confinement space through sexual misconduct prevention policies; (2) failure to meet standards for reporting procedures or investigations of claims; and (3) failure to provide rehabilitative services for victims.[354] This proposed amendment would finally serve as an effective enforcement mechanism for the PREA, protect incarcerated people's constitutional Eighth Amendment right against cruel and unusual punishment, and hopefully, bring our country closer to preventing these miscarriages of justice in prisons and jails.[355]

348 *See supra* Part III.

349 *See* Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2013); *see also* 34 U.S.C. §§ 30301-09; *see supra* Parts I-III.

350 *See* 42 U.S.C. § 1997(e); *see supra* Parts I-III.

351 For more information on the qualified immunity doctrine, see Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). For information on societal immunity, see Yurcaba, *supra* note 330.

352 *See* Sapien, *supra* note 69, for many additional stories in which PREA has not effectively prevented sexual victimization or ensuing injustice.

353 34 U.S.C. § 30302.

354 *See supra* Part IV.

355 *See* 34 U.S.C. §§ 30301-09; *see* U.S. CONST. amend. VIII.