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ARTICLES

PUBLIC HEALTH AND SAFETY CONSEQUENCES OF DENYING ACCESS TO JUSTICE FOR VICTIMS OF PRISON STAFF SEXUAL MISCONDUCT

Beth A. Colgan*

Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim must thereafter endure.

Farmer v. Brennan, 511 U.S. 825, 853 (1994)
(Blackmun, J. concurring)

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I. INTRODUCTION

Sexual abuse perpetrated by correctional staff in America's prisons¹ occurs at an alarming rate. Recent studies by the United States Department of Justice Bureau of Justice Statistics indicate that the prevalence of staff sexual abuse surpasses inmate-on-inmate sexual abuse in correctional facilities housing juveniles and

1. For ease of reference, the terms "prison" or "correctional facility" are used throughout this article to encompass state and federal prisons, local jails, and juvenile detention centers that are owned and operated by governmental or private entities unless specifically noted. Staff sexual abuse also occurs in other settings, such as immigration detention facilities and community corrections. See NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 19-24 (National Prison Rape Elimination Comm'n 2009) [hereinafter NPREA REPORT]. While these abuses are extremely serious and are likely to cause public health and safety concerns similar to those identified herein, the unique qualities of those settings are beyond the scope of this article.

adults and in facilities that exclusively house juveniles.² Yet, despite the fact that staff sexual abuse is a crime in each of the fifty states, the District of Columbia, and federally,³ staff sexual abuse is rarely prosecuted,⁴ and a federal law known as the Prison Litigation Reform Act significantly restricts the ability of victims of such abuse to obtain recompense through civil suits.⁵

This article juxtaposes the rationales provided by prosecutors for not prosecuting staff sexual misconduct and Congress in passing the Prison Litigation Reform Act against the public health and safety consequences of ignoring staff sexual abuse. These costs include increases in mental health problems, infectious disease, unwanted pregnancy, and crime both inside correctional facilities and in the community at large.⁶ To provide context regarding the pervasiveness of this problem, Part II sets out data regarding the prevalence of staff sexual abuse in adult

2. Allen J. Beck, Devon B. Adams & Paul Guerino, U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Violence Reported by Juvenile Correctional Authorities*, 2005-06 2 (2008). *See also* Allen J. Beck & Paige M. Harrison, U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2008-09 5-6 (2010); Allen J. Beck, Paige M. Harrison, & Paul Guerino, U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Victimization in Juvenile Facilities Reported by Youth*, 2008-09 1, 3 (2010) [hereinafter *Juvenile Facilities*]. It should be noted that juveniles are often housed in adult prisons and jails. *See, e.g.*, Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, 4 (2007); James Austin, et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Juveniles in Adult Prisons and Jails: A National Assessment* (2000).

3. Brenda V. Smith & Jaime M. Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perceptions*, Crim. L. Brief, Spring 2008, at 21-22; NPREA Report, *supra* note 1, at 37; Just Detention International, *State-by-State Comparison of Custodial Sexual Misconduct Laws* (2007), http://www.justdetention.org/pdf/state_chart.pdf.

4. *See generally* Smith & Yarussi, *supra* note 3; Office of Inspector General, U.S. Dep't of Justice, *Deterring Staff Sexual Abuse of Federal Inmates* 9 (2005) [hereinafter *OIG Report*].

5. Prison Litigation Reform Act of 1995 18 U.S.C. § 3626 (2006); 42 U.S.C. § 1997(e) (2005).

6. While inmate-on-inmate sexual assaults also have significant societal implications, this article focuses on staff sexual misconduct because of the unique power corrections staff have over people in prison. *See, e.g.*, *Hearing Before the National Prison Rape Elimination Comm'n* 303:18-304:11 (2006), http://nprec.us/home/public_proceedings/proceedings_detroit.php (testimony of Gregory Miller, United States Attorney for the Northern District of Florida) [hereinafter *Miller Testimony*] ("Unlike the rapist on the street, a corrupt prison guard does not need a knife or a gun to achieve his aims. His weapons are the power and authority of his position. And unlike the rapist on the street, these weapons enable the prison rapist not only to facilitate his crime, but to secure his victim's silence. These threats take various forms, but the message is generally the same. No matter how bad it is for you now, I can make it worse.")

and juvenile facilities, including facts regarding the gender of victims and perpetrators as well as characteristics that make certain people uniquely vulnerable to abuse. Part III then details the manner in which victim access to both criminal and civil courts are limited, the former by prosecutorial decisions not to pursue such cases and the latter due to federal restrictions limiting all prisoners' access to civil justice. Part IV describes how those restrictions countervail the public interest by creating and contributing to reductions in public health and safety and creating a drain on public resources. This article concludes in Part V with suggested methods to address the barriers to court access in light of the larger social costs identified herein.

The implications of staff sexual abuse are not minor; one in 100 Americans are incarcerated,⁷ 13.5 million people annually.⁸ Almost all of those people will eventually be returned to society.⁹ As such, it is critical that those prosecutors who refuse to prosecute staff sexual abuse reconsider and work to protect those who are victimized by such abuse and that Congress reform the Prison Litigation Reform Act to allow full access to civil remedies for victims of abuse.

II. PERVASIVENESS OF STAFF SEXUAL MISCONDUCT

Congress has estimated that over 1,000,000 children and adults have been sexually assaulted in U.S. prisons in the last 20 years.¹⁰ To further establish the frequency of prison sexual abuse, Congress directed the Bureau of Justice Statistics to compile incident data from adult and juvenile facilities.¹¹ In August 2010, the Bureau published a report documenting data gathered through a random sample survey of a statistically significant number of people who are incarcerated.¹² The data detailed inci-

7. THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 3 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

8. THE COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 11, 19, 70 (2006) [hereinafter CONFRONTING CONFINEMENT]; see also *id.* at 8 ("We incarcerate more people and at a higher rate than any other country in the world.").

9. Nationally, 95% of prisoners are eventually released from prison and return to the community. See *id.* at 11, 19.

10. Prison Rape Elimination Act of 2003 [hereinafter PREA], 42 U.S.C. § 15601(2) (2003).

11. *Id.* § 15603.

12. BECK & HARRISON, *supra* note 2, at 6. The figures obtained through these surveys may not be exact, as they could include both false reporting and underre-

dents of prison sexual abuse for the twelve month period preceding the survey, or from the date of admission if the survey respondent had been incarcerated for less than twelve months.¹³ The Bureau found that nearly three percent of the state and federal prison population—41,200 people—reported being sexually abused by prison staff in the reporting period.¹⁴ In adult jails, two percent of the jail population—15,800 people—reported sexual abuse by jail staff in the reporting period.¹⁵ In both settings, reported staff sexual abuse was higher than abuse by inmates.¹⁶

The Bureau's study also documented the distinctions between sexual assaults by gender of perpetrator and victim. Of staff sexual abuse incidents reported by men:

68.8 percent of prison incidents and 64.3 percent of jail incidents involved sexual abuse by female staff;

14.9 percent of prison incidents and 18.2 percent of jail incidents involved sexual abuse by male staff; and

16.3 percent of prison incidents and 17.5 percent of jail incidents involved sexual abuse by both male and female staff.¹⁷

Of staff sexual abuse incidents reported by women:

9.3 percent of prison incidents and 27.7 percent of jail incidents involved sexual abuse by female staff;

71.8 percent of prison incidents and 62.6 percent of jail incidents involved sexual abuse by male staff; and

18.9 percent of prison incidents and 9.8 percent of jail incidents involved sexual abuse by both male and female staff.¹⁸

The Bureau has found that overall, staff-on-inmate sexual abuse was found to be more pervasive in male facilities than

porting. *See id.* While false reports do occur, it is safe to assume that such reports are outweighed by the likelihood that victims of staff sexual abuse do not report. It is widely recognized that countless victims remain silent out of fear of retaliation (including placement in segregation, loss of programming, transfer to facilities far from their families, physical threats) and of not being believed; in other cases victims fail to report because the staff member is providing contraband or privileges. *See* OIG REPORT, *supra* note 4, at 4. Regardless of the balance between underreporting and false reporting, the Bureau's statistics provide insight into the prevalence of staff misconduct in America's correctional facilities.

13. BECK & HARRISON, *supra* note 2, at 6.

14. *Id.*

15. *Id.*

16. *Id.* (2.8% of people reported staff-on-inmate sexual violence in state and federal prisons compared to 2.1% who reported inmate-on-inmate sexual violence; 2.0% of people reported staff-on-inmate sexual violence in jails compared to 1.5% who reported inmate-on-inmate sexual violence).

17. *Id.* at 24.

18. *Id.* *See also*, ALLEN J. BECK, PAIGE M. HARRISON, & DEVON B. ADAMS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006 7 (2007), ("More than one staff member was involved in the sexual misconduct in 2% of the incidents.").

those housing women.¹⁹ However, this may be due in part to the greater likelihood that men will report staff sexual abuse than women.²⁰

In January 2010, the Bureau released its report on incident data from facilities housing adjudicated juveniles.²¹ The Bureau found that over ten percent of youth—2,730 nationally—reported sexual abuse by facility staff.²² Of those youth, over 43 percent (1,150) reported that the abuse involved “force, threat, pressure, or offers of special favors or privileges,” including the provision of drugs and alcohol.²³ As in adult facilities, many youth victims reported multiple incidents of abuse. Of those who reported abuse, “[a]n estimated 88% had been victimized more than once by the staff; 27% had been victimized more than 10 times[.]. . . [and a] third (33%) said they had been victimized by more than one staff member.”²⁴

As with the adult studies, the juvenile facility study also documented the frequency of assaults by gender of perpetrator and victim. Of reported staff sexual abuse incidents:

- 92.0 percent involved sexual abuse of boys by female staff;
- 1.7 percent involved sexual abuse of boys by male staff;
- 2.5 percent involved sexual abuse of boys by both male and female staff;
- 3.0 percent involved sexual abuse of girls by male staff; and
- 0.8 percent involved sexual abuse of girls by both male and female staff.²⁵

Overall, rates of staff sexual misconduct were highest in male-only facilities, larger facilities, and facilities where youth are housed for the longest periods of time.²⁶

In addition to the Bureau's recent studies, research has also shown that certain people are more likely to be victimized in cor-

19. See, e.g., ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES, 2007 6 (2008) (reported rates of staff sexual misconduct are slightly higher in male facilities than in facilities that are either female only or coed). Compare BECK, HARRISON & ADAMS, *supra* note 18 at 7 (“In State and Federal prisons 65% of inmate victims of staff sexual misconduct and harassment were male, while 58% of staff perpetrators were female In local jails, 80% of victims were female, while 79% of perpetrators were male.”).

20. BECK & HARRISON, *supra* note 2 at 23.

21. JUVENILE FACILITIES, *supra* note 2.

22. *Id.* at 1, 3.

23. *Id.* at 1, 3, 13-14.

24. *Id.* at 14.

25. *Id.* at 13.

26. *Id.* at 10-11.

rectional facilities. The most vulnerable populations include youth (particularly those in adult facilities);²⁷ people who are first-time or non-violent offenders;²⁸ people with mental illness or developmental disability;²⁹ people who have histories of sexual or physical abuse;³⁰ people who are small in stature;³¹ and people who are gay or are seen as gender variant.³² Federal investigators of prison rape allegations report that corrections staff who commit sexual abuse prey upon those vulnerabilities to identify and victimize the inmates they are supposed to oversee and protect.³³

27. NPREA REPORT, *supra* note 1, at 7; 42 U.S.C. § 15601(4) (2009) (“Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.”); *see also* BECK & HARRISON, *supra* note 19, at 6 (reporting that reported sexual assaults are higher for younger inmates).

28. NPREA REPORT, *supra* note 1, at 7-8; STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES, A SHADOW REPORT TO THE U.N. COMMITTEE AGAINST TORTURE 4 (2006) [hereinafter IN THE SHADOWS].

29. NPREA REPORT, *supra* note 1, at 7-8; 42 U.S.C. § 15601(3) (2009) (“Inmates with mental illness are at increased risk of sexual victimization.”). *See also* CONFRONTING CONFINEMENT, *supra* note 8, at 43 (prevalence rates of mental illness among people in prisons and jails range from 16% to 54%). One in 26 American adults suffers from serious mental illness. *See* STEVE AOS, ET AL., EVIDENCE-BASED TREATMENT OF ALCOHOL, DRUG, AND MENTAL HEALTH DISORDERS: POTENTIAL BENEFITS, COSTS, AND FISCAL IMPACTS FOR WASHINGTON STATE 4 (Washington State Institute for Public Policy 2006); *see also* 42 U.S.C. § 15601 (2003) (“America’s jails and prisons house more mentally ill individuals than all of the Nation’s psychiatric hospitals combined. As many as 16% of inmates in State prisons and jails, and 7% of Federal inmates, suffer from mental illness.”).

30. BECK & HARRISON, *supra* note 2 at 14-15 (people who experienced sexual victimization prior to incarceration reported experiencing staff sexual misconduct at higher rates than their peers); NPREA REPORT, *supra* note 1 at 7-8. BECK & HARRISON, *supra* note 19 at 6 (“Inmates who had experienced a prior sexual assault were 6 times more likely to report a sexual victimization in jail (11.8%), compared to those with no sexual assault history (1.9%).”).

31. NPREA REPORT, *supra* note 1, at 7-8; IN THE SHADOWS, *supra* note 28, at 12.

32. BECK & HARRISON, *supra* note 2 at 14 (prison and jail inmates who are heterosexual reported staff sexual victimization at lower rates than people who are gay; 2.5% of heterosexual people in prison compared to 6.6% of gay people; 1.9% of heterosexual people in jail compared to 3.5% of gay people); JUVENILE FACILITIES, *supra* note 2, at 11; NPREA REPORT, *supra* note 1, at 7-8 (sexual abuse in prison is higher for people who are lesbian, gay, bisexual, and/or transgender); IN THE SHADOWS, *supra* note 27, at 12 (“Gay and transgender detainees, or those who are small, effeminate, and perceived to be gay or gender variant, experience rates of prisoner rape that are several times higher than those for inmates overall.”).

33. OIG REPORT, *supra* note 4, at 5 (“OIG agents who investigate sexual abuse cases stated they often found that guards took advantage of vulnerable or psychologically weak inmates to have sex with them. Such inmates included those who had drug addictions, who previously were physically or sexually abused, who had mental

III. WHY ACCESS TO JUSTICE FOR VICTIMS OF PRISON STAFF SEXUAL MISCONDUCT IS DENIED

Despite the pervasiveness of staff sexual abuse, victims are routinely denied access to justice in both the criminal and civil courts. Part A of this section identifies reasons prosecutors have given for ignoring staff sexual misconduct, and part B describes the barriers to civil justice created by the federal Prison Litigation Reform Act.

A. *Why Prosecutors Ignore Staff Sexual Misconduct*

Staff sexual abuse is rarely prosecuted.³⁴ Two recent reports shed light on why staff sexual misconduct is ignored. The first, an April 2005 report by the Office of the Inspector General—the agency charged with investigating staff sexual misconduct in federal Bureau of Prison facilities—documents reasons identified by federal prosecutors for their failure to prosecute staff sexual misconduct (OIG report).³⁵ The second, a report resulting from a joint project between the National Institute of Corrections and American University's Washington College of Law, involved interviews and focus groups with state and federal prosecutors and a literature review (NIC/WCL report).³⁶ While it is undisputed that some prosecutors take these charges seriously,³⁷ what these studies reveal is that, for the reasons set forth below, “[t]he per-

health issues, who had little experience in the criminal justice system, who were awaiting deportation, or who had previously engaged in prostitution.”).

34. See, e.g., *id.* at 9 (only 45% of staff misconduct cases referred for prosecution by the Office of Inspector General are ever prosecuted); BECK, ADAMS & GUERINO, *supra* note 2, at 8 (“Nearly 40% of perpetrators of staff misconduct or harassment were arrested or referred for prosecution.”); BECK, HARRISON & ADAMS, *supra* note 18, at 8 (reporting that even where sexual misconduct is substantiated, arrest rates were only 28% in 2005 and 24% in 2006; of substantiated cases only 34% were referred for prosecution in 2005 and 45% were referred for prosecution in 2006); NPREA REPORT, *supra* note 1, at 37 (“many instances of sexual abuse by staff or prisoners are never prosecuted”).

35. OIG REPORT, *supra* note 4, at 1, 2.

36. Smith & Yarussi, *supra* note 3, at 19.

37. See, e.g., Christine Clarridge, *Ex-Officer Admits She Had Sex with Teens at Detention Hall*, THE SEATTLE TIMES, June 7, 2007, http://seattletimes.nwsourc.com/html/localnews/2003738660_webjailguard07m.html (describing the prosecution of two male correctional officers at an adult jail facility and one female officer at a juvenile facility in King County, Washington); Miller Testimony, *supra* note 6.

ception that prosecutors are either reluctant or unwilling to prosecute cases of sexual violence in custody is well-founded.”³⁸

1. Staff Sexual Abuse Cases Frequently Suffer from Evidentiary Challenges

According to the Office of the Inspector General, the primary reason that prosecutors give for failing to prosecute staff sexual misconduct is a lack of sufficient evidence, particularly physical evidence that can verify the alleged misconduct.³⁹ This problem turns in large part on the failure of corrections personnel and/or local law enforcement to properly investigate allegations at the facility level.⁴⁰ For an investigation to support prosecution it must be conducted by investigators who are able, among other things, to properly process crime scenes, collect and preserve related evidence, interview sexual assault victims and suspects, and identify and interview potential witnesses.⁴¹ Yet corrections personnel often are not sufficiently trained to handle sexual abuse investigations.⁴² Law enforcement officials may either refuse to become involved or may not have sufficient familiarity with the complexities of investigations in the corrections setting.⁴³ Given these deficiencies in investigations, it is perhaps not surprising that in over half of reported incidents of prison sexual abuse, “investigators could not determine whether or not the abuse occurred.”⁴⁴

In addition to the problems with identifying, collecting, and processing evidence, prosecutors also expressed concern about witness credibility issues in cases where the victim and supporting witnesses are prisoners.⁴⁵ In contrast, correctional officers

38. Smith & Yarussi, *supra* note 3, at 20. *See also* NPREA REPORT, *supra* note 1, at 119 (“the Commission repeatedly heard testimony that prosecutors decline most referrals”).

39. OIG REPORT, *supra* note 4, at 10.

40. Smith & Yarussi, *supra* note 3, at 20.

41. *Id.* at 23.

42. NPREA REPORT, *supra* note 1, at 110-11; *see also* Smith & Yarussi, *supra* note 3, at 20, 23.

43. *See, e.g.*, Stacey Mulick, *Pierce County Sheriff to Defer More Cases*, THE NEWS TRIBUNE, Feb. 18, 2009 (detailing sheriff’s office refusal to investigate cases in county’s correctional facilities); NPREA REPORT, *supra* note 1, at 57 (noting that many law enforcement agencies are unaware of PREA).

44. NPREA REPORT, *supra* note 1, at 13 (noting that 17% of allegations were substantiated, 29% were found to be untrue, and 55% were inconclusive).

45. *See, e.g.*, Norman Sinclair et al., *Michigan Faces Conflict of Interest: Attorney General Defends the State Against Lawsuits and Prosecutes Offenders*, THE DETROIT NEWS, May 24, 2005, at A8 (county prosecutor declined to prosecute staff

are seen as (and in many states are) law enforcement officials who in some cases "are the same individuals that prosecutors must rely on to testify in their other criminal cases."⁴⁶ With defendants who are perceived as more credible and victims as unsympathetic, prosecutors see staff abuse cases as risky.⁴⁷ According to the NIC/WCL report,

Prosecutors often measure their success by their wins. Sexual assault cases are notoriously hard to win. Custodial sexual abuse cases are even more difficult and expose prosecutors to the possibility of expending valuable resources on a case that may not have a high likelihood of prosecutorial success – either a plea or conviction.⁴⁸

2. Staff Sexual Assault Is Not Seen As a Serious Crime

Evidentiary problems cannot explain the failure to prosecute in every case; in many instances, prosecutors reported alarming attitudes regarding the seriousness of staff sexual abuse. The OIG study documented several instances in which cases did not suffer from evidentiary problems but still were not prosecuted. The following is one such example:

An employee of a Federal Correctional Institution intercepted a letter indicating that a contract teacher in the facility was having a sexual relationship with an inmate. The OIG substantiated the allegations, and the subject confessed to sexually abusing an inmate. However, the Assistant United States Attorney (AUSA) assigned to the case declined prosecution because, according to him, it was a "stupid sex case" that was only a misdemeanor and therefore a "waste of time." The

sexual misconduct cases in part due to witness credibility issues). This concern about victims of staff sexual abuse being believed by the finder of fact is not without merit. For example, Seventh Circuit Judge Richard Posner once wrote, "the evidence [at trial] consisted of testimony by inmates, who frequently lie in prisoner rights' cases. . . ." *Bruscino v. Carlson*, 854 F.2d 162, 166 (7th Cir. 1988). He did so without citing any authority supporting the notion that plaintiffs who are prisoners lie to support their claims. His reliance on what seems to be his personal disdain of prisoners, rather than actual evidence, is perhaps unsurprising given that in the same opinion, Judge Posner appears to lament the fact that constitutional jurisprudence had limited the ability of correctional officers to senselessly beat prisoners. *See id.* at 164, 166.

46. Smith & Yarussi, *supra* note 3, at 20. Prosecutors may also see corrections staff not as a criminal defendant, but as a peer; that attitude can compromise the prosecutor's commitment to a case.

47. *Id.*; Sinclair et al., *supra* note 45.

48. Smith & Yarussi, *supra* note 3, at 20. *But see* Miller Testimony, *supra* note 6, at 311:21-312:7 (noting that he does not base his judgment of his deputy prosecuting attorneys on the number of victories they have).

prosecutor asked the OIG agents, “Why do you people keep bothering us with these cases? It’s only a misdemeanor!”⁴⁹

The OIG and NIC/WSL studies documented a number of reasons relayed by prosecutors that contribute to this attitude. One factor relates to the statutory level of the crime. Although most jurisdictions have made at least some forms of staff sexual abuse a felony, in 3 states (Iowa, Kentucky and Vermont), all forms of staff sexual abuse are misdemeanors.⁵⁰ Even where staff sexual abuse is a felony, cases are not seen as “high profile, high value cases.”⁵¹

Confusion about the issue of consent is also evident in some cases. The OIG report documented examples of prosecutors declining to prosecute cases where they deemed that the sexual abuse was consensual or not coerced.⁵² However, consent is not a legal defense under federal law,⁵³ and there are only three jurisdictions with statutes suggesting that a consent defense may be allowed.⁵⁴ The principle that underpins excluding a consent defense is well founded. Staff control every aspect of the lives of people in their custody—their safety, ability to participate in prison programs, ability to communicate and visit with families, and in many cases the length of time they will serve in prison.⁵⁵ Under these circumstances, staff and people who are in custody “are in inherently unequal positions, and inmates do not have the same ability as staff members to consent to a sexual relationship.”⁵⁶

The NIC/WCL study also documented that some prosecutors feel that administrative penalties in the employment context

49. OIG REPORT, *supra* note 4, at 12. *But see* 18 U.S.C. §§ 2241-2244 (2006) (changing federal law to raise correctional sexual assault to a felony).

50. CHECKLIST OF STATE CRIMINAL LAWS PROHIBITING THE SEXUAL ABUSE OF PERSONS IN CUSTODY OF LAW ENFORCEMENT, LOCK-UP AND JAIL AUTHORITIES (Am. Univ. Washington College of Law 2008), http://www.wcl.american.edu/nic/legal_responses_to_prison_rape/lock-up_fifty_state_checklist.pdf?rd=1 [hereinafter STATE CHECKLIST]. *Cf.* OIG REPORT, *supra* note 4, at 1 (“OIG has found that many federal prosecutors are less interested in prosecuting sexual abuse cases, regardless of the strength of the evidence, because the crimes are not felonies.”); *id.* at 10 (noting that the second most common reason that prosecutors declined to prosecute staff sexual abuse was because the crime was only a misdemeanor).

51. Smith & Yarussi, *supra* note 3, at 20.

52. OIG REPORT, *supra* note 4, at 13.

53. *Id.* at 4.

54. *See* STATE CHECKLIST, *supra* note 50, at 2, 5, 14 (showing coverage of the laws in Arizona, Delaware, and Nevada).

55. *See, e.g.*, NPREA REPORT, *supra* note 1, at 104-05.

56. OIG REPORT, *supra* note 4, at 4.

or resignation by accused staff are a sufficient resolution, making criminal penalties unnecessary.⁵⁷ An example documented in the OIG study illustrates this attitude:

A male correctional officer assigned to a U.S. Penitentiary was accused of sexually abusing several male inmates multiple times. One inmate alleged that the officer forcibly raped him three times. The officer confessed to sexually abusing one inmate and resigned his position with the BOP during the OIG's investigation. The AUSA assigned to the case declined prosecution and stated it would not be an efficient use of United States Attorneys' Office resources to prosecute the officer for a misdemeanor offense since he resigned his position with the BOP.⁵⁸

Staff discharge or resignation does occur in many cases.⁵⁹ However, administrative consequences do not carry with them the permanence of a criminal conviction and can result in additional victimization: "staff who resign or are even fired are often rehired in other correctional environments, potentially importing their predatory behavior with even more vulnerable populations."⁶⁰ For example, a study of abuse in California's juvenile facilities found that in cases where youth complained of sexual misconduct by staff, "the accused staff were permitted to resign, were placed on limited duty, or the charges were dropped."⁶¹ Even in cases where the staff members were fired, "the State Personnel Board restored these staff to regular employee status."⁶² None of the accused staff were prosecuted.⁶³

Additionally, foregoing prosecution because there have been some administrative consequences leaves perpetrators in a position to victimize even more people. Repeating predatory behavior is not unlikely; in 18 percent of incidents reported to correctional authorities in 2006, the staff perpetrator had victimized more than one inmate.⁶⁴

57. Smith & Yarussi, *supra* note 3, at 21 ("[T]he resignation creates a sense among employers and prosecutors that the matter is resolved. Given the high burden of proof in criminal cases, many prosecutors see this as a just result . . .").

58. OIG REPORT, *supra* note 4, at 12-13.

59. See, e.g., BECK, ADAMS & GUERINO, *supra* note 2, at 8 ("Almost all staff perpetrators lost their job in local or private facilities (99%), compared to 75% of staff perpetrators in state systems.").

60. Smith & Yarussi, *supra* note 3, at 21.

61. Barry Krisberg, PH.D., Nat'l Council on Crime & Delinquency, *Breaking the Cycle of Abuse in Juvenile Facilities* 3-4 (Feb. 2009).

62. *Id.* at 4.

63. *Id.*

64. Beck, Harrison & Adams, *supra* note 18 at 7.

Further, prosecutors who contend that administrative penalties are sufficient fail “to realize that prosecution accomplishes other goals—a public recognition that sexual abuse of offenders rises to the level of a crime, that prisoners are victims who deserve their day in court as well, and that no one is above the law.”⁶⁵

The failure to see these other goals as important is perhaps the most troubling response provided by prosecutors. Some prosecutors simply do not see people in prisons as victims deserving of the same protections afforded to victims in the community, regardless of the abuse they have suffered.⁶⁶ Others may see crimes that occur in prison as outside of their field of responsibility—essentially that their job is to put people in prison, not to protect them once they are there.⁶⁷ The NIC/WSL study documented a related concern that “prosecuting these cases could significantly weaken a prosecutor’s standing in the community by making her appear to be soft on criminals.”⁶⁸ Ironically, in allowing staff perpetrators to commit sexual assaults with impunity, that is exactly what they are doing.

It is important to note that this attitude does not just apply to adult prisoners, but also children who are in custody. For example, in 2007, allegations surfaced that an assistant facility superintendent and a school principal at the Pyote juvenile facility in Texas had repeatedly abused youth in the facility.⁶⁹ “As the investigation unfolded, over 750 wards from every Texas youth facility began to come forward with allegations of sexual misconduct from flirtation to rape.”⁷⁰ Prosecutors at the United States Justice Department did not take action “despite knowing for four

65. Smith & Yarussi, *supra* note 3, at 21.

66. See NPREA Report, *supra* note 1, at 13 (“Only a fraction of cases are referred to prosecutors, and the Commission repeatedly heard testimony that prosecutors decline most of these cases. Undoubtedly, some investigations do not produce evidence capable of supporting a successful prosecution. But other dynamics may be at play: some prosecutors may not view incarcerated individuals as members of the community and as deserving of their services as any other victim of crime.”); *id.* at 120; see also Mulick, *supra* note 43 (quoting a sheriff as explaining a decision not to prosecute crimes arising in prison facilities because doing so “robs from the citizens of Pierce County.”).

67. Smith & Yarussi, *supra* note 3, at 20 (“[P]rosecutors may be reluctant to pursue prison sexual assault cases because they see their job as done after securing the conviction or because they do not view crimes that occur in confinement as part of their purview.”).

68. *Id.*

69. Krisberg, *supra* note 61, at 4.

70. *Id.* (citation omitted).

years of allegations of staff abuse."⁷¹ Ultimately, over 2,000 incidents of staff sexual misconduct were confirmed to have occurred between 2003 and 2006, yet not one staff member was ever incarcerated for the abuses suffered by those youth.⁷²

B. *Restrictions on Staff Sexual Abuse Victims' Access to Civil Remedies*

Changes in prosecutorial attitude regarding staff sexual abuse will not occur overnight. In the meantime, the best deterrent of staff sexual abuse is civil litigation. As recognized by the National Prison Rape Elimination Commission, "Courts provide a crucial role, especially when other modes of oversight fail. Civil court cases can spark reforms reaching far beyond the individual plaintiffs to protect other prisoners."⁷³

However, the federal Prison Litigation Reform Act of 1995 (PLRA) creates numerous barriers to juvenile and adult⁷⁴ sexual abuse victims seeking civil redress for the harm caused. The PLRA was intended to eliminate frivolous lawsuits filed by prisoners.⁷⁵ The law was passed as a rider to an appropriations bill, with little consideration for its potential unintended consequences for non-frivolous suits.⁷⁶ A prime example of how the PLRA bars meritorious suits is in the context of staff sexual abuse; where such cases have not been barred by the PLRA, courts have routinely found that prison rape violates the Eighth Amendment prohibition on cruel and unusual punishment.⁷⁷ In

71. *Id.*

72. *Id.*

73. NPREA REPORT, *supra* note 1, at 10.

74. 18 U.S.C. § 3626(g)(3), (5) (2006) 42 U.S.C. § 1997e(h) (2006).

75. See, e.g., Deborah M. Golden, The Prison Litigation Reform Act—A Proposal for Closing the Loophole for Rapists, 1 ADVANCE: J. AM. CONST. SOC'Y ISSUE GROUPS 95, 97 (2006); David Fahti, An Unfair Prison Litigation System, THE BOSTON GLOBE, Aug. 25, 2009, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/08/25/an_unfair_prison_litigation_system/.

76. See CONFRONTING CONFINEMENT, *supra* note 8, at 85 ("Congress conducted no studies and held only one substantive hearing to consider potential solutions before passing the PLRA as a rider to an appropriations bill."); *id.* at 16 (noting that the PLRA includes several "misguided" provisions). For a detailed description of the short but fervent history of the PLRA debate and ultimate passage in Congress, see Margo Schlanger, Inmate Litigation, 116 HARV. L. REV. 1555, 1565-70, 1587-88, 1633-34 (2003).

77. See, e.g., Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) ("In the simplest and most absolute of terms, the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established . . ."); Daskalea v. District of Columbia, 227 F.3d 433, 440 (D.C. Cir. 2000) (holding that sexual assault and forced strip tease violated the Eighth Amendment).

essence, the PLRA “immunizes rape” by establishing procedural hurdles and bars to recovery that are inapposite to the realities of the trauma experienced by sexual assault victims.⁷⁸ Some of the more onerous provisions of the PLRA are detailed below.

1. Administrative Exhaustion

The PLRA prohibits challenges to conditions in local, state, and federal prisons under 42 U.S.C. § 1983, the United States Constitution, or any other federal law where the plaintiff did not exhaust available administrative remedies prior to filing suit.⁷⁹ In 2006 the United States Supreme Court interpreted this provision strictly to require “proper” exhaustion of procedures, meaning that plaintiffs must have met all applicable deadlines, writing requirements, and other technical requirements of the prison’s grievance system.⁸⁰ In reality, this means that victims of prison staff sexual abuse have “generally no more than 15 days, and . . . in nine States. . . between 2 and 5 days” to file a grievance detailing their assault.⁸¹

These requirements ignore the realities of both sexual trauma and the prison environment. By requiring a person who may be experiencing severe mental distress to have the wherewithal to complete a grievance process, the administrative exhaustion requirement does not account for the psychological implications of sexual assault.⁸² A leading expert on posttraumatic stress disorder and prison mental health, Dr. Terry Kupers,

78. 42 U.S.C. § 1997e(a) (2005) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

79. *Id.* The PLRA does not prohibit lawsuits in state courts or those that utilize state law; however, following the passage of the PLRA, some states passed similar statutes prohibiting state-based suits. See HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 4, n.10 (2009), <http://www.hrw.org/en/reports/2009/06/16/no-equal-justice-0> [hereinafter NO EQUAL JUSTICE].

80. *Woodford v. Ngo*, 548 U.S. 81, 93-94, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006).

81. *Id.* at 118 (Stevens, J., dissenting).

82. See NPREA REPORT, *supra* note 1, at 93-94; *Review of the Prison Litigation Reform Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Stop Prisoner Rape), <http://www.justdetention.org/pdf/House%20Subcommittee%20hearing%20testimony.pdf> [hereinafter *Stop Prisoner Rape Testimony*] (testifying that a man did not report the sexual assault and harassment he was subjected to by a federal corrections officer because he was “[h]umiliated and traumatized.”).

explained the link between trauma experienced by sexual assault victims and the exhaustion requirement:

Trauma has specific dynamics of its own. The person goes into a very dysfunctional state right after the trauma. They're flooded with emotions. What we generally find is a dysregulation of emotions and cognition that lasts for many days. This is the period when there are intrusive symptoms, flashbacks, et cetera. And in that state a person is unable to carry out an organized task. And that happens to be the same timeline as the deadline for the internal grievances. . . . Particularly when you're looking at survivors of sexual assault, they don't do anything for a long time. They mull it over. They tend to withdraw and be isolated. And they tend to be flooded with emotions, and for instance, experience shame. And reporting in a formal way is the last thing on their mind.⁸³

Further, the exhaustion requirement makes no consideration for victims who may have particular difficulties with the grievance system that could be compounded by trauma, such as victims who are mentally ill or have developmental disabilities.⁸⁴ Likewise, children who have been traumatized may be even less equipped than adult victims of sexual assault to manage administrative grievance systems, but are still held to the exhaustion requirement.⁸⁵

83. NO EQUAL JUSTICE, *supra* note 79, at 21-22; *see also* NPREA REPORT, *supra* note 1, at 44-45 ("Sexual abuse experienced in any environment commonly invokes shock, numbness, withdrawal, and denial.").

84. *See, e.g.*, NPREA REPORT, *supra* note 1, at 93 (quoting the prepared statement of Jeanne Woodward before the House Judiciary Subcommittee, that "[m]any of these prisoners are mentally ill or barely literate."). Illiteracy, mental illness, disability, physical incapacity, and having English as a second language have all been used as reasons to dismiss. *See* NO EQUAL JUSTICE, *supra* note 79, at 16 (citing, *Parker v. Adjetey*, 89 Fed. Appx. 886, 887-88 (5th Cir. 2004) (being in a coma); *Ferrington v. La. Dep't of Corr.*, 315 F.3d 529, 532 (5th Cir. 2002) (blindness); *Benavidez v. Stansberry*, No. 4:07CV03334, 2008 WL 4279559, at *4 (N.D. Ohio Sept. 12, 2008) (inability to read English); *Rigsby v. Schriro*, No. CV 07-0916-PHX-EHC (ECV), 2008 WL 2705376, at *3 (D. Ariz. July 9, 2008) (brain injury causing memory loss and Post Traumatic Stress Disorder); *Williams v. Pettiford*, C/A No. 9:07-0946-RBH, 2007 WL 3119548, at *3 (D.S.C. Oct. 22, 2007) (dyslexia and mental illness); *Yorkey v. Pettiford*, C.A. No. 8:07-1037-HMH-BHH, 2007 WL 2750068, at *4 (D.S.C. Sept. 20, 2007) (mental illness); *Elliott v. Monroe Corr. Complex*, No. C06-0474RSL, 2007 WL 208422, at *3 (W.D. Wash. Jan. 23, 2007) (cerebral palsy); *Williams v. Kennedy*, No. C.A. C-05-411, 2006 WL 18314, at *2 (S.D. Tex. Jan. 4, 2006) (brain injury resulting in memory loss)).

85. *See, e.g.*, *M.C. ex. rel. Crider v. Whitcomb*, No. 1:05-cv-0162-SEB-TAB, 2007 WL 854019, at *4 (S.D. Ind. Mar. 2, 2007) (dismissing claim of youth who had not filed a written grievance regarding failure of staff to protect him from assault); *see also* No Equal Justice, *supra* note 79, at 30-31; *Fathi*, *supra* note 75, (regarding dismissal of the suit of a teenage girl who was sexually abused by a male staff member at the Illinois Youth Center; "[I]ncarcerated youth suffer from high rates of

The grievance process itself may make it unlikely that victims will report abuse. For example, in some states, prison grievance procedures would require the victim to attempt to reconcile the assault with his or her assailant before filing a written grievance.⁸⁶ In other instances, the victim may be required to report to prison staff who are friendly, or perceived to be friendly, toward his or her attacker. Having to face one's attacker or his or her friends within days of an assault—particularly where a victim will likely have to remain confined in both the location of the attack and with the attacker nearby—is understandably too burdensome for some victims.

This requirement also presumes that a meaningful grievance system exists. Testimony of Jeanne Woodford, the former warden of San Quentin State Prison and head of the California Department of Corrections and Rehabilitation calls that presumption into question.⁸⁷ Ms. Woodford testified

that 'it is absurd to expect prisoners to file grievances . . . without *ever* making a mistake.' . . . Woodford went on to give examples of circumstances that may derail a prisoner's claim completely, noting that 'prisoners may be transferred from one institution to another or paroled before they are able to fulfill each level of appeal. Grievances may be rejected because the prisoner could not clearly articulate his complaint, or for a minor problem such as using handwriting that is too small.'⁸⁸

The Commission on Safety and Abuse in America's Prisons, a non-partisan national commission made up of "civic leaders, experienced corrections administrators, scholars, advocates for the rights of prisoners, law enforcement professionals, members of the religious community, and former prisoners,"⁸⁹ also documented these issues. The Commission found that "[i]n many correctional facilities, there are inadequate, sometimes wholly meaningless, systems for receiving and responding to prisoners'

mental illness, learning problems, impulse-control disorders, and other disabilities that make pursuing a complex task challenging or impossible.").

86. *See, e.g.*, *Sanders v. Bachus*, No. 1:07-cv-360, 2008 WL 5422857, at *5 (W.D. Mich. Dec. 10, 2008) (prison rejected grievance from respondent because he "did not first attempt to resolve the issue with involved staff [who he alleged physically assaulted him] prior to writing the grievance" and therefore he did not meet the PLRA exhaustion requirement); *see also* NPREA REPORT, *supra* note 1, at 94.

87. NPREA REPORT, *supra* note 1, at 91, 93.

88. *Id.* at 93 (quoting the prepared statement of Jeanne Woodford before the House Judiciary Subcommittee).

89. CONFRONTING CONFINEMENT, *supra* note 8, at 6.

grievances and reports by staff about misconduct, and there are failures to safeguard from retaliation those who speak out.”⁹⁰

Justice Stevens also recognized the risk of retaliation for reporting sexual abuse in his dissent in *Woodford v. Ngo*:

[T]hose inmates who are sexually assaulted by guards, or whose sexual assaults by other inmates are facilitated by guards, have suffered grave deprivations of their Eighth Amendment rights. Yet, the Court's engraftment of a procedural default sanction into the PLRA's exhaustion requirement risks barring such claims when a prisoner fails, *inter alia*, to file her grievance (perhaps because she correctly fears retaliation) within strict time requirements that are generally no more than 15 days, and that, in nine States, are between 2 and 5 days.⁹¹

Given the realities of prison sexual abuse—from the trauma of the assault to fear of retaliation—the likelihood that the PLRA's administrative exhaustion requirement will bar victims of staff sexual abuse from receiving civil remedies is high.

2. Physical Injury Requirement

The PLRA also creates a barrier to civil redress of staff sexual misconduct by requiring that a plaintiff may not bring a claim for damages resulting from emotional distress without making a showing that a related physical injury occurred, a requirement that ignores the complexities of sexual assault.⁹² Of course serious physical harm does occur in many sexual assaults.⁹³ However, a sexual assault itself may not be deemed a physical injury. While at least one court has found that common sense dictates that allegations of sexual assault meet the physical injury requirement,⁹⁴ in several other cases courts have found that sexual assault does not constitute a physical injury.⁹⁵ For example, in

90. *Id.* at 17.

91. *Woodford*, 548 U.S. at 118 (Stevens, J. dissenting) (footnote omitted).

92. Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (1996) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”). *See also* 28 U.S.C. § 1346(b)(2) (1997).

93. *See, e.g.*, NPREA REPORT, *supra* note 1, at 36 (describing an incident where a perpetrator threw a woman against a wall, slammed her head repeatedly, and violently raped her); *id.* at 129 (sexual assault may result in severe physical damage).

94. *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (“[T]he alleged sexual assaults qualify as physical injuries as a matter of common sense.”).

95. *See, e.g.*, *Cobb v. Kelly*, No. 4:07CV108-P-A, 2007 WL 2159315, at *1 (N.D. Miss. July 26, 2007) (no physical injury alleged in complaint where staff was alleged to have rubbed the plaintiff's genitals); *Smith v. Shady*, No. 3:CV-05-2663, 2006 WL 314514, at *2 (M.D. Pa. Feb. 9, 2006) (staff grabbing and holding man's penis not

Hancock v. Payne, plaintiffs alleged that among other things a correctional officer “fondled their genitalia; sexually battered them by sodomy, and committed other related assaults.”⁹⁶ In determining that the physical injury requirement was not met, the court wrote: “the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault.”⁹⁷

Further, where a sexual assault results in physical injuries such as cuts, abrasions, bruising, and other injuries not necessitating emergency treatment, those injuries may be considered *de minimis*, and therefore insufficient to meet the physical injury requirement.⁹⁸ Likewise, health consequences related to sexual trauma have been discounted as *de minimis*, under the rationale that “[p]rison itself is a stressful environment.”⁹⁹

3. Attorney Fee Restrictions

The PLRA also makes it more difficult for people victimized by staff to find attorneys to represent them by restricting the ability to seek attorney fees when the victim is the prevailing party.¹⁰⁰ In cases where physical injury is found, the PLRA restricts attorneys’ fees to a statutory per hour cap that is often well below an attorney’s billable rate.¹⁰¹ Further, attorneys’ fees are capped at 150 percent of any damages awarded;¹⁰² in extreme cases, this may mean that an attorney may receive as little as

considered a physical injury); Hancock v. Payne, No. Civ.A.103CV671MRJMR, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006).

96. Hancock, 2006 WL 21751, at *1.

97. *Id.* at *3.

98. Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997) (injuries such as cuts and bruises that would heal in a few days were *de minimis* and therefore not sufficient physical injury for PLRA purposes).

99. See Todd v. Graves, 217 F. Supp. 2d 958, 960-61 (S.D. Iowa 2002) (increased blood pressure, aggravated hypertension, dizziness, insomnia and loss of appetite were not physical injuries); cf. Pearson v. Welborn, 471 F.3d 732, 744 (7th Cir. 2006) (mental and physical depression caused by being wrongfully held in a supermax facility that resulted in significant weight loss was not a physical injury).

100. 42 U.S.C. § 1997e(d)(3) (2006) (creating a cap on attorney fees for prisoner rights cases). These restrictions add to a pre-existing lack of counsel. Even before the PLRA was enacted, most people who brought inmate civil rights suits were unrepresented. See Schlanger, *supra* note 76, at 1609-10. The PLRA has, however, even further chilled access to counsel. *Id.* at 1654-57.

101. 42 U.S.C. § 1997e(d)(3).

102. *Id.* § 1997e(d)(2).

\$1.50 in fees for successfully litigating a complex prison conditions case.¹⁰³

The severity of these provisions has been discounted by some courts. For example, in 2006 the Tenth Circuit dismissed a case pursuant to the PLRA, noting that: "Prisoners . . . have time in abundance, do not need money for their own necessities, and are entitled to free legal assistance or access to legal materials."¹⁰⁴ The court was misinformed on several levels.¹⁰⁵ For example, people in prison not only are not entitled to free legal assistance, the provision of such services is significantly hampered by laws which prevent civil legal services attorneys from providing legal services to people in prison.¹⁰⁶ Likewise, the court's reliance on "access to legal materials" is misguided. Even assuming that the individual needing legal services is proficient in using legal materials,¹⁰⁷ prison law libraries are often woefully deficient¹⁰⁸ and, in some cases, may be directly linked to the staff abuse in question.¹⁰⁹

103. See, e.g., *Pearson*, 471 F.3d at 742 (attorney's fees capped at \$1.50 following nominal damage award of \$1.00 where plaintiff was not allowed to present a damages claim due to no showing of physical injury).

104. *Robbins v. Chronister*, 435 F.3d 1238, 1244 (10th Cir. 2006).

105. For example, the court's statement that people in prison do not need money for necessities is belied by the fact that they are often required to pay co-pays for medical and other costs of incarceration, including room and board. See, e.g., *CONFRONTING CONFINEMENT*, *supra* note 8, at 48-49.

106. See 45 C.F.R. § 1637 (1997) (prohibiting civil legal service providers who receive federal funding from participating in civil litigation on behalf of juveniles or adults who are incarcerated).

107. This presumption is largely unreliable. See *Schlanger*, *supra* note 76, at 1611-12.

108. Following the U.S. Supreme Court's holding in *Lewis v. Casey*, 518 U.S. 343, 351 (1996) in which the Court held that people in prison have no "freestanding right to a law library," there is little impetus for prison officials to provide useful and up to date legal materials.

109. See, e.g., *Daskalea v. District of Columbia*, 227 F.3d 433, 438 (D.C. Cir. 2000) ("When Daskalea first attempted to use the library's research materials, Gardner leered at her and rubbed his genitals. She rebuffed his advances, and thereafter had difficulty obtaining any assistance from the library staff."); *Liner v. Goord*, 196 F.3d 132, 133 (2d Cir. 1999) (appellant alleged that following staff sexual assault "Attica prison officials denied him meals, showers, and access to the law library as well as stole and destroyed legal materials in retaliation for filing lawsuits against them."); *Smith v. Shady*, No. 3:CV-05-2663, 2006 WL 314514, at *3 (M.D. Pa. Feb. 9, 2006) (plaintiff alleged offending staff "began opening and reading his legal mail" in retaliation for the grievance he filed).

4. Limitations on Court Oversight

One of the most damaging aspects of the PLRA on a systemic level is the limitation it creates on the ability of courts to oversee prisons that fail to protect the people housed there.¹¹⁰ The PLRA requires:

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.¹¹¹

This restriction applies not just to consent decrees issued by a court, but to preliminary injunctions, which must expire after 90 days unless the court finds it meets the narrow tailoring requirements above.¹¹² The restriction also applies to settlements between the parties. While parties may agree to a settlement that does not meet the PLRA restrictions, such agreements would be unenforceable in federal court.¹¹³

The PLRA also makes early termination of a consent decree or settlement more likely, by making any prospective relief terminable upon the motion of any party or intervener as early as two years after an order granting such relief is approved.¹¹⁴ Prospective relief is further limited by the PLRA's requirement that courts enter an automatic stay of injunctive relief shortly after any motion to modify or terminate prospective relief is filed and while such motions are pending.¹¹⁵

110. NPREA REPORT, *supra* note 1, at 91 ("Beyond the reforms courts usher in, their scrutiny of abuses elicits attention from the public and reaction from lawmakers in a way that almost no other form of oversight can accomplish.").

111. 18 U.S.C. § 3626(a)(1)(A) (2006); *see also id.* § 3626(c)(1) ("In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).").

112. *See id.* § 3626(a)(2).

113. *Id.* § 3626(c)(2)(A) ("Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.").

114. *Id.* § 3626(b).

115. *Id.* § 3626(e)(2).

The danger that these limitations may cause is evidenced in the long and sordid history of staff sexual misconduct in the District of Columbia Jail. In *Women Prisoners v. District of Columbia*, the District of Columbia jail facilities were found to allow ongoing and systematic sexual abuse and harassment of women confined in three facilities, including "forceful sexual activity, unsolicited sexual touching, exposure of body parts or genitals and sexual comments."¹¹⁶ The court determined that the plaintiffs had "demonstrated a deprivation which amounts to a wanton and unnecessary infliction of pain. The evidence revealed a level of sexual harassment which is so malicious that it violates contemporary standards of decency."¹¹⁷ The court held that the mismanaged handling of sexual abuse complaints and failure to protect women from such abuse amounted to deliberate indifference.¹¹⁸ As such, the court issued a detailed order requiring the District to act immediately to prevent continued sexual abuse of female inmates by corrections staff.¹¹⁹

On appeal, however, the circuit court amended the order, vacating certain protections against sexual harassment reasoning that they were too broad.¹²⁰ The abuse perpetrated against women at the facilities was allowed to continue. For example, one woman, Sunday Daskalea, experienced extreme degradation at the hands of jail staff. The abuse began with verbal harassment,¹²¹ which escalated into incidents where jail staff arranged for and assisted in inmate assaults on Ms. Daskalea.¹²² The atmosphere was so corrosive in the jail, that the "head guard on the evening shift, organized a series of evenings during which female inmates stripped and danced provocatively to loud music," for the viewing pleasure of female and male staff, and where wo-

116. *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 877 F. Supp. 634, 639 (D.D.C. 1994) ("*Women Prisoners I*").

117. *Id.* at 664-65.

118. *Id.* at 665-66.

119. *Id.* at 679-81.

120. *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 930 (D.C. Cir. 1996) ("*Women Prisoners III*") (although the District argued that the order was too broad under the PLRA, the court stated that its reasoning was based on general principles of equitable relief apart from the PLRA).

121. *See Daskalea v. District of Columbia*, 227 F.3d 433, 438 (D.C. Cir. 2000) ("From the beginning of her confinement, Daskalea testified that she was called 'whore,' 'white bitch,' 'cracker,' and other epithets by guards and inmates alike.").

122. *Id.* (describing a staff member forcibly restraining Ms. Daskalea's hands while an inmate attacked her).

men who refused to dance were assaulted by staff.¹²³ On a July evening, as Ms. Daskalea sat in her cell:

. . . loud music began and inmates started moving to the dining area. Daskalea followed, arriving late and standing at the back of the crowd. There, at the center of attention, was Officer Walker, doing a handstand on one of the dining tables and gyrating her hips provocatively. Soon, at Walker's instigation, three inmates climbed onto the table and began dancing, completely naked, while the crowd cheered. One of the dancing inmates performed a lewd act, and Officer Walker placed her head between the inmate's legs to get a closer look. By that point, all of the inmates, numerous female guards, and several male guards and maintenance workers were in attendance.

Then, someone called out Daskalea's name. Fearing what might be coming, plaintiff fled back to her cell, but was unable to close the door. A few minutes later, Officer Walker belted out the command: "Get Sunday down here!" The crowd began chanting Daskalea's name, and the dancing stopped. Two inmates pulled plaintiff out of her cell, one taking each arm while a third followed behind preventing escape. The inmates dragged Daskalea to the center of the crowd. Officer Walker commanded her to dance, and when Daskalea hesitated, Walker visibly angered. Afraid, Daskalea complied. She removed all of her clothes except for her underwear and attempted to dance to the music. But she was in such a state of shock and fear that her legs trembled. Guards began shouting and clapping; some flashed money. Officer Walker tried to get Daskalea to remove her underwear. An inmate began rubbing baby oil all over Daskalea's body. The inmate then began rubbing her own body against Daskalea's. Plaintiff lost control of her legs and collapsed to the ground. The other inmate lay on top of her. Eventually, the guards permitted Daskalea to take her clothes and return to her cell. Later that night, both guards and inmates approached her, communicating sexual interest. One guard exposed herself to Daskalea while telling her how much she enjoyed the dance.¹²⁴

Had there been meaningful court oversight of the District of Columbia jails, Ms. Daskalea and others like her may not have been victimized. Put simply,

the failure of the authorities to adequately deal with the problem of prison assaults counsels us to not be hesitant to find a constitutional violation, if one exists, and to provide an adequate remedy for the violation. In sum, we 'have learned from repeated investigation and bitter experience that judicial inter-

123. *Id.* at 439.

124. *Id.*

vention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons.¹²⁵

IV. THE PUBLIC INTEREST IN ADDRESSING PRISON STAFF SEXUAL MISCONDUCT

Victims of prison staff sexual abuse may experience horrible trauma, which itself warrants swift action to enforce laws prohibiting such abuse and to open the courts to victims seeking justice. In addition, there is a significant public interest in addressing this problem.¹²⁶ Upwards of 95 percent of all people in prison are ultimately released, bringing to the community the repercussions of what they experienced in prisons.¹²⁷ In the case of staff sexual assault, that may include, among other things, serious mental health issues, infectious disease, and an increased likelihood of recidivism. As noted by the federal Commission on Safety and Abuse in America's Prisons:

What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with corrections officers at the end of each day's shift . . . We must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all.¹²⁸

As described below, these problems have tremendous consequences for public health, public safety, and the use of taxpayer dollars.

125. *Martin v. White*, 742 F.2d 469, 473 (8th Cir. 1984) (citation omitted) (pre-PLRA case finding that the Eighth Amendment is violated where people in prison are subjected to violent physical or sexual attacks or must live in fear of such attacks).

126. See NPREA REPORT, *supra* note 1, at 2 ("Given our country's enormous investment in corrections, we should ensure that these environments are as safe and productive as they can be. Sexual abuse undermines those goals. It makes correctional environments more dangerous for staff as well as prisoners, consumes scarce resources, and undermines rehabilitation. It also carries the potential to devastate the lives of victims.").

127. *Id.* at 26 ("Institutional violence and sexual abuse in particular undermine the very purposes of corrections. They make facilities less safe for everyone, they consume scarce resources, and their consequences extend into our cities and towns as 95% of all prisoners are one day released.").

128. CONFRONTING CONFINEMENT, *supra* note 8, at 11.

A. *Public Health*

Just as when rape occurs in the community, “[p]rison rape survivors endure physical scars, contract HIV and other sexually transmitted diseases, and suffer severe psychological harm.”¹²⁹ A non-inclusive list of these harms is detailed below.

1. Mental Health Consequences of Staff Sexual Abuse

Survivors of staff sexual abuse often experience what can be debilitating, life-long mental health issues:

Almost all victims of an invasive or violent sexual assault develop some symptoms of post traumatic stress disorder (PTSD) in the weeks after the attack. These include numbing, intrusive thoughts, nightmares, insomnia, flashbacks during which the victim vividly re-experiences the event, outbursts of anger or irritability, and panic attacks. For some victims, PTSD symptoms resolve several months after the incident; for others, PTSD becomes chronic. Victims with long-term PTSD are more likely to develop other mental health problems as well.¹³⁰

The unique nature of the correctional setting may serve to exacerbate these harms. People who are assaulted by prison staff cannot retreat to a safe environment away from the scene of the abuse; rather, they are literally locked into the place where they were traumatized and subjected to the authority of their assailant and his or her peers.¹³¹ As a result, “[t]he constant threat of subsequent abuse and physical proximity to danger are likely to increase the risk of developing PTSD and other aftereffects.”¹³²

129. Melissa Rothstein & Lovisa Stannow, *Improving Prison Oversight to Address Violence in Detention*, AM. CONSTITUTION SOC’Y FOR LAW & POL’Y 1 (2009).

130. NPREA REPORT, *supra* note 1, at 44-45; *see also id.* at 14 (detailing “psychological aftereffects of sexual abuse”); *id.* at 45 (“Victims of sexual abuse often struggle with long-lasting effects, including anxiety, a sense of alienation and isolation, mistrust of others, hostility, depression, and helplessness. Thoughts of suicide are common.”); *id.* at 128 (“A study of teenage girls who had experienced sexual abuse found that almost half of them suffered from clinical levels of depression, anxiety, and PTSD, and 62% engaged in self-mutilating behavior.”).

131. *Women Prisoners I*, 877 F. Supp. at 665 (“In free society, a woman who experiences harassment may seek the protection of police officers, friends, coworkers or relevant social service agencies. She may also have the option of moving to locations where the harassment would no longer occur. In sharp contrast, the safety of women prisoners is entrusted to prison officials, some of whom harass women prisoners and many of whom tolerate the harassment. Furthermore, the women are tightly confined, making their escape from harassment as unlikely as escape from the jail itself.”).

132. NPREA REPORT, *supra* note 1, at 45; *see also id.* at 127 (“Avoiding stimuli likely to trigger a flashback or other emotional responses is particularly difficult in a

These effects may be exacerbated by the placement of victims in isolation (known commonly as “segregation”) when sexual abuse is discovered.¹³³ Although placement in isolation may be done with good intentions—to protect the victim from further abuse or retaliation¹³⁴—segregation can actually intensify the mental health consequences of sexual assault for two reasons:

First, the conditions of confinement tend to exacerbate pre-existing psychiatric disorders to cause decompensation in individuals who are psychologically vulnerable under duress. Second, with continued confinement in these same conditions—particularly in the absence of meaningful psychiatric services—the afflicted prisoner’s condition tends to deteriorate even further, and the long-term prognosis worsens.¹³⁵

2. Infectious Disease, Unwanted Pregnancy, and Other Medical Harms

Mental health concerns are not the only consequences of staff sexual assaults; such abuse can have devastating repercussions for a victim’s physical health as well.

An area of critical concern is the spread of sexually transmitted diseases and infectious disease. In passing the Prison Rape Elimination Act, Congress found that “[p]rison rape undermines the public health by contributing to the spread of these diseases,

correctional facility, where victims may regularly encounter the setting where the abuse occurred—in some cases their own cell. It also may be impossible to avoid their abuser, causing them to continually relive the incident and maintaining the trauma.”); OIG REPORT, *supra* note 4, at 7 (“[I]nmates may experience deep psychological and emotional trauma by being sexually abused in prison.”).

133. Other commonly used terms for isolation settings are “protective custody” and “intensive management unit.” The placement of victims in segregation or transfer to new facilities happens frequently. See BECK, HARRISON & ADAMS, *supra* note 18, at 8 (“Correctional authorities indicated that the victims of staff sexual misconduct or harassment during 2006 were often transferred to another facility (31%) or placed in administrative segregation or protective custody (25%). Inmate victims had been transferred to another facility in 48% of the incidents in local jails and in 19% of the incidents in State and Federal prisons. Victims were less likely to have been moved to administrative segregation or protective custody when the incident occurred in a jail (19%) than in a prison (28%).”).

134. See, e.g., *Women Prisoners I*, 877 F. Supp. at 639-40.

135. See, e.g., SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS, 153-54 (2003), <http://www.hrw.org/reports/2003/usa1003/>; see also *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (describing placing a mentally ill person in segregation as “the mental equivalent of putting an asthmatic in a place with little air to breathe”); NPREA REPORT, *supra* note 1, at 8 (segregation “is exceptionally difficult and takes a toll on mental health, particularly if the victim has a prior history of mental illness”).

and often giving a potential death sentence to its victims.”¹³⁶ That concern is well founded.¹³⁷ In 2006, the National Commission on Correctional Health Care reported to Congress “that rates of infectious diseases were dramatically higher among inmates and releasees compared to the prevalence in the general population,” including five times higher for AIDS and nine times higher for hepatitis C.¹³⁸ The federal Commission on Safety and Abuse in America’s Prisons also reported: “[e]very year, more than 1.5 million people are released from jail and prison carrying a life-threatening contagious disease.”¹³⁹

The link between sexual abuse and the spread of infectious disease is very real.¹⁴⁰ However, the prevalence of the spread of disease is difficult to gauge, in large part due to the lack of medical follow-up care following incidents of prison sexual abuse: “[v]ictims were given a medical examination in 6% of the incidents in prisons and jails.”¹⁴¹ Despite that low rate, two percent of victims of prison sexual assault tested positive for HIV/AIDS and two percent for other sexually transmitted diseases.¹⁴² Of course, it is not just the victim who is harmed; there is an ongoing risk of infection for the victim’s loved ones as well as the perpetrator and the perpetrators’ sexual partners in the community.

Another harm experienced by some female victims of staff sexual misconduct is unwanted pregnancy.¹⁴³ Fear of further abuse and retaliation may lead women who are pregnant to avoid

136. Prison Rape Elimination Act, 42 U.S.C. § 15601(7) (2003).

137. See, e.g., LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HIV IN PRISONS, 2005, at 1 (2007) (by year-end 2005, over 22,000 state and federal prisoners were infected with HIV/AIDS); ALLEN J. BECK & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HEPATITIS TESTING AND TREATMENT IN STATE PRISONS 1 (2004) (in 2000, of those people in state and federal facilities who were tested for hepatitis C, nearly 18,000 were positive).

138. See UNDER SECRETARY FOR HEALTH’S INFORMATION LETTER, DEP’T OF VETERANS AFFAIRS, GUIDELINES AND RECOMMENDATIONS FOR SERVICES PROVIDED BY VHA FACILITIES TO INCARCERATED VETERANS RE-ENTERING COMMUNITY LIVING para. 2d (2006).

139. CONFRONTING CONFINEMENT, *supra* note 8, at 13; see also NPREA REPORT, *supra* note 1, at 14, 129.

140. See, e.g., NPREA REPORT, *supra* note 1, at 46 (describing an incident where a man contracted HIV after being sexually assaulted by a fellow inmate).

141. BECK, HARRISON & ADAMS, *supra* note 18, at 8. Cf. CONFRONTING CONFINEMENT, *supra* note 8, at 13 (“Every U.S. prison and jail should screen, test, and treat for infectious diseases under the oversight of public health authorities and in compliance with national guidelines and ensure continuity of care upon release.”).

142. BECK, HARRISON & ADAMS, *supra* note 18, at 9, Table 12.

143. See, e.g., *Berry v. Oswald*, 143 F.3d 1127 (8th Cir. 1998).

seeking medical care during their incarceration.¹⁴⁴ This fear is not unfounded; in one case a staff member who learned that the woman he assaulted became pregnant, forced her to drink quinine and turpentine in an effort to force an abortion.¹⁴⁵ Even where fear of further abuse does not exist, prenatal care may not be provided in the prison where she is housed.¹⁴⁶ The lack of prenatal care can have serious consequences for the health of the victim, and the health of the child.¹⁴⁷

Serious physical harm can also occur during the course of a sexual assault, including: "bruises, lacerations, bleeding, broken bones, concussions, knocked-out teeth, internal injuries, and even more serious physical damages. . . [and for women] also may lead to persistent pelvic pain, excessive menstrual bleeding and cramping, and other gynecological disorders."¹⁴⁸ There are also physical consequences related to the emotional trauma experienced by victims:

The trauma can also lead to serious medical conditions, including cardiovascular disease, ulcers, and a weakened immune system. Studies indicate that sexual abuse victims have poorer physical functioning in general and more physical ailments than non-abused individuals, even after controlling for emotional disturbances such as depression.¹⁴⁹

Some of these medical issues may be resolved in the short-term, but many—including sexually transmitted diseases and cardiovascular disease—can have life-long consequences for a vic-

144. NPREA REPORT, *supra* note 1, at 46.

145. *Berry*, 143 F.3d at 1129.

146. *See, e.g., Women Prisoners I*, 877 F. Supp. at 645-48, 667-68 (facilities did not provide adequate prenatal care); *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 899 F. Supp. 659, 664-8 (D.D.C. 1995) ("*Women Prisoners II*") (rejecting motion to stay enforcement of order to provide prenatal health services in the correctional facility); *but see Women Prisoners III*, 93 F.3d at 923 (holding that district court abused its discretion by issuing too detailed an order regarding prenatal care).

147. *See, e.g., Women Prisoners II*, 899 F. Supp. at 666 ("The Defendants' failure to meet the standard for obstetrical and gynecological care is the proximate cause of past injuries, and it is reasonably foreseeable that their actions or inactions will lead to future injuries to the Plaintiffs.")

148. NPREA REPORT, *supra* note 1, at 129.

149. *Id.* at 14; *see also id.* at 128 (explaining that victims of sexual abuse may suffer from insomnia, eating disorders, depression, and chemical dependency); *id.* at 44-45 (describing symptoms of posttraumatic stress disorder suffered by many victims of an invasive or violent sexual assault); *id.* at 126-28 (describing many of the well-documented psychological aftereffects of sexual abuse); *Women Prisoners of the D.C. Dep't of Corr. v. D.C.*, 877 F. Supp. 634, 665 (D.D.C. 1994) (describing expert testimony regarding health consequences of staff sexual abuse).

tim. In turn, the mental health and medical effects of sexual abuse undermine the level of health generally in the families and communities of survivors of such abuse. For example, for victims' families, the repercussions of prison sexual abuse may include instability in the home,¹⁵⁰ resulting from difficulty experienced by abuse victims in maintaining employment and housing as a result of their trauma.¹⁵¹ In addition, the likely link between victimization, mental health problems, and self-medication with illicit drugs¹⁵² is particularly troubling for family stability, as "60% of parents in State prison reported using drugs in the month before their offense, and 25% reported a history of alcohol dependence."¹⁵³ Poor communities and communities of color—which disproportionately bear the brunt of failing public health systems¹⁵⁴—are likely hardest hit, as members of those communities are disproportionately represented in America's prisons.¹⁵⁵

150. See, e.g., NPREA REPORT, *supra* note 1, at 2, 45 (quoting a survivor of staff sexual abuse: "I continue to contend with flashbacks of what this correctional officer did to me and the guilt, shame, and rage that comes with having been sexually violated for so many years . . . I still struggle with the memories of this ordeal and take it out on friends and family who are trying to be there for me now.").

151. Prison Rape Elimination Act, 42 U.S.C. § 15601(11) (2003) ("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.").

152. See *infra* note 156 and accompanying text.

153. Christopher J. Mumola, *Incarcerated Parents and Their Children 1* (2000) [hereinafter *Incarcerated Parents*] ("Parents held in U.S. prisons had an estimated 1,498,800 minor children in 1999, an increase of over 500,000 since 1991."). See also Jeremy Travis et al., *Urban Inst. Justice Policy Center, From Prison to Home: The Dimensions and Consequences of Prisoner Reentry 13* (2001) ("Sixty-five percent of female prisoners have a child below the age of 18.").

154. See, e.g., Devi Sridhar, U.N. Development Programme, *Human Development Report Office, Inequality in the United States Healthcare System* (2005), http://hdr.undp.org/en/reports/global/hdr2005/papers/hdr2005_sridhar_devi_36.pdf.

155. See Thomas P. Bonczar, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1, 5 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf> (in 2001, "[t]he rate of ever having gone to prison among adult black males (16.6%) was over twice as high as among adult Hispanic males (7.7%) and over 6 times as high as among adult white males (2.6%)); *id.* at 1 ("About 1 in 3 black males, 1 in 6 Hispanic males, and 1 in 17 white males are expected to go to prison during their lifetime, if current incarceration rates remain unchanged."); William J. Sabol, Ph.D., et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2008 2* (2009) (listing imprisonment rates per 100,000 people in the U.S. as follows: white men at 487; black men at 3,161; Hispanic men at 1,200; white women at 50; black women at 149; and Hispanic women at 75). See also NPREA Report, *supra* note 1, at 15, 130; *Confronting Confinement*, *supra* note 8, at 19, 38. *But see* Sabol, *supra* note 154, at 5 (describing a decrease in the imprisonment rate for African Americans between 2000 and 2008).

B. *Public Safety*

Just as staff sexual abuse has devastating consequences for the health of our communities, it may also decrease community safety by contributing to recidivism. In addition, staff misconduct contributes to decreased security and safety in prison facilities, putting people who are incarcerated or who work in those facilities in harm's way.

1. The Link Between Staff Sexual Abuse and Recidivism

In passing the Prison Rape Elimination Act, Congress found: "Prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released. . . ." ¹⁵⁶ In part, this reality is linked to the mental health consequences of staff sexual abuse discussed above. Recidivism rates of prisoners experiencing mental health problems are high: nationwide, 52 percent of state prisoners with mental illness "reported three or more prior sentences to probation or incarceration. . . ." ¹⁵⁷

In addition, some victims of staff sexual misconduct will self-medicate with street drugs or illegal prescription drugs in order to quell the mental and physical health consequences of the abuse they have suffered. ¹⁵⁸ The interrelation between substance abuse and criminal activity are well-recognized. ¹⁵⁹ More than 80 percent of people in prison report past illicit drug use. ¹⁶⁰ Signifi-

156. Prison Rape Elimination Act, 42 U.S.C. § 15601(8) ("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.").

157. Paula M. Ditton, U.S. Dep't of Justice, Bureau of Justice Statistics, *Mental Health Treatment of Inmates and Probationers* 5 (1999).

158. NPREA Report, *supra* note 1, at 47; *see also* Sally Wynn, *Dual Diagnosis*, J. of Addictive Disorders 2 (2002), <http://www.breining.edu/jad02sw.pdf> ("Many persons seek relief of their mental health symptoms by self-medicating with drugs and alcohol.").

159. *See, e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FACT SHEET: DRUG-RELATED CRIME 1-2 (1994) [hereinafter *DRUG-RELATED CRIME*] (drug users are more likely than non-users to commit crimes).

160. *See, e.g.*, DORIS J. WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *DRUG USE, TESTING, AND TREATMENT IN JAILS* 2 (revised Sept. 29, 2000) (approximately 82% of all jail inmates reported drug use); CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997*, 1 (1999) [hereinafter *SUBSTANCE ABUSE*] (in 1997, 83% of all prisoners in the United States reported past drug use); TRAVIS, *supra* note 153, at 25 (nationally "[e]ighty percent of the state prison population report a history of drug and/or alcohol use, including 74 percent of those expected to be released within the next 12 months").

cant numbers report being intoxicated during the commission of the crime for which they were convicted.¹⁶¹ In fact, when all crimes are considered, one in every six was committed in order to obtain money for drugs.¹⁶² Self-medication by victims of staff sexual misconduct can quickly spiral beyond self-destructive behavior: “offender drug use is involved in more than half of all violent crimes and in 60 to 80 percent of child abuse and neglect cases.”¹⁶³ Further, the nature of offenses subsequent to release can increase in severity, with recidivists moving from non-violent to violent offenses.¹⁶⁴

Prison sexual abuse can have particularly negative consequences for youth. Sexual abuse of juveniles may increase criminalization, by moving youth who may have otherwise aged out of delinquent behavior¹⁶⁵ toward lifelong criminality.¹⁶⁶ For youth who may never have been involved in the criminal justice system, where the sexual abuse of their parents leads to parental recidivism, such abuse may change their fate. Research has shown that “children of offenders are significantly more likely than other children to be arrested or incarcerated.”¹⁶⁷

161. See, e.g., WILSON, *supra* note 160, at 2 (36% of jail inmates were using illegal drugs at the time of the offense); SUBSTANCE ABUSE, *supra* note 160, at 1 (in 1997 51% of prisoners in the United States “reported the use of alcohol or drugs while committing their offense”); DRUG-RELATED CRIME, *supra* note 159, at 2-3 (“[i]ncarcerated offenders were often under the influence of drugs when they committed their offense”); TRAVIS, *supra* note 153, at 25 (“more than half of state prisoners report that they were using drugs or alcohol when they committed the offense that led to their incarceration”).

162. WILSON, *supra* note 160, at 2 (“Nearly 1 in 6 convicted jail inmates committed their offenses to get money for drugs.”); SUBSTANCE ABUSE, *supra* note 160, at 1 (“In 1997 . . . about 1 in 6 of [all state and federal prisoners] reported committing their current offense to obtain money for drugs.”).

163. Nora D. Volkow, *Treat the Addict, Cut the Crime Rate*, WASHINGTON POST, Aug. 19, 2006 at A17.

164. MATTHEW R. DUROSE & CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE OF NONVIOLENT OFFENDERS EXITING STATE PRISONS 2 (2004) (“Among nonviolent releasees, about 1 in 5 were rearrested for a violent crime within 3 years of discharge.”).

165. See BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POL’Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 5 (2006).

166. NPREA REPORT, *supra* note 1, at 17 (“[If youth] are sexually abused, they may live with lifelong consequences that can include persistent mental illness and tendencies toward substance abuse and criminality.”).

167. TRAVIS, *supra* note 153, at 39. See also DITTON, *supra* note 157, at 6 (in state prison facilities, 55% of mentally ill prisoners and 47% of other prisoners “reported a history of family incarceration”).

2. Staff Sexual Abuse Undermines Safety in Correctional Facilities and The Community

It is well recognized that staff sexual abuse undermines the safety and security of prison facilities for both the people housed there and the people who work there.¹⁶⁸ This is in no small part due to the link between staff sexual misconduct and the introduction of contraband—including drugs and weapons—into the facility.¹⁶⁹ In fact, “[n]early half of the subjects in OIG sexual abuse cases also smuggled contraband into prisons for the inmates with whom they had sexual relationships. . . . Many of these staff members helped inmates conceal contraband by alerting the inmates to unannounced searches or by storing the contraband with the staff’s own possessions.”¹⁷⁰

Staff engaging in these activities often threaten their victims or other prisoners who they believe will report their behavior,¹⁷¹ or engage in retaliation against those who do.¹⁷² “Retaliation by

168. See, e.g., Miller Testimony, *supra* note 6, at 309:4-11 (noting the high correlation between staff assaults and contraband).

169. See, e.g., OIG REPORT, *supra* note 4, at 1 (“[S]taff sexual abuse can corrupt prison staff and lead to other dangers, such as staff smuggling drugs or weapons into prison facilities for inmates.”); *Daskalea v. District of Columbia*, 227 F.3d 433, 438 (D.C. Cir. 2000) (“The civilian employee in charge of the Jail’s library, Edward Gardner, was well known for providing inmates with cigarettes in exchange for sex.”); *Hancock v. Payne*, No. Civ.A.103CV671JMRJMR, 2006 U.S. Dist. WL 21751, at *1 (S.D. Miss. Jan. 4, 2006) (case in which plaintiffs claimed that a staff member provided them with contraband and then sexually assaulted them).

170. OIG REPORT, *supra* note 4, at 7; see also Smith & Yarussi, *supra* note 3, at 23.

171. See, e.g., *United States v. Alfred Barnes*, 4:06 CR 36/RH, Indictment (N.D. Fla., June 6, 2006) at 8, on file with author (staff “would and did discourage inmates from reporting defendants illegal conduct by threatening to plant contraband among the inmates’ belongings”); *id.* (staff “would and did discourage inmates from reporting defendants’ illegal conduct by threatening to have inmates ‘shipped’ to another BOP facility in a location farther from their families”); Miller Testimony, *supra* note 6, at 303:18-304:11 (regarding staff threats to people in prison).

172. See, e.g., *Pearson v. Welborn*, 471 F.3d 732, 734-37 (7th Cir. 2006) (jury found staff falsified a disciplinary report in retaliation for an inmate complaining about conditions of confinement and refusing to act as a confidential informant; falsified report resulted in the inmate being held in a supermax facility for a year); *Daskalea*, 227 F.3d at 439 (after reporting sexual misconduct by staff, woman was required to turn over her underwear as “contraband” and was placed in solitary confinement); *Liner*, 196 F.3d at 133 (appellant alleged that following staff sexual assault “Attica prison officials denied him meals, showers, and access to the law library as well as stole and destroyed legal materials in retaliation for filing lawsuits against them.”). See also OIG REPORT, *supra* note 4, at 4 (one reason for underreporting of staff abuse is fear of retaliation); ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 1 (2008) (“Some vic-

staff can include unwarranted disciplinary action, unfavorable changes in housing and work assignments, and threats of violence against the victim or even the victim's family."¹⁷³ For example, after violently raping a man in his unit, an officer told him that if he reported the rape the officer "would have him transferred to a rougher unit where prison gang members would rape him repeatedly."¹⁷⁴ Moreover, offending staff do not just threaten the people they are abusing to keep them silent; they also engage in violence and intimidation toward their colleagues who report them.¹⁷⁵

The actions of offending staff have ripple effects on safety in the community as well. For example, in June 2006, a grand jury indicted six correctional officers, alleging that they engaged in a conspiracy to trade contraband and money for sex for a period of two years at the Federal Correctional Institute (FCI) in Tallahassee, Florida.¹⁷⁶ As in many prisons, staff at FCI were not screened for contraband or weapons as they entered the facility, and therefore one of the indicted correctional officers was able to bring in a personal firearm.¹⁷⁷ When FBI agents arrived at the prison to arrest the officers, the armed officer shot and killed a U.S. Justice Department investigator and injured a prison em-

tims may be reluctant to report incidents to correctional authorities due to lack of trust in staff, fear of reprisal from perpetrators, a code of silence among inmates, or personal embarrassment."); Fahti, *supra* note 75 (teenage girl did not report staff sexual abuse out of fear of retaliation).

173. NPREA REPORT, *supra* note 1, at 105; *see also id.* at 104-05 (quoting testimony of a woman who lost good time in retaliation, delaying her release); *id.* at 11 ("Victims and witnesses are bullied into silence and harmed if they speak out. In a letter to the advocacy organization Just Detention International, one prisoner conveyed a chilling threat she received from the male officer who was abusing her: 'Remember if you tell anyone anything, you'll have to look over your shoulder for the rest of your life.'").

174. *Id.* at 94.

175. *See, e.g., id.* at 105 (when a correctional officer reported misconduct that he observed in his facility, other members of the corrections staff slashed the reporting officer's tires, called him a "rat" and threatened him). *Cf. Fairley v. Andrews*, 578 F.3d 518, 520 (7th Cir. 2009) (plaintiffs alleged that correctional officers who regularly beat prisoners without justification threatened to kill officers who reported their behavior, assaulted the reporting staff by "grabbing them from behind and simulating anal intercourse," and harassed them).

176. *United States v. Alfred Barnes*, 4:06 CR 36/RH, Indictment (N.D. Fla., June 6, 2006) at 5, 7-13, on file with author.

177. Melissa McNamara, *Fed Agent, Guard Die in Prison Gunfire*, CBS NEWS, June 21, 2006, <http://www.cbsnews.com/stories/2006/06/21/national/main1736630.shtml>; *2 Feds Die in Prison Shooting*, THE ASSOCIATED PRESS, June 21, 2006, <http://www.msnbc.msn.com/id/13415618/print/1/displaymode/1098/>; Miller Testimony, *supra* note 6, at 309:15-310:10.

ployee assisting in the arrest.¹⁷⁸ The indicted officer was also shot and killed in the ensuing gun battle.¹⁷⁹

Whether through the introduction of weapons, as was the case at FCI, or other forms of contraband, illicit materials used to promote concealment of staff sexual misconduct threatens prison safety. Likewise, the use of retaliation to quell reporting of staff sexual abuse remains a major obstacle to reporting of abuse by victims, their peers, and other staff. The existence of staff sexual misconduct, and the related misconduct that stems there from, substantially undermines the safety of people incarcerated in prisons and staff alike.

C. *Staff Sexual Abuse Leads to a Drain on Public Resources*

In addition to the direct public health and safety consequences listed above, staff sexual abuse may also lead to a significant drain on public resources that might otherwise be used for rehabilitative programming and services that ultimately would reduce crime.¹⁸⁰ With respect to public safety, one key cost relates to the likely increase in recidivism stemming from staff sexual abuse. These new crimes create an enormous fiscal burden for taxpayers to investigate, prosecute, defend, and incarcerate the recidivists.¹⁸¹ New crime can also create the need for publicly funded services for crime victims, in addition to the direct financial and emotional costs to crime victims.¹⁸² There are also significant costs to the public health system,¹⁸³ particularly given that so few victims of prison sexual abuse receive medical or

178. McNamara, *supra* note 177; *2 Feds Die in Prison Shooting*, *supra* note 175; Miller Testimony, *supra* note 6, at 309:15-310:10.

179. McNamara, *supra* note 177.

180. *See, e.g.*, AOS, *supra* note 29, at 9. *See also* CONFRONTING CONFINEMENT, *supra* note 8, at 27-28.

181. *See* Danny Davis, *Everybody Deserves a Second Chance*, THE HILL, July 25, 2006 ("The fiscal burden on taxpayers of this revolving-door system is enormous. According to the U.S. Department of Justice's Bureau of Justice Statistics, the costs associated with corrections have increased from \$9 billion in 1982 to \$60 billion in 2002. However, this figure does not take into account the additional costs of arrest, prosecution and defense, and health care and, perhaps most important, the cost to victims."); Prison Rape Elimination Act, 42 U.S.C. § 15601(14) (2003) (prison rape decreases the "effectiveness and efficiency" of "crime prevention, investigation, and prosecution").

182. *See, e.g.*, PATSY A. KLAUS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, THE COST OF CRIME TO VICTIMS (1994) (The Department of Justice has estimated that in 1992 alone, the direct costs to crime victims was \$17.6 billion, exclusive of certain costs for medical and psychological treatment).

183. *See, e.g.*, NPREA REPORT, *supra* note 1, at 47.

mental health care during incarceration.¹⁸⁴ The increased incidence of mental health issues, infectious disease, and other medical issues add to the strain on an already over-burdened public health system.¹⁸⁵

The potential drain on public resources extends beyond public health and safety to include other government expenditures as well. For example, sexual victimization in prison may also lead to difficulties in maintaining stable employment and housing, making victims of staff sexual misconduct “more likely to become homeless and/or require government assistance.”¹⁸⁶ Further, the instability caused to families that may result for sexual trauma in prison can lead to increased costs to taxpayers, particularly in relation to foster care and other child protective services.¹⁸⁷

Another significant cost to taxpayers associated with staff sexual abuse arises where staff sexual misconduct is allowed to fester, exposing corrections agencies to civil liability.¹⁸⁸ While an untold number of cases are precluded due to the Prison Litigation Reform Act, in recent years, staff sexual abuse cases have resulted in tens of thousands—and in some cases, millions—of dollars in civil judgments.¹⁸⁹ For example, in July 2009, the Michigan Department of Corrections agreed to a \$100 million dollar

184. BECK, HARRISON & ADAMS, *supra* note 18, at 8 (“In most incidents of staff sexual misconduct or harassment (76%), victims received no medical followup, counseling or mental health treatment. Victims were given a medical examination in 6% of the incidents in prisons and jails. They were provided counseling or mental health treatment in 12% of the incidents.”).

185. *See, e.g.*, 42 U.S.C. § 15601(14) (“The high incidence of prison rape undermines the effectiveness and efficiency of United States Government expenditures through grant programs such as those dealing with health care; mental health care; [and] disease prevention . . .”); NPREA REPORT, *supra* note 1, at 47 (“Individuals suffering from the psychological and physical effects of sexual abuse carry those effects home with them. Many victims require ongoing medical and mental health care, increasing the burden on already struggling public health care systems.”).

186. Prison Rape Elimination Act, 42 U.S.C. § 15601(11); *see also id.* § 15601(14) (regarding the increased need for governmental expenditures to address unemployment and homelessness related to prison sexual abuse).

187. *See* INCARCERATED PARENTS, *supra* note 153, at 1 (“10% of mothers and 2% of fathers in State prison reported a child now living in a foster home or agency”).

188. *See* NPREA REPORT, *supra* note 1, at 35. Note that conflicts may arise where prosecutors are responsible for both criminal prosecution and for representing the correctional facility in civil cases arising from the sexual abuse. *See, e.g.*, Sinclair, *supra* note 45. In such instances, proving that the crime took place in the criminal matter could increase liability in the civil matter.

189. *See, e.g.*, *Daskalea*, 227 F.3d at 437 (upholding award of \$350,000 in compensatory damages to plaintiff who was forced to dance naked in front of staff and inmates); *Berry*, 143 F.3d at 1129 (jury award of \$80,000 for woman impregnated by

settlement with more than 500 women who claimed sexual abuse and harassment by corrections staff.¹⁹⁰ Likewise, the Federal Bureau of Prisons paid \$600,000 to settle two lawsuits alleging that after a BOP staff member sexually abused inmates, the staff member was allowed to remain in the prison, where he assaulted the inmate again.¹⁹¹

All of these costs could be avoided if prison staff sexual abuse were deterred. Those funds could then be re-directed to community improvement, including crime prevention programs and improvements in public health services.

V. WHAT SHOULD BE DONE

Given the potentially devastating effects to public health and safety and the potential drain on public coffers, it is essential that victims of staff sexual abuse have access to justice in both criminal and civil courts. The following recommendations are certainly not the only steps needed to reduce staff sexual abuse,¹⁹² but instead are intended to address the deficiencies detailed above.

A. Reducing Evidentiary Challenges

Proper and thorough investigations of staff sexual abuse are critical to ensuring that prosecutions take place successfully and

guard who raped her and then forced her to drink quinine and turpentine in an attempt to cause an abortion).

190. Jeff Seidel, *Michigan Women Abused in Prison Get \$100 Million*, DETROIT FREE PRESS, July 15, 2009.

191. OIG REPORT, *supra* note 4, at 8.

192. Preventing staff sexual misconduct, as well as inmate-on-inmate sexual assaults will require numerous changes to most prison systems, including better classification systems to ensure vulnerable inmates are protected from potential predators, reductions in overcrowding, improved staff training, improved staffing models, etc. See generally NATIONAL PRISON RAPE ELIMINATION COMM'N STANDARDS: ADULT PRISONS AND JAILS WITH IMMIGRATION SUPPLEMENT (June 2009); NATIONAL PRISON RAPE ELIMINATION COMM'N STANDARDS: JUVENILE FACILITIES (June 2009); NATIONAL PRISON RAPE ELIMINATION COMM'N STANDARDS: LOCKUPS (June 2009), <http://www.nprec.us/>. See also IN THE SHADOWS, *supra* note 28, at 9 ("One of the most important tools available to corrections officials to prevent prisoner rape is the appropriate classification of detainees when they enter a facility, as well as a system for rapidly re-classifying them when an actual or potential problem arises."). In addition, to date corrections experts have largely assessed how vulnerabilities of certain populations relate to inmate-on-inmate sexual misconduct. See also NPREA REPORT, *supra* note 1, at 70. Similar analyses should be conducted to determine how vulnerabilities link to staff sexual misconduct.

that valuable evidence is preserved for use in civil suits.¹⁹³ Vast improvements are needed in the investigation of many of these cases.¹⁹⁴

First, investigations must be conducted by trained professionals who utilize proper forensic techniques.¹⁹⁵ Investigators should also have an understanding of “techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings when interviewing alleged perpetrators, protocols for collecting evidence in a correctional facility, and the evidentiary criteria required to substantiate a case for administrative sanctions and, separately, for referral to a prosecuting attorney.”¹⁹⁶

Equally important, investigations must be thorough: investigators must vigorously pursue evidence, and continue investigations regardless of whether victims, staff, or other witnesses are willing to cooperate or are readily available.¹⁹⁷ In particular, the “reassignment, termination, or resignation,” of staff who have allegedly perpetrated sexual abuse should not be an acceptable excuse for closing an investigation;¹⁹⁸ rather, investigations should

193. NPREA REPORT, *supra* note 1, at 12, 106 (“Unless investigations produce compelling evidence, corrections administrators cannot impose discipline, prosecutors will not indict, and juries will not convict abusers.”).

194. Smith & Yarussi, *supra* note 3, at 23 (listing key components of a proper investigation and noting: “Unfortunately, these ingredients are often missing in institutional investigations of custodial sexual abuse.”).

195. See NPREA REPORT, *supra* note 1, at 12 (forensic medical exams should follow the “National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents”); *id.* at 115 (testimony of nurse that prosecution was more effective after she received specialized training for collecting and preserving evidence).

196. *Id.* at 114. *Garrity* warnings relate to the Fifth Amendment right to avoid self-incrimination in the context of compelled statements by employers where an employee is questioned about criminal activity under the threat of discipline or discharge. See *Garrity v. New Jersey*, 385 U.S. 493 (1967). *Miranda* warnings are an advisement of an individual’s Fifth and Sixth Amendment rights that must be read to and knowingly waived by individuals subjected to custodial interrogations. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

197. NPREA REPORT, *supra* note 1, at 107 (“Investigators must pursue direct and circumstantial evidence, whether or not the alleged victim confirms the abuse occurred and is willing to cooperate.”); *Chao v. Ballista*, 630 F. Supp. 2d 170, 174 (D. Mass. 2009) (“Defendants’ argument that they are entitled to qualified immunity mainly because Chao denied a sexual relationship when questioned by officials is extraordinary. Plaintiff was a prisoner, after all, subject to the coercive dynamics frequently at play in these institutions; moreover, her environment was fully controlled by prison officials, who had a wide range of ways to monitor Chao’s activities and investigate repeated rumors of sexual misconduct. The notion that Defendants’ liability somehow begins and ends with her denials makes no sense.”).

198. NPREA Report, *supra* note 1, at 107.

be taken to completion so that appropriate decisions can be made regarding the pursuit of criminal charges.

Improved use of technology can also aid investigators in proving a sexual abuse allegation. Video cameras and radio frequency identification tags (technology that tracks movement of staff and inmates throughout a facility) can be useful tools in this regard.¹⁹⁹ However, where these technologies are used, it is critical the investigators confirm that the equipment is operational and not tampered with when relying on them to prove or disprove an allegation.²⁰⁰

Whether investigations are performed by corrections staff or law enforcement, it is essential that investigators have a thorough understanding of criminal law, particularly as it relates to the relevance—or in most jurisdictions, irrelevance—of consent. It is also important that the investigators understand prison dynamics, including the interplay between sexual abuse, the power of staff to control the lives and welfare of victims and witnesses, and codes of silence.²⁰¹ By making themselves aware of those dynamics, investigators will have a better chance of spotting abuse as well as related crimes, such as introduction of contraband.²⁰² Investigators will also be better able to see the warning signs of retaliation, thereby protecting victims from further abuse and making it more likely that they will actively participate in an investigation.²⁰³

199. See, e.g., *CONFRONTING CONFINEMENT*, *supra* note 8, at 12, 34; see also *NPREA REPORT*, *supra* note 1, at 111 (noting that reviewing camera footage should be part of sexual abuse investigations); Miller Testimony, *supra* note 6, at 308:12-14. Radio frequency identification tags works as a transponder that can be used to transmit a signal from an item worn by an individual (e.g., an identification badge), thereby tracking the individual's location. RFI technology has already been implemented in some prisons. See, e.g., Radio Frequency Identification, <http://rfid-chip.org/>.

200. See *NPREA REPORT*, *supra* note 1, at 103-04 (describing an incident where a staff member took the lens off of a camera to cover up his sexual misconduct).

201. See *id.* at 110 ("According to a report published by the National Institute of Corrections, many sexual abuse investigators are so unfamiliar with the dynamics inside a correctional facility that they cannot operate effectively . . .").

202. See, e.g., 18 U.S.C. § 1791(a)(1) (prohibiting the introduction of contraband to federal correctional facilities). Given the high correlation between staff sexual abuse and contraband, corrections agencies must do more to stem the introduction of contraband. For example, requiring staff to go through metal detectors and be searched going in and out of prisons should be regular practice. See Miller Testimony, *supra* note 6, at 310:11-19 (noting that employees of the United States Mint are searched going in and out of the facility, and corrections staff should be as well).

203. See *OIG REPORT*, *supra* note 4, at 4 (noting that fear of retaliation prevents inmates from reporting staff sexual abuse).

B. *Changing Attitudes Regarding the Seriousness of Staff Sexual Abuse*

While improving investigative techniques is important, the failure of some prosecutors to file charges even where there are no evidentiary challenges shows that it is equally important that prosecutors see these as serious crimes and believe that the victims are worthy of protection.²⁰⁴ This will occur only when it becomes widely accepted among prosecutors that “[t]olerance of sexual abuse of prisoners in the government’s custody is totally incompatible with American values.”²⁰⁵

A key component to changing the attitudes expressed in the OIG Report and NIC/WCL Report, will be training for prosecutors regarding the public health and safety consequences of staff sexual abuse.²⁰⁶ That training must include information that humanizes the victim. For example, prosecutors must understand that the victimization that occurs when people are sexually abused in prison is commensurate with the pain and trauma experienced by people who are sexually abused in the community. As discussed in Part IV.A above, just as in the community, people victimized in prison experience serious mental and physical health consequences that can last a lifetime.²⁰⁷ And just like in the community, prison sexual abuse can have ripple effects that are felt not just by the victim, but by his or her loved ones, members of the community to which he or she returns, and the public health generally.²⁰⁸ In recognizing the intrinsic link between victims of staff sexual abuse and the health and well-being of the community at large, prosecutors would have to acknowledge that people in prison “still have the right to be treated in a manner consistent with basic human dignity, the right to personal safety, and the right to justice if they become victims of crime. Prisons,

204. NPREA REPORT, *supra* note 1, at 111 (quoting the Chief Inspector of the Rhode Island Department of Corrections: “Investigative personnel can be trained [and] proficient [in] investigatory techniques, standards, [and] protocols and yet fail in securing either successful prosecution or termination of violators if they do not recognize the basic premise that an offender can also be a victim.”).

205. *Id.* at 1.

206. See Smith & Yarussi, *supra* note 3, at 23-24 (noting that prosecutors need training regarding staff sexual abuse); see also CONFRONTING CONFINEMENT, *supra* note 8, at 84 (“[T]his is not a job that most local prosecutors’ offices are prepared to handle.”).

207. See *supra* Part IV.A.

208. See *id.*

jails, and other correctional environments are part of the justice system, not apart from it."²⁰⁹

Prosecutor training must also address the public safety consequences of staff sexual misconduct. A thorough understanding of the possible increases in recidivism, drug use, and other activities that put community safety at risk,²¹⁰ should provide incentives to prosecutors to take on these cases. Further, training should include information regarding how staff sexual misconduct puts the welfare of both people incarcerated in prisons and staff who work at those facilities at risk, whether due to retaliation from offending staff or through incidents such as the 2006 shooting of a federal investigator and a prison employee.²¹¹

To best utilize this training, prosecutors' offices should consider setting up special units or positions to develop expertise in addressing staff sexual abuse.²¹² Well-trained, dedicated attorneys who have an understanding of prison culture will be best equipped to handle these cases. Examples of these types of programs exist; for example, in Texas there is a special prosecution unit charged with prosecuting all crimes that occur within state prison facilities.²¹³ The prosecutor there reported to the National Prison Rape Elimination Commission that successful prosecutions of those cases are increasing each year.²¹⁴ The United States Department of Justice has an important role to play in this regard, particularly in jurisdictions where prosecutors lack the resources, training, or political will to take on staff sexual abuse cases.²¹⁵ The Department has authority to prosecute staff sexual

209. NPREA REPORT, *supra* note 1, at 25.

210. *See supra* Part IV.B.

211. *See supra* Part IV.B.2.

212. Smith & Yarussi, *supra* note 3, at 25 (recommending establishment of special prosecution units).

213. NPREA REPORT, *supra* note 1, at 121.

214. *Id.*

215. *See, e.g., id.* at 97 ("Criminal prosecution at the Federal level is essential when local jurisdictions lack the political will or resources to prosecute cases of sexual abuse."); CONFRONTING CONFINEMENT, *supra* note 8, at 83 ("Criminal enforcement at the federal level is crucial because too frequently local jurisdictions lack the political will, and sometimes the expertise, to thoroughly investigate and prosecute abusive corrections officers within their own communities."); *id.* at 84 ("[T]his is not a job that most local prosecutors' offices are prepared to handle. Resources in these offices are stretched thin, and local prosecutors may not be in the best position to handle these types of cases.").

abuse,²¹⁶ and should do so in jurisdictions where staff sexual abuse is ignored.

Finally, lawmakers should undertake to change existing laws in ways that will encourage prosecutors to take these crimes more seriously. In particular, in Iowa and Maryland—the only two states where staff sexual abuse of prisoners is only a misdemeanor—lawmakers should pass legislation to convert staff sexual abuse to felony offenses.²¹⁷ Whether by increasing the penalties available or through improved understanding of the importance to public health and safety, changing prosecutors' attitudes is an important step towards achieving justice in courts for victims of staff assault.

C. *PLRA Restrictions That Hamper Victims of Staff Assault From Accessing Courts Should Be Eliminated*

Acknowledging the basic humanity of the victims of staff sexual abuse is severely hampered by the PLRA. As such, several prominent national organizations have called on Congress to eliminate or amend several of the provisions of the PLRA, including those detailed in Part III.B. For example, the National Prison Rape Elimination Act Commission has recommended that Congress amend the PLRA's administrative exhaustion and physical injury requirements.²¹⁸ The American Bar Association has also "urge[d] Congress to repeal or amend" the PLRA's

216. 18 U.S.C. § 241 (1996) (regarding actions by two or more people who commit "aggravated sexual abuse or an attempt to commit aggravated sexual abuse"); 18 U.S.C. § 242 (1996) (regarding an act under color of state law to deprive a person of the "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" including "aggravated sexual abuse, or an attempt to commit aggravated sexual abuse").

217. Press Release, Just Detention International, *Kentucky Makes Staff Sexual Abuse of Inmates a Felony—Iowa and Maryland Must Do the Same* (Apr. 15, 2010) (on file with author). See also *IN THE SHADOWS*, *supra* note 28, at 7 ("Penalties for custodial sexual misconduct must be increased to appropriately reflect the severity of such crimes."); *OIG REPORT*, *supra* note 4, at 1 ("misdemeanor penalties do not adequately punish those prison employees who commit this crime").

218. *NPREA REPORT*, *supra* note 1, at 10, 95. In the meantime, the PREA Standards, if adopted, would require "corrections agencies to adopt a policy stating that a victim of sexual abuse is deemed to have exhausted his or her administrative remedies within 90 days after the incident of sexual abuse is reported, even if someone other than the victim makes the report and regardless of when the abuse allegedly occurred." *Id.* In addition, "the standard recognizes that there may be emergency situations in which a prisoner is in immediate danger and only a court order will provide protection. In such cases, the standard requires correctional agencies to deem that all administrative remedies have been exhausted within 48 hours after the report is made." *Id.* See also Golden, *supra* note 74, at 96 (recommending changing

physical injury and exhaustion requirements, as well as “restrictions on the equitable authority of federal courts in conditions-of-confinement cases,” provisions related to attorneys fees, filing fees, and the extension of the PLRA to juveniles.²¹⁹ The federal Commission on Safety and Abuse in America's Prisons also supported eliminating several provisions of the PLRA, reasoning that, “[t]he courthouse door should not be barred to anyone that a corrections system fails to protect from sexual assault.”²²⁰

In 2009 Congressman Robert Scott (D-VA) introduced The Prison Abuse Remedies Act of 2009 which addresses many of those calls for reform.²²¹ The bill would exempt all juveniles from the PLRA.²²² It would also eliminate the PLRA's physical injury requirement in its entirety.²²³ While the bill would retain an administration exhaustion requirement, it would reform the requirement by aligning the timeline for filing an administrative grievance with the generally applicable statute of limitations.²²⁴ Where a prisoner brings a cognizable claim without following the grievance process, the bill would require courts to enter a 90 day stay to allow prison officials to remedy the allegations, at the conclusion of which the action would proceed on any claims that were not resolved.²²⁵ No stay would issue in cases where “the court determines that the prisoner is in danger of immediate harm.”²²⁶

The bill would also increase judicial discretion with regard to ordering relief in cases brought by prisoners. It would eliminate the automatic expiration of preliminary injunctive relief and would restrict termination upon motion by a party to cases where the moving party can demonstrate that the violation of the federal right is at issue and that the violation is unlikely to recur. Additionally, it would eliminate the requirement that relief be automatically stayed when a motion to modify or terminate is pending.²²⁷

the PLRA to read: “without a prior showing of physical injury or sexual assault or abuse”).

219. Am. Bar Ass'n: Criminal Justice Section, Resolution 102(B) (2007).

220. Confronting Confinement, *supra* note 8, at 86.

221. Prison Abuse Remedies Act of 2009, H.R. 4335, 111th Cong. (1st Sess. 2009).

222. *Id.* § 4.

223. *Id.* § 2.

224. *Id.* § 3(a)(1).

225. *Id.* § 3(a)(2)-(3).

226. *Id.* § 3(a)(2).

227. *Id.* § 9.

The Prison Abuse Remedies Act could be strengthened by excluding allegations regarding sexual abuse from all PLRA restrictions, but provides critical reform regarding barriers to civil justice for victims of staff sexual abuse. That reform is essential, particularly in light of the consequences of staff sexual abuse to public health and safety and given how rarely such cases are addressed in the criminal arena.

VI. CONCLUSION

Sexual abuse perpetrated by prison staff causes great harms to the victims and to the community at large. Not only do victims of such abuse suffer physical and emotional trauma, these abuses also relate to serious public health problems and decreased public safety both inside and outside of America's prisons. When these abuses occur, the door to the justice system should not be closed to its victims. Prosecutors and lawmakers must recognize the seriousness of these cases and act to protect both the human dignity of the victim and the well-being of us all.

