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CIVIL RIGHTS LAW—OUT OF THE SHADOWS: THE CASE FOR ARKANSAS TO ACHIEVE FULL COMPLIANCE WITH THE PRISON RAPE ELIMINATION ACT

I. INTRODUCTION

The United States Congress passed the Prison Rape Elimination Act (PREA) in 2003, and yet in 2021, Arkansas still does not fully comply with PREA and sexual violence remains a persistent problem in Arkansas state prisons. The consequences of Arkansas's failure to protect prisoners from sexual violence can be seen in the ongoing lawsuit *Villarreal v. Dewitt*.[1] Leticia Villarreal, a mother and Mexican national, was sentenced in 2005 to 40 years imprisonment at the Arkansas Department of Correction (ADC) women's McPherson Unit in Newport, Arkansas for a controlled substance violation.[2] At the same time, Carolyn Arnett had been held at McPherson since 1999 and was serving a life sentence without parole for capital murder.[3] These two women sought religious solace and, in the case of Villarreal, the possibility of favorable parole review, through participation in a program called Principles and Application for Life (PAL).[4] PAL is an ADC program that provides "worship services, religious materials, and counseling services, to all inmates within the ADC, by community involvement of outside representation."[5]

PAL was run at McPherson Unit by chaplain Kenneth Dewitt, a former ADC probation officer, with authority delegated by the warden to dole out privileges and punishments.[6] Dewitt had a uniquely influential role at the ADC. He not only encouraged select PAL members to inform on fellow inmates but keeping in Dewitt's good graces could influence an early parole release from the Parole Board.[7] In 2016, Dewitt was charged with 50 counts of third-degree sexual assault against inmates at McPherson Unit and ultimately pleaded guilty to three charges.[8]

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1. *See* Villarreal v. Dewitt, No. 1:16-CV-00163 KGB, 2017 WL 5659824 (E.D. Ark. Aug. 28, 2017); Villarreal v. Dewitt, No. 1:16-CV-00163 KGB, 2018 WL 4701788 (E.D. Ark. Sept. 28, 2018).
2. *Villarreal*, 2017 WL 5659824, at *2.
3. *Villarreal*, 2018 WL 4701788, at *3.
4. *Villarreal*, 2017 WL 5659824, at *2.
5. *Id.*
6. *Id.* at *2.
7. *Id.*
8. *Villarreal,* 2018 WL 4701788, at *3; Melissa Jeltsen, *The Rape Victims Silenced By Their Prison Cells*, HUFFINGTON POST (Jul. 16, 2016, 8:05 AM), https://www.huffpost.com/entry/sexual-assault-prisons_n_578808e5e4b0867123e0893c.

Villarreal and Arnett were among Dewitt's victims, with Villarreal claiming that she was repeatedly raped and assaulted by Dewitt from January 2013 through July 2014. [9] She alleges in her lawsuit that Dewitt manipulated his power and authority as an ADC chaplain and conspired with corrections officers to maintain his streak of sexual violence without interference.[10] Arnett alleges that Dewitt assaulted her regularly from September 2010 until his resignation as chaplain in September 2014.[11] Villarreal was released from prison in 2015 and was subsequently deported to Mexico.[12] Arnett remains at McPherson Unit where she is serving the term of her life sentence.[13] On June 11, 2015, the United States Department of Justice (DOJ) announced that it was investigating allegations of sexual abuse and sexual harassment by correctional staff at the ADC McPherson Women's Prison to determine whether the prisoners there were subjected to a pattern or practice of sexual abuse in violation of their Constitutional rights.[14] The outcome of that investigation has not been made public.

Villarreal's case and Arnett's have been consolidated and are, at the time of writing, being litigated in the United States District Court for the Eastern District of Arkansas.[15] The filings and orders released up to now shed light on the ways that the ADC currently enforces internal procedures for addressing sexual violence suffered by incarcerated Arkansans.[16] Arkansas has adopted a "PREA" policy for its state prisons that is independent of the federal PREA statute.[17] The ADC PREA policy mirrors the federal PREA regulations in many respects,[18] but the gaps between ADC PREA policy and federal PREA regulations reveal the ways Arkansas falls short of national standards to prevent and address prison rape.[19]

Arkansas is one of two states, along with Utah, that as of 2017[20] has not provided an assurance or certification to the DOJ that it will reach full com-

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9. *Villarreal*, 2017 WL 5659824, at *3.
10. *Id*.
11. *Villarreal*, 2018 WL 4701788, at *6.
12. Jeltsen, *supra* note 8.
13. *Villarreal*, 2018 WL 4701788, at *3.
14. Press Release, U.S. Dep't of Justice, Justice Department Announces Investigation Into Allegations of Sexual Abuse at the McPherson Women's Prison in Newport, Arkansas (June 11, 2015), https://www.justice.gov/opa/pr/justice-department-announces-investigation-allegations-sexual-abuse-mcpherson-womens-prison.
15. *Villarreal*, 2018 WL 4701788, at n.1.
16. *Villarreal*, 2018 WL 4701788; Prison Rape Elimination Act of 2003, S. 1435, 108th Cong.
17. *See* ARKANSAS DEPARTMENT OF CORRECTIONS, ADMINISTRATIVE DIRECTIVE 15 – 29 PRISON RAPE ELIMINATION ACT (PREA) (June 9, 2017).
18. *Id.*
19. *See infra* Section III.
20. Fiscal Year 2017 is the most recent year that the Bureau of Justice Assistance has publicly released the Governors' Certification and Assurance submissions. *See Governors'*

pliance with PREA.[21] Arkansas Governor Asa Hutchinson's justification for Arkansas's failure to fully comply with PREA is a 1997 settlement and consent decree between Arkansas and the DOJ that mandates equal employment opportunities for female correctional officers in the ADC.[22] Hutchinson claims that the required provisions of the PREA regulations conflict with the settlement's terms.[23] As a consequence of this non-compliance, Arkansas does not take part in three-year PREA audits of its state-run prisons.[24] Further, open questions remain about the state's adherence to other requirements of PREA compliance, such as the Youthful Inmate Standard, designed to protect incarcerated children under the age of 18 in adult jails and prisons.[25] This note argues that, contrary to Governor Hutchinson's statement, there are no legal barriers for Arkansas to achieve full compliance with national PREA standards, and as such, Arkansas should implement those standards so that the state can better understand and address continuing sexual abuse in its prisons. This note also addresses how Arkansas's state PREA policy has created barriers for individuals who have been sexually harmed in prison and seek recompense through litigation.

Section II of this note provides the background and purposes behind the passage of PREA into federal law, a brief history of responses to prison sexual abuse in Arkansas before PREA, and an overview of current PREA procedures in Arkansas state prisons.[26] Section III examines the rationale for why Arkansas is currently not in full compliance with PREA and what the

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PREA Certifications and Assurances, BUREAU OF JUST. ASSISTANCE, https://bja.ojp.gov/program/prison-rape-elimination-act-prea/overview#governor (last visited Nov. 21, 2020). However, as recently as Fiscal Year 2019, Arkansas's failure to assure or certify compliance with PREA resulted in a federal grant reduction of $61,138 for that year. *Impact of PREA on Department of Justice Grants for Fiscal Year, 2019,* BUREAU OF JUST. ASSISTANCE, https://www.bja.gov/programs/FY2019-PREA-Grant-Impact.pdf (last visited Nov. 21, 2020).

21. U.S. Dep't of Justice, FY 2017 Certification and Assurance Submissions; John Moritz, *State: Can't fulfill prison-rape law*, ARK. DEMOCRAT-GAZETTE (May 15, 2017, 4:30 a.m.), https://www.arkansasonline.com/news/2017/may/13/state-can-t-fulfill-prison-rape-law-201-1/.

22. U.S. Dep't of Justice, FY 2015 Certification and Assurance Submissions (June 29, 2015).

23. *Id.*

24. *See* 28 C.F.R. § 115.401(a) (2020) ("During the three-year period starting on August 20, 2013, and during each three-year period thereafter, the agency shall ensure that each facility operated by the agency, or by a private organization on behalf of the agency, is audited at least once."); 28 C.F.R. § 115.401(b) ("During each one-year period starting on August 20, 2013, the agency shall ensure that at least one-third of each facility type operated by the agency, or by a private organization on behalf of the agency, is audited."); Arkansas has not provided any PREA audit reports to the DOJ. *State PREA Submissions,* BUREAU OF JUST. ASSISTANCE, https://www.bja.gov/state-PREA-submissions (last visited Nov. 22, 2020).

25. *See infra* Section III.A.2.

26. *See infra* Section II.

effects of non-compliance mean for the state and for prisoner safety.[27] Finally, Section IV surveys Section 1983 prisoner rights cases in Arkansas federal district courts and examines how the ADC's PREA procedures affect the requirement of exhausting prison grievance procedures under the Prison Litigation Reform Act (PLRA).[28]

II. HISTORICAL BACKGROUND AND THE PASSAGE OF PREA

Sexual violence in prison has a devastating impact on individuals and costly ramifications for the state and society. Prisoners are uniquely vulnerable to violence and exploitation, and exposure to sexual violence in prison contributes to elevated levels of depression, psychological distress, and negative long-term health outcomes, including HIV risk-related behaviors.[29] Incarcerated women in particular are disproportionately victims of sexual violence at the hands of correctional staff, constituting 7% of all prisoners nationwide, yet making up around 33% of substantiated custodial rape victims.[30] Problems tracking the scope of rape and sexual assault in prison are compounded by the fact that prison sexual violence, particularly when perpetrated by staff against prisoners, is almost certainly underreported due to the disincentives of possible retaliation by prison staff and fear of being labelled a snitch.[31] More than 80,000 prisoners each year experience a sexual assault, but only about 8% of prisoners report their assault.[32]

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27. *See infra* Section III.

28. *See infra* Section IV; 42 U.S.C. § 1997e (2020); Jones v. Bock, 549 U.S. 199, 202 (2007) (upholding the requirement under the PLRA that prisoners exhaust prison grievance procedures before filing suit).

29. Tawandra L. Rowell-Cunsolo, Roderick J. Harrison, & Rahwa Haile, *Exposure to Prison Sexual Assault Among Incarcerated Black Men*, 18 J. OF AFR. AM. STUD. 54, 56 (2013).

30. Elana M. Stern, Comment, *Accessing Accountability: Exploring Criminal Prosecution of Male Guards for Sexually Assaulting Female Inmates in U.S. Prisons*, 167 U. PA. L. REV. 733, 737 (2019).

31. *Id.* at 742; Elizabeth A. Reid, *The Prison Rape Elimination Act (PREA) and the Importance of Litigation in Its Enforcement: Holding Guards who Rape Accountable*, 122 YALE L. J. 2082, 2086 (2013). According to Elizabeth Reid, a formerly-incarcerated prison rights advocate, "There was a penalty for reporting sexual abuse under PREA; a stiff penalty. Everyone knew this. So there was a decision to make. Speak up and go to the hole for months only to be found incredible. Speak up and be returned to prison and stay in the hole until your release date. Speak up and paint a great big target right on your forehead. There was no winning when you spoke up. The only option left was to be abused and not say a word."

32. Sheryl P. Kubiak, et al., *Sexual Misconduct in Prison: What Factors Affect Whether Incarcerated Women Will Report Abuses Committed by Prison Staff?* 41 LAW & HUM. BEHAV. 361, 370 (2017). This statistic is based on the difference between the number of officially reported acts of sexual violence and the number of incarcerated women in the same year who disclosed in a confidential survey that they had experienced sexual victimization.

A. Enactment of PREA

The Prison Rape Elimination Act (PREA) was passed unanimously by Congress and signed into law by President Bush in 2003.[33] The Act establishes a "zero-tolerance standard" for rape and sexual assault in prisons in the United States and seeks to protect the Eighth Amendment rights of prisoners.[34] The Act functions primarily by instituting a scheme of data collection on the incidence of prison rape nationwide,[35] calling for training and assistance to corrections professionals on the detection and prevention of sexual violence,[36] disbursing grant funding to federal, state, and local agencies,[37] and creating the National Prison Rape Elimination Commission (NPREC) to review policies that address prison sexual violence and propose standards to the Attorney General.[38] PREA applies to all detention facilities in the United States, including private companies contracting with the government, county jails, and juvenile facilities.[39]

Prior to PREA, existing studies on the incidence of rape in prison faced practical difficulties that made it difficult to ascertain the scope of the problem.[40] The literature on prison sexual violence was rife with methodological deficiencies such as small sample sizes, low response rates, long time horizons, and non-random sampling.[41] The drafters of PREA sought to improve the availability and reliability of national survey data by mandating that the Bureau of Justice Statistics (BJS) carry out a statistical review and analysis of prison rape in America for each calendar year with a sample of "not less than 10% of all Federal, State, and county prisons, and representative sample of municipal prisons."[42] Federal data collection and standards-setting allows for comprehensive tracking of prison rape and comparisons among jurisdictions.[43]

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33. Prison Rape Elimination Act of 2003, S. 1435, 108th Cong.
34. 34 U.S.C. § 30302 (2020).
35. 34 U.S.C. § 30303.
36. 34 U.S.C. § 30304.
37. 34 U.S.C. § 30305.
38. 34 U.S.C. § 30306.
39. 34 U.S.C. § 30309.
40. *See* Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1645 (2012).
41. *Id.*
42. *PREA Data Collection Activities, 2018,* BUREAU OF JUST. STAT., https://www.bjs.gov/content/pub/pdf/pdca18.pdf (last visited Nov. 21, 2020). In the most recent Survey of Sexual Victimization nationwide, substantiated allegations of sexual victimization (where an investigation determined that the report of abuse was credible) rose from 902 in 2011 to 1,473 in 2015 (up 63%). *Id.* In 2015, "58% of substantiated incidents were perpetrated by inmates, while 42% were perpetrated by staff members." *Id.*
43. *See* Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 CRIM. L. BR. 10, 11 (2008) ("The simple requirement of data collection has created important changes that have the potential to reduce sexual violence in custody. . . .

PREA does not provide a private cause of action or affirmative defense for prisoners to seek justice for harm committed.[44] An earlier attempt to pass anti-prison rape legislation, the Prisoner Custodial Sexual Abuse Act of 1998, was focused primarily on protecting women who faced sexual harm at the hands of prison staff[45] and would have allowed for damage awards and attorneys' fees[46] as well as a registry of staff who had committed sexual abuse of prisoners.[47] The 1998 legislation never garnered enough support for consideration, and its failure influenced the ultimate form that PREA took as an information-gathering and standards-disseminating law that relies on voluntary top-down compliance among states rather than bottom-up rights enforcement on the part of prisoners.[48]

In 2012, the DOJ issued regulations implementing PREA based on the recommendations of the NPREC to the Attorney General.[49] The standards set forth in the regulations seek to "prevent, detect and respond to sexual abuse" through requirements in how correctional facilities hire and train their employees, screen prisoners for risk of vulnerability to sexual abuse, disseminate policies for reporting abuse, provide medical and mental health care to victims, and discipline perpetrators of sexual violence, among other requirements.[50] These regulations are binding on the Federal Bureau of Prisons, but states are incentivized to comply with the regulations with the threat of reductions in federal funding.[51] States must have their prisons audited by external examiners at least once within a three-year cycle, and if a state's detention units are not in full compliance with PREA, the state's federal DOJ grants may be reduced by five percent unless the Governor certifies that those funds will only be used to come into full compliance.[52]

Finally, in 2016, Congress passed the Justice for All Reauthorization Act, which includes a requirement that the Attorney General publish all final PREA audit reports from each state-run prison on a public website.[53] These

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Prior to enactment of PREA, there was tremendous variation in definitions between and within states about what constituted sexual violence against inmates.").

44. *See* Hendrickson v. Schuster, No. 16-CV-05057, 2018 WL 1597711, at *12 ("[T]here is no private right of action under PREA for failure to investigate a sexual assault claim."); Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (discussing the standard for determining a private right of action in federal statutes).

45. *See* Smith *supra* note 43, at n.37.

46. *Id.* at 11.

47. *Id.* at 10.

48. *Id.*

49. Press Release, U.S. Dep't of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape.

50. *Id.*

51. *Id.*

52. *Id.*; 28 C.F.R. § 115.401(a) (2020); 34 U.S.C. § 30307(e) (2020).

53. Justice for All Reauthorization Act, Pub. L. No. 114-324, 130 Stat. 1948 (2016).

reports are accessible from the Bureau of Justice Assistance website.[54] Arkansas has not provided PREA audit reports for any of the audit cycles listed.[55]

B. Sexual Violence in Arkansas Prisons

1. Prisoner sexual violence in Arkansas prior to PREA

The Arkansas prison system has had a fraught history with federal oversight and regulation. In a landmark series of prisoner rights cases from the late 1960s and early 1970s, *Holt v. Sarver* I[56] and *Holt v. Sarver* II,[57] a federal judge held that the totality of the conditions of the Arkansas prison system constituted a form of cruel and unusual punishment in violation of the prisoners' rights under the Eighth and Fourteenth Amendments.[58] The opinions describe the hands-off approach toward inmate sexual violence in the prison barracks during this period.[59] Leading up to the *Holt v. Sarver* decisions, the Arkansas State Police conducted an investigation in 1966 that included interviews with over 100 inmates in the Arkansas prison system.[60] The report documented widespread sexual abuse:

> Sexual abuse of inmates by other inmates was commonplace. Sometimes such abuse was physically forced (particularly in the case of younger inmates), while in other cases sexual favors were exchanged for food. Sexual misconduct reportedly extended to prison employees, who offered preferential treatment or early release to inmates in exchange for sexual favors from the inmates' wives or female friends.[61]

Prior to the enactment of PREA, the Supreme Court of the United States stated in *Farmer v. Brennan* that "[b]eing violently assaulted in pris-

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54. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 20.

55. *Id.*

56. Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969).

57. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971).

58. *Id.* at 365.

59. *Holt*, 309 F. Supp. at 377 ("In an effort to protect young men from sexual assaults, they are generally assigned to the two rows of cots nearest the front bars of the barracks, which portion of the barracks is called 'punk row.' It appears, however, that if would-be assailants really want a young man, his being assigned to the 'row' is no real protection to him. To the extent that consensual homosexual acts take place in the barracks, they are not carried out in any kind of privacy but in the full sight and hearing of all of the other inmates. Sexual assaults, fights, and stabbings in the barracks put some inmates in such fear that it is not unusual for them to come to the front of the barracks and cling to the bars all night").

60. M. KAY HARRIS & DUDLEY P. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 36 (American Bar Association, 1976).

61. *Id.* at 38.

on is simply not part of the penalty that criminal offenders pay for their offenses against society,"[62] and ruled that a prison official may be liable under the Eighth Amendment for a prisoner's sexual victimization at the hands of fellow inmates if two requirements are met: (1) the prisoner has shown that he or she is "incarcerated under conditions posing a substantial risk of serious harm," [63] and (2) the prison official was deliberately indifferent in both *knowing* that a prisoner faces a substantial risk of serious harm and *disregarding* the risk "by failing to take reasonable measures to abate it."[64]

Following *Farmer*, the Eighth Circuit in *Spruce v. Sargent* found that a prisoner incarcerated in the ADC in 1998 who had been repeatedly raped by over twenty different inmates was held in "conditions that posed a substantial risk that he would be sexually assaulted," satisfying the first prong of *Farmer*.[65] The decision came down to whether there was sufficient evidence to prove that Willis Sargent, the Unit Warden, and Larry Norris, the Associate Director of the ADC, were deliberately indifferent to the risk under the second prong of *Farmer*.[66] The Eighth Circuit held that evidence of Warden Sargent denying a request for the plaintiff to be separated from a cellmate who forced him to perform oral sex and testimony by Warden Sargent that prisoners had a responsibility to fight off sexual aggressors on their own were sufficient to conclude that Sargent was deliberately indifferent.[67] The Eighth Circuit did not find, however, that Director Norris had subjective knowledge of a significant risk to the plaintiff's safety based on a single grievance form signed by Norris in which the plaintiff complained of "being forced to cell with inmates from the general population, of being 'jumped on' by an inmate, and of mental stress."[68] The facts of this case reveal how even two decades after the *Holt* decisions, ADC officials prior to PREA left protection from sexual violence in the hands of the incarcerated individuals themselves.

2. Arkansas PREA Procedures

The Arkansas Board of Corrections enacted the Arkansas PREA regulations in 2005.[69] Because the 2003 federal PREA law and 2012 regulations are non-binding on states, each state has developed its own PREA policies

62. Farmer v. Brennan, 511 U.S. 825, 834 (1994).
63. *Id.*
64. *Id.* at 847.
65. Spruce v. Sargent, 149 F.3d 783, 785–86 (8th Cir. 1998).
66. *Id.* at 786.
67. *Id.*
68. *Id.*
69. ARK. BOARD OF CORRECTIONS, Administrative Regulation 413.

that apply to its state Department of Corrections.[70] The PREA policy for the ADC is codified in Administrative Directive 15-29.[71] As discussed in Section III, *infra*, Arkansas PREA policies selectively match the language of the DOJ regulations and elide particular wording of the federal standards.[72] Additionally, because the ADC does not take part in external PREA audits as mandated under the federal PREA statute[73] and regulations,[74] there is currently no oversight into whether ADC prisons are upholding federal PREA standards in practice.[75]

Arkansas participates in the BJS Survey of Sexual Violence, and the data collected that is responsive to the Survey is released publicly in the ADC's Annual PREA Report.[76] These reports provide aggregated data on substantiated PREA investigations, broken down by categories such as the type of sexual violence (e.g., inmate-on-inmate, staff sexual misconduct), the time and location of the incident (e.g., in the dorms, common rooms, or offsite), the victims' sex or gender identity, race, and age, and the staff members' demographics, age, race, and position.[77] The reports also include five-year trends for particular allegations (e.g., inmate-on-inmate nonconsensual sexual acts or staff-on-inmate sexual misconduct) that have been investigated each year across the state prison system as a whole.[78] The BJS Survey of Sexual Violence responses from 2009–2011 suggest that prisoners in Arkansas correctional facilities were, at that time, "more than twice as likely to be the victims of a substantiated instance of sexual abuse or harassment than state and federal prisoners nationwide[.]"[79] The responses from

70. *See* Kevin R. Corlew, *Congress Attempts to Shine A Light on A Dark Problem: An in-Depth Look at the Prison Rape Elimination Act of 2003*, 33 AM. J. CRIM. L. 157, 186 (2006) ("PREA is a good example of legislation in which the scope, tone, priority, and basic standards are set at the federal level, but the 'nuts and bolts' implementation decisions are left to the states. The Act provides general structure; corrections officials fill in the details.").

71. ARKANSAS DEPARTMENT OF CORRECTIONS, *supra* note 17.

72. *See, e.g.*, *infra* Section II.1, on the requirement that opposite-gendered staff announce their presence when entering a prison housing unit.

73. 34 U.S.C. § 30307(e)(2)(B) (2020).

74. 28 C.F.R. § 115.401 (2020).

75. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 20. The DOJ, pursuant to the PREA amendment of the Justice For All Reauthorization Act of 2016, has requested from all fifty governors PREA audit reports for every detention center under the control of the state's executive branch. *FAQs for the State PREA Submissions Website,* BUREAU OF JUST. ASSISTANCE. https://www.bja.gov/state-PREA-submissions/JFARA%20Website_FAQs_FINAL_101617_508.pdf (last visited Nov. 22, 2020).

76. *CY2017 Annual PREA Report,* ARK. DEPT. OF CORRECTION, https://adc.arkansas.gov/images/uploads/CY17_PREA_Annual_Report_Final_-_2_27_2019.pdf (last visited Nov. 22, 2019).

77. *Id.*

78. *Id.*

79. Jeannie Roberts, *State Wouldn't Sign on to Prison-Rape Law Before Inquiry*, ARK. DEMOCRAT-GAZETTE (June 13, 2015, 3:59 a.m.), https://www.arkansasonline.com

the BJS 2018 National Survey of Youth in Custody reported that an Arkansas youth detention center, the Arkansas Juvenile Assessment and Treatment Center, had the sixth-highest percentage of youth reporting sexual victimization among comparable juvenile lockups across the country.[80]

These survey results offer a glimpse of areas where Arkansas prisoners report high rates of abuse, but without comprehensive external auditing, the state's overall rates of prisoner sexual victimization cannot be fully quantified. As discussed in Section II A, *supra*, the DOJ enforces state compliance with federal PREA standards by mandating that states have their prisons audited once every three years or risk losing five percent of their DOJ grant funds.[81] According to a spokesperson for Governor Hutchinson, the ADC refuses to take part in federal PREA audits because this penalty costs the state less than comprehensive auditing of the prison system that the state knows it would fail.[82] Without these audit reports to compare how each prison under state control is complying with each federal standard,[83] there is currently no federal oversight or public accountability into how the ADC carries out its written policies to address sexual violence.

III. ARKANSAS'S FAILURE TO FULLY IMPLEMENT PREA

A. Background on Arkansas's Non-Compliance with PREA

In March 2015, the Office of Justice Programs and the Office of Violence Against Women sent letters to the governors of all fifty states requesting either certification that their states were in full compliance with PREA or a letter of assurance that they would work toward complete compliance.[84] In May 2015, Governor Hutchinson replied in a letter to the DOJ that Arkansas "could not certify full compliance with the National PREA Standards, or submit an assurance of future compliance."[85] Governor Hutchinson

/news/2015/jun/13/state-wouldn-t-sign-on-to-prison-rape-l-1; *See* Ramona R. Rantala, Jessica Rexroat, & Allen J. Beck, *Survey of Sexual Violence in Adult Correctional Facilities, 2009–11 - Statistical Tables*, BUREAU OF JUST. STAT (Jan. 2014), https://www.bjs.gov /content/pub/pdf/ssvacf0911st.pdf.

80. Erica L. Smith & Jessica Stroop, *Sexual Victimization Reported by Youth in Juvenile Facilities, 2018*, BUREAU OF JUST. STAT (Dec. 2019), https://www.bjs.gov/content /pub/pdf/svryjf18.pdf.; Tony Holt, *Sex-abuse survey finds high rate at teen lockup in Arkansas*, ARK. DEMOCRAT-GAZETTE (Dec. 16, 2019, 7:22 a.m.), https://www.arkansasonline.com /news/2019/dec/16/sex-abuse-survey-finds-high-rate-at-tee/.

81. 28 C.F.R. § 115.401(a) (2020); 34 U.S.C. § 30307(e) (2020).

82. Moritz, *supra* note 21.

83. *See* PREA Audit Report Template, https://www.prearesourcecenter.org/sites/default /files/library/Prisons%20and%20Jails_Audit%20Report%20Template_Version5.pdf (last visited Dec. 22, 2019).

84. U.S. Dep't of Justice, *supra* note 22; Roberts, *supra* note 79.

85. U.S. Dep't of Justice, *supra* note 22.

stated that he did believe that the Arkansas Community Correction Department would be found to be in full compliance with national PREA standards were it subject to an audit.[86] However, "ADC cannot fully comply with the limits to cross-gender viewing and searches found in 28 § C.F.R. 115.15, due in part to the terms of a settlement in *United States v. Arkansas*." [87] This 1997 settlement resolved a Title VII suit filed by the DOJ in 1995 alleging gender discrimination in hiring and placement of female correctional officers in male prison facilities.[88] Furthermore, the letter included that the state's juvenile corrections system, the Division of Youth Services (DYS), was not fully compliant with PREA either.[89] Wendy Kelley, the Director of the ADC during this time, gave further elaboration of the justifications for Arkansas's non-compliance with PREA in a newspaper interview.[90]

In the sections that follow, this note will address the justifications offered by Governor Hutchinson and Director Kelley for non-compliance with federal PREA standards and argue that the 1997 consent decree does not pose a true legal barrier to full compliance and that Arkansas should enact further measures to protect prisoners that are vulnerable to sexual victimization.

1. Title VII and Cross-Gender Contact

The specific PREA regulation on cross-gender viewing and searches identified by Governor Hutchinson in his letter as being in conflict with the state's gender discrimination settlement specifies that a prison "shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners."[91] The regulation also does not permit cross-gender pat-down searches of incarcerated women for prisons with a population of fifty inmates or more; prevents opposite-gendered staff from viewing the breasts, buttocks, and genitalia of incarcerated people while they are showering, changing and performing bodily functions; requires opposite-gendered staff to announce their presence before entering a housing unit; and prevents staff from physically examining transgender or intersex incarcerated people for the sole purpose of determining that person's gender.[92] This language from the federal standards has been incorporated into the ADC's PREA Administrative Directive, ex-

86. *Id.*
87. *Id.*
88. *Id*.
89. *Id.*
90. Roberts, *supra* note 79.
91. 28 § C.F.R. 115.15(a) (2020).
92. 28 §§ C.F.R. 115.15(b), (d), (e).

cept that the language requiring opposite-gendered staff to announce their presence when entering a housing unit is not included in Arkansas's PREA policy.[93]

The $7.2 million settlement that serves as the rationale for Arkansas's current noncompliance, *United States v. Arkansas*, ended in a June 19, 1997 consent decree that ordered the State to provide employment opportunities to female correctional officers on an equal basis with men.[94] Under the agreement, the state was ordered to "open all correctional officer positions and assignments at ADC facilities housing male inmates to women on an equal basis with men—with limited exceptions necessary to protect the privacy interests of male inmates."[95] The consent decree makes a specific exception that "the ADC shall not be required to assign a female correctional officer to conduct a strip search of a male offender. A strip search involves the removal of all of an inmate's clothing."[96] Therefore, the consent decree specifically excepts women under its terms from having to do the kinds of invasive searches prohibited under PREA regulation 28 § C.F.R. 115.15(a).

Furthermore, the consent decree is silent about restricting *male* staff from engaging in any of the conduct prohibited under the PREA regulations, and the following case law suggests that if male staff were to bring a lawsuit in response to restrictions on their duties to perform invasive searches of cross-gender inmates, their lawsuit would not prevail.[97] Thus there is no legal barrier in the consent decree nor the case law preventing Arkansas from complying with the audit requirement.

In a case brought by male correctional officers on the basis of sex discrimination for their denial of positions that require strip and cavity searches of inmates in a women's prison, the Sixth Circuit held that gender is a bona fide occupation qualification (a "BFOQ") under Title VII of the Civil Rights Act of 1964 for positions that require those specifically invasive tasks.[98] The Sixth Circuit reasoned that the Michigan Department of Corrections (MDOC) was owed deference in its determination that male corrections of-

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93. ARKANSAS DEPARTMENT OF CORRECTIONS, *supra* note 17, at 11–12.

94. United States v. Arkansas *(Correctional Discrimination Elimination Decree)*, C.A. No. LR-C-95-543 (E.D. Ark. June 19, 1997).

95. Press Release, U.S. Dep't of Justice, Justice Department Reaches Agreement with Arkansas Corrections System Ensuring Equal Employment Opportunities for Women (Apr. 14, 1997), https://www.justice.gov/archive/opa/pr/1997/April97/152cd.htm.

96. *Correctional Discrimination Elimination Decree,* C.A. No. LR-C-95-543, at 4.

97. *See, e.g.,* Everson v. Mich. Dep't. of Corrs., 391 F.3d 737 (6th Cir. 2004); Tharp v. Iowa Dep't. of Corrs., 68 F.3d 223 (8th Cir. 1995); Breiner v. Nevada Department of Corrections, 610 F.3d 1202 (9th Cir. 2010).

98. *Everson*, 391 F.3d at 753. Title VII broadly prohibits gender-based discrimination in the workplace, but the statute provides a defense "in those certain instances where ... sex ...is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e–2(e) (2020).

ficers could be excluded from female prison housing units, as this policy gets to the essence of the MDOC's mandate to safeguard female prisoners from sexual abuse.[99] Further, the court rejected proposed alternatives to a female BFOQ, such as pre-employment psychological screening.[100]

The Eighth Circuit decided a case in 1995, prior to the passage of PREA, that "a prison employer's reasonable gender-based job assignment policy, particularly a policy that is favorable to the protected class of women employees, will be upheld if it imposes only a 'minimal restriction' on other employees."[101] Factors that the court considered in determining that the prison's gender-based assignment policy imposed only minimal restrictions included that the male plaintiffs did not suffer termination, demotion, reduced pay, or lack of access to promotions as a result of the policy.[102] The Eighth Circuit did not address the specific issue of whether or not gender is a BFOQ in this context,[103] but the Sixth Circuit included favorable discussion of this case in its reasoning that gender was a BFOQ in that jurisdiction.[104]

The Ninth Circuit held in 2010 that sex is not a BFOQ in the context of male correctional officers in Nevada challenging a women's prison's policy of only hiring women to be correctional lieutenants.[105] The Ninth Circuit reasoned that employers seeking to justify a BFOQ must show "a high correlation between sex and ability to perform job functions," and that employment restrictions based on preventing abuse of prisoners must be supported by evidence or logical inferences that opportunities for abuse are inherent to the position.[106] In the opinion of an author of an unsigned case comment on *Breiner v. Nevada Department of Corrections*, the difference between the holding of the Ninth Circuit in *Breiner* that sex is not a BFOQ and the Sixth Circuit in *Everson* that sex is a BFOQ likely comes down to the fact that the job positions at issue in *Breiner* were merely supervisory in nature, while the job positions in *Everson* involved contact between guards and inmates.[107] The job duties prohibited in the PREA regulations and excepted by the terms of the consent decree are the types of invasive and con-

99. *Id.*
100. *Id.* at 756.
101. *Tharp*, 68 F.3d at 226.
102. *Id.*
103. *Id.* at 225 n.2.
104. *See Everson*, 391 F.3d at 758.
105. *Breiner*, 610 F.3d at 1216.
106. *Id.* at 1213–14 (*citing* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 202 (1991)).
107. Case Comment, *Employment Discrimination - Title VII - Ninth Circuit Holds That Excluding Men from Supervisory Positions in Women's Prison Violates Title VII.* - Breiner v. Nevada Department of Corrections*, 610 F.3d 1202 (9th Cir. 2010)*, 124 HARV. L. REV. 1588, 1593 (2011); *Everson*, 391 F.3d at 740.

tact-based tasks that the Sixth Circuit found warranted a BFOQ in its decision. Following the PREA regulations would not require that the ADC restrict its opposite-gendered prison staff from access to supervisory positions that do not involve invasive contact and cavity searches.

Therefore, applying Eighth Circuit precedent and persuasive Sixth Circuit case law to the issue of reasonable restrictions to male contact positions with female inmates, such cross-gender distinctions as mandated under the PREA regulations would violate neither Title VII nor the terms of *United States v. Arkansas*. If concern about violating the consent decree or making the ADC liable to further employment discrimination lawsuits is truly preventing the state from coming into compliance with federal PREA standards, this concern has no support from either the terms of the consent decree or the relevant case law.

2. Policy Arguments Against Compliance

According to ADC Director, Wendy Kelley, should Arkansas attempt to reach full PREA compliance, "[t]he number of units where female employees could be assigned would be reduced—which means an overall reduction in female employees departmentwide."[108] But apart from the already-excepted restrictions on cross-gender strip searches and restrictions on viewing the genitalia of opposite sex inmates, the remaining regulations apply to male staff, not female.[109] Furthermore, Director Kelley's position on the requirement under federal PREA regulations that opposite-gendered prison staff announce their presence before entering a housing unit is that the practice "lessens the ability to enforce rules and conduct inspections."[110] Specifically, Kelley stated that the announcement guidelines in the regulations would give inmates an opportunity to hide contraband before the opposite gendered correctional officer could conduct an inspection.[111] This is a policy determination on the part of Director Kelley, but implementing an announcement requirement would not subject the ADC to any legal liability.[112] And the DOJ, in promulgating this regulation, determined that the

108. Roberts, *supra* note 79, at 4.
109. *See* 28 § C.F.R. 115.15 (2020).
110. Roberts, *supra* note 79, at 4.
111. *Id.*
112. A male prisoner in California argued that a female guard's alleged failure to announce her presence before entering his housing unit as required under 28 § C.F.R. 115.15(d) amounted to sexual harassment in violation of his rights under the Eighth Amendment, but the federal magistrate judge dismissed the claim, reasoning that such a claim on its own does not state sufficient facts to support an Eighth Amendment violation and the PREA statute's lack of a private cause of action. Hardney v. Moncus, 215CV1842KJMACP, 2016 WL 7474908, at *4 (E.D. Cal. Dec. 28, 2016).

interests of prisoners to be free from custodial sexual assault outweighed any concerns about contraband.

Additionally, at the time of the DOJ settlement with the state of Arkansas, the DOJ had reached similar agreements with other state corrections departments that employed similar practices, including Indiana, Massachusetts, Florida, Delaware, New Jersey, and North Carolina.[113] As of Audit Year 2017, the Governors of each of these states provided either certifications (New Jersey and Delaware) or assurances (Indiana, Massachusetts, Florida, North Carolina) of full PREA compliance.[114] For these states, a comparable consent decree with DOJ has posed no barrier to good-faith efforts at PREA compliance.

Given that the terms of the consent decree, cited by Governor Hutchinson as the primary legal barrier to full compliance with federal PREA standards,[115] do not conflict with the requirements of the federal regulations, Arkansas has no basis to claim that complying with federal PREA standards would open the state to additional liability. Rather, the justifications given for non-compliance are policy disagreements with, at minimum, the requirement of officers to announce their presence before entering opposite-gendered housing units,[116] complete adherence to the Youthful Inmate Standard,[117] and the expense of auditing every prison at least once every three years as required.[118] Arkansas's refusal to comply with the Youthful Inmate Standard deserves particular attention.

3. The Youthful Inmate Standard

One of PREA's regulations, the Youthful Inmate Standard, prohibits youth under the age of 18 from being housed in adult jails and in prisons where the youth would have sight, sound, or physical contact with the general adult population.[119] Prisons must also maintain separation between youth and adults in common areas, unless the youth are directly supervised by staff, and avoid placing youthful inmates in isolation.[120] This language has been incorporated into the ADC's PREA Administrative Directive.[121] However, the ADC's PREA Administrative Directive makes an exception to

113. Press Release, U.S. Dep't of Justice (1997), *supra* note 95.

114. U.S. Dep't of Justice, *supra* note 21.

115. Indeed, in 2017, the governor's senior advisor for criminal justice reiterated that "I don't know that we can ever come into full compliance because of that settlement." Moritz, *supra* note 21.

116. *See* Roberts, *supra* note 79; 28 C.F.R. § 115.15(d) (2020).

117. Roberts, *supra* note 79.; 28 C.F.R. § 115.14.

118. *See* Moritz, *supra* note 21; 28 C.F.R. § 115.401.

119. *See* 28 C.F.R. § 115.14.

120. *Id.*

121. ARKANSAS DEPARTMENT OF CORRECTIONS, *supra* note 17, at 10.

the requirement of separating youthful inmates from sight, sound, or physical contact with adult inmates in housing, allowing that "[t]he Director may approve youthful inmates being housed as necessary for healthcare or to participate in an early release program such as boot camp or a re-entry center."[122] Director Kelley's interview with the *Arkansas Democrat-Gazette* further reinforced that such exceptions in violation of the federal Youthful Inmate Standard have been made: "a recent decision she made to allow a 17-year-old to attend a boot camp to earn early release would also be a violation of the federal standards, which dictate that juvenile inmates must either be separated from the adult population or have an officer with them at all times."[123]

In a letter cosigned by the American Civil Liberties Union (ACLU) of Arkansas and Arkansas Advocates for Children and Families, those organizations called on Governor Hutchinson to implement the Youthful Inmate Standard, pointing to research indicating that youth in adult prisons run the greatest risk of sexual victimization.[124] States such as Oregon and South Dakota have met the requirements of the Youthful Inmate Standard by transferring youth convicted as adults to juvenile facilities.[125] Arkansas should follow the example of Oregon and South Dakota and amend its youthful transfer law and policies to keep all children under the age of 18 out of ADC jurisdiction.

B. Consequences of Non-Compliance

By refusing to fully comply with PREA, Arkansas has suffered reductions each year in federal grants allocated for law enforcement officers, juvenile justice and delinquency prevention, and preventing violence against women. Withheld grant funding totaled $148,023 in 2014,[126] $138,206 in

122. *Id.*

123. Roberts, *supra* note 79.

124. Letter from ACLU of Arkansas & Arkansas Advocates for Children and Families, to Arkansas Governor Asa Hutchinson (Oct. 3, 2016), http://cfyj.org/images/Arkansas_PREA_Letter_2016.pdf.

125. Oregon transfers youth convicted as adults to a juvenile facility based on factors such as whether the youth will complete their sentence before they turn 25, and age, maturity and risk of physical harm in adult prison, while South Dakota entered into an agreement with the North Dakota Department of Corrections to send its young offenders to a State Industrial School where the entire inmate population is under the age of 18. CARMEN E. DAUGHERTY, CAMPAIGN FOR YOUTH JUSTICE, ZERO TOLERANCE: HOW STATES COMPLY WITH PREA'S YOUTHFUL INMATE STANDARD 5 (2015).

126. BUREAU OF JUST. ASSISTANCE, IMPACT OF PREA ON DEPARTMENT OF JUSTICE GRANTS (FY 2014), https://www.bja.gov/Programs/14PREA-Reallocations.pdf (last visited Nov. 22, 2020).

2015,[127] and $148,311 in 2016.[128] With the passage of the Justice for All Reauthorization Act of 2016, grants administered by the Office of Violence Against Women are no longer subject to PREA[129] and consequently, the total amount of federal grant funding withheld from Arkansas for PREA non-compliance in 2019 was $61,138.[130] As discussed above, a spokesperson for the Governor has stated that losing this amount in grant funding is preferable to the $100,000 that the spokesperson quotes would be the cost to conduct an audit of the state's prisons that the state knows it will fail.[131] But the ADC's assured failure to pass an audit of its prisons is a consequence of its voluntary refusal to adopt federal PREA standards rather than an avoidance of liability as the Governor claims. In the absence of audits, abuses are currently going unchecked and unmonitored (as evidenced by prisoners' rights litigation), and the audit process, albeit imperfect,[132] would bring a minimum standard of oversight and accountability to a closed system.

C. Where PREA Does Not Go Far Enough

Eliminating sexual violence in prisons is one small part of remedying the inhumanity of the American prison system as a whole. Further, many scholars have argued that PREA is far from a panacea for addressing prison sexual violence and that other remedies and strategies should be pursued in its place.[133] For prison abolitionists, PREA is part of a long line of prison

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127. BUREAU OF JUST. ASSISTANCE, IMPACT OF PREA ON DEPARTMENT OF JUSTICE GRANTS (FY 2015), https://www.bja.gov/Programs/2015-PREA-Grant-Impact.pdf (last visited Nov. 22, 2020).

128. BUREAU OF JUST. ASSISTANCE. IMPACT OF PREA ON DEPARTMENT OF JUSTICE GRANTS (FY 2016), https://www.bja.gov/Programs/FY2016-PREA-Grant-Impact.pdf. (last visited Nov. 22, 2020). .

129. BUREAU OF JUST. ASSISTANCE, PREA AMENDMENT JUSTICE FOR ALL REAUTHORIZATION ACT OF 2016 FACT SHEET 2 (Sept. 17, 2019), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jfara-fact-sheet_updated-2017.03.01.pdf.

130. BUREAU OF JUST. ASSISTANCE. IMPACT OF PREA ON DEPARTMENT OF JUSTICE GRANTS FOR FISCAL YEAR 2019 (2019), https://www.bja.gov/programs/FY2019-PREA-Grant-Impact.pdf (last visited Nov. 22, 2020).

131. Moritz, *supra* note 21.

132. The quality of work of some PREA auditors has come under criticism. *See* Derek Gilna, *Five Years after Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/ ("'The problem is with the auditors themselves. A handful dominate the market, offering cheap audits and quick assessments of facilities,' said Stannow. 'This results in auditors who do little advance research, relying only on documents provided by the agency.'").

133. *See generally* Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 811 (2014); Giovanna Shay, *PREA's Peril*, 7 NE. U. L.J. 21, 38 (2015); David W. Frank, *Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 BERKELEY

reform projects that are doomed to fail because prison itself acts as a form of "sexual punishment" through "loss of privacy and intrusive searches that may be experienced as sexual assaults,"[134] and devoting more money and resources into the prison bureaucracy acts counter to the goal of ending mass incarceration.[135] Professor Gabriel Arkles has argued that PREA's lack of a private right of action raises the barrier of exhaustion of administrative remedies under the PLRA rather than lowering it, making it more difficult for victims of prison violence to bring Section 1983 claims.[136] In addition, the use of PREA as a justification to place people who are labeled as sexual predators into administrative segregation raises concerns about the expansion of solitary confinement as a form of punishment.[137]

As noted professor and advocate of prison abolition Angela Y. Davis has written, "[a] major challenge of this movement is to do the work that will create more humane, habitable environments for people in prison without bolstering the permanence of the prison system."[138] One potential strategy of reconciling Angela Davis's challenge to seek an end to mass incarceration while also protecting the health and safety of people already in prison is to pursue non-criminal alternatives to low-level offenses in order to reduce the overall prisoner population,[139] while also embracing measures that seek to improve conditions for those who are currently serving a prison sentence. Encouraging Arkansas to comply with federal PREA standards should therefore be conceived as part of a larger advocacy effort to make conditions of confinement more humane across the board and put fewer people in prison to begin with.

Actions that federal and state officials should take to better address prison sexual violence beyond simply complying with existing PREA standards include: (1) Congress should amend PREA to include a private right of action; (2) Arkansas should restrict the use of administrative segregation as a form of punishment in its PREA procedures; and (3) Arkansas should keep all children under 18 out of adult prisons.

In the next section, this note will address how PREA procedures in Arkansas have influenced prisoner rights litigation, particularly as the policies

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J. GENDER L. & JUST. 1, 11 (2014); Kevin Medina & Brian Nguyen, *Acknowledged but Ignored: A Critical Race Theory Approach to the Prison Rape Elimination Act*, 2 QUEER CATS J. L. OF LGBTQ STUD. 59, 72 (2018); Stern, *supra* note 30, at 735.

134. Shay, *supra* note 133, at 38.

135. Frank, *supra* note 133, at 11–20.

136. *See* Arkles, *supra* note 133, at 811.

137. *See infra* Section IV.B.

138. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 103 (Greg Ruggiero ed., 2003).

139. Stern, *supra* note 30, at 765 ("Noncriminal alternatives reject using the state or criminal justice system, but instead focus on decriminalizing certain behaviors, addressing underlying sociocultural and economic disparities, and utilizing restorative justice in lieu of criminal sanctions to address interpersonal and domestic violence.").

have affected the requirement of administrative exhaustion under the PLRA and expanded the use of administrative segregation.

IV. PREA AND SECTION 1983 LITIGATION IN ARKANSAS

Prisoners who have been victims of sexual violence, particularly custodial rape at the hands of prison staff, may not find a suitable remedy in PREA and instead elect to pursue a civil lawsuit. Nevertheless, enacting PREA could mitigate against harsh measures such as solitary confinement, despite PREA not providing a private cause of action. In the aftermath of *Farmer v. Brennan*, the typical claim brought for sexual abuse in prison is through 42 U.S.C. § 1983[140] based on a prisoner's claim of cruel and unusual punishment under the Eighth Amendment. Claims may also be brought under the Fourth Amendment because an expectation of bodily privacy extends to inmates.[141] Finally, prisoners harmed by sexual assault may also bring state law tort claims.[142]

A. PLRA and the Requirement of Administrative Exhaustion

The biggest hurdle for prisoners to overcome in their Section 1983 claims is the requirement to exhaust administrative remedies before bringing a case in federal court under the PLRA.[143] In *Woodford v. Ngo*, the U.S. Supreme Court held that prisoners must fully exhaust all internal grievance procedures as defined by the correctional unit before suing under Section 1983.[144]

Villarreal v. Dewitt provides an illustration of how exhaustion of grievance procedures imposes a barrier to prisoners attempting to sue for sexual harm inflicted at the hands of prison staff. In that case, the plaintiff survived the defendant's motion for summary judgment on the theory that prison grievance procedures were not fully exhausted before the plaintiff brought suit.[145] The court held that the record evidence raised an inference that prison officials at McPherson Unit misled Arnett by informing her that Internal Affairs would handle her allegations of sexual abuse rather than

140. A claim under 42 U.S.C. § 1983, or a "Section 1983 claim," may be brought by an individual who alleges that he or she has suffered a deprivation of Constitutional rights, or rights secured by a law passed by Congress, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia . . . ." 42 U.S.C.. § 1983 (2020).

141. *See* Arkles, *supra* note 133, at 808; Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1523 (2012).

142. Arkles, *supra* note 133, at 809.

143. 42 U.S.C. § 1997e(a) (2012).

144. Woodford v. Ngo, 548 U.S. 81, 94 (2006).

145. 2018 WL 4701788, at *11 (E.D. Ark. Sept. 28, 2018).

informing her of her right to proceed using the correct grievance procedures that constitute administrative exhaustion.[146] Additionally, Arnett followed the grievance procedures, but did not appeal the decision of the warden when she was informed that her case was "with merit."[147] Finally, the court found that Arnett raised an inference that prison officials interfered with her ability to file grievances through a series of explicit statements and alleged conduct that pressured her to remain silent about the abuse she suffered at the hands of Dewitt.[148] The *Villarreal* case is still in litigation and has yet to reach final judgment, but by withstanding a challenge based on failure to exhaust administrative remedies under PLRA, the plaintiff has survived the stage that ends most prisoner Section 1983 claims.

A prisoner reporting her abuse under the ADC PREA procedures must also separately follow the prison's internal grievance process in order to meet the required exhaustion of administrative remedies if she intends to bring a Section 1983 lawsuit.[149] Further, prisoners in Arkansas cannot sustain a Section 1983 suit on the sole basis that an official failed to follow policies to investigate a PREA complaint.[150] Judge Timothy Brooks of the United States District Court for the Western District of Arkansas, in ruling on a lawsuit brought by a detainee in a county jail, quotes a decision out of Alabama, *Jacoby v. PREA Coordinator*,[151] that "[t]he Constitution does not require officials to investigate or otherwise correct wrongdoing after it has happened," and that therefore any alleged failure to "follow PREA investigation regulations did not contribute to the sexual assault of the Plaintiff."[152] Because PREA does not provide a private cause of action for failure to investigate a claim and the Constitution has not been found to guarantee a right to an investigation, the plaintiff-detainee's official capacity claim against the jail staff failed.[153] The existence of PREA, therefore, does not provide a means through which a prisoner can advance a private lawsuit,

146. *Id.* at *11.

147. *Id.* at *14. As the opinion explains, "A determination that her grievance was 'with merit,' viewed in the light most favorable to Ms. Arnett, is unlikely to be characterized as an unsatisfactory response from which to appeal. *Id.*

148. *Id.* at *16.

149. *See* ARKANSAS DEPARTMENT OF CORRECTIONS, *supra* note 17; ARKANSAS DEPARTMENT OF CORRECTIONS, ADMINISTRATIVE DIRECTIVE 12-16 INMATE GRIEVANCE PROCEDURE (May 28, 2012); *see also* Bledsoe v. McDowel, 4:16-CV-4057, 2017 WL 1091332, at 3 (W.D. Ark. Mar. 21, 2017) (finding that the Plaintiff's PREA complaint could not substitute for a properly filed grievance as outlined in Arkansas Department of Community Corrections' grievance procedure.).

150. Hendrickson v. Schuster, No. 16-CV-05057, 2018 WL 1597711, at *12 (W.D. Ark. Apr. 2, 2018).

151. 2017 WL 2962858, at *5 (N.D. Ala. Apr. 4, 2017).

152. *Hendrickson*, 2018 WL 1597711, at *12.

153. *Id.* at 12.

and PREA reporting in Arkansas does not fulfill the PLRA's requirement of administrative exhaustion.

B. PREA Segregation Cases

One of the most frequently litigated PREA issues using Section 1983 in Arkansas is the ADC's practice of placing prisoners who have been labeled PREA offenders in administrative segregation.[154] According to the ADC PREA policy, all "PREA inmates" are placed in single-man housing status, subject to review every six months, and subject to review for eligibility for programs and/or job assignments every ninety days.[155] Once removed from single-man housing, the PREA label remains with the person throughout his or her sentence, albeit as inactive.[156] When PREA policies came into effect in the ADC in 2005, plaintiffs in these cases who had received a disciplinary conviction for rape prior to the enactment of the policies had their housing policies reviewed and were assigned to single-cell housing for violations that took place years earlier.[157]

ADC inmates have been labelled PREA offenders and placed in administrative segregation even when the act that triggered the designation was consensual sex with a fellow inmate.[158] The national PREA standards specify that prisons may not designate non-coerced sexual acts as sexual abuse,[159] and the ADC's PREA policy notes that "consensual sexual activity between inmates does not qualify as a PREA incident although it is against the ADC policy and can lead to a disciplinary action."[160] Administrative segregation as a remedy for PREA violations in Arkansas raises concerns about the expansion of isolation as a form of punishment, particularly as the label of being a PREA offender or even "victim-prone" remains with a prisoner throughout his or her sentence and any future terms of imprisonment, open-

154. *See, e.g.,* Bailey v. Hobbs, No. 5:11CV00031 JLH, 2012 WL 3038856 (E.D. Ark. July 25, 2012); Linell v. Norris, 2009 Ark. 303, 320 S.W.3d 642; Waller v. Maples, No. 1:11CV00053 JLH-BD, 2011 WL 3861370 (E.D. Ark. July 26, 2011), *report and recommendation adopted*, No. 1:11CV00053 JLH-BD, 2011 WL 3861369 (E.D. Ark. Aug. 31, 2011); McKnight v. Hobbs, No. 2:10CV00168 DPM HDY, 2010 WL 5056024 (E.D. Ark. Nov. 18, 2010), *report and recommendation adopted*, No. 2:10-CV-168-DPM HDY, 2010 WL 5056013 (E.D. Ark. Dec. 6, 2010).

155. ARKANSAS DEPARTMENT OF CORRECTIONS, *supra* note 17, at 17.

156. *Id.* at 18.

157. *See Bailey*, 2012 WL 3038856, at *1; *Linell*, 2009 Ark. at 2–3, 320 S.W.3d at 642–43.

158. Arkles, *supra* note 133, at 817–18; s*ee Waller*, 2011 WL 3861370, at *1; *McKnight*, 2010 WL 5056024, at *2.

159. 28 C.F.R. § 115.78(g) (2020).

160. *CY2017 Annual PREA Report*, *supra* note 76, at 3.

ing the potential for arbitrary enforcement of administrative segregation at any time.[161]

PREA regulations prohibit placing victim-prone individuals in involuntary segregated housing unless "an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers."[162] Arkansas coming into full compliance with federal PREA standards would therefore act to mitigate against the use of solitary confinement as a means of protecting vulnerable prisoners.

V. CONCLUSION

By being one of only two states refusing to comply with PREA, Arkansas has fallen behind other states in preventing, detecting, and responding to prison sexual abuse. As this note has argued, the Governor's justifications for non-compliance are not a true legal barrier, and meeting national PREA standards would be an important first step to protect women like Leticia Villarreal and Carolyn Arnett, as well as children, trans people, and other particularly vulnerable people in Arkansas prisons whose stories have yet to come to light.

Because the ADC does not allow its prisons to be audited for PREA, coming into full PREA compliance would begin to bring a fundamentally closed system to a minimal standard of transparency and oversight. It is both achievable and a moral imperative to bring prison sexual violence in Arkansas out of the shadows.

*Connor Thompson**

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161. *See* Victoria Law, *For People Behind Bars, Reporting Sexual Assault Leads to More Punishment*, JUST DETENTION (Sept. 30, 2018), https://justdetention.org/for-people-behind-bars-reporting-sexual-assault-leads-to-more-punishment/ ("When Venus Williams, a 25-year-old trans woman incarcerated in east Arkansas, arrived at the state's male prison in March 2010, she was immediately placed in segregation. Why? Because she informed staff that she was trans and, during her previous incarceration in 2007, had been caught having consensual sex with another incarcerated person. At the time, she was told that consensual sex does not exist in prison, was written up for violating the prison's rule against sexual activity, and was placed in segregation until her release a year later. In 2010, when she re-entered the prison system on a parole revocation, staff labeled her "victim-prone" and placed her in segregation, where she has remained for the past eight years.").

162. 28 C.F.R. § 115.43(a) (2020).

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