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Sexual Violence as an Occupational Hazard & Condition of Confinement in the Closed Institutional Systems of the Military and Detention

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Abstract

Women in the military are more likely to be raped by other service members than to be killed in combat. Female prisoners internalize rape by corrections officers as an inherent part of their sentence. Immigrants held in detention fearing deportation or other legal action endure rape to avoid compromising their cases. This Article draws parallels among closed institutional systems of prisons, immigration detention, and the military. The closed nature of these systems creates an environment where sexual victimization occurs in isolation, often without knowledge of or intervention by those on the outside, and the internal processes for addressing this victimization allow for sweeping discretion on the part of system actors. This Article recommends a two-part strategy to better make victims whole and effect systemic, legal, and cultural change: the use of civil lawsuits generally, with a focus on the class action suit, supplemented by administrative law to enforce federal rules on sexual violence in closed systems. This Article strives to break down the walls that separate these

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different closed systems into silos, toward an end of shifting laws and policy to better address the multi-faceted problem of sexual victimization.

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INTRODUCTION

A Lieutenant in the United States Marine Corps, Ariana Klay,[1] endured sexual abuse so horrific that she requested to be deployed to Afghanistan to escape the hostile environment.[2] A female inmate in a low security program in Michigan requested to be sent back to jail rather than face the officers that abused her upon entrance to a lower security program.[3] A detainee at an immigration facility gave up an appeal of her deportation case, despite having four children who were citizens of the United States, to avoid the abuse she encountered.[4] These real-life examples illustrate the drastic lengths those who endure sexual violence[5] will go through to escape further victimization in the insular institutional settings of prison, immigration detention centers, and the military.

Across the country, female prisoners are routinely relegated to solitary confinement—a practice internationally condemned as a human rights violation—to "protect" them from the sexual victimization they endure at the hands of prison guards, staff, and other inmates.[6] This practice is also

1. Klay was the named plaintiff in the class action lawsuit, *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014). *See infra* Section III.B.2 for further discussion.

2. While speaking on behalf of Senator Kirsten Gillibrand's Military Justice Improvement Act on November 6, 2013, Klay said the following: "[t]o get out of this climate, after six months, I sought and received a by-name request to deploy to Afghanistan. My command denied my requests, four times, under the rationale that I was too critical to the command, only six months before I was assaulted." Adam Mordecai, *A Marine Was Assaulted. Her Commander Said She Deserved It for Wearing Running Shorts*, UPWORTHY (Nov. 14, 2013), http://www.upworthy.com/a-marine-was-assaulted-her-commander-said-she-deserved-it-for-wearing-running-shorts-really.

3. "I protected myself by removing myself and requested to be sent back to jail because Sgt. [B] was still workin [sic] there as well as officer, Mr. [R]." Interview with Inmate #11, on file with author. This article contains de-identified quotes extracted from files in the *Neal* case; however, due to confidentiality constraints, editors were not permitted access to these original documents for verification, and the authors assume responsibility for accuracy.

4. *See* Bessie Muñoz, *Immigrants for Sale: Corporate America Puts a Price Tag on Sexual Abuse*, 17 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 553, 574–75 (2015).

5. This Article uses the term "sexual violence" or "sexual victimization" as umbrella terms to refer to a range of acts including rape, sexual assault, and sexual harassment. The use of these terms is consistent with language promulgated by the United Nations and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. *See* EUROPEAN INST. FOR GENDER EQUAL., THE STUDY TO IDENTIFY AND MAP EXISTING DATA AND RESOURCES ON SEXUAL VIOLENCE AGAINST WOMEN IN THE EU 7 (2012).

6. *See generally Reassessing Solitary Confinement: The Human Rights, Fiscal and Safety Consequences: Hearing Before the Senate Judiciary Subcomm. on the Constitution, Civil Rights, and Human Rights*, 112 Cong. 1 (June 19, 2012); ACLU, WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES (2014), https://www.aclu.org/sites/default/

used in immigration detention facilities, where experts estimate that as many as 300 individuals are placed in solitary confinement every day.[7] Similarly, military victims[8] of sexual violence routinely leave service or are forced out of their positions as a means of "protection."[9] Despite these common responses that address sexual violence either as an occupational hazard or a condition of confinement, deployment to a war zone or detention in a small windowless space twenty-four hours a day are not effective solutions or appropriate remedies to address the rampant institutional problem of sexual violence.[10] The desperation inherent in these measures reflects the current state of affairs as it relates to the problem of sexual violence in detention facilities[11]—specifically prisons and immigration detention centers—and across military branches in the United States.

The military and detention facilities[12] reflect exceedingly high occurrences of sexual violence.[13] Measuring these occurrences to provide meaningful comparison is challenging because there are no universally agreed-upon definitions of sexual violence or regular data collection efforts across these systems.[14] The data that is available shows that in 2014, 6131 sexual assaults were reported in the military.[15] The U.S. Department of

files/assets/worse_than_second-class.pdf.

7. *See* Azadeh Shahshahani & Ayah Natasha El-Sergany, *Challenging the Practice of Solitary Confinement in Immigration Detention in Georgia and Beyond*, 16 CUNY L. REV. 243, 245 (2013).

8. The authors use the terms victim and survivor interchangeably in this Article.

9. *See* THE INVISIBLE WAR (Chain Camera Pictures 2012).

10. *See, e.g.*, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) [hereinafter ALL TOO FAMILIAR]; *see also infra* Part III.

11. Here, this Article uses the term "detention facilities" to refer to institutional settings where individuals are intentionally confined, specifically, prisons and immigration detention facilities. *See* Shahshahani & El-Sergany, *supra* note 7, at 253.

12. This Article includes prisons and immigration detention facilities under the broad category of "detention."

13. *See* ALL TOO FAMILIAR, *supra* note 13; Meghan Rhoad, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, HUM. RTS. WATCH (Aug. 25, 2010), https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention [hereinafter *Detained and at Risk*]; Sara Darehshori & Meghan Rhoad, *Embattled: Retaliation Against Sexual Assault Survivors in the US Military*, HUM. RTS. WATCH (May 18, 2015), https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military [hereinafter *Embattled*].

14. *See infra* notes 15–19 and accompanying text.

15. *See* DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2014 (2015) [hereinafter DOD ANNUAL REPORT FY14], http://sapr.mil/public/docs/reports/FY14_Annual/FY14_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

Justice estimates that between 149,200 and 209,400 inmates are victims of sexual abuse each year.[16] Female inmates are disproportionately victimized by both staff and other inmates, and less than eight percent of those victimized report it to authorities.[17] Statistics on sexual violence are not readily available for immigration detention facilities—a 2004 Human Rights Watch Report reveals that as of its publication date, "[n]o systematic research has ever been undertaken to examine sexual abuse in immigration detention centers, and no statistics about its frequency have been collected."[18] In 2011, the American Civil Liberties Union (ACLU) filed requests pursuant to the Freedom of Information Act to obtain statistics from the United States Government; the resulting documentation reflected only minimal reports of abuse, unlikely reflecting the true number of incidences.[19]

Despite their shared status as institutions in which sexual violence occurs frequently, the military, detention facilities, and prisons may seem ill-suited for comparison. The nation's service men and women are highly revered, praised, and celebrated by society, while prisoners and immigration detainees are disdained, discarded, and effectively removed from the collective consciousness.[20] In reality, both kinds of institutions have a commitment to safety at their core, although they address it from different perspectives. The military is dedicated to enforcing the law and preserving national security, while prison and immigration detention facilities are committed to punishing or rehabilitating those who break the law and

16. *See* U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES 2011–12 (2013), http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

17. *See* PAUL GUERINO & ALLEN BECK, U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007–2008 8 (Jan. 2011), https://www.bjs.gov/content/pub/pdf/svraca0708.pdf [hereinafter BJS STATISTICS 2011].

18. ALEX COOLMAN ET AL., STOP PRISONER RAPE, NO REFUGE HERE: A FIRST LOOK AT SEXUAL ABUSE IN IMMIGRATION DETENTION (2004), http://www.ncdsv.org/images/JD_NoRefugeHere_2004.pdf [hereinafter STOP PRISONER RAPE].

19. American Civil Liberties Union, *Sexual Abuse in Immigration Detention Facilities: Sexual Abuse Complaints Since 2007 from ACLU Freedom of Information Act Documents*, ACLU, https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities (last visited Apr. 20, 2017). There were 200 allegations of abuse in the Freedom of Information Act files, but there is no doubt the actual instances were much higher. *Id*. Although this number may not accurately reflect the number of abuses, it still shows that sexual violence in detention is a widespread issue.

20. *See Public Esteem for Military Still High*, PEWRESEARCH CTR. (July 11, 2013), http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/; *see also* Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1 (2000).

threaten the security of local communities.[21] Beyond their shared safety goals, these systems have more in common than is immediately apparent.

Detention facilities and the military are both insular, "closed systems," meaning they are distinguishable from the general community.[22] There are nuances inherent in both environments that create a separate system within a broader social system. The unique structure of a closed system means that it is independent and has its own rules and policies—both formal and informal—that allow it to address problems internally.[23] A closed-system model implies that the system does not depend on the external environment for solutions to managerial issues; instead, it is enclosed—sealed off from the outside world.[24] The military functions in this way because of "[t]he unique authority and responsibilities of commanders, the need for effective and efficient procedures in a wide range of places and circumstances, including combat, and the critical importance of obedience of orders and adherence to standards of conduct all distinguish military society from the society at large."[25]

The closed nature of the military and detention facilities creates an environment in which sexual victimization occurs in isolation, often without knowledge of or intervention by those on the outside.[26] The internal processes for addressing this victimization allow for sweeping discretion on the part of system actors.[27] Within both systems, accusations of sexual violence are addressed by specialized, unique, and complex internal policies and procedures distinct from those in the civilian community.[28] As part of recent attention and scrutiny, major flaws have been observed in both systems; some of the same issues identified in the prison system for reporting sexual assault were identified in the military context, and vice

21. *See About the Department of Defense (DoD)*, U.S. DEP'T DEF., https://www.defense.gov/About-DoD (last updated Jan. 27, 2017).

22. *See generally* JEFF HEARN & WENDY PARKIN, GENDER, SEXUALITY AND VIOLENCE IN ORGANIZATIONS: THE UNSPOKEN FORCES OF ORGANIZATION VIOLATIONS (2001).

23. *See* Daniel Katz & Robert L. Kahn, *Organizations and the Systems Concept*, *in* CLASSICS OF ORGINAZATIONAL THEORY 347, 356 (8th ed. 2016).

24. *See generally* RICHARD L. DAFT, ORGANIZATION THEORY AND DESIGN (7th ed. 2001).

25. John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 8–9 (2000).

26. *See infra* Part II.

27. *See infra* Part II.

28. *See infra* Part II.

versa.[29] Female victims convey doubts about the reporting processes, express fear of retaliation, and have concerns that they ultimately will not find justice.[30] Additionally, the fact that there is only minimal external oversight on the internal reporting systems may explain why addressing sexual assault is so difficult.

In comparing these two kinds of closed systems, this Article makes connections using the narratives of individuals by relying on their experiences of victimization, instances of reporting, and attempts to seek justice.[31] This Article stems from a National Science Foundation-funded interdisciplinary research project[32] that addresses a major gap in understanding the reporting of sexual victimization in prison and the confluence of factors that contribute to the ineffectiveness of prison-based laws and policies.[33] It is the hope that by using expertise gained in the prison context and drawing connections to the military and immigration detention centers, this Article will ultimately reveal that while the systems are characterized by a culture of sexual violence that makes efforts to address and eradicate such violence difficult, there is great potential in utilizing specific legal tools to effect institutional change.[34]

Recommendations for legal solutions stem from the successes and failures observed in this prison-based research. Ultimately, this Article argues that a two-fold remedy, part administrative and part civil, is the best

29. *See infra* Part II.

30. *See infra* Part II.

31. *See infra* Part II.

32. *See* Sheryl P. Kubiak, Hannah Brenner, Deborah Bybee, & Rebecca Campbell, *Award Abstract # 1429948: Using an Ecological Framework to Examine Reporting of Abuse During Incarceration*, NAT'L SCI. FOUND. (July 10, 2015), http://www.nsf.gov/awardsearch/showAward?AWD_ID=1429948.

33. *See id*. To this end, this cohort of experts in law, social work, and psychology are utilizing data, including personal narratives of inmate victims, from cases that formed the basis of the groundbreaking class action lawsuit, *Neal v. Department of Corrections*, brought on behalf of over 800 women sexually victimized during incarceration. 824 N.W.2d 285 (Mich. Ct. App. 2012). This Article argues that this lawsuit, its lessons learned, and the resulting remedies for Michigan class members, both on an individual and prison-wide level, provide a useful template that can be extrapolated to address similar issues nationwide. *See infra* Part III. This specific setting was chosen for this article for multiple reasons, including that Michigan is home to some of the worst prisons for sexual assault and is currently taking steps to comply with standards set by the Prison Rape Elimination Act. *See infra* Part III.

34. *See infra* Parts I–II.

existing avenue for compensating victims and creating change.[35] To illustrate the relative effectiveness of the class action, this Article relies, as a starting point, on the successes of *Neal v. Michigan Department of Corrections* (*MDOC*)—class action litigation on behalf of over 800 inmates in Michigan who were sexually victimized during incarceration.[36] Although the case does not craft a perfect remedy, the *Neal* court's settlement nonetheless accomplished a number of significant ends: it provided compensation for victims, resulted in changes to prison policies, acted as a deterrent for future violence, placed other states on notice that sexual victimization perpetrated by staff against inmates will not be tolerated, and generated substantial public awareness through media coverage of sexual victimization in prisons.[37] There have not been any landmark civil cases on sexual violence in the context of the military, but this is not for lack of trying. A suit similar to *Neal*, *Klay v. Panetta*, was brought on behalf of military members who were sexually victimized, but it had a different outcome; its failure did not rest on the merits of the case, but rather hinged on current Supreme Court jurisprudence surrounding limitations on military liability.[38] Litigation on behalf of victims of sexual violence in immigration detention facilities has involved the administrative remedy of suing to enforce the rules and guidelines set by the Prison Rape Elimination Act (PREA)[39]—a solution that is just beginning to be considered in the prison context. This Article argues that this administrative remedy should be utilized more readily and could effectively complement civil lawsuits like

35. *See infra* Part III.

36. *See* Neal v. Dep't of Corr. (*Neal I*), 583 N.W.2d 249 (Mich. Ct. App. 1998).

> In 1996, Tracey Neal, and five other female prisoners filed a complaint on behalf of themselves and all similarly situated female prisoners against the Michigan Department of Corrections (MDOC), its directors, and various wardens and deputies in the prison system. Plaintiffs filed suit in the circuit court specifically alleging eight causes of action based on the treatment of women prisoners in the prison system.

Neal v. Dep't of Corr. (*Neal II*), No. 253543, 2005 WL 326883, at *1 (Mich. Ct. App. Feb. 10, 2005). *See also* Rachel Culley, "*The Judge Didn't Sentence Me to Be Raped":* Tracy Neal v. Michigan Department of Corrections*: A 15-Year Battle Against the Sexual Abuse of Women Inmates in Michigan*, 22 WOMEN & CRIM. JUST. 206 (2012).

37. Class Settlement Agreement, *Neal I*, 583 N.W.2d 249 (No. 96-6986-CZ). Although the case settled before trial, it still yielded substantial financial compensation for victims and resulted in important policy changes inside prison. *Id.* The survey data of the claimants reveals varying levels of satisfaction with the outcome of the case, illustrating the limitations.

38. Klay v. Panetta, 758 F.3d 369 (D.C. Cir. 2014).

39. *See* 42 U.S.C. § 15607 (2016).

Neal.[40]

Part I of this Article considers the defining characteristics of closed institutional systems generally.[41] Part II explores the prevalence and incidence of sexual victimization in detention facilities and the military, as well as corresponding policies and preventative strategies, identifying parallels and drawing distinctions between these settings and the broader community.[42] Part II also exposes the extremely limited internal remedies available to individuals who experience sexual victimization in these closed systems.[43] Part III of the article transcends the discussion surrounding limitations within these systems to consider the necessity of external solutions,[44] and specifically explores two avenues of relief to make victims whole and effect systemic, legal, and cultural changes: (1) the use of civil lawsuits generally, with a focus on the class action, supplemented by (2) the use of administrative law to enforce federal rules on sexual violence in closed systems.[45] This Article strives to break down the walls that separate these different closed systems into silos, toward an end of shifting laws and policy to better address the multifaceted problem of sexual victimization.

I. CLOSED INSTITUTIONAL SYSTEMS

Scholars describe a "closed system" as one that is "sufficiently independent to allow most of its problems to be analyzed with reference to its internal structure and without reference to its external environment."[46] Social scientist Erving Goffman created the term "total institution" to refer to a place where people both live and work and are, at the same time, isolated from the larger community for a significant length of time.[47] Examples of the "total institution" include mental hospitals and institutions, military settings, and incarceration sites such as jails and prisons.[48]

40. *See Neal I*, 583 N.W.2d 249.
41. *See infra* Part I.
42. *See infra* Part II.
43. *See infra* Part II.
44. *See infra* Part III.
45. *See infra* Part III.
46. Katz & Kahn, *supra* note 23, at 356.
47. Erving Goffman, *The Characteristics of Total Institutions*, *in* ORGANIZATION AND SOCIETY 312, 314 (1961).
48. *Id.* at 313.

The unique structure of a closed system means that it lacks the influence and oversight of external actors.[49] It exists much like a silo, isolated from the outside world and other closed systems.[50] This isolation frequently leads to problems within that are compounded by biases or assumptions that shape the system's internal structures and processes.[51] Further, its internal processes and procedures are separate, nontransparent, and hidden from those on the outside.[52] The public often has no idea about the inner workings of such a system.[53]

"Closed organizations, such as residential care facilities, children's homes and prisons, are relatively isolated from the outside world, and as such, violations and violence are often contained and intensified."[54] Unfortunately, without the societal and legal checks and balances that exist in the community, the closed system is a setting ripe for sexual violence to occur unchecked, without recourse for its victims.[55] Both the military and detention facilities are quintessential examples of closed systems because they are governed by their own set of rules, laws, and policies; further, external oversight is extremely limited.[56] Perhaps unsurprisingly, both systems have historically experienced disproportionately high incidences of sexual assault, and victims in each have faced insurmountable barriers to finding justice.[57] Certain elements of the closed system, including reporting, investigations, and retaliation, all contribute to an atmosphere where sexual

49. *See* Sheryl Pimlott Kubiak et al., *"I Came to Prison to Do My Time—Not to Get Raped": Coping Within the Institutional Setting*, 8 STRESS, TRAUMA, & CRISIS: AN INT'L J. 157, 160 (2005) [hereinafter *I Came to Prison to Do My Time*] (explaining the environment and structure of closed organizations and how such an environment is prime for misconduct).

50. *See id*.

51. *See id*.

52. *See id*.

53. *See id.*

54. *Id*.

55. *See id.* at 159–60.

56. *See id*. at 160; *see also* Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 582 (2014) (highlighting the differences in military society to that of civilian life); *see also* MIKHAIL LYUBANSKY ET AL., CONFLICTING VIEWS ON CLOSED-SYSTEM CONFLICT: AN ANALYSIS OF THE ROLE OF FIVE DANGEROUS BELIEF DOMAINS IN A PRISON SETTING, http://internal.psychology.illinois.edu/~lyubansk/prison.htm (last visited Apr. 17, 2017) (explaining how prison is an inherently closed system).

57. *See infra* Part II (highlighting the prevalence of sexual assault in detention centers and the military and the obstacles that victims face).

violence thrives and is difficult to curtail.[58]

Sexual violence is prevalent in closed systems in part due to the lack of external oversight, as well as the power imbalance inherent in the hierarchy of these systems, and the existence of a tightly knit protective culture.[59] The system will assume a "state-like" role in members' lives where the internal structures and processes are the primary and initial governing body, supplanting civilian law and policy.[60] These systems are self-governing, with a complex and often self-created set of policies and procedures, as well as a detailed and highly constraining set of informal norms that govern appropriate behavior.[61] The informal norms may supersede official policy and procedure; therefore, the system is disincentivized from investigating and punishing perpetrators of sexual violence because doing so would admit its existence within the system.[62]

Prisons, immigration facilities, and the military are all structured slightly differently but share core tenets of a closed system that obstruct victims from being able to successfully report and receive justice for sexual violence perpetrated against them.[63]

A. Military

In part because entrance is voluntary, there are certain constraints that may inhibit individuals from reporting sexual violence in the military. Survivors may remain silent because they have a desire to protect the institution or fear betraying the system.[64] If they do report, they may feel "doubly victimized," first by their attackers and second, by the process that penalizes those who speak up about abuse.[65] Further, the military is characterized as a hyper-masculine culture and has been flagged as potentially encouraging male aggression; hyper-masculine settings are more

58. *See I Came to Prison to Do My Time*, *supra* note 49.

59. *See id.*

60. *See generally* Francine Banner, *Institutional Sexual Assault and the Rights/Trust Dilemma*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 97 (2014).

61. *See Goffman*, *supra* note 59 (explaining the lifestyle of those in closed systems).

62. *Id.*

63. *See* Banner, *supra* note 60, at 134.

64. *See id*. at 137.

65. *Id*. at 166.

prone to sexual violence.[66]

In many ways the military is indeed a quintessential example of a closed institutional system.[67] The military exists as a separate entity within the United States justice system, and in recognizing it as such, the Supreme Court acknowledged that "the military is, by necessity, a specialized society separate from civilian society . . . [and] that the military has, . . . by necessity, developed laws and traditions of its own during its long history."[68] The military is governed by its own policies, protocols, and procedures separate from the civilian system of justice.[69] It is an insular structure that creates a unique cultural context in addition to its legal context.[70] It elicits a strong loyalty from its members and remains closed off—literally and conceptually—from those on the outside.[71]

The basis of the military justice system is the Uniform Code of Military Justice (UCMJ), passed by Congress in 1950.[72] Despite the extensive codification of military law in existence today, the framework of the military's closed system was not always governed by this code and originally lacked much definition other than deference and service to one's commander.[73] It also bore little resemblance to the outside civilian system

66. *See* Michal Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 WIS. J. L. GENDER & SOC'Y 341, 347–52 (2015).

67. *See* OFFICE OF THE UNDER SEC'Y OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES: FISCAL YEAR 2000 (Feb. 2002), https://www.cna.org/pop-rep/2000/assets/pdf/chapters 2000.pdf. The military demonstrates the fact that it is a closed system by comparing its internal statistics to those of its "civilian counterparts." *Id.*; *see also infra* notes 68–79 and accompanying text.

68. Schenck, *supra* note 56 (quoting Parker v. Levy, 417 U.S. 733, 743 (1973)).

69. *See generally* Uniform Code of Military Justice of 1950, Pub. L. No 81–506, 64 Stat. 107 (2013).

70. *See* Andrew Ferris, *Military Justice: Removing the Probability of Fairness*, 63 U. CIN. L. REV. 439, 452–54 (1994).

71. *See id*. Scholars take note of the difference in critiquing American law schools charged with educating future lawyers; most schools do not offer even basic courses on military justice. *See* Eugene R. Fidell, *Military Justice Instruction in Civilian Law Schools*, 60 J. LEGAL EDUC. 472, 474 (2011) ("The number seems to have risen in the last several years but plainly the vast majority of schools still do not offer courses in military law.").

72 *See* Uniform Code of Military Justice of 1950, Pub. L. No 81–506, 64 Stat. 107 (2013). The UCMJ underwent major subsequent revisions in 1968, 1983, and 2013. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, tit. XVII, §§ 1701–1753, 127 Stat. 672, 950–85 (2014).

73. *See* Cooke, *supra* note 25, at 3.

of justice.[74] In the creation of the UCMJ in the early 1950's, "[t]he aim was to codify and explain existing practice, rather than to create new procedures."[75] The system was slow to change over time, but nonetheless eventually evolved from its earliest incarnation.[76] Today, for example, the system allows an accused to have counsel present and allows the counsel to speak during the proceedings—provisions previously not permitted.[77]

> Most significant was its acceptance of the idea that discipline cannot be maintained without justice, and that justice requires, in large measure, the adoption of civilian procedures. The new Code was an effort to combine elements of two competing models: the old command-dominated military justice system and the civilian criminal justice system with its heavy emphasis on due process.[78]

The multiple and sometimes competing functions of the military justice system are revealed best perhaps in the Manual for Courts-Martial preamble: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[79] These goals characterize the military's uniqueness as a closed institutional setting.[80]

74. *See id*. at 3.

75. *See id*. at 5.

76. *See id*. at 10–17.

77. *See id*. at 5.

78. *See id.* at 8. The civilian criminal law system includes fundamental objectives like discovering the truth, acquitting the innocent without unnecessary delay or expense, punishing the guilty proportionately with their crimes, and preventing and deterring further crime, thereby providing for the public order. *See* R. CHUCK MASON, CONG. RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW, summary (Aug. 12, 2013). Military justice shares these objectives in part, but also serves to enhance discipline throughout the Armed Forces, serving the overall goal of providing an effective national defense. *Id.*

79. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES, I-1 (2012), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

80. *See id*. at 5. The military justice system has its own structure, rules of evidence, judges, and punishment procedure. *Id*. at I-1-2.

B. Prisons and Immigration Detention Centers

This Article refers broadly to institutions of detention to describe settings where individuals are intentionally confined, specifically prisons and immigration detention centers. Drawing a connection between these two seemingly disparate systems is not without precedent: "[c]ivil detention centers in theory provide for the temporary holding of immigrants. Therefore, their practices must be distinguishable from prisons and jails. Yet in reality, there are few practical differences between correctional facilities and the facilities used to detain immigrants."[81] Importantly, they are both closed systems whose occupants are governed by internal policies and procedures, often have limited constitutional rights and access to the legal system, and are at the lower end of a power hierarchy.[82] Further, they are both similarly situated because they are governed by PREA rules.[83]

"Today, [in the United States,] prisons are the primary means of dispensing punishment for serious crimes, and their use is accelerating."[84] As of the end of 2014, the Bureau of Justice Statistics reported that 6,851,000 people were under correctional supervision in the United States,[85] and of these, 2,224,400 offenders in 2014 were in state or federal prisons, or local jails.[86] Women are a growing percentage of the population.[87] The number of women in prison increased by more than 700% between 1980 and 2014, rising from 26,378 female prisoners to 215,332.[88]

Prisons are governed by their own set of rules and norms—formal and informal—and their actors operate almost entirely internally.[89] The mission of United States Correctional facilities is to "provide constitutional, ethical, humane, safe, and cost-effective prisons, jails, and community corrections

81. Shahshahani & El-Sergany, *supra* note 7, at 253.

82. *See* Hearn, *supra* note 22.

83. *See* 42 U.S.C. § 15607(c) (2016).

84. Alexander Volokh, *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1841 (2002).

85. *See* BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, (2014), http://www.bjs.gov/content/pub/pdf/cpus14.pdf.

86. *See id.* at 2.

87. THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS (2015), http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf.

88. *Id*.

89. *See infra* notes 90–95 and accompanying text.

programs and facilities."[90] Prisons are given much leeway to create policies to accomplish these goals.[91] "Prison life is precisely regimented, and conditions are similar across many variables, including general quality of life variables, population composition, and authority structure between inmates and corrections officers."[92] When problems arise in a prison, they are dealt with using a "closed system approach," which relies on internal organizational processes and dynamics to account for organizational, group, and individual behaviors.[93] Thus, in addressing issues like the perpetration of sexual assault against inmates, closed system officials look for explanations within the prison itself and then attempt to adopt appropriate internal correctional measures.[94] When looking for explanations, the prison might examine its policies, interview its prison warden and correctional officers, analyze prison culture, explore officer–inmate interaction and inmate–inmate interaction, and evaluate other organizational components of the prison.[95]

Immigration detention centers are unique facilities that house immigrants, typically those who are defending their immigration status in the United States.[96] Individuals in these facilities are detained for alleged civil violations of U.S. Immigration law and include "asylum seekers, undocumented immigrants, legal permanent residents convicted of certain crimes, refugees who the US had accepted for resettlement but who did not apply for permanent residency in time, and even US citizens whose citizenship the government disputes."[97] Further, "[a]pproximately one [in

90. *Mission and Goals*, NAT'L INST. CORRECTIONS, https://nicic.gov/mission (last visited Apr. 17, 2017).

91. *See* Lyubansky et al., *supra* note 68.

92. *Id*.

93. JENNIFER M. ALLEN & RAJEEV SAWHNEY, ADMINISTRATION AND MANAGEMENT IN CRIMINAL JUSTICE: A SERVICE QUALITY APPROACH 28 (2d ed. 2015).

94. *See id.*

95. *See id.*

96. *See* Molly Hennessy-Fiske & Cindy Carcamo, *Overcrowded, Unsanitary Conditions Seen at Immigrant Detention Centers*, L.A. TIMES (June 18, 2014), http://www.latimes.com/nation/nationnow/la-na-nn-texas-immigrant-children-20140618-story.html#page=1.

97. *Detained and at Risk*, *supra* note 13. The Immigration and Nationality Act (INA) prescribes mandatory and discretionary immigration detention, five categories of noncitizens who must be detained, and discretion on detention for citizens awaiting removal proceedings. *See* Immigration & Nationality Act § 236(a), 8 U.S.C. § 1226(a). "The Secretary of Homeland Security and the AG must detain five categories of noncitizens: (1) certain arriving noncitizens, (2) noncitizens subject to 'expedited removal,' (3) noncitizens who have certain criminal convictions, (4) suspected terrorists,

ten] immigration detainees is seeking asylum [or] petitioning for safe haven in the United States . . . after fleeing . . . violence in his or her home country.[98] The refugees fleeing violence may be victims of trafficking, survivors of sexual assault or domestic violence, pregnant women, or nursing mothers.[99] Detention functions as a constitutionally permissible mechanism to facilitate removal from the United States and is allegedly used to "prevent individuals from fleeing or endangering public safety."[100] Immigration and Customs Enforcement (ICE) governs the detention and removal of noncitizens.[101] Because these facilities are responsible for civil punishment and not criminal, if conditions of confinement become unduly punitive, they may be deemed unconstitutional.[102]

Detention centers exist in multiple states,[103] and the number of people detained increases each year.[104] In 2012, the government detained approximately 400,000 people in immigration custody in roughly 250 facilities—9% of whom are women.[105] The length of stay for a pre-removal-

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and (5) noncitizens who have final orders of removal." Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1838–39 (2011). Section 236(a) of the INA allows for the arrest and detention of a noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States." Immigration & Nationality Act § 236(a), 8 U.S.C. § 1226(a).

98. NAT'L CRIMINAL JUSTICE REFERENCE SERV., NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 1, 177–78 (June 2009), http://www.ncjrs.gov/pdffiles1/226680.pdf [hereinafter PREA COMMISSION REPORT 2009].

99. *See* Alison Parker & Meghan Rhoad, *US: Victims of Trafficking Held in ICE Detention: Letter to the US Department of State on 2010 Trafficking in Persons Report*, HUM. RTS. WATCH, (Apr. 19, 2010, 11:56 A.M.), http://www.hrw.org/en/news/2010/04/19/us-victims-trafficking-held-ice-detention.

100. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44 (2010).

101. *See* Sayed, *supra* note 97, at 1843.

102. *See* Kalhan, *supra* note 100, at 44 (citing United States v. Salerno, 481 U.S. 739, 747 (1987); Wong Wing v. United States, 163 U.S. 228, 237 (1896); Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial [criminal] detainee not be punished.")).

103. *See Sexual Abuse in Immigration Detention Facilities—Methodology*, ACLU, https://www.aclu.org/sexual-abuse-immigration-detention-facilitites-methodology (last visited Apr. 17, 2017).

104. *See* Kalhan, *supra* note 100, at 44–45. "In 1994, officials held approximately 6,000 noncitizens in detention on any given day. That daily average had surpassed 20,000 individuals by 2001 and 33,000 by 2008. . . . This growth has been fueled by enforcement policies that subject ever-larger categories of individuals to removal charges and custody . . . ." *Id.*

105. *See Detained and at Risk*, *supra* note 13; *see also The Issues*, DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/resources (last visited Apr. 17, 2017).

order detainee in this type of facility is estimated to be eighty-one days on average, but some experience stays of longer than a year.[106] Recently issued Executive Orders suggest that the number of detainees as well as the amount of time they spend in facilities will continue to increase.[107] The conditions of confinement in immigration detention facilities across the United States are sometimes characterized as inadequate to serve their intended purpose,[108] and worse, are argued to present human rights issues and violations of international law.[109] Scholars identify issues such as inadequate medical care,[110] the improper use of solitary confinement,[111] concerns of coercion and due process,[112] inadequate access to counsel,[113] and prolonged and indefinite detention.[114] Notwithstanding the fact that those individuals housed in the

106. *See* Kalhan, *supra* note 100, at 49; *see generally* Donald Kerwin & Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, MIGRATION POL'Y INST. 16 (Sept. 2009), http://www.migrationpolicy.org/research/immigrant-detention-can-ice-meet-its-legal-imperatives-and-case-management-responsibilities. Of the 10,771 immigrants who received final orders of removal, 8513 were detained for less than ninety days (79%), 1266 were detained for between ninety days and six months (12%), 676 were detained for between six months and one year (6%), and 316 were detained for one year or more (11%). *Id.* at 17.

107. Exec. Order No. 13,780, 3 C.F.R. § 6 (2017).

108. *See* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1111–27 (1995).

109. *See id.*

> International law prohibits arbitrary detention. The International Covenant on Civil and Political Rights, art. 9, requires that anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful.

Arzoo Rajani, *Remedies for Detainees: The Impact of the Ninth Circuit's Decision on Medical Negligence Cases*, 5 U. MASS. ROUNDTABLE SYMP. L.J. 210, 243 n.42 (2010).

110. *See* Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167, 177 (2016).

111. *See* Sarah Davila-Ruhaak, *ICE's New Policy on Segregation and the Continuing Use of Solitary Confinement Within the Context of International Human Rights*, 47 MARSHALL L. REV. 1433, 1435 (2014).

112. *See Sayed*, *supra* note 97, at 1847. Enemy combatants, such as those at Guantanamo bay, are in fact "afforded more procedural protections than are immigrant detainees subject to mandatory detention." Sayed, *supra* note 97, at 1834; *see generally* Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990).

113. *See* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1667 (1997).

114. *See* Kimere J. Kimball, *A Right to Be Heard: Non-Citizens' Due Process Rights to in-Person Hearings to Justify Their Detentions Pursuant to Removal*, 5 STAN. J.C.R. & C.L. 159, 162 (2009).

detention facilities are detained for civil—not criminal—violations of U.S. immigration law, some experts have gone so far as to make the overt comparison to conditions of incarceration or imprisonment.[115]

II. SEXUAL VIOLENCE IN DETENTION AND THE MILITARY

A. The Prevalence and Incidence of Sexual Violence in Detention

In 2009, in an effort to address the widespread problem of sexual violence in prisons, Congress passed the Prison Rape Elimination Act, which "provides for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape."[116] While the PREA does not create a private right of action,[117] it implemented guidelines to facilitate reporting and create zero-tolerance policies.[118] States' failure to comply with the guidelines results in the loss of federal funding.[119] Although not readily apparent from its title, the PREA also applies to immigration detention centers.[120] Due in large part to the insular nature of these institutions, sexual victimization in prison and immigration detention facilities is significantly under-reported despite

115. *See* Kalhan, *supra* note 100, at 43. "Some commentators even resist the very term 'detention' as misplaced, masking circumstances approximating criminal 'incarceration' or 'imprisonment.'" Kalhan, *supra* note 100, at 43; *see also* Shahshahani & El-Sergany, *supra* note 7, at 253.

116. Prison Rape Elimination Act, 42 U.S.C. § 147 (2003).

117. For a full discussion of courts' dismissal of PREA claims brought by prisoners for lack of a private claim, see Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 LEGIS. & PUB. POL'Y 801 (2014).

118. *Id*.

119. *See* 42 U.S.C. § 15607(e)(2) (2003). Adoption of national standards:

> For each fiscal year, any amount that a State would otherwise receive for prison purposes for that fiscal year under a grant program covered by this subsection shall be reduced by [five] percent, unless the chief executive of the State submits to the Attorney General—(i) a certification that the State has adopted, and is in full compliance with, the national standards described in subsection (a); or (ii) an assurance that the State intends to adopt and achieve full compliance with those national standards so as to ensure that a certification under clause (i) may be submitted in future years, which includes—(I) a commitment that not less than [five] percent of such amount shall be used for this purpose.

Id.

120. *See* 42 U.S.C. § 15607(c) (2016). *See also Muñoz*, *supra* note 4, at 574.

widespread understanding and acceptance of its prevalence.[121] The closed nature of these systems makes it difficult to report sexual violence, complicates an already challenging investigation process, and reinforces fears related to retaliation.[122]

1. Prisons

Recently, there has been significant attention directed at problems within the United States prison system.[123] The specific issue of sexual violence in prisons is the focus of news articles,[124] Congressional hearings,[125] and even a recurring theme on television, such as the highly popular memoir-turned-Netflix-series: *Orange Is the New Black*.[126] Recent litigation filed on behalf of six female prisoners in New York State highlights the pervasive and ongoing victimization of inmates.[127] This victimization is not easily addressed due to complexities involving reporting and investigation of claims.[128]

In correctional settings, abuse is perpetrated both by other inmates and correctional staff.[129] Understanding the dynamics of sexual violence in

121. *See* Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 164 (2009).

122. *See id*.

123. *See* The Editorial Board, *Mr. Obama Takes on the Prison Crisis*, N.Y. TIMES (July 17, 2015), https://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html?_r=0.

124. *Id*.

125. *See generally National Prison Rape Elimination Commission Report and Standards: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009).

126. *See generally* PIPER KERMAN, ORANGE IS THE NEW BLACK: MY LIFE IN A WOMEN'S PRISON (2011); *Orange Is the New Black* (Netflix 2013).

127. *See* Benjamin Weiser, *Suit Alleges Persistent Sexual Abuse of Female Inmates in New York State Prisons*, N.Y. TIMES (Feb. 25, 2016), http://www.nytimes.com/2016/02/26/nyregion/6-inmates-file-suit-alleging-persistent-sexual-abuse-of-women-in-new-york-state-prisons.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0; *see also* Class Action Complaint at 1, Jones v. Dep't of Corrections, No. 1:2016cv01473 (S.D.N.Y. Feb. 25, 2016), http://www.legal-aid.org/media/201965/02.26.16_complaint.pdf.

128. *See* Thompson, *supra* note 121.

129. *See* BARBARA OWEN ET AL., GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN'S FACILITIES PART I OF III (Dec. 2008), https://www.ncjrs.gov/pdffiles1/nij/grants/225338.pdf; *see also* M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 No. 3 CRIM. L.

prison requires an understanding of prison culture as a whole.[130] Sexual victimization that occurs in prison differs from the outside society due in large part to the power imbalance between staff and inmates and the general prohibition on sexual relations between inmates or between inmates and staff—expressed statutorily by making it impossible for an inmate to legally give consent to staff.[131] It is also complicated by the fact that upon entrance to prison, as part of the punishment, an inmate gives up certain rights, liberty, goods and services, autonomy, security, and privacy.[132]

The Bureau of Justice Statistics defines staff sexual misconduct generally as "any behavior or act of a sexual nature, either consensual or nonconsensual, directed toward an inmate by an employee, volunteer, official visitor, or agency representative."[133] Specific acts that are prohibited include inappropriate "[i]ntentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse, or gratify sexual desire; [as well as c]ompleted, attempted, threatened, or requested sexual acts."[134] An additional category disallows "[o]ccurrences of indecent exposure, invasion of privacy, or staff voyeurism for sexual gratification."[135] Stringent correctional policies bar any sort of sexual relationship, consensual or otherwise, and restrict "overfamiliar" relationships between inmates and staff during incarceration.[136] Further, laws across almost all states prohibit

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BULL. 1, 2 (2010).

130. *See* MARK S. FLEISHER & JESSIE L. KRIENERT, THE CULTURE OF PRISON SEXUAL VIOLENCE (Nov. 2006), https://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf.

131. *See* Hannah Brenner et al., *Bars to Justice: The Impact on Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 538 (2016).

132. *See id*. at 549. Therefore, some privacy violations that would be deemed abuse in the community are in fact mandated by prison policy. *Id*. Michigan's policy directive on Staff–Prisoner Sexual Misconduct clearly separates abusive acts from proper duties, clarifying that "[t]his does not include acts related to official duties (e.g., strip searches, pat down searches, chest compressions during CPR)." MICH. DEP'T OF CORRECTIONS, POLICY DIRECTIVE: PROHIBITED SEXUAL CONDUCT INVOLVING PRISONERS 2 (Feb. 18, 2015), https://www.michigan.gov/documents/corrections/03_03_140_481633_7.pdf. *See* Flyn L. Flesher, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free from Rape*, 13 WM. & MARY J. WOMEN & L. 841, 865 (2007).

133. McGuire, *supra* note 129, at 2.

134. *Id*.; *see also* Owen, *supra* note 129, at 16.

135. McGuire, *supra* note 129, at 2.

136. *See* MICH. DEP'T OF CORR., POLICY DIRECTIVE: PROHIBITED SEXUAL CONDUCT INVOLVING PRISONERS, *supra* note 132, at 1. "E. Staff Overfamiliarity—Conduct between an employee and a prisoner which has resulted in or is likely to result in intimacy, including but not limited to a kiss or a hug, or a close personal or non-work related association." *Id*.

any sort of sexual relationship between inmates and correctional staff, statutorily criminalizing even "consensual" sexual acts.[137] The rationale for these laws and policies is informed by the inherent power imbalance between inmate and staff and the vulnerability of inmates to abuse.[138]

The extent to which sexual violence occurs in women's prisons was largely unknown until Human Rights Watch (HRW) uncovered details about abuses in prisons across the United States in the mid-1990s with its report: *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*.[139] In this report, HRW exposed the rampant nature of abuse, identified the flawed reporting processes, and revealed that internal investigations rarely yielded justice for victims.[140] Legal advocates who interacted with the prison population filed lawsuits on behalf of these incarcerated victims, including the landmark class action, *Neal v. MDOC*, the lawsuit that forms the basis for this ongoing NSF-funded research study.[141] In response, the federal government created the PREA Commission to brainstorm laws and policies to effectively reduce and address sexual abuse in prison.[142]

Despite state correctional facilities' attempts to comply with the implemented zero-tolerance policies demanded by PREA, the number of inmates who still face sexual abuse during incarceration annually is significant.[143] Both male and female inmates report being abused by inmates and staff of the same or opposite sex.[144] In 2013, 2.4% (34,100) of inmates surveyed "reported an incident involving facility staff, and 0.4% (5,500) reported both an incident by another inmate and staff."[145] While both inmates and correctional staff—male and female—are perpetrators of abuse,

137. *See* NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (Aug. 2009), http://www.prearesourcecenter.org/sites/default/files/library/50statesurveyofssmlawsfinal2009update.pdf.

138. *See* Aubrey J. Bromse, *Prison Abuse: Prison–Staff Relations*, 57 GUILD PRAC. 216, 222 (2000); *see, e.g.*, Brenda V. Smith, *Analyzing Prison Sex: Reconciling Self-Expression with Safety*, 13 No. 3 HUM. RTS. BRIEF 17, 18 (2006).

139. *See generally* ALL TOO FAMILIAR, *supra* note 13.

140. *Id.*

141. Class Settlement Agreement at 1, Neal v. Mich. Dep't of Corr. (*Neal I*), 583 N.W.2d 249 (Mich. Ct. App. 1998), http://www.clearinghouse.net/chDocs/public/PC-MI-0021-0003.pdf. *See also* Culley, *supra* note 36.

142. *See* National Prison Rape Elimination Commission, 42 U.S.C. § 15606 (2003).

143. ALLEN J. BECK ET AL., U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 (May 2013), http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

144. *See id*. at 17.

145. *See id*. at 6.

the specific subsets of female inmates who are victimized by male correctional staff are staggering.[146] Unfortunately, researchers estimate that the number of sexual assaults is much higher than the numbers suggest because inmates may not report, even to researchers, for myriad reasons.[147]

Because prison is a closed system, a victim is largely limited to reporting sexual abuse internally and thus must adhere to the internal policies and procedures regarding reporting.[148] Pursuant to the Prison Litigation Reform Act (PLRA), to preserve the right to sue civilly, an inmate victim must first comply with and exhaust all administrative procedures within the prison.[149] It is useful to examine Michigan's correctional policy as an example of the proper internal processes and procedures to report sexual assault and trigger an internal investigation.[150] To comply with the administrative requirements for reporting a sexual assault by staff in a Michigan prison, an inmate must fill out and file a "grievance."[151] However, before an inmate can submit the grievance, she must first confront the abuser and try to resolve the issue or provide a reason why confrontation is not possible.[152] Once submitted, the prison grievance coordinator may deny the

146. *See* BJS STATISTICS 2011, *supra* note 17, at 8. It should be noted that female officers working in both men's and women's prisons have also been found to be involved in sexual misconduct. *See* James W. Marquart, Maldine B. Barnhill, & Kathy Balshaw-Biddle, *Fatal Attraction: An Analysis of Employee Boundary Violations in a Southern Prison System*, 18 JUST. Q. 877, 889 (2001). About half of all verified staff sexual misconduct is perpetrated by female staff members guarding male inmates. *Id*.

147. *See* Samiera Saliba, *Rape by the System: The Existence and Effects of Sexual Abuse of Women in United States Prisons*, 10 HASTINGS RACE & POVERTY L.J. 293, 299, 304–06, 312 (2013) (citing BJS STATISTICS 2011, *supra* note 17, at 2).

148. *See infra* notes 149–52 and accompanying text.

149. *See* 42 U.S.C. § 1997(e) (2013) ("No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted."). *See generally* Robin L. Dull, *Understanding Proper Exhaustion: Using the Special-Circumstances Test to Fill the Gaps Under* Woodford v. Ngo *and Provide Incentives for Effective Prison Grievance Procedures*, 92 IOWA L. REV. 1929 (2007).

150. *See infra* notes 151–53 and accompanying text.

151. MI DEP'T OF CORR., POLICY DIRECTIVE: PRISONER/PAROLEE GRIEVANCES 3 (July 9, 2007), http://www.michigan.gov/documents/corrections/03_02_130_200872_7.pdf.

152. *See id*. at 2.

> A grievance also may be rejected for any of the following reasons: . . . [t]he grievant did not attempt to resolve the issue with the staff member involved prior to filing the grievance unless prevented by circumstances beyond his/her control or if the issue falls within the jurisdiction of the Internal Affairs Division in Operations Support Administration.

Id.

grievance for administrative reasons (i.e., it is deemed vague, illegible, duplicative, untimely, or contains more than one issue).[153] These administrative denials may thwart reporting from the outset.[154] One inmate recounts, "[f]inally, in 2001, after about a year of [retaliation], the abuse got so bad that I decided to say something. I told the counselors, and they had me file a grievance against him, but the warden rejected it. They said I hadn't done it in a timely manner."[155]

The nature of the closed system means that when abuse happens, the victim is often still forced to interact with and be subject to supervision from her abuser for the duration of her sentence.[156] As best summarized by a woman who was abused in prison: "Imagine being raped inside a stranger's house and being confined to that stranger's house for months afterwards, even years."[157] Much of the prison population is undereducated on prohibited behavior and may not understand how to utilize the reporting system, especially because it is full of complicated language and legalese.[158] An inmate may not identify what transpired as abuse.[159] One woman noted she "wasn't aware there was anything that could be done,"[160] and another seemed to carry notions of what abuse was from outside the closed system, stating "I do not wish to press criminal charges against [the correction officer]. I was not force [sic] into doing anything that I did not want to do."[161] The line between appropriate pat downs and inappropriate touching, appropriate supervision and privacy violations, and appropriate interaction

153. *Id.*

154. *See* Saliba, *supra* note 147, at 306 (explaining that one of the impediments to reporting abuse is "the feeling that staff would . . . do nothing about it").

155. ROBIN LEVI & AYELET WALDMAN, INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS 65, 98 (1st ed. 2011).

156. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 45.

157. Interview with Inmate #13 (on file with author). The PREA attempted to address this issue with policies that bar a time limit on sexual-abuse grievances. *See* 28 C.F.R. § 115.52(b)(1) (2012) ("The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.").

158. *See infra* notes 160–64 and accompanying text.

159. *See, e.g.*, Hope H. & Brenda L., "*This Is Happening in Our Country": Two Testimonials of Survivors of Prison Rape*, 42 HARV. C. R-C. L. L. REV. 89, 93 (2007) ("The biggest obstacle in reporting the abuse was my own complete shock at what had happened to me. My own disbelief at what had happened, wanting to deny being raped by a corrections officer, an old salt-and-pepper man who could have been my uncle.").

160. Interview with Inmate #5 (on file with author).

161. Interview with Inmate #9 (on file with author).

and overfamiliarity is extremely difficult to understand and navigate.[162] Finally, due to the lack of sexual relationships and the complicated dynamics of sexuality in prison, a victim may feel she is giving consent or consensually seeking the relationship, and thus, be disinclined to report such instances.[163] This is evidenced by a victim's own account, "I wanted a relationship with this officer b/c I thought it would make me happy and this is what people did in prison."[164]

These examples reflect just some of the very significant barriers to reporting inside the closed system of prison, operating both formally and informally.[165] They include the structure of the policies themselves, feelings of shame or guilt, a fear of not being believed, rape myth and victim blaming, and fear of retaliation or punishment.[166] Some barriers unique to the closed prison environment may impact one's willingness to report; including time served, sexual orientation, or other demographic variables.[167] "[A]dditional consequences, like retaliation or additional labels of being 'weak,' which could lead to increased harassment by other inmates" are significant deterrents to reporting.[168] Anecdotal evidence shows there are great risks that accompany reporting, and many women do not want to "cause trouble" and risk extending their release date: "I couldn't tell anyone. My appeal was still in the courts, and I wanted to go home."[169] One woman was told if she pursued reporting the abuse she would "see her max date."[170]

If an inmate overcomes the barriers associated with reporting, she will likely encounter a separate set of challenges involved with investigating a claim of sexual assault in prison, particularly if the allegation is against

162. *See* Flesher, *supra* note 132, at 865 (explaining the difficulties in cross-gender inmate supervision).

163. *See* OWEN ET AL., *supra* note 129, at v–viii.

164. Interview with Inmate #12 (on file with author).

165. *See generally* Brenner et al., *supra* note 131.

166. *See* Shannon K. Fowler, *Would They Officially Report an in-Prison Sexual Assault? An Examination of Inmate Perceptions*, 90 PRISON J. 220, 224–25 (2010); Brenner et al., *supra* note 131.

167. *See* Fowler, *supra* note 166, at 225. Further, sexual orientation and certain demographic variables such as race, education, and previous incarceration may help predict whether an inmate would report. *Id*.

168. *See id*. at 229.

169. LEVI & WALDMAN, *supra* note 155, at 97.

170. Interview with Inmate #14 (on file with author).

correctional staff.[171] An internal investigator interviews the victim, perpetrator and witnesses, and assesses evidence.[172] Although policies provide that "[a]ll investigations shall be conducted promptly, thoroughly and objectively" and should refer to the PREA for guidance,[173] the investigator has wide discretion, which often goes unchecked.[174] The findings of an investigation are integral: they may result in discipline for the perpetrator if found guilty, or, in many cases, discipline for the victim if the claim is found to be untrue.[175]

PREA-inspired research reveals that "just [seventeen] percent of all allegations of sexual violence, misconduct, and harassment investigated in 2006" were substantiated.[176] The Bureau of Justice Statistics further reports that investigators concluded that in twenty-nine percent of the alleged incidents, there was no sexual assault.[177] In over half of the incidents, they could not conclusively determine if abuse actually occurred.[178] It is important to note that the high numbers of "unsubstantiated" findings—those where the investigators could not determine if the abuse occurred—is not necessarily attributable to a high number of false allegations.[179] Acknowledging these barriers, steps have been made in many prisons to remedy these procedures and make them easier for victims to use. For example, under PREA, some prisons have changed their policies and allow a victim to report to any correctional staff as well as providing a way to report abuse to a public or private entity, and requiring staff to report any knowledge, suspicion, or information regarding sexual abuse.[180] Some

171. *See* Fowler, *supra* note 166, at 229; PREA COMMISSION REPORT 2009, *supra* note 98, at 101.

172. *See* MICH. DEP'T OF CORR., POLICY DIRECTIVE: PROHIBITED SEXUAL CONDUCT INVOLVING PRISONERS, *supra* note 139, at 6.

173. *Id.* at 5.

174. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 188.

175. *See id*. at 122–23; *see also* Michael Rigby, *Michigan's Dirty Little Secret: Sexual Abuse of Female Prisoners Pervasive, Ongoing*, PRISON LEGAL NEWS (Jan. 15, 2016), https://www.prisonlegalnews.org/news/2006/jan/15/michigans-dirty-little-secret-sexual-abuse-of-female-prisoners-pervasive-ongoing/.

176. PREA COMMISSION REPORT 2009, *supra* note 98, at 13.

177. *See id*.

178. *See id*.

179. *Id*. at 118.

180. *See* 28 C.F.R. § 115.51(a) (2014) (stating that "[t]he agency shall provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment"). In addition,

> [t]he agency shall also provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to

prisons also allow a victim to file a grievance without submitting it to the staff member who is the subject of the complaint; a requirement that is an improvement from, and at odds with, Michigan's policy of requiring an inmate to try and resolve the issue face-to-face before she may submit a grievance.[181]

Despite the existence of laws like the PREA, certain elements inherent in the structure of the closed prison system may make it so that a "substantiated" finding for a sexual-abuse claim is near impossible.[182] The power imbalance between inmate and staff, presumptions about character and credibility,[183] rape myths, discretion in investigation, and a culture of protection and acceptance among correctional staff all contribute to the difficulty for an inmate to find justice through an investigation.[184]

The power imbalance between inmates and correctional staff is extreme.[185] Corrections officers may utilize this imbalance to facilitate abuse,[186] to ensure inmates do not report,[187] and to ensure investigations do

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> receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials, allowing the inmate to remain anonymous upon request. Inmates detained solely for civil immigration purposes shall be provided information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security.

28 C.F.R. § 115.51(b) (2014). Finally, 28 C.F.R. § 115.61(a)—staff and agency reporting duties, requires

> [t]he agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against inmates or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

181. 28 C.F.R. § 115.52(c). "(1) An inmate who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and (2) Such grievance is not referred to a staff member who is the subject of the complaint." *Id*.

182. *See generally* PREA COMMISSION REPORT 2009, *supra* note 98.

183. *See, e.g*., Hope H. & Brenda L., *supra* note 159, at 91.

> The shift captain was suspicious, and they took me to the hospital to do a rape kit, but he had used a condom. I told the nurses what had happened, but nothing ever came of it. The jail people said I was nuts because I had been hallucinating for days. But I didn't hallucinate being raped. I was devastated.

Id. at 91.

184. *See* Brenner et al., *supra* note 131.

185. *See* ALL TOO FAMILIAR, *supra*, note 13.

186. *See id.*

> Christina Kampfner, a clinical psychologist who had worked extensively with women in Michigan's prisons, told us that in these relationships, officers often target "like a radar"

not yield a substantiated finding for the allegation.[188] In many cases, investigators presume that an officer is inherently more credible than an inmate or may assume that the inmate "deserved" the abuse.[189] One inmate–victim explained the common (but mythic) assumption that "all the women in here want sex . . . [T]hey will do anything to get it."[190] Correctional officers have the power to write misconduct tickets for a range of inmate behaviors that do not require proof; these charges can range from being out of place (or not where they are supposed to be at a given time) to the broader "insolence" charge, which can encompass any behavior perceived by correctional staff as insolent.[191] In addition, these tickets can later be used to cast doubt on an inmate victim's motives for reporting abuse. "It is believed that the prisoner's allegation was in retribution for misconduct tickets written by [the correctional officer]."[192] One woman discussed this horrific tactic, used by her correction officer perpetrator, where in a letter to her, her abuser apologized for being rude to her and writing her a ticket and explains that he was trying to throw others off the

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> women with histories of sexual or physical abuse or prisoners in emotionally vulnerable positions, such as those who lack support from family or friends, who are alienated or isolated by other prisoners or staff, and younger women who are incarcerated for the first time.

Id.

187. *See* HUM. RTS. WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998), http://www.hrw.org/legacy/reports98/women/ [hereinafter NOWHERE TO HIDE].

188. *See* PREA COMMISSION REPORT 2009, *supra* note 98. During interviews, perpetrators may fabricate reasons why the inmate is lying, and the internal investigator defers to the credibility of staff. *See supra* note 174 and accompanying text. One women's investigation file stated, "[t]he grievant has failed to provide any substantive evidence to support the claims. Therefore, this Office must rely on the credibility of staff." Interview with Inmate #28 (on file with author).

189. Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 581 (2006); Tricia Zunker, *Changing the Policy of Prisoner-Cide in America: Providing Access to Condoms*, 5 NW. INTERDISC. L. REV. 39, 72 (2012). Half of those questioned in one survey stated that "society accepts prison rape as 'part of the price criminals pay for wrongdoing.'" Charles M. Sennott, *Poll Finds Wide Concern About Prison Rape; Most Favor Condoms for Inmates*, BOS. GLOBE, May 17, 1994, at 22.

190. Interview with Inmate #10, (on file with author).

191. *Discipline—Prisoner Discipline*, MICH. DEP'T CORR., https://www.michigan.gov/corrections/0,4551,7-119-9741_12798-292458--,00.html (last visited Apr. 17, 2017). "Insolence—Words, actions, or other behavior [that] is intended to harass, degrade, or cause alarm in an employee." *Id.*; *see also* MICH. DEP'T OF CORR., POLICY DIRECTIVE: PRISONER DISCIPLINE (Apr. 9, 2012), http://www.michigan.gov/corrections/0,4551,7-119-9741_12798-292458--,00.html.

192. Interview with Inmate #26 (on file with author).

track of the love letters he was writing her.[193]

The closed system creates a strong, almost fraternal bond between correctional staff and facilitates a culture of silence about abuse across the spectrum of reporting and investigation.[194] "It's like if you fall out with one officer, you fall out with all of them."[195] Correctional staff tends to protect each other, a dynamic that may interfere with their ability to conduct impartial, fair investigations.[196]

> The ADW had his friends threaten me before the investigation. They told me that if I kept quiet I wouldn't be retaliated against, I would be left alone. They said I'd be able to go home, but if the investigation continued, he'd lose his job, and then everybody would come down on me. I was afraid, and I lied to the investigators, told them nothing was happening, that the ADW was just my boss, a good friend.[197]

2. Immigration Detention Facilities

Individuals "held in the U.S. immigration detention system experience sexual victimization from both fellow detainees and detention facility employees," similar to that which occurs in prison.[198] "The extent of such abuse is unknown due to discretionary reporting requirements and fear amongst the detainees."[199] As a threshold matter, better data collection is needed.

The Department of Homeland Security set forth standards addressing sexual victimization to comply with President Obama's directive to implement the PREA.[200] However, there are no real enforceable rules for these closed systems.[201] The standards focus on preventing staff-on-detainee

193. Interview with Inmate #8 (on file with author).

194. *See* BRENDA V. SMITH & JAIME M YARUSSI, NAT'L INST. OF CORR., BREAKING THE CODE OF SILENCE 11–12 (2007), https://nicic.gov/library/022473.

195. Interview with Inmate #20 (on file with author).

196. *See* SMITH & YAARUSSI, *supra* note 194.

197. LEVI & WALDMAN, *supra* note 155, at 98.

198. Grace Trueman, *Pocketing a Pretty Penny: Sexual Victimization, Human Rights, and Private Contractors in the U.S. Immigration Detention System*, 89 U. DET. MERCY L. REV. 339, 340 (2012).

199. *Id*.

200. *See* 6 C.F.R. § 115 (2014).

201. *See* Anshu Budhrani, *Regardless of My Status, I Am a Human Being: Immigrant Detainees*

sexual abuse, which is defined as any sexual contact between a detainee and any staff member, volunteer, or contractor.[202] "Improper medical searches and the attempts to coerce a detainee into engaging in sexual contact are considered sexual abuse. The standards also focus on preventing detainee-on-detainee sexual abuse . . . through coercion, intimidation, or force," which is an expansion beyond what the PREA contemplates in this context.[203]

Experts have only recently exposed sexual violence as a significant problem in immigration detention centers.[204] As populations in these settings grow, so do the number of allegations.[205] However, much like in prison and the military, the number of actual victimizations is likely far higher than the reports of abuse.[206] Immigration and Custom Enforcement's data system reflected "215 allegations of sexual abuse and assault from October 2009 through March 2013 in facilities that had over 1.2 million admissions."[207] This data should be viewed cautiously because the "ICE data did not include all reported allegations."[208] The extent to which abuses are occurring in detention centers has remained largely under the radar.[209] However, in 2009, the PREA Commission detailed abuses in detention centers, identifying the population as particularly vulnerable, and in 2010, the Human Rights Watch issued a report on these abuses.[210] From these sources, the descriptions of sexual abuse in detention centers are eerily

and Recourse to the Alien Tort Statute, 14 U. PA. J. CONST. L. 781, 783 (2012). "Additionally, while the Obama Administration has announced an overhaul of the immigration detention system, it has concurrently refused to create legally binding rules, arguing that 'rule-making would be laborious, time-consuming and less flexible' than a simple overhaul." *Id.*

202. *See* U.S. DEP'T OF HOMELAND SEC., STANDARDS TO PREVENT, DETECT, AND RESPOND TO SEXUAL ABUSE AND ASSAULT IN CONFINEMENT FACILITIES 27 (2012), http://www.dhs.gov/sites/default/files/publications/prea-nprm-final-120612.pdf.

203. Muñoz, *supra* note 4, at 569.

204. *See Detained and at Risk*, *supra* note 13.

205. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 3 (2013), http://www.gao.gov/assets/660/659146.pdf [hereinafter IMMIGRATION DETENTION].

206. *See Detained and at Risk*, *supra* note 13; IMMIGRATION DETENTION, *supra* note 205.

207. IMMIGRATION DETENTION, *supra* note 205.

208. *Id.*

209. *See supra* notes 206–08 and accompanying text.

210. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 175–81 (2009); *Detained and at Risk*, *supra* note 13.

similar to both prison and the military.[211] The abuses and dynamics mirror the imbalanced power relationships—including threats, retaliation, not being believed, reporting and being ignored, reporting and not being sustained—with the added dynamic of deportation and removal.[212] Just as in prison, other detainees, as well as guards or staff, perpetrate abuse; and, while outside the scope of this paper, abuses against children are shockingly widespread.[213]

The closed nature of the immigration detention system represents a hybrid of the many problems seen in reporting, investigation, and retaliation in prison and the military.[214] In 2010, Human Rights Watch extensively studied these abuses, concluding that the growing abuse has "quietly emerged as a pattern across the rapidly expanding national immigration detention system."[215] Thus, while abuse is a burgeoning issue in this context, it bears similarities to other closed institutional systems, and therefore the suggestions for remedying it are very similar. There is potential to address the practices in these immigration centers before the problem becomes as institutionally entrenched as in other systems like prisons and the military.

ICE policies governing sexual abuse and assault mirror those in the PREA context, setting forth a zero-tolerance scheme barring even "consensual" sexual contact.[216] "Sexual abuse and assault of a detainee by a staff member, contractor, or volunteer" encompasses a range of behaviors

211. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 175–81.

212. *Id*.

213. *Id*. at 178.

> Allegations of sexual abuse started surfacing, and among those cases was an eight-year-old boy from El Salvador who was raped and sexually abused. Bryan Johnson, the immigration attorney representing the boy, explained how ICE officials did very little to stop the abuse. He came from his home country with his mother and younger brother. After arriving in the United States, the family was placed in the detention facility. Days after their arrival, the eight-year-old boy was raped by an older boy. The abuse occurred in the facility's game room and bathroom, areas not supervised by officials. The child's mother reported the incident to ICE officials; however, the officials told her there was nothing they could do.

Muñoz, *supra* note 4, at 580.

214. *See supra* notes 198–213 and accompanying text.

215. *Detained and at Risk*, *supra* note 13.

216. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 11062.2: SEXUAL ABUSE AND ASSAULT PREVENTION AND INTERVENTION ¶¶ 2, 3.3 (May 22, 2014), https://www.ice.gov/doclib/detention-reform/pdf/saapi2.pdf [hereinafter ICE ABUSE AND PREVENTION].

from "[c]ontact between the penis and the vulva or anus and . . . contact involving the penis upon penetration, however slight" to "[v]oyeurism, which is defined as the inappropriate visual surveillance of a detainee for reasons unrelated to official duties."[217] Further, ICE policy addresses the prevention of retaliation against those who report sexual abuse, provides for confidentiality, and mandates training for investigating sexual abuse.[218]

The power dynamics of abuse by a guard in a detention center against a detainee are very similar to the patterns seen in the other closed systems.[219] The guard is in a higher position of power than a detainee, similar to a guard–inmate and a military victim–higher officer relationship.[220] Perpetrators utilize their high status in the closed system to facilitate abuse: "The guard [] dragged the victim into the guard's bathroom and engaged in intercourse with her."[221] The same type of coercion seen in the prison context occurs in immigration facilities where "deportation officers have propositioned women whose cases they control, telling them that if they want to be released they need to comply with the officers' sexual demands."[222]

Detainees in immigration centers, like prisoners, are a group particularly vulnerable to sexual abuse.[223] They may have a higher likelihood than the general public of having experienced sexual abuse prior to their detention, especially if they are asylum seekers or survivors of torture in their home countries.[224] Detainees "often have posttraumatic stress disorder (PTSD) and other trauma responses," which include "difficulty problem-solving and a sense of hopelessness and lack of control, all of which make individuals more susceptible to sexual victimization and also less likely to report it."[225]

Reporting sexual abuse and assault in immigration centers is usually accomplished internally through facility grievance policy and procedures—

217. *Id.* at 2–3.
218. *Id.* at 8–9.
219. *See infra* notes 220–22.
220. *See* Brenner et al., *supra* note 131.
221. Muñoz, *supra* note 4, at 574–77.
222. PREA COMMISSION REPORT 2009, *supra* note 98, at 179.
223. *Id.* at 177 (stating that "[m]any factors—personal and circumstantial, alone or in combination—make immigration detainees especially vulnerable to sexual abuse").
224. *Id.* at 178.
225. *Id.*

much like the process in prisons.[226] Although there is an option to report externally, for example, "directly to . . . the DHS [Department of Homeland Security's] Office of Inspector General," an audit of detention facilities showed that most detainees were not aware of these options.[227] The PREA Commission recommended standards to educate detainees on their rights and options, but many informal barriers persist.[228]

Detainees, like prisoners, have concerns that no one will believe them if they report and that such efforts will be futile; and they are fearful of retaliation.[229] They also face unique barriers, such as a lack of information about rules governing staff conduct, difficulty accessing reporting avenues, language barriers, and the possible trauma from prior abuse.[230] Much like in prison, if a victim considers reporting, she is reminded of her inferior status in the closed system and often internalizes the message that "nobody would believe her,"[231] or the victim even may be threatened, perhaps with physical violence.[232] Upon reporting, system actors may reiterate that sexual abuse is trivial; they are not incentivized to do anything about it.[233] One detainee reflects, "it was useless to complain."[234] Additionally, just as in prisons, verbal sexual harassment is so pervasive that it seems it is just part of the culture that they must accept.[235] The futility of reporting is illustrated by the lack of response from the system; one "victim reported the abuse immediately after the incident occurred; however, the guard continued to

226. *See* ABA COMM'N ON IMMIGRATION, COMPLAINT PROCESSES FOR IMMIGRATION DETAINEES (2014), http://www.immigrantwomennetwork.org/Resources/Complaint_Processes_Immig_Detainees.pdf. *See* ICE ABUSE AND PREVENTION, *supra* note 216.

227. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 33 (2006), https://ia601902.us.archive.org/18/items/241267-treatment-of-immigration-detainees-housed-at/241267-treatment-of-immigration-detainees-housed-at.pdf (explaining how detention facilities fail to explain the process for reporting abuse allegations).

228. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 177–78.

229. *See* Muñoz, *supra* note 4, at 575.

230. *See id*. at 566.

231. *Id*. at 575.

232. *See id*. "He threatened her that if she told anyone, she would not leave Willacy alive." *Id*. at 580.

233. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 188.

234. Muñoz, *supra* note 4, at 575.

235. *See* SUNITA PATEL & TOM JAWETZ, AM. CIVIL LIBERTIES UNION, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES 1, 10 (2007), https://www.aclu.org/files/pdfs/prison/unsr_briefing_materials.pdf.

work at Willacy for eight more months. It took two years for the guard to be indicted."[236]

Fear of punishment or fear of the system itself not only renders the detainees vulnerable to abuse, but almost guarantees they won't report.[237] The PREA Commission acknowledges that "[b]ecause immigration detainees are confined by the agency with the power to deport them, officers have an astounding degree of leverage, especially when detainees are not well informed of their rights and access to legal counsel."[238] Cheryl Little, an attorney at the Haitian Refugee Center, noted that "[a] lot of women . . . don't feel they can question sexual demands by guards. Basically they are at the mercy of their offenders."[239]

Those who do report may be labeled as "troublemakers"[240] or face retaliation: "some of the women who have given statements have either been transferred or deported to their countries."[241] While in prison, women may resign themselves to accept abuse, and in immigration centers, the consequences are potentially more far-reaching, because it may mean giving up their fight to remain in the US.[242] One woman, to avoid further abuse, consented to being deported back to Canada, where she currently resides, despite the fact that she had children living in the U.S.[243]

Grievance procedures may seem "impossibly complex, especially for detainees who speak languages other than English or Spanish" because they often do not receive information regarding abuse reporting in a language they can understand.[244] Additionally, cultural proscriptions or fears of stigma may impact the willingness to report.[245]

Investigations in detention centers often lead nowhere and result in little

236. Muñoz, *supra* note 4, at 575.

237. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 22.

238. *Id*. at 22.

239. STOP PRISONER RAPE, *supra* note 18, at 4. "Immigrants are amongst the most vulnerable of populations; not only are they almost always unable to exert their rights in this context, but these remote immigration detention centers often deprive them of access to legal counsel." Muñoz, *supra* note 4, at 578.

240. Muñoz, *supra* note 4, at 175.

241. PREA COMMISSION REPORT 2009, *supra* note 111, at 179.

242. *Id*. at 22.

243. Muñoz, *supra* note 4, at 575.

244. PREA COMMISSION REPORT 2009, *supra* note 98, at 23.

245. *See id*. at 180 (stating that "[i]n many cultures, families and communities view victims of sexual assault very unsympathetically after the abuse becomes known").

if any action.[246] In 2014, an American Immigration Council report analyzed approximately 800 complaints alleging Border Patrol misconduct.[247] The report indicated that between January 2009 and January 2012, roughly 97% of grievances inspected by internal investigators were deemed to have "No Action Taken."[248] For allegations of sexual victimization, the numbers are less clear, but likely reflect the same trend.[249] For example, in one detention center with more sexual assault complaints than any other facility of its kind, the internal grievance process resolved only four of the nine hundred complaints.[250] The personnel involved in those incidents were not disciplined nor was any corrective action taken; this demonstrates how little external criminal recourse is available to victims. [251]

Thwarting success rates of these investigations are cover-ups and codes of silence surrounding internal system actors.[252] Internal actors investigating allegations of sexual abuse may be disincentivized to report findings that sustain the claim.[253] "A former transportation guard at the Willacy facility, Sigrid Adameit, explained that cover-ups for sexual abuse and physical assault allegations were pervasive," and one employee was "advised not to say anything about the alleged sexual assault."[254] One guard in New York routinely verbally sexually harassed detainees, but when they complained, "the [facility] tour commander and security chief dismissed the concerns,

246. *See infra* notes 247–57 and accompanying text.

247. *See* Daniel Martinez et al., *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, AM. IMMIGR. COUNCIL 1 (May 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf.

248. Muñoz, *supra* note 4, at 583–84.

249. *See* Martinez et al., *supra* note 247, at 4–6. The numbers are unclear because while the types of complaints are divided, there are no statistics about the percentage of each type that ended with "No Action Taken." *Id*.

250. *See* Muñoz, *supra* note 4, at 578.

251. *See* Martinez et al., *supra* note 247, at 2–4.

252. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 66, 83–84.

253. *See id.* at 83–84.

254. Muñoz, *supra* note 4, at 576–77.

> Sigrid recounted the time a manager requested her to transport a female detainee. When Sigrid picked her up at the facility, the detainee was receiving a rape kit. The manager instructed Sigrid to find a flight for the detainee to her native country. Amongst the instructions, Sigrid was advised not to say anything about the alleged sexual assault. Sigrid was to transport the detainee to the airport, where she would meet U.S. Marshals.

Id. at 576.

stating that [the officer] was crazy and that they could not help."[255] In that case, the grievance filed never received a response.[256]

There is a dearth of research on internal investigations in immigration facilities, but the lack of appropriate investigatory response or failure to award punishment following an investigation may deter reporting by illustrating that a claim is essentially viewed as unimportant or trivial.[257] In 1998, an officer from the Immigration and Naturalization Service's Office of Internal Audit was assigned to a sexual abuse investigation but responded that it was "just another person making false accusations against Immigration."[258] Not only was no disciplinary action taken, but when the incident was mentioned at a meeting, one supervisory official began to laugh.[259] After one report, "the perpetrator was allowed back into her cell where he raped her again."[260] Even when a guard is found guilty of sexual assault, often there is no criminal prosecution.[261]

B. The Prevalence and Incidence of Sexual Violence in the Military

Like in the prison context, the problem of sexual violence in the military was also recently illuminated in myriad contexts, ranging from Congressional hearings,[262] to documentary films,[263] to mainstream news

255. *Detained and at Risk*, *supra* note 13, at 12–13.

256. *See id.*

257. *See id.* at 3–4.

258. STOP PRISONER RAPE, *supra* note 18, at 4.

259. *Id*.

260. *Id*. at 5. Two rapes were committed by an INS officer against Christina Madrazo—a pre-operative transgender detainee at Krome. *Id*.

261. *See Detained and at Risk*, *supra* note 13 (stating that "an investigation into an alleged assault of a detainee from Mexico by a private security guard [] led to his firing but did not result in prosecution"). In 2007, a legislative amendment was finally passed to extend the portion of the criminal code that criminalizes sexual contact between guards and prisoners into the detention context. *Id.*

262. *See The Relationships Between Military Sexual Assault, Post-Traumatic Stress Disorder and Suicide, and on Department of Defense and Department of Veterans Affairs Medical Treatment and Management of Victims of Sexual Trauma: Hearing Before the Subcomm. of Pers. of the S. Comm. on Armed Services*, 113th Cong. (2014); *Sexual Assaults in the Military: Hearing Before the Subcomm. of Pers. of the S. Comm. on Armed Services*, 113th Cong. (2013); *Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs (DAMA) of the H. Comm. on Veteran's Affairs*, 112th Cong. (2012).

263. *See* THE INVISIBLE WAR, *supra* note 9.

media,[264] to the highly acclaimed television show *Scandal*.[265]

A bleak reality for service members in the United States is that the risk of experiencing sexual victimization in the military is significantly higher than dying in combat.[266] "Female soldiers today are 180 times more likely to be sexually assaulted by a fellow soldier than killed by an enemy."[267] Rates of sexual victimization are twice as high in the military than in the civilian context, but similarly and potentially even more problematically, obtaining accurate statistics is more difficult.[268] Research shows that 6,131 individuals reported incidents of sexual victimization to the military in the 2014 fiscal year (October 2013 to September 2014), an 11% increase from 2013.[269] However, this statistic does not tell the full story, and a 2013 Pentagon report found that that the number of people sexually assaulted in the military was closer to 26,000.[270] This number rose sharply from the 19,000 incidents reported in 2010.[271]

The *2014 Department of Defense (DoD) Report to the President of the United States on SAPR* reflects that of the total reports of sexual victimization, 86% were perpetrated by service members.[272] The remaining

264. *See generally* Tom Vanden Brook, *Insults to Injury: Military Sexual-Assault Victims Endure Retaliation*, USA TODAY (May 18, 2015, 6:02 A.M.), http://www.usatoday.com/story/news/nation/2015/05/18/military-sexual-assault-retaliation/27395845/; Courtney Kube, *Reports of Sexual Assault in Military Increase Again*, NBC NEWS (May 1, 2015, 3:19 P.M.), http://www.nbcnews.com/news/us-news/reports-sexual-assault-military-increase-again-n352156; *Reports of Sexual Assaults Spike at Military Academies*, CBS NEWS (Jan. 8, 2016, 9:41 A.M.), http://www.cbsnews.com/news/sexual-assault-reports-air-force-army-navy-military-academies-us/.

265. *See Scandal: A Few Good Women* (ABC television broadcast May 7, 2015).

266. *See* Megan N. Schmid, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 475 (2010).

267. Schenck, *supra* note 56, at 579 (citing The Week Staff, *The Military's Sexual Assault Epidemic*, WEEK (Mar. 31, 2013), http://theweek.com/articles/466100/militarys-sexual-assault-epidemic).

268. Schmid, *supra* note 266, at 475.

269. *See* DOD ANNUAL REPORT FY14 (2015), *supra* note 15, at 41.

270. *See* DEP'T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, fig.6 (2013), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [hereinafter DOD ANNUAL REPORT FY12 (2013)]. A recent survey estimated that 26,000 service members (6.1% of females and 1.2% of males) experienced at least one incident of sexual violence in the twelve months prior to being surveyed. *Id*.

271. *Id.*

272. *See* DEP'T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE (2014), http://sapr.mil/public/docs/reports/fy14_potus/fy14_dod_report_to_potus_full_report.pdf [hereinafter DOD REPORT TO POTUS (2014)].

victims were those who were not on active military duty, civilians in the United States, or foreign nationals.[273] This Article focuses exclusively on sexual assaults between military service members; situations involving those on the outside of the closed system present additional challenges and barriers worth exploring, but they are outside the scope of this Article.

An important facet of this discussion is that most sexual assaults are committed against enlisted service members by their superiors.[274] The DoD report further suggests that the typical sexual assault involves a junior female enlistee assaulted by a more senior service member.[275] As one author observes, "[n]ew recruits are expected to report any misconduct directly to their chain of command, but reporting a sexual assault to the direct commander is often not a viable option if this commander is also the perpetrator of the sexual assault."[276] This power dynamic mirrors that of detention facilities, where staff members exploit their power and sexually victimize detainees, making reporting difficult.[277]

Although this Article focuses on the military in its entirety as a closed institutional system as it relates to the problem of sexual victimization, it is worth noting that there are significant distinctions among the various branches.[278] For example, both men and women in the Air Force face a significantly lower risk of sexual assault than any other branch in the military.[279] The Air Force is cited frequently as a place that is not seen as a hostile work environment; only twelve percent of women and three percent of men experienced a sexually hostile work environment in the past year.[280] These rates are compared against twenty-seven percent of women in both the

273. *See id.*

274. *See* Buchhandler-Raphael, *supra* note 66, at 342.

275. *See id*. at 348. "[Seventy-three] percent of victims were grades E1–E4, meaning that the vast majority of the victims were either training or in their initial assignment . . . [and fifty-one] percent of perpetrators also were grades E1–E4 and [twenty-eight] percent of perpetrators were sergeant level or higher." *Id.* at 348–49.

276. *Id.* at 349.

277. *See supra* Part II.

278. *See supra* notes 279–83 and accompanying text.

279. *See* NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND WORKPLACE STUDY 9–10 (2014) [hereinafter RAND WORKPLACE STUDY (2014)].

280. *See id.* at 10. Further exploration of this phenomenon would be a fascinating project for scholars to take up.

Navy and Marines.[281] Those in the Navy face a significantly higher risk of sexual victimization than any other branch in the military.[282] Finally, the percentage of penetrative assaults was the highest for both men and women in the Marines.[283] Explanations for these differences are not widely understood, but would be a fascinating topic for further research.

The military addresses crimes of sexual violence within its own system of laws, specifically covering rape and sexual assault in article 120 of the UCMJ.[284] The most recent revisions to this part of the UCMJ occurred in 2007. While reforms were generally welcomed, many argue they do not go far enough, and the UCMJ is still subject to critique.[285] "With the new statute, Congress attempted to answer the criticism of the current rape statute. However, the statute does not adequately address many of the significant issues facing the Armed Forces in their attempt to eliminate sexual assault in the military."[286]

The UCMJ creates distinctions among different kinds of sexual violence by defining and distinguishing what constitutes a "sex act" and "sexual contact."[287] A sexual act is defined as:

> (A) contact between the penis and the vulva or anus or mouth . . . [and] contact involving the penis occurs upon penetration, however slight; or (B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by an object, with an intention to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.[288]

Sexual contact, by contrast, is defined as:

281. *See id*.
282. *See id.*
283. *See id.*
284. *See* UCMJ, *supra* note 72, at 145.
285. *See* Major Jennifer S. Knies, Two Steps Forward, One Step Back: Why the New UCMJ Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target (Apr. 2007) (unpublished LL.M. Thesis) (on file with The Judge Advocate General's School United States Army, www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA519227). The author argues, instead, for a consent-based statute. *Id*.
286. *Id.* at 4–5.
287. UCMJ, *supra* note 72.
288. UCMJ, *supra* note 72, at art. 201.

> (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body.[289]

The Code includes four discrete categories of sexual victimization that rest on whether a sexual act (rape and sexual assault) or sexual contact (aggravated sexual contact and abusive sexual contact) was committed and then how specifically the act or contact was carried out.[290] These definitions apply across the entire closed military system, but the Department of Defense (DoD) requires every branch of the military to create its own sexual assault response and prevention protocols.[291]

Widely publicized cases of sexual assault in the military inspired an evolution in the way this problem is handled in the military.[292] The President, Congress, and military leaders have engaged in ongoing efforts to improve responsiveness and more effective prevention.[293] Media accounts over the past decades also helped create major changes in policies and practices related to sexual violence.[294] In 1991, the famous Tailhook scandal brought a pervasive culture of sexual harassment to the forefront.[295] While at a convention for over 5000 active, retired, and reserve Naval and Marine Corps aviators in Las Vegas, men formed a "gauntlet" in a hotel corridor and sexually victimized eighty-three women.[296] Lieutenant Paula Coughlin

289. *Id*.

290. *Id*.

291. *See* Schenck, *supra* note 56 at 656–57 (describing the impact of Section 573(f) on the varying branches of the military).

292. *See generally* Hannah Brenner, *Beyond Seduction: Lessons Learned About Rape, Politics, and Power from Dominique Strauss-Kahn and Moshe Katsav*, 20 MICH. J. GENDER & L. 225 (2013) (providing a comprehensive discussion on the impact of public cases).

293. *See supra* note 123 and accompanying text.

294. *See* Neil A. Lewis, *Tailhook Affair Brings Censure of 3 Admirals*, N.Y. TIMES (Oct. 16, 1993), http://www.nytimes.com/1993/10/16/us/tailhook-affair-brings-censure-of-3-admirals.html.

295. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1, 17 (1993).

296. *Id.*

made the initial complaint, but an investigation revealed that many women were victimized in the same way.[297] In fact, the annual Tailhook convention was well known for this culture of victimizing women.[298] Many officers retired or resigned due to pressure resulting from the scandal, including the Secretary of the Navy, but two years after the incident none of the perpetrators had been disciplined through the military.[299] Eventually, three admirals were given letters of censure, and thirty other senior officers were given letters of caution.[300] These letters were not punitive in nature, but "ma[de] some officers unlikely to win promotions or desirable postings."[301] Some lower ranking officers were fined and disciplined—the numbers of which are unknown—and most cases were dismissed for lack of evidence[302] or other reasons before going to trial. Further, the officer in charge of the sexual assault prevention program for the Air Force was arrested and subsequently charged with sexual battery.[303]

In 1996, five years after Tailhook, another scandal erupted at the Aberdeen Proving Grounds.[304] In this context, a "rape ring" was identified at an Army facility, perpetrated by officers onto trainees when over nineteen women came forward and filed reports.[305] Twenty officers were investigated, but only three were charged criminally—and only two of those included rape charges.[306] During the prosecution, conspiracy among the three men was not proven, but it can be inferred based on the re-

297. *Id.*

298. Norman Kempster, *What Really Happened at Tailhook Convention: Scandal: The Pentagon Report Graphically Describes How Fraternity-Style Hijinks Turned into a Hall of Horrors*, L.A. TIMES (Apr. 24, 1993), http://articles.latimes.com/print/1993-04-24/news/mn-26672_1_tailhook-convention.

299. *See* Chema, *supra* note 295, at 15; *see also* Kempster, *supra* note 298.

300. *See* Lewis, *supra* note 294.

301. *Id*.

302. *Id.*

303. *See* Michael Winerip, *Revisiting the Military's Tailhook Scandal*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html?_r=0.

304. *See* Schenck, *supra* note 56, at 587.

305. *Id*.; Newsweek Staff, *Rape in the Ranks*, NEWSWEEK (Nov. 24, 1996, 7:00 PM), http://www.newsweek.com/rape-ranks-176260.

306. Jackie Spinner, *In Wake of Sex Scandal, Caution Is the Rule at Aberdeen*, WASH. POST (Nov. 7, 1997), http://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/caution.htm; United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003).

victimization of the same female trainees.[307]

Yet another sexual assault scandal in the military occurred in the Air Force in 2003, when over fifty former and then-current cadets came forward with allegations of sexual assault and accusations of mishandling of previous reporting of sexual assault.[308] Due to the time lapse between the assaults and the proper investigations, there was only one cadet who was court-martialed.[309] Leadership at the academy was replaced in an effort to create a culture of zero tolerance.[310] These three examples represent just a fraction of the cases brought into the public's purview.[311]

All of these incidents, while devastating for the victims, ultimately inspired changes in military law and policy related to sexual assault.[312] In 2005, Congress ordered the Secretary of Defense to review the UCMJ to determine what improvements could be made to address the response to sexual victimization.[313] As a result, a new version of Article 120, the section that deals with rape and sexual assault, was circulated.[314] Ultimately, the documentary *The Invisible War*, released in 2012, gave a voice to many of the victims of sexual violence, highlighted their struggles with reporting and seeking justice, and generated media attention.[315] Also in 2012, Congresswoman Tsongas and Congressman Turner created the Military Sexual Assault Prevention Caucus in an effort to develop solutions to the issue of sexual assault in the military.[316]

The Victims Protection Act of 2014 amended the National Defense Authorization Act; both Acts sought to reform policy and procedure to

307. *Three Soldiers Arraigned in U.S. Army Sex Scandal*, CNN (Dec. 6, 1996), http://www.cnn.com/US/9612/06/aberdeen.arraign/.

308. *See* Eric Schmitt, *Air Force Academy Investigated 54 Sexual Assaults in 10 years*, N.Y. TIMES (Mar. 7, 2003), http://www.nytimes.com/2003/03/07/us/air-force-academy-investigated-54-sexual-assaults-in-10-years.html.

309. Colleen Dalton, *The Sexual Assault Crisis in the United States Air Force Academy*, 11 CARDOZO WOMEN'S L.J. 177, 180–81 (2004); Esther Schrader, *Air Force Cadet Is Charged with Rape*, L.A. TIMES (May 14, 2003), http://articles.latimes.com/2003/may/14/nation/na-academy14.

310. *Id*. at 187.

311. *See* Schneck, *supra* note 68, at 579.

312. *See infra* notes 313–16 and accompanying text.

313. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109–163, § 552, 119 Stat. 3136 (codified as amended at 10 U.S.C. § 920 (2006)) (amending UCMJ Article 120 by adding provisions for rape, sexual assault, and other sexual misconduct offenses).

314. *See* UCMJ, *supra* note 72.

315. THE INVISIBLE WAR, *supra* note 9.

316. *Id*.

prevent and reduce sexual assault in the military.[317] In particular, reforms to Article 60 and Article 32 eliminate the commander's ability to modify sentences or overturn a guilty verdict and set specific objectives for a hearing including limiting the cross-examination of the victim if she chooses to testify.[318]

A major effort to overhaul the military response to sexual assault was initiated in the proposed Gillibrand Amendment, or Military Justice Improvement Act, which was introduced in Congress in 2013, but failed to pass.[319] This proposed legislation sought to amend the UCMJ to modify the process and alleviate some of the fears military sexual-assault victims face when reporting sexual violence.[320] In 2015, another reform effort occurred in the context of the Military Justice Review Group, which, at the Secretary of Defense's direction, performed a comprehensive review of the military justice system.[321] That review resulted in a report proposing amendments to the UCMJ in 2015.[322] Most of this report focused on aspects of military justice that are well outside the scope of this Article's focus, but one

317. *See* Victims Protection Act of 2014, S.1917, 113th Cong. (2014).

318. *See* Uniform Code of Military Justice, 10 U.S.C. § 860, art. 60 (2014). The new Article 60 eliminates the commander's ability to modify sentences for serious offenses by overturning a guilty verdict or reducing the finding of guilty to that of a lesser offense. *Id*. The new Article 32—essentially a civilian preliminary hearing in which an Investigating Officer determines if there is probable cause—sets specific and inclusive objectives to the hearing, and limits the cross-examination of the victim, if the victim chooses to testify at all. *Id.*

319. *Comprehensive Resource Center for the Military Justice Improvement Act*, KIRSTEN GILLIBRAND, http://www.gillibrand.senate.gov/mjia (last visited Apr. 17, 2017).

320. *Id*. Sponsored by Democratic New York Senator Kirsten E. Gillibrand, the Act seeks to

> [a]mend[] the Uniform Code of Military Justice (UCMJ) to direct the Secretaries of Defense (DOD) and Homeland Security (DHS) to require the Secretaries of the military departments to modify the process for determining whether to try by court-martial a member accused of: (1) certain UCMJ offenses for which the maximum punishment includes confinement for more than one year; or (2) a conspiracy, solicitation, or attempt to commit such offenses.

S-2970 Military Justice Improvement Act of 2014, CONGRESS.GOV (Dec. 2, 2014), https://www.congress.gov/bill/113th-congress/senate-bill/2970 (summarizing the proposal). This initiative, among others, would alleviate some of the fears that military sexual assault victims face when reporting the crimes committed against them. *See Comprehensive Resource Center for the Military Justice Improvement Act*, *supra* note 319.

321. *See Military Justice Review Group*, DEP'T DEF., http://ogc.osd.mil/mjrg.html (last visited Apr. 17, 2017).

322. *See* MILITARY JUSTICE REVIEW GRP., DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 1 (2015), http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/09_MJRG_Report_PartI_Final_20151222.pdf.

important recognized recommendation, in limited extent, relates to the power dynamic that exists between military recruiters and trainers and those under their control.[323] To this end, "Article 93a would cover military recruiters and trainers who knowingly engage in prohibited sexual activity with prospective recruits or junior members of the armed forces in initial training environments. Consent would not be a defense to this offense."[324] This statutory prohibition is similar to the ban on sexual relationships between prison guards and inmates.[325]

The military system of reporting sexual violence reveals the uniqueness of the closed institutional setting; unlike in almost any other context, military victims have two options of how to report: restricted or unrestricted.[326] A restricted report allows a victim access to vital services like medical treatment and counseling, a Sexual Assault Response Coordinator (SARC) and chaplains; but it does not trigger an investigation or any legal action.[327] The SARC informs the commander that an assault has occurred, but no details are disclosed to reveal the victim's identity.[328] An unrestricted report automatically triggers an investigation: notification is provided to law enforcement, chain of command, and the SARC.[329] If an unrestricted report is made, the Military Criminal Investigative Organization (MCIO) should be informed immediately, "regardless of the severity of the allegations,"[330] and per military policy, all adult-sexual-assault investigations assumed by an MCIO will be investigated thoroughly and in compliance with the respective DoD Instructions.[331] If the investigation finds that the

323. *Id.* at 38.

324. *Id.* at 738.

325. *Id.* at 733–34.

326. *See* DOD ANNUAL REPORT FY12 (2013), *supra* note 270, at 17.

327. *See id*.

328. *See id.* at 17–18; *see also Restricted Reporting*, DEP'T DEF. SEXUAL ASSAULT PREVENTION & RESPONSE OFF., http://sapr.mil/index.php/restricted-reporting (last visited Feb. 13, 2017).

329. *See* DOD ANNUAL REPORT FY12 (2013), *supra* note 270, at 17.

330. U.S. DEP'T OF DEF., INSTRUCTION 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE 1 (2013) (June 18, 2015) [hereinafter DOD INSTRUCTION 5505.18]. "Military criminal investigative organizations (MCIOs) will initiate investigations of all offenses of adult sexual assault of which they become aware, as listed in the Glossary, that occur within their jurisdiction regardless of the severity of the allegation." *Id*.

331. DEP'T OF DEF., INSTRUCTION 5505.18: INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE 6 (Mar. 22, 2017), http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf; DEP'T OF DEF., INSTRUCTION 5505.03: INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS 5–7, http://www.dtic.mil/whs/directives/corres/pdf/

allegation is substantiated, the commander possesses the power to take action and may choose to do so in a judicial, nonjudicial, or administrative process.[332] If the case reaches the court-martial stage, military prosecutors pursue a conviction under the UCMJ.[333]

Other scholars have sought to give voices to military victims of sexual violence.[334] This Article draws from their work and makes its own observations that reflect three common themes that frequently emerge: the report is trivialized or simply accepted as part of the culture of the military, it is ignored altogether, or the reporter is punished or retaliated against.[335] These themes in the military mirror those expressed by victims in detention facilities.[336] Over the past six years, it is estimated that fewer than 15% of military sexual assault victims reported the matter to a military authority.[337] "Of the 4.3% of women who indicated experiencing unwanted sexual contact in the past year and who reported the matter to a military authority or organization, 62% perceived some form of professional or social retaliation, administrative action, and/or punishment associated with their report." [338]

If a victim of sexual violence chooses to report within the military, she often receives no response, or her superiors deliver a message to just "deal with it."[339] Even though policy mandates that the claims be taken seriously,

550503p.pdf (last updated Feb. 13, 2017); DEP'T OF DEF., INSTRUCTION 5505.11: FINGERPRINT CARD AND FINAL DISPOSITION REPORT SUBMISSION REQUIREMENTS 7, http://www.dtic.mil/whs/directives/corres/pdf/550511p.pdf (last updated Mar. 30, 2017) [hereinafter DOD INSTRUCTION 5505.11]; DEP'T OF DEF., INSTRUCTION 5505.14: DEOXYRIBONUCLEIC ACID (DNA) COLLECTION REQUIREMENTS FOR CRIMINAL INVESTIGATIONS, LAW ENFORCEMENT, CORRECTIONS, AND COMMANDERS 9, http://www.dtic.mil/ whs/directives/corres/pdf/550514p.pdf (last updated Mar. 9, 2017). The governing rules on the investigative process are outlined in the Department of Defense Instruction Number 5505.18. *See* DOD INSTRUCTION 5505.18, *supra* note 330, at 1.

332. *See* DOD INSTRUCTION 5505.18, *supra* note 330, at 4.

333. *See, e.g.*, DOD INSTRUCTION 5505.11, *supra* note 331, at 15.

334. *See generally* Alexandra Lohman, *Silence of the Lambs: Giving Voice to the Problem of Rape and Sexual Assault in the United States Armed Forces*, 10 NW J. L. & SOC. POL'Y 230 (2015); Deborah Rhode, *Rape on Campus and in the Military: An Agenda for Reform*, 23 UCLA WOMEN'S L.J. 1 (2016).

335. *See* Rhode, *supra* note 334, at 20–22; Lohman, *supra* note 334, at 236–37.

336. *See* Chandra Bozelko, *Why We Let Prison Rape Go On*, N.Y. TIMES (Apr. 17, 2015), https://www.nytimes.com/2015/04/18/opinion/why-we-let-prison-rape-go-on.html?_r=0; Jesse Ellison, *The Military's Secret Shame*, NEWSWEEK (Apr. 3, 2011), http://www.newsweek.com/militarys-secret-shame-66459.

337. DOD ANNUAL REPORT FY14, *supra* note 15, at 10.

338. *Id.*

339. Complaint at 6, Klay v. Panetta, 758 F.3d 369 (D.C. Cir. 2014) (No. 13-5081). "When Lt.

in practice, one victim first received no response, and then superiors actively discouraged her from seeking a rape kit—the evidence collection tool commonly used in these crimes.[340] In another case, when one woman reported to "several supervising Sergeants in her Command about the assault[, t]hey did nothing except tip her perpetrator off in advance that [she] was going to file a report."[341] Additionally, the Marine Corps ignored its own protective order and forced the victimized soldier to be in formations with her attacker.[342] As an extreme example, Lieutenant (Lt.) Ariana Klay was raped as punishment for reporting the abuse she endured, and she eventually attempted to commit suicide.[343] Lt. Helmer became the subject of investigation and prosecution and was forced to leave the Marine Corps.[344]

In a similar vein, during an investigation, Command accused Navy Seaman Apprentice Cummings of falsifying legal documents and statements, then threatened that if she continued to try to prosecute, her sexual history that she shared with her psychiatrist would be admitted.[345] As part of the informal military response, one woman was ostracized and assigned extra duty; another was stopped from completing coursework and graduating.[346] Human Rights Watch identified this trend of the military's punishment of victims for minor "collateral misconduct" that only came to light because they came forward to report sexual assault.[347] The most worrying element of this trend of retaliation is that commanders are aware of the harassment and do nothing to stop it.[348] The narratives of women who have been a part of sexual-abuse investigations in the military reflect four general themes: investigators' discretion in complying with policies, no real punishment—even if the allegation is sustained, adoption of rape myths or victim blaming,

Klay reported the hostile environment to her Executive Officer, he refused to take any steps to stop the open and pervasive hostility towards Lt. Klay and other females at the Marine Barracks, and instead told Lt. Klay to 'deal with it.'" *Id.*

340. *Id.* at 9.

341. *Id.* at 10.

342. *Id.* at 11.

343. *See* Complaint at 6, *Klay*, 758 F.3d 369 (No. 13-5081).

344. *Id*. at 9.

345. *Id*. at 14–15.

346. *Id*.

347. These collateral misconducts include underage drinking or adultery and serve as a powerful deterrent to reporting. *See Embattled*, *supra* note 13.

348. Complaint at 14, *Klay*, 758 F.3d 369 (No. 13-5081).

and obstruction from seeking justice.[349]

Investigators utilize a good amount of discretion in adhering to policy during investigations.[350] Lt. Helmer reported to the Navy Criminal Investigative Service, and they initially refused to investigate, claiming that her inability to recall the rape precluded the need for investigation; they eventually "lost" her rape kit.[351] Lieutenant Corporal (LCpL) McCoy, "[d]espite findings by CID . . . that her assailant was being brought to justice, the Command used its unfettered power to shut down the investigation without taking any action against the perpetrator."[352] LCpL Kalhe was denied proper policy and procedure during the investigation when she was not offered any medical assistance or psychological counseling.[353] And, like in many of the cases, no meaningful investigation was performed, and no one inspected or preserved the crime scene or collected DNA evidence.[354] One perpetrator's superior even admitted that the NSIC investigation was "woefully inadequate."[355]

Even if an investigation is properly performed, it often effectively functions in a way that blames the victim.[356] Scholars examine the operation of rape myths (including those that blame the victim) in numerous contexts,[357] but a more in depth examination of how these rape myths operate in the military is worthy of further study.[358] Lt. Klay reported that she was told because she wore makeup and exercised in running shorts and tank tops she "welcomed" the sexual harassment.[359] Hannah Sewell detailed that she faced questions in her investigation about what she was wearing, if

349. *See Embattled*, *supra* note 13.

350. *See infra* notes 351–55 and accompanying text.

351. Complaint at 9, *Klay*, 758 F.3d 369 (No. 13-5081).

352. *Id*. at 11. McCoy's perpetrator and the people she reported to obstructed the investigation and harassed McCoy; her perpetrator moved his room around to undercut her allegations and was assisted by his supervisor. *Id.*

353. *See id*. at 12.

354. *See id*.

355. *Id*. at 9.

356. *See infra* notes 358–60 and accompanying text.

357. *See* Nisha Veerd, What Influences Victim Blaming in Rape? (unpublished Ph.D. dissertation, University of Nottingham) (on file at http://www.psychology.nottingham.ac.uk/staff/ddc/c8cxpa/further/Dissertation_examples/Veerd_15.pdf) (last visited Apr. 18, 2017) (defining "rape myths" as a set of beliefs and attitudes that aim to condone male sexual aggression towards women).

358. *See, e.g*., Brenner et al., *supra* note 131; Russell Norton & Tim Grant, *Rape Myth in True and False Allegations*, 14 PSYCHOL., CRIME, & L. 275 (Aug. 20, 2006).

359. Complaint at 6, *Klay*, 758 F.3d 369 (No. 13-5081).

she had made a similar claim before, and about her boyfriend and sexual history; ultimately, her credibility was questioned.[360] Even the initial responses to the Tailhook sexual abuses included victim-blaming sentiments such as "that's what you get for walking down a hallway full of drunk aviators."[361]

Perpetrators often face minimal or no punishment.[362] "If you serve in the U.S. military and you rape or sexually assault a fellow service member, chances are you won't be punished. In fact, you have an estimated 86.5% chance of keeping your crime a secret and a 92% chance of avoiding a court-martial."[363] In a particularly chilling outcome, some perpetrators are even "rewarded" (Lt. Klay's rapists were featured in a nationally televised recruitment commercial and in a Marine calendar).[364] Although one of Lt. Klay's rapists was court-martialed, he was not convicted of rape, and instead faced charges of adultery and indecent language.[365] Lt. Helmer reported that the military removed her perpetrator from command but refused to press any charges or take further steps to punish him; subsequently, the military investigated her and forced her to leave the military.[366] Her perpetrator remains in good standing.[367]

360. THE INVISIBLE WAR, *supra* note 9.

361. *Id.*

362. *See infra* notes 363–67 and accompanying text.

363. Jackie Speier, *Why Rapists in Military Get away with It*, CNN (June 21, 2012, 8:19 A.M.), http://www.cnn.com/2012/06/21/opinion/speier-military-rape/; *see also* DOD ANNUAL REPORT FY12 (2013), *supra* note 270. This report indicates that in Fiscal Year 2012, there were 2661 subjects of investigations with disposition information to report, and of those, 1714 involved subjects that could be considered for possible action by DOD; of those, 880 were substantiated, and of those 880, only 594 had court martial preferred punishments. *Id*. The rest had nonjudicial punishments, administrative discharges, or other adverse administrative actions. *Id.* at 68. But within the court-martial proceedings, only 238 subjects were convicted, and their punishments ranged from confinement, reduction in rank, fines and forfeitures, and discharge or dismissal. *Id*.

364. Complaint at 7, *Klay*, 758 F.3d 369 (No. 13-5081).

365. *Id*.

366. *Id.* at 9.

367. *Id*.

III. CIVIL REMEDIES FOR VICTIMS OF SEXUAL VIOLENCE IN DETENTION AND THE MILITARY

Sometimes it takes a different kind of action for change to come—and sometimes that's a lawsuit.[368]

No simple solutions exist to stop sexual violence in prison, detention centers, or the military. The passage of the PREA was certainly a start to address abuse in both prisons and detention centers, but even the very structure of the PREA's suggestions for change is criticized as ineffective.[369] Further, the PREA does not create a private cause of action to allow external enforcement of the standards. Critics argue that while higher levels of prison surveillance and prosecutions of prison rapists are key aspects of the PREA's agenda, sexual violence is an inherent characteristic of institutions like prisons that discipline and punish, and the law is unlikely to eliminate this coercion with more discipline and more punishment.[370]

Sexual violence reported in prison remains subject to problematic investigatory practices.[371] Some argue that the only viable solutions are to reduce prison populations,[372] change community sexual-abuse-prevention campaigns to promote economic sustainability to help women avoid their entrance to prison altogether, or turn to insider organizations where feminists and advocates work within mainstream institutions to combat sexual abuse.[373]

In detention centers, scholars express many of the same concerns with the PREA and direct their suggestions toward restructuring detention centers at a macro level—including a reevaluation of who should be in them in the first place.[374] Similarly, efforts in the military to reduce sexual violence include legislative attention vis-à-vis the facilitation of Congressional

368. THE INVISIBLE WAR, *supra* note 9.

369. *See* Michelle VanNatta, *Conceptualizing and Stopping State Sexual Violence Against Incarcerated Women*, 37 SOC. JUST. 27, 44 (2010–2011).

370. *Id.*

371. *See* ALL TOO FAMILIAR, *supra* note 13.

372. *See* VanNatta, *supra* note 369, at 45; Alice Ristroph, *Sexual Punishments*, 15 COLUMB. J. GENDER & L., 139, 146 (2006).

373. *See* VanNatta, *supra* note 369, at 45–46.

374. *See generally* Norma E. Loza, *Abuse in Illinois Immigration Detention Centers: Does the Current System Grant Human Rights to All Humans?*, 17 PUB. INT. L. REP. 143 (2012); *see also* Sayed, *supra* note 97, at 1849.

hearings,[375] legislative directives requiring annual research and data collection, along with subtle policy changes.[376] The efforts are laudable, especially when compared to the complete inaction that has been the case historically, but nonetheless fall short of effectively solving these problems.[377] Critics propose more radical solutions, such as targeting the military structure—e.g., by removing the discretion of commanders—but these ideas to date have not yet been implemented.[378] While the insular nature of these closed systems is relatively static and some reform of existing policies and practices is necessary, changing entire institutional structures is not realistic or viable for women in these systems suffering abuse now, and thereby requires the creation of other kinds of solutions.[379]

A novel legal strategy within the closed systems is to utilize an administrative cause of action to enforce regulatory standards.[380] This Article examines this in more depth in the context of the PREA and detention centers, but it is a viable option to enforce standards within any system.[381] Solutions might *also* be found outside of these systems, and to this end, a companion avenue for creating change may be to utilize the civil law system.[382] The PREA Commission acknowledges, "[e]ven the most rigorous internal monitoring, however, is no substitute for opening up correctional facilities to outside review."[383] In particular, the class action

375. *See generally* U.S. COMM'N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY (Sept. 2013), http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf.

376. *See* BARBARA SALAZAR, CONG. RESEARCH SERV., MILITARY SEXUAL ASSAULT: CHRONOLOGY OF ACTIVITY IN CONGRESS AND RELATED RESOURCES 6–14 (2013) (providing an overview of recent congressional activity involving sexual assault in the military); Christopher Neiweem, *Next Congress Must Act to Reduce Military Sexual Assault*, HILL (Nov. 1, 2016), http://thehill.com/blogs/pundits-blog/the-military/303847-next-congress-will-face-renewed-fight-to-reduce-military.

377. *See generally* SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: VOLUME 2. ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY (Andrew R. Morral, Kristie L. Gore, and Terry L. Schell, eds., 2016) (noting the continuing prevalence of sexual assault and harassment in the military).

378. *See generally* Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and Harassment*, 222 MIL. L. REV. 211 (2014).

379. *Id*. at 226–30.

380. *See, e.g.*, Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

381. *See id.*

382. *See id*.

383. PREA COMMISSION REPORT 2009, *supra* note 98, at 9.

lawsuit is a valuable mechanism through which to accomplish the dual goals of forcing change within the very structure and culture of these institutions as well as compensating the victims for the harm they endured.[384]

The civil legal system in the United States provides options for those who sustain harm as a result of intentional, negligent, or reckless behavior to hold their perpetrators accountable in a noncriminal context.[385] Civil liability exists alongside or in lieu of criminal sanctions and is independent in its burden of proof and evidentiary requirements.[386] If the criminal system is designed to punish wrongdoers, prevent future harm, and keep communities safe, the civil system has, at its core, a commitment to restore victims to the position they were in before they suffered harm and to maintain notions of deterrence and fairness.[387] This restorative effect is accomplished through compensation for things like medical expenses, lost wages, pain and suffering, emotional harm, and the loss of enjoyment of life.[388] In addition to directing financial benefits to the victim, tort law also provides the opportunity for injunctive relief or court-imposed directives aimed at changing policies or behaviors.[389] In these ways, civil liability offers victims of sexual violence another avenue to find justice on an individual and system-wide level.[390] In the closed systems of the military and detention facilities—systems that make internal justice seeking near impossible—holding those accountable who perpetrate or allow the systemic perpetration of sexual violence in a civil context is a critical option.[391]

Here, this Article explores the availability of civil lawsuits that can be brought against institutions on behalf of victims of sexual violence. It does not focus on individual liability that might be borne by specific perpetrators

384. *See id*. at 51–53.

385. *See generally* DAN B. DOBBS, THE LAW OF TORTS (2008).

386. *Id*.

387. *Id*. at 4; *see also* Brigett N. Shephard, *Classifying Crime Victim Restitution: The Theoretical Arguments and Practical Consequences of Labeling Restitution as Either a Criminal or Civil Law Concept*, 18 LEWIS & CLARK L. REV. 801, 814 (2014) (stating that civil damages go beyond the scope of criminal damages because "civil damages are much more likely to include punitive damages, loss of consortium, and pain and suffering, concepts not traditionally included in restitution").

388. *See generally* Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages*, 42 U. MICH. J.L. REFORM 431 (2009).

389. *See* Dobbs, *supra* note 385, at 2; RESTATEMENT (FIRST) OF TORTS § 933 (1939).

390. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 10.

391. *See id*. at 52.

largely because of the systemic focus of this work. A comprehensive discussion of all generally available civil causes of action[392] is beyond the scope of this Article; however, it is a topic that other scholars have written about extensively[393] and deserves even further exploration to develop solutions.[394]

This Article focuses on one particular civil legal tool—the class action lawsuit—and its application to civil causes of action brought to find redress for the perpetration of sexual violence.[395] The class action lawsuit has long been recognized as a powerful vehicle through which "mass justice" can be accomplished, serving multiple important goals.[396] Providing compensation for harm and changing policy are two obvious ends, but even the threat of a class action can have a powerful deterrent effect.[397]

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, a class action lawsuit must meet four preliminary requirements: numerosity,[398] commonality,[399] typicality,[400] and adequacy of representation.[401] A plaintiff must prove these four preliminary requirements by a preponderance of the evidence.[402] According to the Supreme Court, class certification is only proper when the district court finds that the four prerequisites have been

392. On the state level, there are many common law tort causes of actions that individual victims of sexual violence may initiate against individuals or entities, including intentional torts like battery, assault, false imprisonment, intentional infliction of emotional distress; and in the case of systemic abuse that occurs in an institutional setting, negligence. Many states have statutorily created special causes of actions that are available for victims of sexual violence as civil rights provisions or state-based versions of the now unavailable Violence Against Women Act.

393. *See* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 56 (2006); *see generally* Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249 (1998).

394. *See, e.g.*, PREA COMMISSION REPORT 2009, *supra* note 98. "Despite this important progress, much remains to be done." *Id*. at v.

395. *Id*. at 51–52.

396. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 830 (2013).

397. *Id.*

398. *See* FED. R. CIV. P. 26(a)(1). Numerosity requires that "the class is so numerous that joinder of class members is impracticable." *Id*.

399. FED. R. CIV. P. 26(a)(2). The second requirement, commonality, dictates that "there are questions of law or fact common to the class." *Id*.

400. FED. R. CIV. P. 26(a)(3). Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Id*.

401. FED. R. CIV. P. 26(a)(4). Lastly, the final requirement states, "the representative parties will fairly and adequately protect the interests of the class." *Id*.

402. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008).

satisfied "after a rigorous analysis."[403] Lastly, the district court must find that the lawsuit falls under the purview of Rule 23(b).[404] The court's decision to certify or to deny certification of a class is subject to review based on a "limited" abuse of discretion standard, meaning that the certification order must be premised on legal error to be overturned.[405] Ultimately, courts are less deferential to the denial of certifications than they are to the granting of them.[406]

There is strong legal precedent for the use of class actions in a variety of contexts, and "[c]ivil rights and class actions have an historic partnership."[407] This partnership is one that is worth exploring and ultimately expanding for victims of sexual violence in closed institutional systems. "Indeed, some of the large cases [that] have drawn the most criticism, like prisoners' rights suits, have reformed large, inefficient, abusive, unconstitutional prison systems [that] remained unchanged for decades or longer before courts ordered class relief."[408]

Professor Robert Klonoff documents, however, that there has actually been a decline in the success of class action lawsuits generally, in large part due to a more stringent application and interpretation of Federal Rule 23 imposed by the courts.[409] The erosion of class action availability will have serious consequences for individuals in closed institutional systems whose access to justice is already seriously compromised. The trend toward limiting class action availability is made even more difficult by additional limitations imposed on civil lawsuits brought on behalf of those in prisons, detention centers, and the military. This Article explores these limitations in the following section in an effort to move toward a change in law and policy

403. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982)).

404. FED. R. CIV. P. 23(b)(1)–(3). In other words, the court must find that *one* of the following elements is met: (1) that prosecution of separate actions risks either inconsistent adjudications that would establish "incompatible standards of conduct" for the defendant or would, as a practical matter, be "dispositive of the interests of the other[s]"; (2) that "defendants have acted or refused to act on grounds that are applied generally to the class"; or (3) that there are common questions of law or fact that predominate over any individual class member's questions and that a class action is superior to other methods of adjudication. *Id*.

405. Paton v. N.M. Highlands Univ., 275 F.3d 1274, 1278 (10th Cir. 2002).

406. *See In re* Salomon Analyst Metromedia Litig., 544 F.3d 474, 480 (2d Cir. 2008).

407. Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ L. REV. 575, 577 (1997).

408. Greenberg, *supra* note 407, at 576.

409. *See* Klonoff, *supra* note 396, at 830.

so that the power of the class action lawsuit may be fully realized for this particular group of victims.

From observing the victim-identified barriers to implementing lasting change within closed institutional systems, this Article presents a dual remedy to address sexual abuse.[410] Both internal and external strategies are needed: administrative suits to ensure the institutions are complying with existing rules, as well as civil suits to compensate victims and effect system change.[411]

A. Civil Causes of Action for Sexual Violence Victims in Detention

1. Limitations on Causes of Action in Institutions of Detention

a. Prisons

Victims of sexual violence can initiate several different civil causes of action, often referred to as constitutional torts, on both the state and federal level.[412] Prisoners can bring claims against prison officials under the Eighth Amendment's prohibition on cruel and unusual punishment—accomplished on a state level by making a § 1983 claim under Title 42 of the United States Code[413] and on a federal level by bringing a Bivens claim.[414]

Due in large part to the public safety implications of running a prison, there are stringent limitations on the types of actions inmates can bring to challenge conditions of confinement.[415] Further, courts give great deference to prison administrators to operate their facilities and control behavior of the incarcerated population,[416] not unlike the deference afforded to the command structure in the military. In 1996, the passage of the Prison Litigation

410. *See supra* Section II.A.1.

411. *See infra* Sections III.A–B.

412. *See infra* notes 413–14 and accompanying text.

413. 42 U.S.C. § 1983 (2012).

414. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

415. *See* NATIONAL PREA RES. CTR., TRAINING CURRICULUM: HUMAN RESOURCES AND ADMINISTRATIVE INVESTIGATIONS (Jan. 2014), http://www.prearesourcecenter.org/sites/default/files/content/hr_and_admin_inv_curriculum_module_10_legal_liability_and_admin_investigations_0.pdf.

416. *See* Neal v. Dep't of Corr. (*Neal I*), 583 N.W.2d 249, 252 (Mich. Ct. App. 1998) (emphasizing the "wide-ranging deference" given to prisons).

Reform Act placed significant limitations on prisoners in terms of how and when they may bring civil actions regarding prison conditions and aspects of confinement in federal court.[417] This new legislation made it more difficult "for prisoners to bring, settle, and win lawsuits."[418] These limitations encompass "all inmate suits [regarding] prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[419] Congress passed the PLRA as an attempt to curb "frivolous" lawsuits by prisoners and prohibit those confined in any jail, prison, or other correctional facility from bringing a claim "until . . . [all] administrative remedies [that] are available are exhausted."[420] It also requires that prospective relief be narrowly drawn and extend no further than is necessary to correct the violation of a federal right of plaintiffs, but places no limitation on private settlements.[421] In practice, courts are somewhat limited in their ability to impose systemic change for a violation, such as injunctive relief; courts are to give "substantial weight to adverse impacts on public safety or criminal justice operations"[422] Until recently, an inmate could not bring a claim of sexual abuse under the PLRA unless there was a concrete showing of injury beyond the occurrence of the victimization itself.[423]

417. *See* 18 U.S.C. § 3626(g)(2) (2012). PLRA restrictions apply to "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison . . . [excluding] habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id*.

418. Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519, 520 (2015).

419. JOHN BOSTON, LEGAL AID SOC'Y: PRISONERS' RIGHTS PROJECT, THE PRISON LITIGATION REFORM ACT, 39 (Mar. 31, 2014), http://www.wnylc.net/pb/docs/plra2cir04.pdf [hereinafter PLRA REPORT].

420. 42 U.S.C. § 1997e(a) (2012).

421. *See* Schlanger, *supra* note 418, at 527–28.

422. PLRA REPORT, *supra* note 419, at 16. A court must take into account "the public safety consequences of its order and to structure, and monitor, its ruling in a way that mitigates those consequences while still achieving an effective remedy of the constitutional violation." Brown v. Plata, 563 U.S. 493, 534 (2011). Although, the PLRA does allow "highly intrusive or burdensome remedies where the record supports their necessity." *See* PLRA REPORT, *supra* note 419, at 26.

423. In 2013,

> [t]he Violence Against Women Act [] largely resolved this [injury for sexual assault] question by declaring that § 1997e(e) "is amended by inserting before the period at the end the following: 'or the commission of a sexual act (as defined in section 2246 of title 18, United States Code).'" VAWA similarly amended 28 U.S.C. § 1346(b), the PLRA section imposing the physical injury requirement on the Federal Tort Claims Act for persons convicted of a felony and awaiting sentencing or serving a sentence.

While inmates relinquish certain rights as a condition of their confinement, this relinquishment is not absolute, and the Court recognizes that prisons must not impinge upon certain inalienable rights.[424] The perpetration of sexual violence in prison is actionable under the Eighth Amendment.[425] The Supreme Court considered the issue of perpetration of sexual assault against prisoners in *Farmer v. Brennan*, and Justice Blackmun, in a concurring opinion, wrote that prison officials have an "affirmative duty under the Constitution to provide for the safety of inmates" and that "[b]eing violently assaulted in prison is simply not part of the penalty."[426] Therefore, although subject to stringent limitations, prisoners do have the ability to bring causes of action that address abuse.

Despite the clear message conveyed in *Farmer* that inmates should be protected from sexual violence in prisons, certain aspects of the closed system make this violence difficult to address: there is a power disparity that cuts against the victims' credibility, there are rarely witnesses, victims are disincentivized to report for fear of being labeled a snitch or because they could face retaliation, and the cases are rarely prosecuted.[427]

However, prisoners historically found some success in enacting changes in prison policy through constitutional tort actions.[428] In a class action lawsuit against the District of Columbia, the court stated that, "[r]ape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'"[429] Specifically,

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John Boston, *Congress Amends PLRA Physical Injury Requirement for Sexual Abuse Cases*, PRISON LEGAL NEWS (July 15, 2013), https://www.prisonlegalnews.org/news/2013/jul/15/congress-amends-plra-physical-injury-requirement-for-sexual-abuse-cases/ (citing Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-12, 127 Stat. 54, § 1101 (2013) (Sexual Abuse in Custodial Settings)).

424. *See infra* note 462 and accompanying text.

425. *See* Amy Laderburg, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 326 (1998) (discussing why class actions under the Eighth Amendment are the best option for inmate victims of sexual violence).

426. Farmer v. Brennan, 511 U.S. 825 (1994).

427. *See* Laderburg, *supra* note 425, at 323–24, 324 n.4.

428. *Id*.

429. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 641 (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995) (quoting *Farmer*, 511 U.S. at 834).

class action litigation utilizing a constitutional tort cause of action has become an effective way to effect system change and compensate victims.[430] Class action suits have certain features that contribute to success in achieving relief for those sexually abused while incarcerated, including increased media attention and exposure; enhancing an inmate's credibility, bolstering the claim that the abuses occurred in a "sexualized environment" instead of simply happening on an individualized basis, and potentially leading to a greater perception of harm by the courts and public.[431]

Much of the scholarly discussion of constitutional torts focuses on Eighth Amendment actions presenting an "insurmountable challenge" facing the inmate–plaintiff, due in large part to the harshness of the standards of review in the Supreme Court's Eighth Amendment analysis.[432] Yet, in combining claims into a class action, plaintiff–inmates have found some success in impacting system-level change.[433] While Eighth Amendment actions against a guard in his individual capacity have had some success, they are somewhat limited in their capacity to change patterns of abuse or the greater system.[434] An infrequently discussed option in the literature is the initiation of a civil rights cause of action (§ 1983) to address sexual violence in prison.[435] Civil rights causes of action may be commenced at the state or federal level and may face their own challenges, but they have emerged as an avenue for promoting settlements that both effect system change and result in monetary settlement and compensation.[436] Therefore, it is a particularly valuable tool for survivors of assault in incarceration settings because the large number of victims bolsters legal argument and provides a better capacity for system-wide injunctive relief.[437]

430. *See infra* note 437 and accompanying text.

431. Laderburg, *supra* note 425, at 327–28.

432. *See id.* at 328; John Boston et al., Farmer v. Brennan*: Defining Deliberate Indifference Under the Eighth Amendment*, 14 ST. LOUIS U. PUB. L. REV. 83, 99 (1994).

433. *See* Laderburg, *supra* note 425, at 323.

434. *See id.* at 326 n.12 ("A prisoner's suit against a guard in his individual capacity for a violation of her Eighth Amendment rights may arise from the plaintiffs' allegations that the guard raped or otherwise sexually abused her."). *See, e.g.*, *Women Prisoners of D.C. Dep't of Corr.*, 877 F. Supp. 634, 640; Carrigan v. Delaware, 957 F. Supp. 1376, 1390 (D. Del. 1997); Fisher v. Goord, 981 F. Supp. 140, 174–75 (W.D.N.Y. 1997).

435. *See infra* notes 436–37.

436. *See* Neal v. Dep't of Corr. (*Neal I*), 583 N.W.2d 249 (Mich. Ct. App. 1998).

437. *See* Laderburg, *supra* note 425, at 323. Laderburg argues that Eighth Amendment class actions are the best option for prisoners wishing to obtain injunctive relief from custodial abuse in

b. Immigration Detention Facilities

While civil immigration detention centers improperly replicate practices of prisons and jails in addressing sexual victimization, federal law has been relatively silent regarding forms of relief available to individuals held in detention.[438] The need for civil remedies in this context is a pressing and timely issue. In 2010, numerous reports of sexual abuse at the hands of a guard emerged from the Hutto Detention Center in Texas.[439] These reports are particularly chilling, because this was the detention center identified by President Obama in 2009 as the "model for the detention reform plan" and thus "an example of the enhanced oversight ICE planned."[440] This system purported to "make better use of sound practices . . . that comply with the Prisoner Rape Elimination Act," and yet this was clearly insufficient to halt abuse.[441]

Before exploring remedies available to those detained in immigration detention facilities, it should be noted that immigration centers house individuals for a variety of reasons for differing amounts of time.[442] The detention systems are largely operated directly by ICE, but there are contract detention facilities run by private companies, and facilities run by the Federal Bureau of Prisons, and state and county jails.[443] "Approximately seventy percent of detainees are held in jails under ad hoc agreements, up from approximately twenty-five percent fifteen years ago."[444] Legal action to challenge their detention may include a *Joseph* hearing to challenge their detention, or a removal hearing to challenge their removability. [445]

American prisons. This Article does not necessarily argue that Eighth Amendment class actions are the best option, but acknowledges that many of the same strengths Laderburg identifies in the Eighth Amendment class action exist in the civil rights action of *Neal*. *See* Laderburg, *supra* note 425, at 323.

438. *See infra* Section III.A.1.b.

439. *See Detained and at Risk*, *supra* note 13.

440. *Id.*

441. *Id*.

442. *Id*.

443. *Id*.; *see also Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, HUM. RTS. WATCH (Mar. 17, 2009), http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed-0.

444. Kalhan, *supra* note 100, at 46.

445. Sayad, *supra* note 97, at 1849; *see generally* Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999). Notably, the Federal Rules of Evidence do not apply in removal proceedings; the Immigration Judges (IJs) "have broad discretion to admit and consider relevant and probative

For abuses that occur in detention centers, detainees do not have the same constitutional rights as citizens of the United States.[446] Because the detention center is considered a form of civil punishment, the Eighth Amendment does not provide an avenue for relief,[447] but the Court has recognized that detainees have some due process rights and that they should not be subjected to government conduct that "shocks the conscience or interferes with rights implicit in the concept of ordered liberty."[448] To this end, detainees have the Fifth and Fourteenth Amendment rights to be free from torture,[449] rights to be free from inhumane and punitive conditions of confinement,[450] and certain privacy rights under the Fourth Amendment.[451] Sexual victimization that occurs in immigration detention facilities may meet the definition of torture in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, violate the International Covenant on Civil and Political Rights (ICCPR), or both—two treaties which the United States has ratified.[452] Some of the federal criminal

evidence." *Id*. An ICE district director makes the initial determination of whether a detainee is mandatorily detainable. *Id.* The detainee may argue that he is not properly included in the mandatory detention provision. *Id*. If the detainee meets the burden in immigration court, there will be a bond hearing to determine if the detainee poses a flight risk; but even if he wins, there may be an automatic stay of the decision; and if the detainee loses, he will remain in detention. *Id*. Immigration judges are precluded from independently reviewing ICE's parole and custody determinations; and ICE has a large amount of discretion. *Id.* at 46.

446. *See* Budhrani, *supra* note 201, at 788 ("[A] series of Supreme Court cases emerged challenging the authority of the federal government both to detain noncitizens for extended periods of time and to hold them in conditions that did not conform with established standards.").

447. *See* STOP PRISONER RAPE, *supra* note 18.

448. Holland v. Carballo, 322 F.3d 386, 410–11 (6th Cir. 2003).

449. *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976); Rosales-Garcia v. Holland, 322 F.3d 386, 410–11 (6th Cir. 2003).

450. *See* Oladipupo v. Austin, 104 F. Supp. 2d 654 (W.D. La. 2000); Taylor, *supra* note 108, at 1090; Budhrani, *supra* note 201, at 788–89 (2012).

451. *See Detained and at Risk*, *supra* note 13, at 6–7 ("[T]he Fourth Amendment's privacy protections are relevant to practices that may facilitate the sexual harassment of individuals in custody. Federal courts have held that those privacy protections prohibit male guards from strip-searching female prisoners, conducting intrusive pat-frisks, or engaging in inappropriate visual surveillance.").

452. *See* STOP PRISONER RAPE, *supra* note 18, at 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 113, 113–14 ("[T]he term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at

penalties for sexual assault of prisoners apply to detainees.[453] The Alien Tort Statute governs civil remedies for immigration detainees and permits litigation for human rights violations.[454]

As discussed previously, the PREA applies to immigration centers and establishes zero-tolerance policies and suggestions to lessen sexual assault by improved reporting in these centers—similarly to prisons.[455] However, these PREA guidelines do not apply to privately run immigration centers.[456] "Despite President Obama's statement that PREA regulations would apply to all federal correctional facilities, including immigration detention centers, PREA standards do not apply to CDFs; for private facilities, DHS intends to implement PREA standards by phasing them in through contract modifications, contract renewals, and creation of new contracts."[457] It is unclear whether a detainee in an immigration detention center can use the PREA as a legal strategy.[458] Some scholars argue there is no cause of action available to target an agency's failure to comply with PREA standards but that victims may have a remedy in arguing that noncompliance violates facilities constitutional obligations.[459] However, if a plaintiff utilizes that constitutional argument, some case law supports that certain institutions do

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the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction."); International Covenant on Civil and Political Rights, art. 10, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 176 [hereinafter ICCPR].

453. *See Detained and at Risk*, *supra* note 13; 18 U.S.C. § 2243(b) (2012).

454. The Alien Tort Statute (ATS), adopted by Congress in 1789 as part of the first Judiciary Act and codified at 28 U.S.C. § 1350, reads: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012); Budhrani, *supra* note 201, at 800 (2012). Some issues identified with bringing a claim under the ATS include a lack of cause of action stemming directly from human rights treaties, and sovereign immunity. For a fuller discussion, see Budhrani, *supra* note 201, at 800–05.

455. *See* 42 U.S.C. § 15607(c) (2012) (making PREA guidelines applicable to detention facilities operated by the Department of Homeland Security); PREA COMMISSION REPORT 2009, *supra* note 98, at 5; *see also US: Protect Against Rape in Immigration Detention: Indictment Alleging Sexual Abuse in Texas Facility Is Latest Case*, HUM. RTS. WATCH (June 24, 2011), https://www.hrw.org/news/2011/06/24/us-protect-against-rape-immigration-detention (discussing the need to protect immigration detainees from rape under the same guidelines proposed for prison facilities).

456. *See* Muñoz, *supra* note 4, at 570.

457. *Id*. (citing Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100, 13127 (Mar. 7, 2014) (codified at 6 C.F.R. pt. 115).

458. *See* Muñoz, *supra* note 4, at 588–89.

459. *See id*. (citing ACLU, END THE ABUSE, PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT (2014), https://www.aclu.org/files/assets/prea/012014-ACLU-PREA-Guide.pdf).

not take these types of suits seriously enough to deter sexual abuse or make change.[460] To respond to this issue, one scholar recommends that there should be a cause of action for victims of sexual abuse when a correctional facility fails to implement or comply with PREA standards.[461] This Article argues that there may be potential worth exploring in bringing an administrative action to enforce compliance with PREA standards in immigration detention facilities due to some progress made in the prison context.[462] This does not, however, underscore the necessity of civil litigation to both inspire change and provide compensation to victims.

2. Available Avenues for Justice in Prison: The Class Action Lawsuit vis-à-vis *Neal v. Michigan Department of Corrections*

The relative success of the class action lawsuit *Neal v. MDOC* illustrates the necessity of preserving access to civil justice in the realm of detention.[463] Though imperfect, *Neal* accomplished important ends: it provided monetary compensation for victims, resulted in widespread changes in prison policies, created a deterrent effect, placed other states on notice that sexual victimization perpetrated by staff against inmates will not be tolerated, and generated substantial public awareness of the problem through media coverage.[464]

Michigan prisons have long been exposed as fostering and turning a blind eye to widespread sexual abuses by correctional staff against female

460. Muñoz, *supra* note 4, at 588–89.

> While it has been suggested that victims may have a remedy in arguing that noncompliance violates the facilities constitutional obligation, case law shows that even with this looming threat, facilities have been deliberately indifferent to harm resulting from a lack of compliance with PREA standards; in many cases, no reasonable action takes place upon filing a complaint to stop and prevent the sexual abuse.

Id. at 588–90.

461. *See id*. at pt.E.

462. *See, e.g.*, Proposed Decision, Brown v. Patuxent Inst., OAH No. DPSC-IGO-002V-14-33232 (2015), https://freestatelegal.org/wp-content/uploads/2015/09/Brown-2015.08.17-Decision-of-Secretary-and-ALJ.pdf.

463. *See* Neal v. Dep't of Corr. (*Neal I*), 583 N.W.2d 249 (Mich. Ct. App. 1998) (holding that subsection 302(a) of the Civil Rights Act prohibits discrimination in facilities such as the MDOC's correctional facilities, which are "places of 'public service'" within the meaning of the Act).

464. *See, e.g.*, Norman Sinclair et al., *Sexual Abuse Behind Bars: Detroit News Special Report*, DETROIT NEWS, May 22–25, 2005.

inmates dating back to the 1980s.[465] Multiple reports, interviews, articles, and lawsuits attempted to address the abuses.[466] For example, in *United States v. Michigan*, the Attorney General alleged that Michigan prisons were subjecting prisoners to unconstitutional conditions, including sexual abuse; the resulting settlement led to a two-year period of oversight aimed at curbing the abuse.[467] However, once the oversight ended, the closed system faced no external pressure to continue its reform efforts, and incarcerated women subsequently continued to report widespread abuses and retaliation.[468] The PREA guidelines and changes were introduced in 2003[469] and implemented from 2009 to 2012,[470] yet prisons saw no real change.[471]

Civil rights attorney Deborah Labelle initiated the groundbreaking class action lawsuit on behalf of 809 incarcerated women who were sexually abused over two decades by correctional staff in the state of Michigan.[472] Plaintiffs filed a civil rights action under Michigan's Elliott Larsen Civil Rights Act (ELCRA), which prohibits discrimination, including sexual harassment, in public accommodations or public services—i.e., public facilities owned, operated, or managed by the state.[473] Plaintiffs alleged that the defendants were aware of widespread and systemic sexual abuse of female inmates by male prison guards and failed to take action to stop the abuse.[474] The alleged abuses ranged from rape, sexual harassment, forced abortions, privacy violations, cross-gender pat-downs, forced public nudity, and retaliation for reporting.[475]

Over a period of almost fifteen years, the litigation faced many

465. *See* United States v. Michigan, 940 F.2d 143 (6th Cir. 1991).

466. *See* NOWHERE TO HIDE, *supra* note 187; *Michigan*, 940 F.2d at 143.

467. *Michigan*, 940 F.2d at 145–46; *see also* Complaint at 5–6, *Michigan*, 940 F.2d 143 (No. 84-63), http://www.clearinghouse.net/chDocs/public/PC-MI-0007-0001.pdf.

468. *See* NOWHERE TO HIDE, *supra* note 187 (noting that several retaliation cases occurred after *Michigan*, 940 F.2d 143).

469. *See* Prison Rape Elimination Act, 42 U.S.C. § 15601 (2003).

470. *See* PREA COMMISSION REPORT 2009, *supra* note 98, at 29.

471. Juan A. Lozano, *Most States Failing to Meet Anti-Prison Rape Rules*, DETROIT NEWS (Sept. 11, 2016), http://www.detroitnews.com/story/news/nation/2016/09/11/prison-rape-rules/90237006/.

472. *See* Culley, *supra* note 36, at 207.

473. *See* Second Amended Complaint, Neal v. Mich. Dep't of Corr. (*Neal I*), 583 N.W.2d 249 (Mich. Ct. App. 1998) (No. 96-6986); Culley, *supra* note 36, at 211–12; MICH. COMP. LAWS § 37.2303 (1992); MICH. COMP. LAWS § 37.2301 (1999).

474. *See Neal I*, 583 N.W.2d at 206.

475. *Id*.; Culley, *supra* note 36, at 210.

challenges; defendants argued the ELCRA did not apply because correctional facilities were not places of public service—an issue the Michigan legislature amended to clarify mid-litigation, concluding that correctional facilities were *not* places of public service.[476] However, the hard work of the attorneys in *Neal* paid off when the Michigan Court of Appeals eventually held that the amendment did not apply retroactively and cleared the way for the case to proceed to trial.[477] At the end of the trial, the jury returned a verdict for the female inmates and awarded them more than $15 million.[478] In an unprecedented move, the trial jury also read an apology to the women for the abuses they had suffered at the hands of the correctional staff.[479] During the litigation, in 2000, men were taken off the housing units of the prison.[480] An appeal by the state was harshly denied by the Michigan Court of Appeals, with the court indicating it was appalled by the officers who "targeted like a radar women with histories of sexual or physical abuse, or prisoners in emotional vulnerable positions."[481] Ultimately, the case settled in 2009 for $100 million and numerous remedial measures were subsequently implemented to address and prevent the future sexual abuse of women in Michigan prisons.[482]

Without access to this civil remedy, the closed system would not have been pressured to change its policies and practices and sexual abuse would still be a serious problem.[483] This remedy is by no means perfect, and it did not eliminate the perpetration of sexual abuse; however, it has significantly changed this closed system in positive ways.[484] In 2016, other prisons followed suit in attempting to utilize the class action lawsuit, arguing that even despite prisons' zero-tolerance policy pursuant to the PREA, "a culture

476. *See generally* Culley, *supra* note 36.

477. *Id*. at 210.

478. *See id*.

479. *See id*.

480. *See* Michael Rigby, *Ban on Male Guards in Michigan Women's Prisons Upheld*, PRISON LEGAL NEWS (Sept. 15, 2005), https://www.prisonlegalnews.org/news/2005/sep/15/ban-on-male-guards-in-michigan-womens-prisons-upheld/.

481. Culley, *supra* note 36, at 213 (citing Neal v. Mich. Dep't of Corr. (*Neal I*), 583 N.W.2d 249 (Mich. Ct. App. 1998).

482. *See* Class Settlement Agreement, *Neal I*, 583 N.W.2d 249 (No. 96-6986), http://www.clearinghouse.net/chDocs/public/PC-MI-0021-0003.pdf.

483. *See infra* notes 484–94 and accompanying text.

484. *See* Culley, *supra* note 36, at 223–24.

has been created that is 'functionally indifferent' to the risk of abuse."[485] Scholars have argued that class actions emerged as an essential option for inmate victims of sexual assault,[486] and *Neal* exhibits how the ability of these inmates to combine their voices into a class action lawsuit yielded significant results in bringing attention to the previously unrecognized issue of sexual assault in prison, compensating the victims, and enacting change in the prison system.[487] This Article attempts to break down the silos among closed systems and learn from the successes and failures of each toward the end of serving the interests of survivors of sexual violence.

To date, a successful class action comparable to *Neal* has not been brought in the context of immigration detention facilities. However, sexual violence in these facilities is widespread and shares many similarities in nature, such as the barriers to reporting and investigation that exist in prisons and the military.[488] Because the immigration detention facilities are a hybrid closed system—civil detention centers where occupants have slightly more rights than prisoners but fewer than those in the community—they are strongly positioned to be sued vis-à-vis the *Neal* model.[489]

Advocates for victims of abuse in immigration detention facilities are beginning to take action to force change and seek compensation on their behalf, but have so far experienced only limited success.[490] "In 2007, the ACLU sued the federal government due to the facility's harsh conditions, which resulted in the release of dozens of families."[491] For remedies to sexual abuse, a Fifth Amendment claim was brought against federal officers individually, arguing they had violated plaintiffs' due process right to freedom of deliberate indifference to a risk of harm.[492] The Fifth Circuit,

485. Weiser, *supra* note 127; *see generally* Class Action Complaint, Jones 1 v. Annucci, slip op. 05275 (S.D.N.Y. Feb. 25, 2016), http://www.legal-aid.org/media/201965/02.26.16_complaint.pdf.

486. *See generally* Laderburg, *supra* note 425.

487. *See generally* Neal v. Mich. Dep't of Corr. (*Neal I*), 583 N.W.2d 249 (1998).

488. *See* JUST DETENTION INT'L, SEXUAL ABUSE IN THE U.S. IMMIGRATION DETENTION (Jan. 2009), http://justdetention.org/wp-content/uploads/2015/10/FS-Sexual-Abuse-in-U.S.-Immigration-Detention.pdf.

489. Gretchen Gavett, *What Are Immigration Detainees' Legal Rights?*, PBS (Oct. 18, 2011), http://pbs.org/wgbh/frontline/article/what-are-immigration-detainees-legal-rights/.

490. Muñoz, *supra* note 4, at 578–79.

491. *Id*.

492. *See id*.

The several sexually abused plaintiffs brought action against federal officers, George Robertson and Jose Rosado, alleging they had violated their Fifth Amendment rights.

ruled:

> [N]o clearly established law provides that an official's knowledge of contractual breaches and of the breached provision's aim to prevent sexual assault of detainees, standing alone, amounts to deliberate indifference in violation of a detainee's Fifth Amendment rights, because no controlling authority provides that such breaches are "facts from which the inference could be drawn that a substantial risk of serious harm exists."[493]

It was determined that both officers were entitled to qualified immunity.[494]

3. Additional Avenue for Justice? The Prison Rape Elimination Act as a Basis for Administrative Causes of Action

Some scholars have discussed the relative successes and failures of the PREA in litigation contexts.[495] Unfortunately, because the PREA does not create a private cause of action for an agency's failure to comply with its standards, a rape victim may not file a suit against the agency solely for noncompliance.[496] It has been argued that victims may be successful in arguing that noncompliance with the PREA results in violations of constitutional obligations borne by the facility, but in practice, most courts do not get to the PREA argument if detainees or prisoners raise it.[497] In cases where the courts do consider plaintiffs' arguments regarding the

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> The immigrant plaintiffs alleged the facility's logbooks and reports demonstrated the officer's indifference to transportation regulation. The documents demonstrated the transportation of female detainees by male officers, without the presence of female officers. The documents indicated seventy-seven incidents.

Id.

493. *Id*.

494. *See id*. at 579.

495. *See* 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).

496. *See* Muñoz, *supra* note 4, at 568 (citing Alex Friedmann, *Prison Rape Elimination Act Standards Finally in Effect, but Will They Be Effective?*, PRISON LEGAL NEWS 3 (Sept. 2013), https://www.prisonlegalnews.org/media/issues/09pln13.pdf).

497. Arkles, *supra* note 495, at 811. "In most cases where prisoners raise violations of PREA in their complaints, courts decline to consider PREA at all because of the lack of a private right of action." *Id*.

PREA, they remain unswayed.[498]

In the context of immigration detention, one legal advocacy group attempted to utilize the PREA as the basis for a cause of action.[499] In 2014, "the Mexican American Legal Defense and Educational Fund (MALDEF) filed a complaint with the Homeland Security Department after several women detained at the facility alleged staff members there sexually assaulted them. The complaint stated that the ongoing sexual abuse allegations were in violation of PREA."[500] They further alleged that the incidents of abuse and sexual harassment subjected the detained individuals to "conditions that are punitive and unconstitutional under the Due Process Clause of the Fifth Amendment."[501] As a remedy, the complaint requested that federal officials "investigate the allegations and implement the necessary protective measures to ensure compliance with PREA."[502] The abuses described in the complaint mirror those cited in *Neal*, specifically when the Karnes Center guards removed female detainees from their cells late in the evening for the purpose of engaging in sexual acts in various parts of the facility.[503] Additionally, they called detainees their "novias" or "girlfriends" and used their power and authoritative positions as a way to manipulate the vulnerable detainees "by requesting sexual favors."[504] In return, the guards made promises of financial reward, committed to help the women with their immigration cases, and made promises to provide housing for them following their release from detention.[505]

Much like the prisons' responses in *Neal*, by September 2014, the facility had not taken action to attempt to stop or prevent any future abuse

498. *See id*. In *Jenkins v. Hennepin*, the plaintiff alleged that defendant officials were deliberately indifferent to create or implement policy with regard to sexual abuse and knew about the need for such a policy because of the PREA. *Id*. (citing Jenkins v. Cty. of Hennepin, Minn., No. CIV.06-3625(RHK/AJB), 2009 WL 3202376, at *2 (D. Minn. Sept. 30, 2009)). The court held that even though the defendants did have some knowledge of the PREA, the plaintiff did not offer sufficient evidence that the defendants consciously understood the risk of rape and deliberately chose not to implement such a policy. *Id*. at 813 (citing *Jenkins*, 2009 WL 3202376, at *2).

499. *See* Muñoz, *supra* note 4, at 581.

500. *Id*.

501. *See* Letter from Marisa Bono, Staff Attorney to Mexican Am. Legal Def. & Educ. Fund to The Honorable Jeh Johnson, Sec'y of Homeland Sec. (Sept. 30, 2014) (on file at http://www.maldef.org/assets/pdf/2014-09-30_Karnes_PREA_Letter_Complaint.pdf).

502. *Id*. at 582.

503. Muñoz, *supra* note 4, at 581–82.

504. *Id*. at 583.

505. *Id*.

despite MALDEF's complaint.[506] In fact, they did the opposite, providing the guards with an environment that facilitated sexual abuse, where male guards had free access to the cells where women and children resided any time during the day and night.[507]

One scholar notes that the current structure of the immigration detention center system facilitates abuse and demands intervention,[508] and others suggest that the facilities require external oversight.[509] Thus, the class action may be a particularly effective method to facilitate the external oversight and effect change. However, even with this oversight, an internal remedy to enforce the rules facilities claim they comply with has equally essential value.[510] Scholars argue that there are ways to make the PREA more effective in litigation, but based on recent successes in the prison context, there may also be a remedy in administrative law.[511]

Despite the successes of *Neal*, it was a hard-won fight that spanned over

506. *See* Marisa Bono, MALDEF Staff Attorney, *PREA and Complaints of Sexual Abuse at ICE Karnes Facility*, U.S. COMM'N ON CIV. RTS. 1, 4 (Jan. 30, 2015), http://www.usccr.gov/OIG/Marisa_Bono_WrittenStatement_FINAL.pdf.

> To date, Complainants have received two formal responses from federal agencies. Complainants received an October 29, 2014 letter from ICE indicating that the complaint had been received, and that an investigation was ongoing. Complainants called the contact provided in the letter, but did not receive a return phone call. Complainants also received a December 4, 2014 letter from DHS Civil Rights and Civil Liberties confirming that the complaint had been received and that an investigation was ongoing. The Office of the Inspector General (OIG) investigator also contacted Complainants in October of 2014, informing Complainants that OIG was conducting an investigation. Despite repeated requests, Complainants have no additional information regarding the details of the investigations.

Id.

507. Muñoz, *supra* note 4, at 578–79.

> The conditions stated in the complaint, violated the zero-tolerance policy established by PREA. PREA specifically states that sexual abuse is any incident when a staff member is involved in sexual contact with a detainee or resident. It is considered sexual abuse regardless of whether or not the sexual intercourse is consensual. Sexual abuse also includes any attempt, threat, or request by a facility staff member with the purpose of engaging in sexual intercourse.

Id.

508. *See* Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 447 (2013) ("This Article argues that the U.S. immigration detention system, the largest law enforcement operation in the country, operates with structural impunity resulting in the perpetual abuse of the detained population.").

509. *Id.* at 497.

510. *See id.* at 470. This type of action would likely be covered by "traditional state tort law." *Id*.

511. *See generally* Arkles, *supra* note 495.

fifteen years, and largely occurred before the PREA had been fully implemented.[512] Thus, learning from the context of immigration detention facilities, a PREA-related cause of action in the prison context may supplement the role of class actions. In April 2015, lawyers utilizing an administrative remedy under the PREA to remedy sexual violence found some success in the prison context.[513] In *Neon Brown v. Patuxent Institution in Maryland*, a transgender inmate alleged the facility failed to train its employees on how to comply with PREA regulations, which led to a hostile environment in which she was subjected to sexual harassment and abuse.[514] The administrative law judge found that this abuse violated specific PREA standards the state facility.[515] The remedy recommended by the ALJ was that the facility promulgate policies and institute mandatory training regarding transgender inmates that comply the with PREA, as well as pay $5000 in damages and award 20 diminution credits in recognition of the 50 days the inmate was held in administrative segregation beyond what was appropriate.[516] The success in this administrative law context may be a model for other members of closed systems who face abuse related to a failure to implement changes to meet compliance with federal regulatory schemes like the PREA.

B. Civil Liability for Military Victims of Sexual Violence

This Article is not the first to suggest sweeping reforms in the military to better serve victims of sexual assault.[517] There are those that argue that the closed-system governance of these issues—which falls entirely within

512. *See* Culley, *supra* note 36.

513. Proposed Decision, Brown v. Patuxent Institution, OAH No. DPSC-IGO-002V-14-33232 (Aug. 17, 2015), https://freestatelegal.org/wp-content/uploads/2015/09/Brown-2015.08.17-Decision-of-Secretary-and-ALJ.pdf.

514. *Id*. at 13.

515. *Id*. at 26. The Administrative Law Judge found that the facility's actions violated the PREA because correctional staff violated her privacy while she was in the shower, verbally harassed her—including telling her she should kill herself—and placed her in administrative segregation for an extended stay—the entire sixty-six days she was confined at the facility. *Id.*

516. *Id*. at 33–34.

517. *See, e.g.*, Schenck, *supra* note 68, at 582; *see generally* Ann M. Vallandingham, *Department of Defense's Sexual Assault Policy: Recommendations for a More Comprehensive and Uniform Policy*, 54 NAVAL L. REV. 205 (2007) (advocating policy changes regarding better definitions for restricted reporting and expanding the class of victims to which restricted reporting is made available).

the military, has nearly no external check, and often leaves victims without remedy—should be overhauled.[518] However, some argue that these critics fail to understand the unique military context, including the "crucial role of convening authorities in the maintenance of good order and discipline, the allocation of resources in the prosecution of cases, and the important prosecutorial element that military cases have legitimacy with military juries, which includes the chain of command's support."[519] This Article explores the existing limitations on military causes of action both conceptually and through the lens of the failed class action, *Klay v. Panetta*; ultimately urging a middle-ground reform of constitutional jurisprudence toward an end of allowing redress for victims of sexual violence.

1. Limitations on Civil Military Causes of Action

Although victims of sexual assault in the broader community may take advantage of a range of civil causes of action, victims in the military face a complex web of limitations imposed by internal policies, federal statutes, and Supreme Court jurisprudence, effectively making access to civil justice difficult if not impossible.[520]

Historically, common law precluded the U.S. Government from bearing liability for the negligent actions of military members.[521] The Federal Tort Claims Act (FTCA) changed the common law doctrine and waived governmental immunity in certain situations, allowing individuals the right to sue for negligent acts committed within a government employee's scope of employment.[522] In passing the FTCA, Congress desired to provide a

518. *See* Ruth Rosen, *The Invisible War Against Rape in the U.S. Military*, HIST. NEWS NETWORK (Mar. 24, 2014), http://historynewsnetwork.org/article/155049; Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0. Senator "Gillibrand's legislation would have taken the prosecution of sexual assault cases out of the military chain of command and given it to the independent Judge Advocates General Corps." Rosen, *supra*.

519. Schenck, *supra* note 68, at 582.

520. *See infra* notes 521–41 and accompanying text.

521. *See* Michael Rust, *Expansion of the Feres Doctrine*, 32 EMORY L.J. 237, 238 (1983). Although, at one point, courts did allow such causes of action when "superior officers act[ed] maliciously or outside the scope of their authority." Ann-Marie Woods, *A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. REV. 1329, 1333–34 (2014).

522. *See* Rust, *supra* note 521, at 238–39.

remedy for individuals harmed at the hands of the government.[523] However, federal law provides exceptions, including one that disallows claims derived from "combatant activities" within the military or that might arise during wartime.[524] The exact meaning of this exception has been the subject of significant controversy, but congressional history lends support to the idea that it was intended only as a narrow exception.[525]

Brooks v. United States was the first Supreme Court case to interpret the FTCA; the Court's decision suggests that this exception should be narrowly interpreted and does not exclude all military personnel tort claims.[526] The Court's opinion made it clear that negligence claims brought in contexts that are not "incident to service" may proceed against the government.[527] *Brooks* involved a vehicular accident occurring off of military base; the Court stated, "[w]ere the accident to the Brooks' service, a wholly different case would be presented."[528] The meaning of "incident to service," however, is the subject of significant debate.[529]

Definition of this elusive phrase occurred just one year later in *United States v. Feres*, where the Court drew a critical distinction between the specific facts of two cases; *Feres* involved a service member's death as a result of a fire while he was on active duty, and *Brooks* involved a car accident committed outside of a military base.[530] The Court's decision rested on whether an act occurred "incident to service," yet it still did not clearly define what the phrase actually meant; the language, which has subsequently taken on a life of its own as a guiding determinant for tort liability against the military, is also glaringly absent from the FTCA.[531] *Feres* expanded governmental immunity in the limited military context.[532] As a result, "[s]overeign immunity trumps individual liability under the *Feres* doctrine, even in the face of clear injustices suffered by military

523. *Id*. at 238–39.
524. 28 U.S.C. § 2680(j) (2016).
525. *See* Woods, *supra* note 521, at 1335–36.
526. *Id*. at 1337.
527. Brooks v. United States, 337 U.S. 49, 53 (1949).
528. *Id.*
529. *See* Feres v. United States, 340 U.S. 135, 155 (1950) ("There are few guiding materials for our task of statutory construction.").
530. *Id.* at 137; *see also Brooks*, 337 U.S. at 53.
531. Woods, *supra* note 521, at 1338.
532. *Feres*, 340 U.S. at 135.

service members."[533]

> In particular, the doctrine has become synonymous with three core principles: (1) respect for and deference to decisions made in the context of intra-military supervision, under the "incident to service" exception to the FTCA; (2) the existence of an alternative compensation scheme and system of justice that is more than sufficient and capable of providing service members with an alternative to tort recovery; and (3) the concern regarding undercutting, and thereby destabilizing, the military discipline structure if soldiers are permitted to hold their superior officers and other government officials liable in Article III courts.[534]

Courts routinely rely on these principles in their decisions involving the *Feres* doctrine.[535]

> While the *Feres* doctrine was originally meant to prohibit FTCA claims against the military as an institution, its reasoning was later used to justify prohibiting military service members from bringing *Bivens* actions against individual military officials for violating service members' constitutional rights as well, under the "special factors counseling hesitation" prong of the two-part *Bivens* inquiry. This has created even greater immunity for the military than was originally intended by the Supreme Court in *Feres*.[536]

Despite compelling arguments to limit government immunity in the military context, there exists a contingent of judges and scholars who argue the *Feres* doctrine should be revisited and refined.[537] Four dissenting Supreme Court opinions authored by Justices Scalia, Thomas, O'Connor, and Brennan argue against the current interpretation.[538] "Coupled with

533. Woods, *supra* note 521, at 1332.

534. *Id*. at 1341.

535. *See, e.g.*, Ortiz v. U.S. ex rel. Evans Army Cmty. Hosp., 786 F.3d 817 (10th Cir. 2015).

536. Aparna Krishnaswamy Patrie, *No Place in the Military: The Judiciary's Failure to Compensate Victims of Military Sexual Assault and a Suggested Path Forward Using Lessons from the Prison Context*, 8 J. NAT'L SEC. L. & POL'Y 119, 124 (2015) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)).

537. *See* Woods, *supra* note 521, at 1345.

538. *See* Lanus v. United States, 133 S. Ct. 2731, 2732 (2013) (Thomas, J., dissenting); United States v. Stanley, 483 U.S. 669, 704–06 (1987) (Brennan, J., dissenting); United States v. Stanley,

disapproval in the lower courts, these judicial critiques of the *Feres* doctrine suggest that it is not a matter of if, but when the Court will reexamine the decision."[539] The Tenth Circuit Court of Appeals in a recent decision dismissing a medical malpractice claim against a military hospital opined, "[s]uffice it to say that when a court is forced to apply the *Feres* doctrine, it frequently does so with a degree of regret."[540] The Court may in fact have an opportunity to revisit *Feres* if it chooses to take up the appeal in the *Ortiz* case.[541]

Based on this Article's observation of the difficulty in attempting to enact change in the closed system of prison without external pressure from the courts, the doctrine demands revision—either through shifts in judicial decision-making or congressional action to amend the FTCA.

2. *Klay v. Panetta* and Its Progeny: The Failure of Class Action Lawsuits Against the Military for Sexual Violence

As this Article extensively discusses, sexual victimization in the military occurs at exceedingly high rates and affects numerous women.[542] Because of the closed institutional military system, victims encounter major barriers to reporting, find investigatory practices to be unsatisfactory, and more often

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483 U.S. 669, 709–10 (1987) (O'Connor, J., dissenting); United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting).

539. Woods, *supra* note 521, at 1343. Other scholars disagree and argue that overturning the *Feres* doctrine is not a realistic option because it would also require overhaul of the FTCA and the Military Claims Act (MCA). For example, one scholar argues,

> even in the unlikely event Congress were to legislatively overturn the affirmed, and entrenched, *Feres* doctrine, the FTCA precludes liability unless the claimant can show that the servicemember's wrongful acts or omissions happened while he or she was "acting within the scope of his office or employment." The "scope of employment" standard still precludes claims of sexual assault and harassment because sexual assault and harassment "cannot be considered performing the employer's work."

Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and Harassment*, 222 MIL. L. REV. 211, 226 (2014).

540. *Ortiz*, 786 F.3d at 822. The Tenth Circuit included a litany of prior decisions in which courts reluctantly applied the *Feres* doctrine. *Id.* at 822–23.

541. The future of *Feres* might well include refinement. Following their loss in *Ortiz v. U.S*, the plaintiffs appealed to the United States Supreme Court on October 13, 2015. Patricia Klime, *Military Family Pushes Supreme Court to Consider Malpractice Claim*, MIL. TIMES (Dec. 21, 2015), http://www.militarytimes.com/story/military/2015/12/21/military-family-pushes-supreme-court-consider-malpractice-claim/77500274/. The government's response to the motion is pending following an extension requesting more time. *Id.*

542. *See supra* note 266 and accompanying text.

than not, are left without access to justice, making the availability of alternative remedies even more important.[543] The civil class action lawsuit is one strategy proven successful in contexts like prisons, and lawyers have attempted to use it to help victims in the military; however, because of the issues with immunity, they have not been attempted, or when they have, they are unsuccessful.[544] *Klay v. Panetta* was filed on behalf of twelve women who were sexually assaulted across the Navy and Marine branches of the military.[545] However, unlike the plaintiffs in *Neal*, the plaintiffs in *Klay* did not sue the government, but instead named individual high-level government officials as defendants.[546]

The *Klay* complaint alleged that the Department of Defense failed to follow Congressional mandates to address sexual victimization in the military; specific to the female plaintiffs, it alleged that these failures led to their claims of rape and sexual harassment being ignored and to them receiving significant retaliation for speaking out.[547] "Rather than being respected and appreciated for reporting crimes and unprofessional conduct, Plaintiffs and others who report are branded 'troublemakers,' endure egregious and blatant retaliation, and are often forced out of military service."[548] The basis of their claims rested on three constitutional violations implied under the First, Fifth, and Seventh Amendments.[549]

The United States Court of Appeals for the District of Columbia dismissed the complaint procedurally, agreeing with the district court that the plaintiffs failed to state a claim upon which relief could be granted.[550] The Court of Appeals, without ever getting to the merits of the case, determined that the plaintiffs did not have access to a *Bivens* cause of action—the gateway to tort liability against the government—in the first place.[551] This roadblock will effectively bar all similar cases from moving forward, no matter how egregious the sexually violent actions on the part of

543. *See supra* Part I.

544. *See, e.g.*, Cioca v. Rumsfield, 720 F.3d 505, 511 (4th Cir. 2013) (citing Feres v. United States, 340 U.S. 135, 146 (1950)).

545. Complaint at 4, Klay v. Panetta, 758 F.3d 369 (D.C. Cir. 2014) (No. 13-5081).

546. *See id*.

547. *See id*. at 3.

548. *Id*. at 3.

549. *Id*. at 32–34.

550. *Klay*, 758 F.3d at 376–77.

551. *Id.*

military service members and the corresponding failure by the military to address this victimization.[552] The court discusses this predicament:

> Their appeal is both difficult and easy. Difficult, because it involves shocking allegations that members of this nation's armed forces who put themselves at risk to protect our liberties were abused in such a vile and callous manner. Easy, because plaintiffs seek relief under a legal theory that is patently deficient.[553]

Despite this difficulty, the Court of Appeals was unwilling to move the roadblock that stands in between the aggrieved plaintiffs and the opportunity to have their claims adjudicated by a court of law.[554] The inability to access a *Bivens* cause of action rests on the satisfaction of one specific legal test that requires a particular harm be perpetrated in a way that is considered "incident" to military service.[555]

Kori Cioca, along with twenty-eight current and former members of the United States armed forces, filed suit against two former secretaries of defense and alleged a battery of sexual violence by fellow service members.[556] They argued that their reports of sexual violence were met with skepticism, hostility, and retaliation by military authorities.[557] Like in *Klay*, they alleged that the defendants' acts and omissions in their official capacities contributed to a military culture of tolerance for the sexual crimes perpetrated against them, and they sought damages pursuant to *Bivens*.[558]

In this case filed after the initial *Klay* complaint but decided before the Court of Appeals for the District of Columbia rendered its decision, the Fourth Circuit explained its nearly identical decision to *Klay*, to prevent the case from moving forward because a *Bivens* remedy was unavailable.[559] The court was unwilling to extend this remedy to the plaintiffs because, "Congress, not the courts, is in the proper constitutional position to conduct such an inquiry and provide a statutory remedy should it determine that

552. *See infra* note 553 and accompanying text.
553. *Klay*, 758 F.3d at 370.
554. *Id.* at 371.
555. *Id.*
556. Cioca v. Rumsfeld, 720 F.3d 505, 506 (2013).
557. *Id.*
558. *Id.*
559. *Id.* at 518.

action is warranted."[560] The Fourth Circuit Court of Appeals in *Cioca* does not deny that the allegations are egregious, but it is deeply committed to the notion that the only remedy available is one that would come from Congress—not the courts—who has, to date, failed to act:

> In the more than twenty-five years since the Supreme Court pronounced in *Stanley* that servicemembers will not have an implied cause of action against the government for injuries arising out of or incident to their military service under *Bivens*, Congress has never created an express cause of action as a remedy for the type of claim that Plaintiffs allege here. And it is Congress, not the courts, that the Constitution has charged with that responsibility.[561]

This Article is not the first to urge Congressional action on this issue.[562] This change in policy would open doors for military victims of sexual violence in a significant and meaningful way.[563] Further, in the spirit of breaking intellectual silos among closed institutions, this Article supports an amendment to the FTCA that creates an exception for sexual assault claims, regardless of not being incident to any service.[564] This legislative solution would help survivors of sexual assault gain access to civil remedies across institutions and is in need of more research and support.[565]

The relative success and resulting remedy of the *Neal* case is not available to victims in the military, but it should be.[566] Drawing this

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560. *Id*.

561. *Id.* at 517.

> In concluding that Plaintiffs lack a *Bivens* cause of action in this case, we do not downplay the severity of Plaintiffs' allegations or otherwise imply that the conduct alleged in Plaintiffs' Complaint is permissible or acceptable. Rather, our decision reflects the judicial deference to Congress and the Executive Branch in matters of military oversight required by the Constitution and our fidelity to the Supreme Court's consistent refusal to create new implied causes of action in this context.

Id. at 518.

562. *See* Rust, *supra* note 521, at 271; Schmid, *supra* note 266, at 506; Vallandingham, *supra* note 517.

563. *See generally* Patrie, *supra* note 536.

564. *See* Gregory C. Sisk, *Official Wrongdoing and the Civil Liability of the Federal Government and Officers*, 8 U. ST. THOMAS L.J. 295, 314 (2011) ("In any event, the Supreme Court, while not overturning *Bivens*, is now more likely to defer to legislative action on whether a private damages remedy should be created for recompense against alleged official wrongdoing.").

565. *See id*.

566. *See* David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of*

comparison between the prison and military systems is not without precedent, even in the courts.[567] The military plaintiffs in the class action lawsuit, *Cioca v. Rumsfeld*, "likened their situation to situations that prisoners face, at least in the sense that members of the armed forces, like prisoners, cannot engage in 'self-help against Constitutional deprivations' like civilians can."[568] Further, explaining the limitations inherent in working in a closed system,

> [a]ctive duty service members cannot move homes or change cities, they cannot take personal actions like civilians can—such as calling the police, seeking the aid of a shelter, or getting out of town—and they cannot simply quit their jobs to go find new employment away from the rapists that they are forced to live near, work with, and salute everyday.[569]

Scholars have also noted the similarities among the closed system facilities.[570] One author proposes a three-part test to assess whether members of the military who are sexually abused may sue for monetary damages, using the Eighth Amendment test of malicious harm and deliberate indifference from the prison context.[571] However, she also argues that *Feres* is here to stay, and although it may be desirable to overturn it, "neither Congress nor the Supreme Court is likely to do so."[572] That said, there is hope that congressional leaders might learn from the struggles of those trying to address sexual abuse in prison and consider refining *Feres* to at least offer a remedy for sexual-violence victims in the military.[573]

The four primary outcomes of the *Neal* class action—monetary compensation, system change, increased awareness, and deterrence—should

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the Feres *Doctrine*, 95 YALE L.J. 992, 1006 (1986) ("[T]he *Feres* doctrine indiscriminately accords the same absolute protection to combat decisions as it does to the decision to commit a sexual assault.").

567. *See* Tara D. Zickefoose, *Battling the Unforeseen Enemy: The Constitutional Attack on Military Sexual Assault*, 48 TULSA L. REV. 143, 162 (2012).

568. *Id.*; *see* Transcript of Hearing on Motions at 12–13, Cioca v. Rumsfeld, 720 F.3d 505, 506 (2013) (No. 12–1065).

569. Transcript of Hearing on Motions at 12–13, *Cioca*, 720 F.3d at 506 (No. 12-1065).

570. *See infra* notes 571–72 and accompanying text.

571. *See* Patrie, *supra* note 563, at 142–49.

572. *See id*.

573. *See supra* note 541 and accompanying text.

be extrapolated further into the military context by allowing sexual-assault victims access to the courts through civil lawsuits.[574] In examining these closed systems together, this Article draws comparisons between the incidences of sexual assault and barriers to reporting and investigation, and applies lessons from one context to another.[575] In prison, policy changes, media attention, and even federal oversight were not sufficient alone to address sexual violence in the system: the class action was an essential tool to effect change and compensate victims.[576] It follows that the class action could similarly operate to finally create the type of change that society, including the judiciary, acknowledges is necessary in the military.

CONCLUSION

There are significant lessons to be learned from engaging in comparisons among seemingly disparate closed institutions like prisons, the military, and immigration detention centers.[577] Though markedly different in their respective societal roles, these systems are all similarly characterized by rampant sexual violence, problems with reporting and related investigations, the failure to provide meaningful internal mechanisms for redress, and limitations in legal remedies.[578] This Article urges policy makers, lawyers, scholars and others to break down the silos across these closed systems and extract lessons from both the successes and failures to better address the problem of sexual violence.

574. *See supra* note 464 and accompanying text.
575. *See supra* Sections III.A–B.
576. *See supra* Sections III.A.1–2.
577. *See supra* Part III.
578. *See supra* Part II.