

FEMALE INMATES LIVING IN FEAR: SEXUAL ABUSE BY CORRECTIONAL OFFICERS IN THE DISTRICT OF COLUMBIA

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Introduction.....	444
I. Conditions in District of Columbia Prisons: A History of Neglect.....	446
A. Conditions for the General Population.....	446
B. Conditions for Female Inmates.....	448
II. Federal Remedies for Female Inmates: High Standards, Disappointing Results.....	453
A. The Eighth Amendment of the Constitution.....	453
1. The Farmer v. Brennan Standard.....	456
2. Applying the Farmer Standard to Sexual Abuse.....	458
3. Meeting the Farmer Standard in the District of Columbia.....	459
B. Prison Litigation Reform Act: The Physical Injury Requirement.....	461
III. Remedies Available in the District of Columbia:.....	463
Lack of Enforcement.....	463
A. Section 24-211.02 of the District of Columbia Code.....	463
1. The Judiciary's Interpretation of Section 24-211.02.....	463
2. Section 24-211.02 and Sexual Abuse of Female Inmates.....	464
B. District of Columbia Department of Corrections.....	466
Sexual Misconduct Policy.....	466
1. Language of the Policy.....	466
2. Application of the Sexual Misconduct Policy.....	468
IV. Recommendations for Change.....	471
A. Enforcement Through Criminal Prosecution of Correctional Officers..	471
B. Assumptions Made by Hiring More Female Guards.....	473
Conclusion.....	475

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*In free society, a woman who experiences harassment may seek the protection of police officers, friends, coworkers or relevant social service agencies. She may also have the option of moving to locations where the harassment would no longer occur. In sharp contrast, the safety of women prisoners is entrusted to prison officials, some of whom harass women prisoners and many of whom tolerate the harassment.*¹

INTRODUCTION

There are few words that can describe the horrendous conditions that all inmates face in the District of Columbia Correctional Facilities.² However, no possible description of the sexual abuse, torture and rape,³ inadequate medical care,⁴ overcrowding,⁵ and deplorable physical conditions⁶ faced each day by female inmates⁷

1. *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 877 F. Supp. 634, 665 (D.D.C. 1994), *rev'd in part and aff'd in part*, 93 F.3d 910 (D.C. Cir. 1996) [hereinafter *Women Prisoners I*].

2. See Jonathan M. Smith, *The District of Columbia Revitalization Act and Criminal Justice: The Federal Government's Assault on Local Authority*, 4 D.C. L. REV. 77, 87 (1998) [hereinafter Smith, *Revitalization Act*].

The conditions in which inmates are housed at the D.C. Jail constitute cruel and unusual punishment These are conditions which turn men into animals, conditions which degrade and dehumanize Imprisonment in conditions such as these absolutely guarantees that the inmates will never be able to return to civilized society, will never feel any stake in playing by its rules.

Id. (citing *Inmates of D.C. Jail v. Jackson*, 416 F. Supp. 119, 122-23 (D.D.C. 1976)).

3. See *Women Prisoners I*, 877 F. Supp. at 665 (describing the "[r]ape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees").

4. See *id.* at 643-44 ("Women prisoners during intake are not given pelvic exams or breast exams Defendants do not routinely test women prisoners at [the Correctional Treatment Facility] for sexually transmitted diseases."). The court also noted that, "When [the Department of Corrections] transport[s] pregnant women prisoners on medical visits they customarily place women in leg shackles, handcuffs and a belly chain" *Id.* at 646.

5. See Katya Lezin, *Life at Lorton: An Examination of Prisoners' Rights at the District of Columbia Correctional Facilities*, 5 B.U. PUB. INT. L.J. 165, 170 (1996) ("The District's prison population has since [1993] risen to 'a vastly overcrowded 11,000 men and women.'") (citing Courtland Milloy, *Baring Their, Uh, Souls for Their Jailbirds*, WASH. POST, June 29, 1994, at B1); see also *Campbell v. McGruder*, 416 F. Supp. 100, 105 (D.D.C. 1975) ("By far the most flagrant and shocking encroachment on the constitutional rights of the [prisoner] class is the overcrowding"), *aff'd in part and rev'd in part*, 580 F.2d 521 (D.C. Cir. 1978).

6. Cf. Lezin, *supra* note 5, at 172 ("The vast majority of inmates . . . describe their incarceration as intolerable").

7. Though this Comment focuses on the female inmate population in the District of Columbia, this Comment cannot ignore the deprivation faced by male inmates in the District's prisons. See Lezin, *supra* note 5, for a discussion of the conditions in which male inmates lived in the Lorton, Virginia complex prior to its closing, and James E. Robertson, *Cruel and Unusual Punishment in the United States*

could come close to the actual conditions in which they live.⁸ Likewise, no one Comment could possibly address all of the problems within the District's correctional facilities.⁹

This Comment explores the crisis within the official structure of the Department of Corrections and the judicial system that allows guards to sexually harass and abuse female inmates in D.C. Correctional Facilities seemingly without punishment.¹⁰ By examining failures within the legal system and the Department of Corrections, this Comment brings to light the severe civil rights violations that are occurring within the District of Columbia prison system¹¹ and the failure of the judicial system to adequately address the problem.¹²

Part I of this Comment discusses the history of poor conditions in District of Columbia prisons as a whole, and specifically conditions for the female inmates therein. The sections that follow provide an analysis of the state of the law applicable to female inmates who are sexually abused, and the remedies that are available to them through both federal and District of Columbia law. Part II focuses on the federal law available to female inmates and explores the rights they are afforded under the Eighth Amendment of the Constitution and

Prisons: Sexual Harassment Among Male Inmates, 36 AM. CRIM. L. REV. 1 (1999).

8. See *Women Prisoners I*, 877 F. Supp. 634, 663 (D.D.C. 1994), *rev'd in part and aff'd in part*, 93 F.3d 910 (D.C. Cir. 1996) (describing the District of Columbia Prisons as containing "a deprivation which amounts to a wanton and unnecessary infliction of pain").

9. Cf. Smith, *Revitalization Act*, *supra* note 2, at 86 (commenting on the poor management, neglect, inefficient training of staff, violence, and other problems with which the District's prisons are plagued).

10. See *Women Prisoners I*, 877 F. Supp. at 640 (explaining that the District has "policies and procedures designed to address sexual misconduct," but these policies are rarely used effectively); see also *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 930-31 (D.C. Cir. 1996) [hereinafter *Women Prisoners II*] (noting that officials in the "[District of Columbia] have conceded that they have failed to protect female inmates from sexual abuse, in violation of the Eighth Amendment"); *Newby v. District of Columbia*, 59 F. Supp. 2d 35, 37 (D.D.C. 1999) ("The District has woefully failed to carry out its responsibilities [toward female inmates] under both Federal law and the laws of the District of Columbia.").

11. Female inmates are incarcerated in several facilities under the control of the District. When referring to the "District of Columbia Prisons," I am referring to the Minimum Security Annex in Lorton, Virginia ("Lorton"), the Correctional Treatment Facility in the District ("C.T.F."), and the Central Detention Facility or D.C. Jail ("D.C. Jail"). See discussion *infra*, Part I.A. (describing the deplorable conditions that exist in District of Columbia prisons). It is important to note that the Lorton facility, was removed from District control in December 2001. See Michael D. Shear, *Homes Would Replace Lorton in Land Swap*, WASH. POST, May 1, 2001, at B1 (discussing the proposed housing project that will be constructed at the site of the Lorton prison upon its closing).

12. Cf. Lezin, *supra* note 5, at 200 ("The reality is that despite the District's efforts, these problems have persisted unabated for twenty years.").

under 42 U.S.C. § 1983 (1994). Part II also addresses the high standards set by the Supreme Court and the Prison Litigation Reform Act, for prisoners who file claims against the government. Part III discusses the applicable District of Columbia regulations and Department of Corrections directives that female inmates who are sexually abused should be able to rely upon to achieve justice. This section also discusses the ways in which the courts have applied these regulations and directives. The Comment concludes in Part IV with the recommendation for criminal penalties for guards who sexually abuse female inmates, and a rejection of the suggestion that increasing the number of female guards will break the pattern of sexual abuse in D.C. prisons.

I. CONDITIONS IN DISTRICT OF COLUMBIA PRISONS: A HISTORY OF NEGLECT

A. *Conditions for the General Population*

Until very recently, the District of Columbia operated three correctional facilities, two in the District, both of which are still operational, and one in Lorton, Virginia.¹³ These facilities consist of the Lorton Complex ("Lorton"), which is made up of several units and closed in December 2001, the Central Detention Facility ("D.C. Jail") and the Correctional Treatment Facility ("C.T.F.").¹⁴ The District has faced a series of problems with the conditions in the D.C. Jail since the 1970s,¹⁵ and in Lorton and C.T.F. since the 1980s and 1990s respectively.¹⁶ Inmates have filed lawsuits against the District regarding the conditions in its facilities for the past thirty years.¹⁷

13. See *supra* note 11 and accompanying text (noting in particular that the District is no longer in control of the Lorton, Virginia facility as of December 2001); see also Lezin, *supra* note 5, at 167 (commenting that the District manages the Lorton, Virginia Facility (until December 2001), the Central Detention Facility ("D.C. Jail"), and the Correctional Treatment Facility ("C.T.F.")).

14. See *supra* text accompanying note 11 (discussing the three facilities operated by the District).

15. See *Campbell v. McGruder*, 580 F.2d 521, 535 (D.C. Cir. 1978) ("[T]he Jail was 'not really fit for human habitation.'") (quoting then Director of the Department of Corrections, Delbert Jackson). The circuit court in *Campbell* also cited trial testimony describing the D.C. Jail as "beyond the tolerable level of human existence." *Id.*

16. See *Inmates of Occoquan v. Barry*, 844 F.2d 828, 830 (D.C. Cir. 1988) (discussing the poor sanitation, housing, and other "environmental conditions" in the Virginia facilities which posed "serious health risks" to prisoners); cf. *Triplett v. District of Columbia*, 108 F.3d 1450, 1452-53 (D.C. Cir. 1997) (evaluating prisoner claims of a practice of excessive force in the District of Columbia prisons).

17. See discussion *supra* text accompanying note 12 (highlighting comments that have been made in lawsuits by prisoners regarding the conditions in D.C. prisons).

These lawsuits have alleged terrible conditions, such as poor sanitation,¹⁸ vermin infestations,¹⁹ vast overcrowding,²⁰ and sexual abuse.²¹ Despite the numerous lawsuits highlighting these problems, as of 1999 the District of Columbia had failed to resolve many of the problems within its prisons.²²

Furthermore, in 1996, the facilities at Lorton suffered a severe food shortage,²³ and the security at the largest facility at Lorton was found to suffer from “major shortcomings.”²⁴ All of the District of Columbia facilities have been vastly overcrowded²⁵ and understaffed.²⁶

18. See *Campbell*, 580 F.2d at 535 (discussing the “serious infestations of rats, mice and cockroaches, as well as general uncleanness causing obnoxious odors” that existed at the D.C. Jail).

19. See *id.*

20. See *id.* at 537 (citing severe overpopulation in D.C. facilities as early as 1975); *Inmates of Occoquan*, 844 F.2d at 842 (reviewing a District Court-ordered population cap on District of Columbia prisons); *Women Prisoners I*, 877 F. Supp. at 651 (noting “population pressures” led the District to house women prisoners in the Annex in Lorton, Virginia).

21. See *Women Prisoners I*, 877 F. Supp. at 634-43 (listing numerous allegations of sexual assault, harassment, and abuse in the D.C. facilities); accord *Daskalea v. District of Columbia*, 227 F.3d 433, 436 (D.C. Cir. 2000) (determining that the evidence “established the routine sexual abuse of women inmates by prison guards at the District of Columbia Jail”); *Newby v. District of Columbia*, 59 F. Supp. 2d 35, 37 (D.D.C. 1999) (describing, as “horrendous,” several evenings of forced female inmate stripping at the D.C. Jail).

22. Cf. *Newby*, 59 F. Supp. 2d at 37 (commenting that the District has failed to institute monitoring procedures in the D.C. Jail despite past lawsuits and court orders).

23. See Bruce D. Brown, *Confronting the Cruel and the Unusual, Daily Troubled Prisons’ Troubleshooter*, LEGAL TIMES, Mar. 11, 1996, at 1 (“[A] severe food shortage at the Lorton complex . . . left inmates underfed and angry.”).

24. See *id.*

25. See *Inmates of Occoquan*, 844 F.2d at 829 (restating findings of the District Court that Occoquan was housing “excessive numbers of people in limited spaces”). The court indicated further that several warehouses on-site had been “hastily converted” to dormitories to house excess prisoners. *Id.* at 830. Justice Greene also noted in a dissent that the “original capacity of the institution was 1,366, but by March of 1988 the inmate population had already risen by almost 700 to 2,051.” *Id.* at 844 (Greene, J., dissenting). Cf. News release, U.S. Dep’t of Justice, Bureau of Statistics, Nation’s Prison and Jail Population Reaches 1,860,520, Could Reach Two Million by Late 2001 [hereinafter *Nation’s Prison and Jail Population*] (Apr. 2000) (on file with author) (“As of December 31, 1998 (the latest data available) state prisons were operating at 13 to 22 percent over capacity, while federal prisons were 27 percent over capacity.”).

26. See Smith, *Revitalization Act*, *supra* note 2, at 86.

There has been, for the past several years, an extreme shortage of correctional officers at the D.C. Jail. These shortages were identified as early as 1994, and have continued [through] today. Over this time period, the D.C. Jail has been operating with more than 100 guard vacancies. As many as fifty additional guards are not available for duty on any given day because of leave. When leave is taken into account more than 150 out of 612 positions are unfilled or are filled by overtime.

Id. at 95 (internal citations omitted).

The District's correctional facilities have been described as "violat[ing] contemporary standards of decency,"²⁷ and as being "inhumane."²⁸

As a result of the offensive conditions in the D.C. prisons, the District has been subject to numerous injunctions by local courts over the years.²⁹ These injunctions have attempted to address the inadequate living conditions in the D.C. prisons,³⁰ but have failed to solve any of the ongoing problems.³¹

Both men and women inmates endure the horrible living conditions in the District of Columbia.³² Female inmates in the District, however, are faced with the additional challenge of avoiding sexual assault by prison guards.³³

B. Conditions for Female Inmates

Female inmates³⁴ in the D.C. prison system are housed in several

27. *Women Prisoners I*, 877 F. Supp. 634, 670 (D.D.C. 1994), *rev'd in part and aff'd in part*, 93 F.3d 910 (D.C. Cir. 1996)

28. *Id.* at 671.

29. See *Campbell v. McGruder*, 580 F.2d 521, 551-52 (D.C. Cir. 1978) (agreeing with parts of the district court's order requiring the Department of Corrections ("D.O.C.") to provide larger spaces for pretrial detainees, to limit the number of inmates housed in the D.C. Jail, and to modify other administrative procedures of the D.O.C.); see also *Women Prisoners II*, 93 F.3d 910, 932 (D.C. Cir. 1996) (affirming in part and vacating in part a 138-paragraph order by the district court instructing the D.O.C. to make numerous modifications to its operation of the D.C. prisons); Lezin, *supra* note 5, at 211 n.6 (noting that in 1996 the Maximum Security facility at Lorton had a "court-ordered population cap of 645 prisoners").

30. See discussion *supra* note 29.

31. See *Newby v. District of Columbia*, 59 F. Supp. 2d 35, 37 (D.D.C. 1999) (noting the District's failure to conform to both federal and District of Columbia law and its failure to protect female inmates); Jonathan M. Smith, *Reform at the End of a Cattle Prod: Bringing Suit to Clean Up D.C. Prisons*, LEGAL TIMES, Jan. 16, 1995, at 35 [hereinafter Smith, *Reform*].

Even those promises that are contained in consent decrees and backed by court orders are routinely ignored by D.C. Officials. In virtually every prison case in which an order has been entered requiring systemic reform, the D.C. Department of Corrections has failed to comply with the terms of the order.

Id.

32. See Lezin, *supra* note 5, at 167-72 (describing the conditions in the facility at Lorton, Virginia).

33. See *Women Prisoners I*, 877 F. Supp. at 664 (highlighting instances of severe sexual abuse of female inmates by correctional officers); *Newby*, 59 F. Supp. 2d at 35 (discussing the "strip-shows and exotic dancing" that female inmates were forced to participate in during the summer of 1995). *Accord Daskalea v. District of Columbia*, 227 F.3d 433, 439, 450 (D.C. Cir. 2000) (ruling in favor of an inmate who was forced to participate in the same "strip-show" as the plaintiff in *Newby*).

34. The U.S. Department of Justice Bureau of Statistics maintains that women represent six and one half percent of all state and federal prisoners. See *Nation's Prison and Jail Population*, *supra* note 25. The Justice Department estimates that approximately 150,000 women were behind bars in June of 1999, 81,100 of those in

areas within the correctional facilities operated by the District.³⁵ The overwhelming majority of female offenders are housed in medium security units³⁶ and are serving time for non-violent offenses;³⁷ moreover, almost one-half of the female prisoner's in the District are serving time for drug-related offenses.³⁸ These women are generally serving less than twenty-four months and are housed as part of the general female population.³⁹ Although the conditions of confinement are horrible for female inmates in the District,⁴⁰ none of the poor conditions that women suffer compare to living each day in fear of sexual assault by correctional officers.⁴¹ In 1993, in an attempt to change these conditions, a group of female prisoners in D.C. correctional facilities filed a class action lawsuit against the District of

prison and 68,100 in local jails. *See id.*

35. *See Women Prisoners I*, 877 F. Supp. at 639. Female inmates at Lorton were housed in a collection of minimum-security dormitories called the Annex. *See id.* In 1994, the Annex housed "174 women prisoners who [were] either held for trial, awaiting sentence or within 24 months of release." *Id.* at 638. The C.T.F. in the District of Columbia housed approximately 271 female inmates out of the 800 beds available in 1994. *See id.* at 639. These female inmates are medium security prisoners and are in the general population at C.T.F. *See id.* The D.C. Jail ranges from medium to maximum security and housed approximately 168 female prisoners in 1994 "who [were] either serving sentences of less than one year or who [were] awaiting trial or sentencing." *See Women Prisoners I*, 877 F. Supp. at 639; *see also* 1999 GAO REP., *Women in Prison: Sexual Misconduct by Correctional Staff 1* [hereinafter *Women in Prison*] ("[F]emale offenders held by the District of Columbia . . . totaled about 320 at year-end 1998.").

36. *See supra* text accompanying note 35 (citing the number of female prisoners in D.C. facilities).

37. *See Smith, Revitalization Act, supra* note 2, at 91 ("Only 15% of women [in the District] are incarcerated for violent crime compared to 50.3% of the total prison population.").

38. *See id.* ("46.6% of all District women prisoners are incarcerated for drug sale.").

39. *See Women Prisoners I*, 877 F. Supp. at 639 (noting that women in the Lorton complex are within twenty-four months of release and women at the D.C. Jail are within one year of release).

40. *See id.* at 648-53 (describing the poor conditions in the female housing units). Among other things, the court cited: inability to generate sufficient heat, defective toilets, problems with rodents, inadequate food preparation, poor air quality due to lack of mechanical ventilation, cockroaches and lice, and the carrying of clean and dirty laundry in the same cart. *See id.* *But see* Rita J. Simon, *Women in Prison, in FEMALE CRIMINALITY: THE STATE OF THE ART* 375, 392 (Concetta C. Culliver ed., 1993) (arguing women's prisons generally have better conditions than men's prisons).

Women usually have more privacy than men; they tend to have single rooms; they may wear street clothes rather than prison uniforms; they may decorate their rooms with bedspreads and curtains provided by the prison. Toilet and shower facilities also reflect a greater concern for women's privacy.

Id.

41. *See Women Prisoners I*, 877 F. Supp. at 665 ("The evidence revealed a level of sexual harassment which is so malicious that it violates contemporary standards of decency.").

Columbia in federal district court,⁴² seeking injunctive relief for a number of inhumane conditions in the D.C. prisons,⁴³ including sexual harassment and abuse by prison staff.⁴⁴

In *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia* ("Women Prisoners I"),⁴⁵ the class of female inmates complained of sexual assault, rape, poor medical facilities, poor housing conditions, and inadequate programs in all three D.C. facilities.⁴⁶ After discussing the conditions that existed in the three D.C. facilities, and finding numerous Eighth Amendment violations,⁴⁷ the district court issued a lengthy order articulating the steps to be taken by the District to improve conditions.⁴⁸ This court order, however, was largely vacated by the Court of Appeals for the D.C. Circuit in 1996.⁴⁹

In 1999, other female inmates brought suit against the District of Columbia for sexual harassment.⁵⁰ In *Newby v. District of Columbia*⁵¹

42. See *id.* at 638 (explaining that the class was certified to include all female inmates in the District as of October, 1993).

43. See *id.* at 638. The class in *Women Prisoners I* sought injunctive relief on the grounds that the conditions in the District's prisons violated their constitutional rights. See *id.* Aside from sexual harassment, the women cited poor obstetrical and gynecological care, poor housing conditions, inadequate fire safety, and unequal educational, recreational, religious and work programs, as grounds for injunctive relief. See *id.*

44. See *Women Prisoners I*, 877 F. Supp. at 639 ("The level of harassment involv[ed] forceful sexual activity, unsolicited sexual touching, exposure of body parts or genitals and sexual comments.").

45. 877 F. Supp. 634 (D.D.C. 1994), *rev'd in part and aff'd in part*, 93 F.3d 910 (D.C. Cir. 1996).

46. See *id.* at 639. The women argued the need for relief on the following grounds: 1) . . . sexual harassment in violation of the Fifth Amendment and the Eighth Amendment; 2) . . . unequal opportunities to participate in prison programs in comparison to similarly situated men at other correctional facilities in violation of Title IX and the Fifth Amendment; 3) . . . inadequate obstetrical and gynecological care . . . ; and 4) the general conditions of confinement and fire hazards . . . violate the Eighth Amendment.

Id.

47. See *id.* at 665. The district court found that the female inmates had demonstrated "a level of sexual harassment which is so malicious that it violates contemporary standards of decency." *Id.* The court also found Eighth Amendment violations regarding the treatment of pregnant women, fire safety, and the general living conditions in the three facilities. See *Women Prisoners I*, 877 F. Supp. at 665-74.

48. The court-ordered injunction consisted of a 138-paragraph decision outlining the actions that the District needed to take to remedy the Eighth Amendment violations. See *id.* at 679-90.

49. See *Women Prisoners II*, 93 F.3d 910, 932 (D.C. Cir. 1996) (vacating all or parts of eighty paragraphs of the 138-paragraph order).

50. See, e.g., *Newby v. District of Columbia*, 59 F. Supp. 2d 35 (D.D.C. 1999); *Daskalea v. District of Columbia*, 227 F.3d 433 (D.C. Cir. 2000).

51. 59 F. Supp. 2d 35 (D.D.C. 1999).

and *Daskalea v. District of Columbia*,⁵² the female plaintiffs exposed episodes of forced nude dancing and a pattern of sexual assaults by correctional officers in the D.C. Jail.⁵³ Correctional officers forced both Newby and Daskalea to perform lewd acts and dance nude in front of their cellblock population in the D.C. Jail on several occasions in July 1995.⁵⁴ The courts in both cases noted the outrageous conduct of the officers involved,⁵⁵ and the circuit court in *Daskalea* held that there were blatant Eighth Amendment violations on the part of the District.⁵⁶

All three of these lawsuits alleged misconduct on the part of prison guards ranging from forced exotic dancing⁵⁷ and unsolicited fondling,⁵⁸ to rape⁵⁹ and forced sodomy.⁶⁰ The lawsuits also implicated the District⁶¹ in a pattern of inadequate responses to

52. 227 F.3d 433 (D.C. Cir. 2000).

53. See *Newby*, 59 F. Supp. 2d at 35-36 (stating that male guards in the D.C. Jail forced female inmates to perform strip shows and sexual acts for them); *Daskalea*, 227 F.3d at 437 (describing the dancing that occurred in front of over one hundred "chanting, jeering guards and inmates").

54. See *Daskalea*, 227 F.3d at 442-43 (relating there were "multiple nude dancing incidents" and fourteen guards were eventually implicated in the sexual misconduct).

55. See *Newby*, 59 F. Supp. 2d at 36-37 (noting that no supervisory steps were taken to prevent sexual abuse of women after the *Women Prisoners I* decision was issued in 1994); *Daskalea*, 227 F.3d at 438 (describing an acceptance of sexual encounters between correctional staff and inmates at the D.C. Jail).

56. See *Daskalea*, 227 F.3d at 441 ("We conclude that the jury had more than sufficient evidence upon which to base its finding of deliberate indifference.").

57. See *Newby*, 59 F. Supp. 2d at 35-36 ("The female prisoners . . . wore only g-strings during the dancing and at least on one occasion danced in the nude. On each of the three dancing occasions the three prison guards on duty directed that the dancing take place.").

58. See *Women Prisoners I*, 877 F. Supp. at 640 ("[A] correctional officer at C.T.F. grabbed Jane Doe W's buttocks and vagina while he escorted her from the medical unit . . . [while] different officers fondled women prisoners' breasts, legs, arms and buttocks.") (internal citations omitted), *rev'd in part and aff'd in part*, 93 F.3d 910 (D.C. Cir. 1996).

59. See *id.* at 639 ("[A] correctional officer at the Jail, sexually assaulted Jane Doe Q while she was a patient in the infirmary. The officer fondled her breasts and vagina, tried to force her to perform oral sex and then raped her.") (internal citations omitted).

60. See *id.* (commenting the rape and forced sodomy of female inmates).

61. The District of Columbia is not alone in its failure to eradicate sexual abuse by correctional officers. See Ashley E. Day, *Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. § 1983*, 38 SANTA CLARA L. REV. 555, 556 (1998) ("As recently as 1996, three female inmates brought suit against federal prison authorities, alleging that some of the male guards were 'selling' female inmates to male inmates . . ."); Anny Kuo, *Plan to Ban Male Guards Sparks Debate*, TIMES UNION (Albany, New York), Jan. 31, 2000, at B2 (discussing responses to the recent arrest of guards for sexual misconduct); see also News Release, U.S. Dep't of Justice, *Justice Department Sues Arizona Over Conditions at Women's Prisons* (1997) (describing lawsuits filed against the states of Arizona and Michigan seeking

female complaints.⁶² Despite the lengthy court order⁶³ issued by the district court in *Women Prisoners I*,⁶⁴ however, the District had failed to curb sexual misconduct against female inmates by 1995.⁶⁵ Even by the time *Newby* reached the district court in 1999, the court noted that the District still had failed to improve monitoring conditions for female inmates.⁶⁶

When the incidents of sexual abuse and harassment of female inmates are brought forward, it may be difficult to believe that women incarcerated in the District⁶⁷ face these conditions of confinement everyday. Yet, however difficult it may be to believe, the

to protect female inmates from "rapes, sexual assaults, and other improper sexual contact by staff").

62. See *Women Prisoners I*, 877 F. Supp. at 640 ("[The] various policies and procedures [regarding sexual harassment] are of little value because the Defendants address the problem of sexual harassment of women prisoners with no specific staff training, inconsistent reporting practices, cursory investigations and timid sanctions.") (citations omitted); see also *Newby*, 59 F. Supp. 2d at 37 (noting that the "sexual dancing" took place in front of an entire cell block in the D.C. Jail, but the incident only surfaced when the victims themselves came forward); *Women Prisoners II*, 93 F.3d at 931 (discussing portions of the court order imposed by the district court and indicating, "[it] does not impose any new burdens on [the District]; it simply requires [the District] to observe [its] own policies and procedures in the running of [its] prisons").

63. See *Women Prisoners II*, 93 F.3d at 933 app. A (attaching the original court order, which was 138 paragraphs long).

64. The U.S. Court of Appeals for the District of Columbia Circuit vacated all or parts of 80 of the 138-paragraph order. See *Women Prisoners II*, 93 F.3d at 932.

65. See *Newby v. District of Columbia*, 59 F. Supp. 2d 35, 36 (D.D.C. 1999) (noting that, despite the fact that the district court opinion was handed down seven months before Ms. Newby's incident, the District had done little to ensure that guards were not taking advantage of female inmates); see also Brown, *supra* note 23, at 1 (discussing a July, 1995 report on inadequate medical and mental health services in the D.C. Jail).

66. See *Newby*, 59 F. Supp. 2d at 37.

Even to this date the District of Columbia has taken no steps to monitor what occurs in the jail, either by the placement of surveillance cameras or directing supervisory officials to be present with prison guards during their daily prison rounds. . . . With the City's past history of sexual misconduct at the jail, it is incumbent upon the city to find some way to monitor the common areas at the jail.

Id.

67. For additional information about sexual abuse by male prison guards in prisons around the United States, other than the District of Columbia, see Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 196 (1999) for a discussion of sexual abuse of female inmates in prisons around America including New Mexico, South Dakota, Delaware, and Texas. See also *The Role of the Department of Justice in Implementing the Prison Reform Act, as Contained in Public Law 104-134 (Omnibus Consolidated Rescissions and Appropriations Act of 1996): Before the Senate Comm. on the Judiciary*, 104th Cong. 63-64 (1996) (statement of Mark I. Soler, President, Youth Law Center) [hereinafter *Prisoner's Rights Legislation*] (discussing sexual relations between prisoners and guards in the Georgia Women's Correctional Institution).

truth remains that despite the many state and federal laws that exist to protect prisoners,⁶⁸ female inmates in the District continue to be sexually brutalized.⁶⁹

II. FEDERAL REMEDIES FOR FEMALE INMATES: HIGH STANDARDS, DISAPPOINTING RESULTS

*[W]hen the State takes a person into its custody and holds [her] there against [her] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for [her] safety and general well-being.*⁷⁰

A. *The Eighth Amendment of the Constitution*

The Eighth Amendment of the U.S. Constitution guarantees that the government shall not inflict “cruel and unusual punishments” on its citizens.⁷¹ Inmates generally can file for civil redress for violations of the Eighth Amendment through 42 U.S.C. § 1983.⁷² This statute provides inmates with a civil remedy for violations of their constitutional rights by state actors, mainly correctional officials.⁷³ However, in order to obtain redress under section 1983, inmates must meet all of the requirements the Supreme Court has outlined for prisoners claiming Eighth Amendment violations.⁷⁴ These

68. See discussion *infra* Parts II and III (analyzing remedies available to sexually abused inmates through the Eighth Amendment of the Constitution and 42 U.S.C. § 1983 (1994), and the local regulations of the District of Columbia and the Department of Corrections).

69. See Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law – A Case Study of Women in the United States Prisons*, 13 HARV. HUM. RTS. J. 71, 74 (2000) (“Within prison populations, increasing numbers of women’s lives are reduced to half-lives under the tortuous effects of sexual abuse by corrections officials.”); see also Robertson, *supra* note 7, at 51 n.3 (“Sexual harassment of female inmates by male prison staff has a long, documented history in American penology.”).

70. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

71. U.S. CONST. amend. VIII.

72. See Day, *supra* note 61, at 557 (“The main legal channel for female prisoners who file a cause of action alleging abuse by male prison guards is under 42 U.S.C. § 1983 . . .”).

73. 42 U.S.C. § 1983 (1994) provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

74. See Day, *supra* note 61, at 585 (noting that obtaining injunctive relief for sexually abused female inmates is still very difficult because of the requirements of Eighth Amendment claims).

requirements are numerous and in most cases difficult for inmates to meet.⁷⁵

The Supreme Court has interpreted the Eighth Amendment to require that a punishment be *both* cruel⁷⁶ and unusual⁷⁷ to qualify as an Eighth Amendment violation.⁷⁸ For inmates this means that a punishment or condition of confinement that is cruel, but not particularly unusual, may not meet the standard required for relief under the Eighth Amendment.⁷⁹ Generally, this prong of Eighth Amendment scrutiny protects prison officials from suit for conditions that result from uncontrollable circumstances — for example, equipment malfunctions and extreme weather conditions.⁸⁰

Additionally, the Supreme Court has derived a number of preconditions that must be met before a condition of confinement,⁸¹ or an act by a prison official, can be found to violate the Eighth Amendment.⁸² In 1976, the Supreme Court held that a prison official

75. See *id.* at 557 (arguing that the additional defense of “qualified immunity” makes 42 U.S.C. § 1983 claims even more difficult for female inmates to win). Although, qualified immunity is indeed a significant obstacle for female inmates, its breadth is beyond the scope of this Comment. For additional critiques of qualified immunity and its application toward female inmates, see Day, *supra* note 61, at 557.

76. See *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (“[A] disproportionate punishment can perhaps always be considered ‘cruel,’ but it will not always be . . . ‘unusual.’”).

77. See *id.* at 976 (indicating that the word “unusual” meant at the time of the writing of the Constitution, and still means today, something which does not “occu[r] in ordinary practice”) (citing WEBSTER’S AMERICAN DICTIONARY (1828)).

78. See *Harmelin*, 501 U.S. at 976 (“According to its terms, then, by forbidding ‘cruel and unusual punishments,’ the Clause disables the Legislature from authorizing particular forms or ‘modes’ of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.”) (citations omitted) (emphasis in original); see also Greer, *supra* note 69, at 96 (commenting that *Harmelin* establishes a two-prong test that requires punishments to be both cruel and unusual to fall under the protection of the Eighth Amendment).

79. The Court has noted a condition of confinement that is not purposely inflicted on a prisoner, but may be particularly cruel and lead to harm, still may not qualify for Eighth Amendment redress. See generally *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991) (discussing the confines of cruel and unusual according to the Eighth Amendment).

80. See *Wilson*, 501 U.S. at 300 (noting that if the boiler breaks down in a very cold winter a prisoner has no basis for a claim, even if he suffers “significant harm”).

81. The Supreme Court has recognized that the conditions of confinement for prisoners, beyond those directly inflicted by prison officials, can also qualify as cruel and unusual punishment under the Eighth Amendment. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (finding that a prison official must know and disregard “an excessive risk to inmate health” to be liable for an Eighth Amendment violation); *Rhodes v. Chapman*, 452 U.S. 337, 350 (1981) (holding that the “double-celling” of inmates was not a condition of confinement that violated the Eighth Amendment); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (determining that inadequate medical care qualifies as a violation of the Eighth Amendment if prison officials act with “deliberate indifference” towards an inmate’s needs).

82. See *Farmer*, 511 U.S. at 842 (discussing the actions that a prison official must

must demonstrate “‘deliberate indifference’ to a substantial risk of serious harm to an inmate” in order to violate the Eighth Amendment.⁸³ Since then, the “deliberate indifference test” has been the foundation for Eighth Amendment jurisprudence, and has been reinterpreted and amended by the Court several times since its inception.⁸⁴

For example, in 1991, in *Wilson v. Seiter*,⁸⁵ the Supreme Court held that an inmate claiming an Eighth Amendment violation must demonstrate that the offending officer was acting with the intent to inflict cruel and unusual punishment upon the inmate.⁸⁶ Previously, the Court had also held that the official’s act must be one which “deprive[s] inmates of the minimal civilized measure of life’s necessities” to be an Eighth Amendment violation.⁸⁷ These and other holdings added to the deliberate indifference test and made its interpretation confusing for the circuit courts throughout the 1980s and early 1990s.⁸⁸

In addition, the standards set by the Supreme Court have been highly subjective and difficult for the complaining inmate to meet,⁸⁹ even when the prisoner shows clear signs of physical injury.⁹⁰ The subjective “intent” prong of the *Wilson* decision requires that the state of mind of the alleged offending prison officer be investigated

take in order to be liable); *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (holding “significant injury” is not required for a prisoner to recover for an Eighth Amendment violation); *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (clarifying that Eighth Amendment cases “mandate inquiry into a prison official’s state of mind”).

83. *Farmer*, 511 U.S. at 828 (referring to the deliberate indifference test articulated in *Estelle v. Gamble*, 429 U.S. 97 (1976)) (citations omitted).

84. *Cf. id.* at 835-36 (discussing the many tests articulated under the Eighth Amendment and relating past jurisprudence regarding “deliberate indifference”).

⁸⁵ 501 U.S. 294 (1991).

86. *See Wilson*, 501 U.S. at 300 (“If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [as an Eighth Amendment violation].”) (emphasis in original).

87. *Rhodes*, 452 U.S. at 347.

88. *See Farmer*, 511 U.S. at 836 (noting that circuit courts have attempted to equate deliberate indifference with recklessness, but have had difficulty determining what level of intent the test requires).

89. *Compare McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991) (“A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety.”), *with Robertson*, *supra* note 7, at 39 (explaining prisoners often do not come forward about sexual misconduct).

90. *See Whitley v. Albers*, 475 U.S. 312, 326 (1986) (holding an inmate shot during a prison uprising did not meet the Eighth Amendment standard because the guard applied the force “in a good faith effort” to quell prisoners).

before an Eighth Amendment violation can be found.⁹¹ This inquiry leaves administrative investigators and courts few objective signs to look for when investigating an Eighth Amendment violation by a prison guard.⁹²

The difficult standards set by the Court can be explained by its reluctance to involve itself in the operation of correctional facilities⁹³ or to scrutinize the actions of prison officials.⁹⁴ Although the Court has repeatedly attempted to articulate a bright line test for Eighth Amendment claims,⁹⁵ it has only continued to create subjective guidelines in an attempt to remove itself from the process of prison administration.⁹⁶ An example of the Court's reluctance to become involved in correctional operations is its most recent attempt to outline a strict definition for the deliberate indifference test in *Farmer v. Brennan*.⁹⁷

1. *The Farmer v. Brennan Standard*

In 1994 the Supreme Court established a new test for cruel and

91. See *Wilson*, 501 U.S. at 299.

92. See David M. Siegal, *Rape in Prison and AIDS*, 44 STAN. L. REV. 1541, 1556 (1992) (noting that the *Wilson* decision may raise an "insurmountable barrier to some claims which allege conduct that should be deemed 'cruel and unusual.'").

93. See *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (opining that the judiciary should be cautious in its approach to prison litigation).

This Court must proceed cautiously in making an Eighth Amendment judgment In assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries "spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility."

Id. (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

94. *Cf. Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (stating that inquiries into measures taken by prison officials must determine whether the "force was applied in a good faith effort to maintain or restore discipline").

95. See *Hudson*, 503 U.S. at 9 (rejecting the "significant injury" test for Eighth Amendment claims, but noting that *de minimus* injuries would not suffice to meet the Eighth Amendment standards); *Wilson*, 501 U.S. at 299 (mandating an inquiry into the correctional officer's state of mind to determine whether the Eighth Amendment has been violated); *Rhodes*, 452 U.S. at 347 (discussing that conditions must violate "contemporary standards of decency" to be cruel and unusual); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that applying "deliberate indifference" to medical needs is a violation of the Eighth Amendment).

96. See *Rhodes*, 452 U.S. at 352 (indicating the judiciary "cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system").

97. 511 U.S. 825, 837 (1994) (defining "deliberate indifference" with a subjective test, which analyzes prison officials' knowledge of excessive risk to an inmate's health or safety relative to the conduct of the accused official).

unusual punishment inflicted by correctional officers.⁹⁸ *Farmer v. Brennan* involved a transsexual male inmate⁹⁹ who had undergone hormone treatments to become female.¹⁰⁰ Although guards knew of Farmer's characteristics, they placed him in the general population¹⁰¹ where, within two weeks, he was raped and beaten by other inmates.¹⁰²

After reviewing the large amount of precedent in the area of the Eighth Amendment,¹⁰³ the Court outlined a new standard¹⁰⁴ to be used when determining the liability of prison officials under the "deliberate indifference" test.¹⁰⁵ The *Farmer* Court held that a prison official "cannot be found liable unless the official knows of and disregards an excessive risk to inmate health or safety."¹⁰⁶ The Court further elaborated that this subjective test could be met if the prison official "failed to act despite his knowledge of a substantial risk of serious harm [to the inmate]."¹⁰⁷ Although this test may be seen as an attempt to clarify the requirements of an Eighth Amendment claim for the circuit courts, in the area of prison rape and sexual abuse, the *Farmer* test is often difficult to meet and remains a highly subjective analysis of an inmate's injuries.¹⁰⁸

98. See *id.* at 835 (commenting that until *Farmer*, the Supreme Court had never explained the meaning of "deliberate indifference" directly).

99. See *id.* at 828 (noting that Farmer had been diagnosed as a transsexual by the Bureau of Prisons).

100. See *id.* at 829 ("[P]etitioner[,] who is biologically male, wore women's clothing . . . , underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful 'black market' testicle-removal surgery.") (internal citation omitted).

101. See *id.* at 831 (discussing the allegation that "despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that [Farmer], as a transsexual who 'projects feminine characteristics,' would be particularly vulnerable to sexual attack," correctional officers placed Farmer in the general population of male offenders).

102. See *Farmer*, 511 U.S. at 830 (discussing the fact that Farmer was attacked by an inmate in his own cell).

103. See *id.* at 834-38 (explaining that the Court has held in the past that the "deprivation alleged must be, objectively, 'sufficiently serious,' . . . must result in the denial of 'the minimal civilized' measure of life's necessities' [and] pos[e] a substantial risk of serious harm") (internal citations omitted).

104. See *id.* at 842 (noting that the Court is adopting a subjective test that inquires into a prison official's state of mind when acting towards an inmate).

105. See *id.* at 835-36 (finding that the "deliberate indifference" test, first introduced in *Estelle v. Gamble*, 429 U.S. 97 (1976), had been treated differently by the circuit courts). The circuit courts, according to the Court, had never answered "the pending question about the level of culpability deliberate indifference entails." *Id.*

106. *Id.* at 837.

107. *Farmer*, 511 U.S. at 842.

108. See Bell et al., *supra* note 67, at 212 (noting the difficulty of proving that officials knew of the risk of harm to the inmate and then failed to act to prevent that harm).

2. *Applying the Farmer Standard to Sexual Abuse*

The test outlined in *Farmer* still requires that there be a “substantial risk of serious harm” to an inmate in order for an Eighth Amendment violation to be proven.¹⁰⁹ For female inmates suffering at the hands of guards, it is often difficult to demonstrate that officials knew about the risk of serious harm prior to the abuse.¹¹⁰ For example, it has been argued that one incident of rape or sexual abuse by a correctional officer does not meet the knowledge requirement of *Farmer*.¹¹¹

Given the difficulty in imputing knowledge of a sexually abusive environment to prison officials, federal courts have narrowly construed the Supreme Court’s ruling in *Farmer*.¹¹² An example of such narrow construction can be found in *Carrigan v. State*,¹¹³ where the rape of a female inmate by a guard¹¹⁴ did not meet the *Farmer* requirements, even though an official was aware of prior sexual harassment in the prison.¹¹⁵ The district court determined that there could be no deliberate indifference on the part of prison officials in *Carrigan* because this was the “first rape” that the plaintiff had brought to the attention of officials.¹¹⁶

Similarly, in *Barney v. Pulsipher*,¹¹⁷ two female inmates being held for forty-eight hours in a county jail were unable to succeed with an Eighth Amendment claim under the *Farmer* test for the sexual assaults they suffered at the hands of their jailer.¹¹⁸ In *Barney*, the Tenth

109. See *Farmer*, 511 U.S. at 837 (“The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”).

110. See Bell et al., *supra* note 67, at 212 (“For victims of rape or sexual misconduct by prison guards, the difficulty lies in proving that prison administrators were aware of the risk and ignored it.”).

111. See *id.* at 213 (noting that courts have refused to hold prison officials liable for the “first rape” because there could be no “deliberate indifference” to an act that they had no reason to know would occur) (citing *Carrigan v. State*, 957 F. Supp. 1376, 1382 (D. Del. 1997)).

112. See Day, *supra* note 61, at 577-80 (commenting on the difficulties female inmates have had in proving the prongs of the *Farmer* test to the federal courts).

113. 957 F. Supp. 1376 (D. Del. 1997).

114. See *id.* at 1380 (relating that the female prisoner was raped in her cell by an officer who then “tossed the condom on the bed, told [her] to dispose of it and returned to his duties”).

115. See *id.* at 1382 (holding evidence of only a few prior incidents of misconduct were insufficient to establish deliberate indifference under *Farmer*).

116. See *id.*

117. 143 F.3d 1299 (10th Cir. 1998).

118. See *id.* at 1304 (stating the jailer threatened to hold the inmate for longer than her forty-eight hour sentence if she did not perform oral sex on him).

Circuit ruled that there was no deliberate indifference on the part of jail officials because they had no notice of prior sexual misconduct on the part of the jailer involved in the assaults.¹¹⁹ The court made this determination even though the jail violated its own policy requiring two jailers to be on duty at all times when female inmates were removed from their cells.¹²⁰ It was the jail's failure to adhere to this policy, which allowed the jailer in *Barney* to work alone and to have the opportunity to sexually assault the female victims.¹²¹

These cases demonstrate that some federal courts have interpreted the *Farmer* test to require that correctional officials have prior knowledge of the *specific* harm to the inmate and the individual officer's prior conduct before allowing an Eighth Amendment claim.¹²² Both *Carrigan* and *Barney* indicate that it is not enough for officials to put inmates in situations involving possible sexual assault; there must be definite evidence that there was a risk of serious harm to prove deliberate indifference.¹²³ For female inmates victimized by sexual assaults, it is difficult to "fall within the narrow range of circumstances justifying a finding of deliberate indifference."¹²⁴

3. Meeting the Farmer Standard in the District of Columbia

The District of Columbia cannot make the argument that it is unaware of the sexual assaults that occur inside its prisons. In 1993, *Women Prisoners I* was filed in the U.S. District Court for the District of Columbia alleging severe sexual abuse in all three of the District's correctional facilities.¹²⁵ The filing of this case, and the allegations of repeated sexual misconduct¹²⁶ alone, should have put the District on

119. See *id.* at 1311 (holding that without any prior "evidence of sexual misconduct" on the part of the jailer involved, jail officials could not act with deliberate indifference).

120. See *id.* (noting the existence of a policy requiring two guards to be with female inmates when they are out of their cells, does not establish that there was a risk of sexual assault at the jail).

121. *Contra id.* (stating the mere existence of a policy requiring two jailers to be present when female inmates were removed from their cells "does not establish an obvious risk that females left alone with male guards are likely to be assaulted").

122. See *Barney*, 143 F.3d at 1311.

123. An example of this can be found in *Barney*, when the facility openly operated without the required amount of staff, and was doing so when the sexual assault occurred. See *Barney*, 143 F.3d at 1304 (citing "understaffing and budgetary constraints" as the reason the required number of jailers may not be on duty at any given time).

124. See *id.* at 1308.

125. See generally *Women Prisoners I*, 877 F. Supp. 634 (D.D.C. 1994), *aff'd in part and rev'd in part*, 93 F.3d 910 (D.C. Cir. 1996).

126. See discussion *supra* Part I (describing existing conditions at the D.C. Jail and other correctional facilities that house women in the District of Columbia).

notice of the conditions of sexual abuse in its prisons.¹²⁷ However, in 1999 and August 2000, the federal district¹²⁸ and appellate¹²⁹ courts in the District noted that the District had done little to improve conditions.¹³⁰

In August 2000, the circuit court in *Daskalea v. District of Columbia* discussed in detail the acts of sexual harassment that were occurring in the D.C. Jail.¹³¹ The trial testimony discussed by the court revealed “a culture of routine acceptance of sexual encounters between staff and inmates.”¹³² The court concluded that the “open and notorious” manner in which the female inmates were harassed¹³³ and the “repeated sexual abuse and harassment of women prisoners by D.C. correctional officers” was more than enough to find deliberate indifference on the part of the District.¹³⁴

The holding of *Daskalea* is a victory for female inmates in D.C. prisons, but it is not the end of the war.¹³⁵ Given that *Daskalea* was forced to participate in nude dancing with other female inmates in

127. See *Daskalea v. District of Columbia*, 227 F.3d 433, 437 (D.C. Cir. 2000).

This is not the first time the federal courts have reviewed charges of sexual abuse by D.C. correctional officers against female inmates. In 1993, a class action was filed on behalf of all women prisoners under the care of the District of Columbia correctional system The court . . . found that the inmates had filed complaints and written letters to prison administrators to no avail, and that the harassment was obvious and widely known.

Id.

128. See *Newby v. District of Columbia*, 59 F. Supp. 2d 35, 37 (D.D.C. 1999) (noting that even as of July 1995, the District had not begun to monitor the activities at the D.C. Jail).

129. See *Daskalea*, 227 F.3d at 442 (citing testimony at trial by the Director of D.C. Department of Corrections indicating she was “unaware of the multiple nude dancing incidents . . . and she took no action to protect [inmates]”).

130. See *id.* (concluding that there was direct evidence to show the District was “indifferent to the plight of women in Jail”).

131. *Id.* at 438-39.

One cell, known as Cell 73, was kept empty and used for sex between prisoners and guards. . . . Officer Walker, the head guard on the evening shift, organized a series of evenings during which female inmates stripped and danced provocatively to loud music. Both female and male guards were present and, according to the testimony at trial, some guards assaulted inmates who refused to dance.

Id.

132. *Id.* at 438.

133. *Id.* at 442.

134. See *Daskalea*, 227 F.3d at 441 (“Given this history, the District and its policymakers were on notice that D.C. guards lacked basic respect for the rights of female inmates, and that absent substantial intervention, the pattern of unconstitutional behavior would persist.”).

135. See *Women in Prison*, *supra* note 35, at 2 (stating there were 111 reported alleged misconduct incidents in the D.C. Department of Corrections from December 1995 through June 1998).

front of an entire cellblock,¹³⁶ it was almost impossible for the circuit court to affirm anything other than deliberate indifference. *Daskalea* involved a series of stark public abuses,¹³⁷ however, there are many female inmates who are raped or sexually abused by guards outside the view of an entire cellblock.¹³⁸ The Eighth Amendment and the *Farmer* test seem to do little to protect these women¹³⁹ and given the acts that took place in *Daskalea* and *Newby*, the actions of the courts have done little to deter sexual abuse in the D.C. Prisons.¹⁴⁰

B. Prison Litigation Reform Act: The Physical Injury Requirement

In 1996 Congress passed the Prison Litigation Reform Act ("PLRA"),¹⁴¹ in an attempt to respond to the explosion of prison litigation in the last few decades.¹⁴² Among the changes to prison litigation made by the PLRA, section 803(d) provides that "no Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."¹⁴³

For female inmates who are sexually harassed or even raped, it is already difficult to come forward and demonstrate that they have

136. See *Daskalea*, 227 F.3d at 439 (pointing out that by the time that *Daskalea* was dragged to the stripping area from her cell by other inmates, "all of the inmates, numerous female guards, and several male guards and maintenance workers were in attendance").

137. See *id.* at 436-37. The acts in *Daskalea* took place in a cellblock with over one hundred inmates and guards present. *Id.*

138. See *Women Prisoners I*, 877 F. Supp. 634, 639-40 (D.D.C. 1994) (discussing assaults on female inmates in the infirmary, in the television room, in the print shop, and other areas of the prison outside the view of other officers and inmates), *aff'd in part and rev'd in part*, 93 F.3d 910 (D.C. Cir. 1996); see also *Daskalea*, 227 F.3d at 438 (D.C. Cir. 2000) (describing a cell reserved for sexual encounters between staff and inmates).

139. Cf. Bell, *supra* note 67, at 212 (noting that the federal courts have "severely limited the liability of prison officials for permitting sexual misconduct within their correctional facilities").

140. See *Women in Prison*, *supra* note 35, at 2 (citing over one hundred reports of staff on inmate sexual misconduct in the three years between 1995 and 1998).

141. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 42 U.S.C.).

142. See Stacey Heather O'Bryan, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1189 (1997) (noting that the purpose of the Act was to respond to the number of "frivolous lawsuits" filed each year).

143. Prison Litigation Reform Act § 803(e). This section amends the Civil Rights of Institutionalized Persons Act of 1994, 42 U.S.C. § 1997 (1994), to deny prisoners the right to claim mental and emotional distress. See O'Bryan, *supra* note 142, at 1192-93.

been sexually abused¹⁴⁴ and the physical injury requirement of the PLRA makes it even more difficult.¹⁴⁵ Women who are forced to live with continual abuse and “male corrections officers and staff . . . [that are] engaged in regular verbal degradation and harassment of female prisoners”¹⁴⁶ suffer extreme mental and emotional consequences.¹⁴⁷ Female inmates who have been physically raped or sodomized may be able to meet the physical injury requirement, but the PLRA seems to deny claims for those women who suffer the emotional consequences of being sexually harassed in prison.¹⁴⁸

As the district court in *Women Prisoners I* indicated, there are many severe emotional results for women who are sexually harassed or abused.¹⁴⁹ The court noted that women experience “irritability, anxiety, and nervousness” as a result of being sexually harassed.¹⁵⁰ They also become “fearful that they will be continually exposed to [harassment] . . . [and] lose confidence in the system” when their reports go uninvestigated.¹⁵¹ The psychological effects on women sexually abused in prison are real.¹⁵² The emotional turmoil that they

144. See *Daskalea*, 227 F.3d at 438. Daskalea filed over fifteen Internal Grievance Procedure forms with D.C. Jail officials, and wrote to the Deputy Warden, the Warden and the Director of the Department of Corrections; however, nothing was done to help her while she was in prison. See *id.*

145. See Rahul Patel & Ann N. Sagerson, *Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 89 GEO. L.J. 1938, 1946 (2001) (“[T]he Prison Litigation Reform Act . . . significantly constrains available relief and imposes procedural barriers for prisoners bringing suits challenging prison conditions.”); see also O’Bryan, *supra* note 142, at 1208-10 (discussing the sexually harassing circumstances which occur in prisons where no actual physical injury is inflicted).

146. Human Rights Watch, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, at 3 (Sept. 1998), available at <http://www.hrw.org/reports98/women> [hereinafter *Nowhere to Hide*].

147. See *Women Prisoners I*, 877 F. Supp. 634, 642-43 (D.D.C. 1994) (observing the many mental and subsequent physical effects on women who have been sexually harassed), *rev’d in part and aff’d in part*, 93 F.3d 910 (D.C. Cir. 1996).

148. See Patel & Sagerson, *supra* note 145, at 1943 (noting that the PLRA restricts recoveries for plaintiff prisoners who have suffered mental or emotion injury to those circumstances when they have also suffered physical injury); Human Rights Watch, *World Report 2001 – United States* (2001) [hereinafter *World Report 2001*] (arguing that under the PLRA and its interpretations by the courts, “inmates cannot sue for humiliation, mental torture or non-physical sadistic treatment by guards, unless, in effect, they have broken bones or blood to show for it.”), available at <http://www.hrw.org/wr2k1/usa/index.html>; see also O’Bryan, *supra* note 142, at 1211 (arguing there are many emotional results of sexual harassment that will not be redressable as a result of the physical injury requirement).

149. See *Women Prisoners I*, 877 F. Supp. at 642 (“The effect of sexual harassment on women prisoners is profound.”).

150. *Id.*

151. *Id.* at 642-43.

152. See Bell, *supra* note 67, at 208 (discussing the suicides and attempted suicides of female inmates sexually abused by their correctional officers).

face as they see their harassers every day can be devastating.¹⁵³ However, the PLRA dictates that these women may receive nothing if they cannot prove physical injury.¹⁵⁴

During the Congressional hearings regarding the PLRA speakers made it clear that sexual abuse is often accompanied by intimidation tactics by correctional officers,¹⁵⁵ which make it even more difficult for inmates to get their abuse reported.¹⁵⁶ How will female inmates who are unable to even report sexual abuse capable of demonstrating physical injury in a courtroom years later? As one inmate at C.T.F. stated in 1994: “You know it’s wrong what the officer did; and he knows it’s wrong. But you’re not going to be able to prove it. The officers always get the benefit of the doubt.”¹⁵⁷ The PLRA leaves female inmates who suffer the emotional effects of sexual abuse in prison without a judicial remedy, and the officers still get the benefit of the doubt.¹⁵⁸

III. REMEDIES AVAILABLE IN THE DISTRICT OF COLUMBIA: LACK OF ENFORCEMENT

A. *Section 24-211.02 of the District of Columbia Code*

1. *The Judiciary’s Interpretation of Section 24-211.02*

Section 24-211.02 (formerly § 24-442) of the District of Columbia Code outlines the responsibilities that the Department of Corrections

153. See *id.* at 208-09 (noting a case in Florida where an inmate hanged herself “after writing to her sentencing judge and to her mother about sexual abuse by prison guards”) (internal citations omitted).

154. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321 (1996) (codified as amended in scattered sections of 42 U.S.C.) (limiting prisoner recovery for emotional injury to a showing of prior physical injury). See also O’Bryan, *supra* note 142, at 1215 (“[T]he most obvious reading of the [PLRA] . . . is that it creates an outright ban on all state and federal prisoners’ suits for mental and emotional distress.”).

155. See *Prisoner’s Rights Legislation*, *supra* note 67 (relating that correctional officers in Georgia intimidated female inmates who came forward about sexual abuse, and officers who learned of abuse kept silent).

156. See *Daskalea v. District of Columbia*, 227 F.3d 433, 439 (D.C. Cir. 2000) (explaining that *Daskalea* was immediately placed in solitary confinement after reporting the nude dancing incident to prison officials).

157. *Lezin*, *supra* note 5, at 200-01 (quoting an interview with a C.T.F. inmate in February 1994).

158. *Cf. O’Bryan*, *supra* note 142, at 1212 (“Depending on how narrowly courts interpret the physical injury requirement, [the PLRA] may inadequately protect against violations of prisoners’ constitutional rights that involve physical invasions or symptoms but do not rise to the level of injury.”).

shall have for maintaining the well being of its inmates.¹⁵⁹ This section of the D.C. Code states that the Department of Corrections shall “be responsible for the safekeeping, care, protection, instruction and discipline for all persons committed to such institutions.”¹⁶⁰

The statute has been interpreted by the District of Columbia Court of Appeals as imposing a “duty to exercise reasonable care in the protection and safekeeping of prisoners.”¹⁶¹ However, the District of Columbia Court of Appeals has also noted several times that this statute does not make prison personnel “the insurers of an inmate’s safety.”¹⁶² Therefore, an inmate who wishes to receive redress under section 24-211.02 must demonstrate negligence on the part of the District through common law tort proceedings.¹⁶³

The District of Columbia Court of Appeals has articulated a three-prong test which must be satisfied in order for an inmate to demonstrate negligence under section 24-211.02.¹⁶⁴ Accordingly, the prisoner bears the burden of proving “the applicable standard of care, a deviation from that standard, and a causal relationship between that deviation and the plaintiff’s injury.”¹⁶⁵ This standard places the burden on the inmate to bring forward expert testimony to demonstrate that the District has violated an accepted standard of care before she may prevail.¹⁶⁶

2. Section 24-211.02 and Sexual Abuse of Female Inmates

Although it appears to be a clear and applicable standard, section 24-211.02 does little to help female inmates who have been sexually

159. D.C. CODE ANN. § 24-211.02 (2001) (formerly D.C. CODE ANN. § 24-442 (1981)). Section 24-211.02 was updated December 31, 2000. All cases in this comment refer to the 1981 version of the bill.

160. *Id.*

161. *Hughes v. District of Columbia*, 425 A.2d 1299, 1302 (D.C. 1981).

162. *See id.* (citing *Matthews v. District of Columbia*, 387 A.2d 731 (D.C. 1978)). *Accord* *Herbert v. District of Columbia*, 716 A.2d 196, 199 (D.C. 1998) (citing the language of *Hughes* to reiterate that corrections officials are not insurers of the safety of inmates under section 24-442).

163. *See Phillips v. District of Columbia*, 714 A.2d 768, 772-73 (D.C. 1998) (noting that the plaintiff bears the burden of proof in a section 24-442 action and must demonstrate that the negligence of the District proximately caused the harm to the plaintiff).

164. *See id.* at 773.

165. *See id.* (citing *Clark v. District of Columbia*, 708 A.2d 632, 634 (D.C. 1997)).

166. *See Hughes*, 425 A.2d at 1303 (stating an inmate “must show by competent expert testimony . . . a negligent deviation from the demonstrated acceptable standard,” if she is to prevail under section 24-442).

abused.¹⁶⁷ Sexually abused female inmates can seek monetary relief under section 24-211.02,¹⁶⁸ but this relief does little to deter future sexual assaults from occurring in D.C. prisons.¹⁶⁹ However, as the D.C. Circuit explained in *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia* (“*Women Prisoners II*”), section 24-211.02 does not seem to dictate injunctive relief.¹⁷⁰

In *Women Prisoners II*, the appellate court refused to apply injunctive relief to the female inmate class regarding poor medical care, because the court regarded injunctive relief as a “final resort” only to be used “when plaintiff’s legal remedies are inadequate.”¹⁷¹ Because local District of Columbia courts had not applied section 24-211.02 as an injunctive tool, the circuit court saw section 24-211.02’s application to inmates seeking injunctive relief as an “unsettled area of local law.”¹⁷² Therefore, it refused to use section 24-211.02 to validate the injunctions imposed by the lower court.¹⁷³

Although the language in *Women Prisoners II* regarding section 24-211.02 was used by the D.C. Circuit Court when analyzing the inadequate medical treatment and unreasonable conditions presented by the class,¹⁷⁴ the court also remained dedicated to preserving local authority when it analyzed the sexual abuse that occurred in *Women Prisoners II*.¹⁷⁵ With regard to sexual abuse, the District of Columbia “conceded that it had failed to protect female inmates from sexual abuse,” and thereby admitted that it had

167. Cf. Day, *supra* note 61, at 585 (discussing the decision of the circuit court in *Women Prisoners II*, which found the injunctive relief ordered by the lower court to be outside the scope of the federal court’s authority).

168. Cf. *Women Prisoners II*, 93 F.3d 910, 923 (D.C. Cir. 1996) (denying injunctive relief because local courts have never interpreted section 24-442 to include it).

169. See Day, *supra* note 61, at 585 (arguing injunctive relief is what most inmates truly desire because it offers them a chance to alleviate the harmful conditions they live in).

170. *Women Prisoners II*, 93 F.3d at 922 (noting that it was significant that there have been no cases in the District of Columbia that have used section 24-442 to apply injunctive relief to injured prisoners).

171. See *id.* at 921-22.

172. See *id.* at 922 (“[I]n a completely unsettled area of local law a federal District Court opinion is no substitute for an authoritative decision by the courts of the District of Columbia.”).

173. See *id.*

174. See *id.* at 923 (vacating all injunctive portions of the district court order pertaining to medical facilities and treatment, and general conditions in the D.C. prisons).

175. See *Women Prisoners II*, 93 F.3d at 930 (vacating portions of the District Court order relating to the Special Officer for sexual misconduct, on the basis that it “effectively usurps the executive functions of the District”).

violated their Eighth Amendment rights.¹⁷⁶ However, the appellate court went on to invalidate several of the most important injunctive remedies provided by the district court based on the same preservation of local authority that it read into section 24-211.02.¹⁷⁷

Among those vacated, the appellate court struck the paragraphs of the district court order that allowed the Special Officer appointed by the district court to monitor sexual abuse in the District's correctional facilities¹⁷⁸ as "an unwarranted intrusion" on local government.¹⁷⁹ The D.C. Circuit Court has previously noted that "a federal court may not shave the requirements of the Constitution to fit the desires of local officials."¹⁸⁰ In light of *Women Prisoners II*, however, it seems that the court may ignore constitutional rights on the basis of local intrusion.

Given the interpretation that the appellate court gave section 24-211.02 in *Women Prisoners II*, female inmates are not likely to be able to use it as an injunctive remedy until local authorities analyze the issue.¹⁸¹ Without the ability to use section 24-211.02 to preserve injunctions against the Department of Corrections, it is difficult to determine how this statute can help female inmates who are sexually abused in prison, or act to prevent such abuse.¹⁸²

B. District of Columbia Department of Corrections Sexual Misconduct Policy

1. Language of the Policy

When *Women Prisoners I* was litigated in 1994, the Department of Corrections had no sexual misconduct policy and no investigation procedures.¹⁸³ As a result of *Women Prisoners I*, in March 1995 the

176. See *id.* at 930-31.

177. See *id.* at 932 (vacating all parts of the order regarding the monitoring of the prisons by a Special Officer).

178. See *id.* at 933 app. A. The Special Officer was to monitor allegations of sexual harassment, investigate outstanding cases, keep records of allegations, and notify local law enforcement of sexual abuse. See *id.*

179. See *id.* at 932.

180. *Campbell v. McGruder*, 580 F.2d 521, 526 (D.C. Cir. 1978).

181. Cf. Day, *supra* note 61, at 584 ("Common sense tells one that asking the problem-maker [the Department of Corrections] to solve the problems will probably not result in the most positive and productive solutions.").

182. See *id.* at 585 ("Injunctive relief is often what the female inmates desire.").

183. See *Women Prisoners I*, 877 F. Supp. 634, 641 (D.D.C. 1994), *rev'd in part and aff'd in part*, 93 F.3d 910 (D.C. Cir. 1996) (noting that the Department did not adequately investigate incidents of sexual misconduct because it had no policy and did not take such incidences seriously).

Department of Corrections issued its first sexual harassment policy,¹⁸⁴ which was soon updated to Department Order 3350.2A (“Order 3350.2A” or “1995 Order”). Order 3350.2A outlined a policy against sexual misconduct towards inmates.¹⁸⁵ Its purpose was to establish a procedure for dealing with sexual misconduct and to discourage such misconduct within the Department of Corrections.¹⁸⁶ Similar to the version which is still in effect as of the writing of this comment,¹⁸⁷ Order 3350.2A defines sexual misconduct as “sexual behavior which is directed toward inmates under the purview of the DCDC [D.C. Department of Corrections].”¹⁸⁸ Additionally, sexual harassment is identified and defined by Order 3350.2A as anything from “making sexually offensive comments,”¹⁸⁹ to “creating an intimidating, hostile or offensive environment.”¹⁹⁰

More important than its definitions of sexual misconduct, Order 3350.2A established sexual misconduct complaint procedures for both female and male inmates,¹⁹¹ as well as penalties for employees who are found to have committed sexual misconduct.¹⁹² The procedures for reporting sexual misconduct begin with a confidential

184. See *Women in Prison*, *supra* note 35, at 13 (reporting that the 1995 policy was the Department’s initial effort toward a sexual misconduct policy).

185. See DEP’T OF CORRECTIONS, DISTRICT OF COLUMBIA, DEP’T ORDER NO. 3350.2A, SEXUAL MISCONDUCT AGAINST INMATES (May 15, 1995) [hereinafter SEXUAL MISCONDUCT AGAINST INMATES 1995] (on file with author).

186. See *id.* at pt. I (“The purpose of this directive is to establish . . . policy regarding sexual misconduct against inmates; to discourage and prevent sexual misconduct against inmates; and, to establish uniform procedures for reporting, investigating, and adjudicating incidents of sexual misconduct in the [D.C. Department of Corrections].”).

187. See DEP’T OF CORRECTIONS, DISTRICT OF COLUMBIA, DEP’T ORDER NO. 3350.2C, SEXUAL MISCONDUCT AGAINST INMATES, pt. VII(G)-(H) (Dec. 10, 1998) [hereinafter SEXUAL MISCONDUCT AGAINST INMATES 1998] (on file with author). This order updates the sexual misconduct policy of the Department of Corrections to include more detailed guidelines for the handling of sexual misconduct complaints, including investigation procedures. See *id.*

188. SEXUAL MISCONDUCT AGAINST INMATES 1995, *supra* note 185, at pt. VI(E). Order 3350.2A further explains that no employee of the Department of Corrections may exhibit inappropriate behavior, and that sexual contact between an inmate and employee is sexual misconduct even if the inmate consents. See *id.*

189. *Id.* at pt. VI(E) (3) (a).

190. *Id.* at pt. VI(E) (3) (c).

191. See *id.* at pt. VII(B)-(C) (dividing investigations of sexual misconduct into categories for male and female inmates, and establishing more detailed procedures for female complainants).

192. See SEXUAL MISCONDUCT AGAINST INMATES 1995, *supra* note 185, at pt. VII(G) and attach. 1. Penalties in the 1995 Order range from reprimand for the first sexual harassment offense, to termination for the first sexual abuse offense. See *id.* at attach. 1. The penalties for retaliation against inmates who report sexual misconduct can range from a fifteen-day suspension to termination. See *id.*

report of the sexual misconduct,¹⁹³ and continue by allowing the inmate to file a written complaint directly with the Warden or by using the internal grievance procedures of the prison.¹⁹⁴ Once sexual misconduct is reported, the 1995 Order outlines the mandatory investigation procedures¹⁹⁵ and disciplinary actions that may be taken against Department of Corrections employees.¹⁹⁶

In addition, the most recently updated version of the Department of Correction's Order¹⁹⁷ incorporates the criminal law of the District of Columbia into the policy.¹⁹⁸ The December 1998 version includes all sexual abuse offenses as defined by the D.C. Code.¹⁹⁹ It includes any sexual abuse ranging from first degree sexual abuse, defined as a sexual act committed on another person by force or threat of force,²⁰⁰ to misdemeanor sexual abuse, defined as commission of a sexual act or contact without the other person's permission.²⁰¹

2. *Application of the Sexual Misconduct Policy*

Though the procedures outlined in the 1995 Order set up reporting,²⁰² investigative,²⁰³ and disciplinary channels²⁰⁴ for female

193. See *id.* at pt. VII(B) (1) ("A female inmate may make a confidential report of sexual misconduct through the established twenty-four hour (24) telephone hotline. The telephone hotline shall be supervised by the Monitor [appointed by the District Court in *Women Prisoners I*].").

194. See *id.* at pt. VII(B) (3) (noting that an inmate was able to advise the Warden of the misconduct by writing him or her a letter or using inmate grievance procedures outlined in Department Order No. 4030.1D).

195. See SEXUAL MISCONDUCT AGAINST INMATES 1995, *supra* note 185, at pt. VII(B) (7) (a) (indicating the duties of the court-appointed monitor to report misconduct allegations to the Executive Deputy Director and the affected Warden, and to issue a report after investigating the incident).

196. See *id.* at pt. VII(F) (2)-(3) (describing disciplinary actions to be taken against employees who fail to report misconduct and who commit sexual misconduct).

197. See *generally* SEXUAL MISCONDUCT AGAINST INMATES 1998, *supra* note 187 (updating the 1995 sexual misconduct policies of the Department of Corrections on December 10, 1998).

198. See *id.* at pt. VI(F) (1) ("Sexual Abuse is defined as: a) forced or coerced sexual act or sexual contact, as defined by former D.C. Code sections 22-4101 through 22-4106 [now sections 22-3002 through 22-3006].").

199. See D.C. CODE ANN. § 22-3002 to 3006 (2001). The sections of the D.C. Code referenced by the 1998 Order define and describe the penalties for first, second, third, and fourth-degree sexual abuse, as well as misdemeanor sexual abuse. See *id.*

200. See D.C. CODE ANN. § 22-3002 (2001) (original version at § 22-4102 (1981)).

201. See D.C. CODE ANN. § 22-3006 (2001) (original version at § 22-4106 (1981)).

202. See SEXUAL MISCONDUCT AGAINST INMATES 1995, *supra* note 185, at pt. VII(B) (1)-(4) (outlining the procedures for inmate reporting of sexual misconduct by Department of Corrections employees, including a procedure for confidential reports); see *also* SEXUAL MISCONDUCT AGAINST INMATES 1998, *supra* note 187, at pt. VII(D)-(E) (updating the sexual misconduct policy to include detailed reporting procedures for employees who receive sexual misconduct complaints).

inmates who are sexually abused in prison, it has continued to fail to aid women who have been abused.²⁰⁵ The Department of Corrections has notoriously had difficulty with employees following the directives contained in Order 3350.2A, and consequently sexual misconduct has not been curbed.²⁰⁶

Perhaps the most chilling example of the failure of Department of Corrections staff to follow the Sexual Misconduct policies is the case of Sunday Daskalea.²⁰⁷ When Daskalea's case reached the circuit court, the court noted that the 1995 Sexual Misconduct policy "was never posted" for the guards.²⁰⁸ The court also discussed the inadequate training and lack of corrective measures taken by the Department of Corrections to implement the 1995 Order.²⁰⁹

As a result of the poor administration of the policy, Sunday Daskalea filed over fifteen internal grievance forms, wrote numerous letters to Department of Corrections officials, and even wrote to the judge handling her criminal matter in order to complain about sexual harassment at the D.C. Jail – all without any response.²¹⁰

The failure of the Department of Corrections to investigate these complaints came to a pinnacle after Daskalea was forced to participate in the nude dancing episodes in July of 1995.²¹¹

203. See SEXUAL MISCONDUCT AGAINST INMATES 1995, *supra* note 185, at pt. VII(B)(7) (placing investigative responsibilities on a Monitor who must complete a detailed report within thirty days); see also SEXUAL MISCONDUCT AGAINST INMATES 1998, *supra* note 187, at pt. VII(G)-(I) (altering investigative procedure to include; interim procedures for during the investigation, investigation procedures conducted by an investigator of the Department of Corrections, and post-investigation procedures).

204. See SEXUAL MISCONDUCT AGAINST INMATES 1995, *supra* note 184, at pt. VII(G), attach. 1 (describing penalties for correctional officers who have committed acts of sexual misconduct against inmates).

205. See *Daskalea v. District of Columbia*, 227 F.3d 433, 437 (D.C. Cir. 2000) (citing trial testimony demonstrating that only some of the guards, and none of the inmates, remembered receiving the sexual misconduct policy); *Newby v. District of Columbia*, 59 F. Supp. 2d 35, 36 (D.D.C. 1999) (finding that other than issuing the sexual misconduct policy, the District had done little to ensure supervision and enforcement).

206. See *Women in Prison*, *supra* note 35, at 12 ("The District of Columbia Department of Corrections has had long-standing problems involving allegations of sexual misconduct by correctional staff."). The GAO Report also noted there was a policy in effect in 1995 when correctional officers forced female inmates to participate in the "striptease" shows at the D.C. Jail. See *id.* at 13.

207. See discussion *supra* Parts I.B and II.A.3 (describing Daskalea's case).

208. *Daskalea*, 227 F.3d at 437.

209. See *id.* ("There was no evidence that the training requirements were implemented nor that any significant corrective intervention occurred [after the first Sexual Misconduct Order was issued].").

210. See *id.* at 438 (detailing Daskalea's complaints to authorities).

211. See *id.* (describing the sexual harassment and assault that Daskalea endured).

Subsequent to the incident, Daskalea discussed the forced nude dancing with a Department of Corrections official, and expressed concern about retaliation from guards if she spoke up about the incident.²¹² Daskalea's concerns were confirmed the day after her complaint when she was placed in solitary confinement as retaliation.²¹³ She was forced to remain in solitary even when committee members appointed to investigate the nude dancing incident attempted to interview her.²¹⁴

The story of Sunday Daskalea is only one example of the inability of the Department of Corrections to effectively use its sexual misconduct policy to investigate and eradicate sexual misconduct in the D.C. Prisons.²¹⁵ Although the policy and its progeny appear to create an effective system for curbing misconduct, the courts have noted that this is simply not the case.²¹⁶ The Department of Corrections' sexual misconduct policy is the only remedy available for female inmates that does not involve litigation²¹⁷ and offers an actual change in the environment sexually abused women live under through the discipline²¹⁸ and removal of violating officers.²¹⁹ Thus, the sexual misconduct policy of the District is the *only* true remedy for female inmates. However, without effective implementation and enforcement of the policy itself, the D.C. Prisons will continue to be plagued by sexual misconduct.²²⁰

prior to the nude-dancing incident in July 1995).

212. See *id.* at 439 (relating Daskalea's meeting in the office of a Department of Corrections official).

213. See *Daskalea*, 227 F.3d at 439 ("A lieutenant appeared, told Daskalea she was going to solitary, and when she protested threatened to mace her. She was then placed in solitary confinement, without any of her belongings and, at first, without a mattress Daskalea's requests to call an attorney were refused.").

214. See *id.* at 440 ("When the Makins' Committee asked to speak with Daskalea in early August — at which time she was being held in solitary confinement — it was informed that she had already been discharged.").

215. See *Women in Prison*, *supra* note 35, at 2 (noting that only twelve of the 111 sexual misconduct allegations in a two and a half year time period resulted in staff resignations or disciplinary actions).

216. Cf. *Newby v. District of Columbia*, 59 F. Supp. 2d 35, 37 (D.D.C. 1999) (reporting as of the date of the opinion, the District had not taken measures to monitor what occurs in the jail despite its history of misconduct).

217. See discussion *supra* Parts I and II (describing the conditions in D.C. prisons and the ineffective federal laws inmates must rely upon).

218. SEXUAL MISCONDUCT AGAINST INMATES 1995, *supra* note 185, at pt. VII(G) (outlining the penalties to correctional officers for violating sexual misconduct policies).

219. See *id.* at attach. 1 (describing the penalty for sexual assault or sexual abuse as "termination").

220. See *Daskalea v. District of Columbia*, 227 F.3d 433, 443 (D.C. Cir. 2000) (noting that some form of sexual misconduct "policy" had been in effect since

IV. RECOMMENDATIONS FOR CHANGE

A. *Enforcement Through Criminal Prosecution of Correctional Officers*

When a woman is sexually assaulted in the District of Columbia, she may rely upon local law enforcement to come to her aid and hopefully to remove her attacker from the streets.²²¹ A woman who is incarcerated may not rely upon her local law enforcement in the same fashion.²²² Female inmates should be afforded the same protections from sexual abuse by the criminal justice system as women living outside of prison.²²³ Criminal investigation and prosecution of correctional officers who commit sexual assaults is one way to assure that protection.²²⁴

Although forty-one states and the District of Columbia have laws criminalizing sexual abuse of inmates,²²⁵ these laws are often unenforced.²²⁶ In fact, in the past the District of Columbia Department of Corrections has been known to simply transfer correctional officers to new facilities when they are suspected of sexual misconduct.²²⁷

before *Women Prisoners I*, but it was found to be “of little value”). *But see Women in Prison*, *supra* note 35, at 30 (“[T]he District of Columbia has one of the strictest and most comprehensive sets of sexual abuse laws and policies in the country [It] has been required by court order since December 1994 to take appropriate steps to prevent and remedy staff sexual misconduct.”).

221. See D.C. CODE ANN. § 22-3002 to 3006 (2001) (defining sexual abuse in the District of Columbia and its criminal penalties). Criminal penalties in the District range from 180 days for a misdemeanor to life in prison for first-degree sexual abuse. *See id.*

222. See, e.g., *Women Prisoners I*, 877 F. Supp. 634, 642 (D.D.C. 1994), *rev'd in part and aff'd in part*, 93 F.3d 910 (D.C. Cir. 1996) (noting that the police failed to inform one inmate who filed criminal charges of the status of their investigation and failed to take disciplinary action against the officer who assaulted her).

223. See SEXUAL MISCONDUCT AGAINST INMATES 1998, *supra* note 187, at pt. VI(F) (1) (referencing the D.C. Code provisions on sexual abuse in its definition of sexual abuse).

224. See *Women Prisoners I*, 877 F. Supp. at 641 (noting that officers accused or suspected of sexual misconduct were simply transferred to other D.C. operated facilities).

225. See Eun-Kyung Kim, *Extent of Inmate Sex Abuse Unknown*, ASSOC. PRESS ONLINE, July 21, 1999, available at 1999 WL 22024831.

226. See World Report 2001, *supra* note 148 (relating that criminal prosecutions of correctional officers from November 1999 to October 2000 “was rare, and convictions in such cases [were] even rarer”), available at <http://www.hrw.org/wr2k1>; see also *Women Prisoners I*, 877 F. Supp. at 642 (explaining failure of D.C. police to inform female inmates of their investigations or to take action against guards who attack female inmates). *Contra* WORLD REPORT 2001, *supra* note 148 (noting that although rare, criminal prosecutions of abusive correctional staff were on the rise from 1999 to 2000), available at <http://www.hrw.org/wr2k1>.

227. See *Women Prisoners I*, 877 F. Supp. at 642 (“When the [Department of Corrections] do[es] suspect that an employee is guilty of sexual misconduct . . . they

Since December 1994, the Department of Corrections has been required to: “(1) notify the Metropolitan Police Department about any allegation involving unwelcome sexual intercourse or unwelcome sexual touching, (2) communicate with the police department concerning the status of any investigations of these allegations, and (3) periodically document the status of police investigations.”²²⁸ However, in a study conducted by the General Accounting Office in 1999, it was noted that the “Department of Corrections did not have any available information on the status of police investigations,” which were supposed to be ongoing.²²⁹

In addition, the district court in *Women Prisoners I* noted that several of the female inmates’ complaints had been reported to the police,²³⁰ but these women had not been informed about the status of their investigations nor had any corrective action been taken against the guards involved.²³¹ Similarly, the strip-tease incident, involving Newby and Daskalea, resulted in the termination of four officers, the suspension of six others, and the filing of four civil lawsuits.²³² There was, however, no criminal action taken against the officers.²³³

This lack of enforcement by local police departments is not a problem unique to the District of Columbia;²³⁴ it is a problem that is endemic in our criminal justice system.²³⁵

Female inmates, and inmates in general, are not believed by local law enforcement when they file complaints.²³⁶ Additionally, sexual

often simply reassign the employee to a different facility.”).

228. *Women in Prison*, *supra* note 35, at 15.

229. *Id.*

230. See *Women Prisoners I*, 877 F. Supp. at 642.

231. See *id.*

232. See *Women in Prison*, *supra* note 35, at 13.

233. See *id.* (omitting any indication that criminal charges were brought against any of the guards involved).

234. See, e.g., Emily Wilkerson, *Corrections Director Disputes Sexual Misconduct Reports*, ST. J. REG. (Springfield, IL), July 24, 1996, at 8 (noting the state corrections spokesman remembered only one incident in which a correctional officer was referred out for criminal prosecution, though over the prior ten years forty-five employees had resigned or been discharged for “socializing with inmates”).

235. See *Cruel and Unusual*, WASH. POST, Apr. 23, 2001, at A14 (“[P]rosecutors rarely bring charges for prison rapes.”); Bill Baskerville, *Sexual Misconduct Charges Common at Women’s Prison*, FORT WORTH STAR-TELEGRAM, Oct. 17, 1999, at 8 (pointing out that inmate sexual abuse complaints in Virginia are investigated and handled by the prison system itself); *Guard-Inmate Sex Should Be a Crime*, NEWS TRIB. (Tacoma, WA), Oct. 23, 1997, at A10 (arguing that guards should be subject to prosecution and that the Washington legislature should pass laws making sex between inmates and guards a felony); see also Steve Schmidt, *Trial Shows Guard Union’s Clout: Brutality Allegations Difficult to Prove*, SAN DIEGO UNION-TRIB., Nov. 11, 1999, at A3 (asking, in a correctional officer brutality case, “Who are you going to believe?”).

236. See Schmidt, *supra* note 235, at A3 (commenting that investigation and

assault cases are difficult to prove when they occur outside the prison setting; attempting to prove they occurred inside the prison setting is far more difficult.²³⁷ However, criminal prosecution is the only remedy which removes correctional officers from the prisons, rather than compensates abused inmates with monetary relief.²³⁸ Thus, it is the only remedy that has the potential to change the sexually abusive environment of the District's prisons.

B. Assumptions Made by Hiring More Female Guards

Another solution that has been recommended and adopted by some correctional systems is the removal of male guards from areas in female inmates' living quarters.²³⁹ Although on its face the removal of male guards appears to be a viable solution to the crisis of sexual abuse in prisons, the suggestion operates under a number of assumptions that make it unlikely to significantly alter behavior inside prisons.²⁴⁰

The first major assumption made by this suggestion is one based on gender stereotypes — that removal of *male* guards will cut down on the sexual abuse of women.²⁴¹ Recently, however, investigations have

prosecution of guard misconduct is an “uphill battle” in California).

237. See *Abuse is Abuse, Whether in Prison or Not*, CHI. SUN-TIMES, Mar. 11, 1997, at 27 (explaining that guards often avoid prosecution by portraying their sexual relationships with inmates as consensual).

238. See 42 U.S.C. § 1983 (1994) (providing that those who deprive a citizen of their rights under color of law are *liable* to the injured person) (emphasis added); *Women Prisoners II*, 93 F.3d at 923 (opining that D.C. CODE ANN. § 24-442, currently codified at § 24-211.02, does not include injunctive relief); *Women in Prison*, *supra* note 35, at 15 (highlighting that the District of Columbia could not provide data regarding the “number, nature, or outcome of staff misconduct allegations during the four-year period, 1995-1998”).

239. See Kuo, *supra* note 61, at B2 (discussing the recent decision by the New York State Department of Correctional Services to ban male correctional officers from ten separate posts inside the female living quarters of the Westchester County jail); Amnesty Int'l, *Report 2000 – United States of America* (2000) (indicating that Amnesty International “called for female inmates to be guarded only by female officers” in 1999), available at <http://www.amnesty.org>; see also Iman R. Soliman, *Male Officers in Women's Prisons: The Need For Segregation of Officers in Certain Positions*, 10 TEX. J. WOMEN & L. 45, 68 (2000) (arguing that a reasonable solution to abuse in women's prisons is to restrict male guards from certain positions).

240. See, e.g., Soliman, *supra* note 239, at 68 (maintaining that removal of male guards from direct-contact positions in women's prisons will “protect . . . women's safety and privacy . . . and increase the women's chances of rehabilitation”). But see Teresa A. Miller, *Sex Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L.J. 291, 292 (2000) (“Judges ignore the realities of sex and power behind bars.”). Miller argues that the traditional notions of gender are not applicable in the complex system of sex and power behind prison walls. See *id.* at 294-95.

241. Cf. Kuo, *supra* note 61, at B2 (articulating the desire of prison officials to have “guards of the same gender working in areas where inmates have an expectation of some privacy, like shower rooms and sleeping areas”); Jo Becker, *Female Prisoners*

begun of sexual abuse by *female* correctional officers.²⁴² Though still a taboo subject, female correctional officers are also involved in incidents of sexual abuse of female inmates.²⁴³ In fact, one of the female guards involved in the episode at the D.C. Jail involving Newby and Daskalea “exposed herself to Daskalea while telling her how much she enjoyed the dance.”²⁴⁴

Correctional officers enjoy near total control over inmates,²⁴⁵ and the judicial system has not yet recognized the “realities of sex and power behind bars.”²⁴⁶ Therefore, exclusively employing female correctional officers in the living areas of the female inmates does not necessarily address the realities of sexual abuse in prison.²⁴⁷

Similarly, the removal of male correctional officers from the female inmate areas operates under another assumption – that there will be enough female correctional officers employed to fill those positions.²⁴⁸ It has been estimated that as many as seventy percent of the guards in federal women’s institutions are male.²⁴⁹ It was noted by the Director of the Women in Prison Project in New York that vigorous attempts to hire more female guards would be necessary if the plan to remove male guards from specified areas within female facilities is to be implemented.²⁵⁰

Report Abuses, ST. PETERSBURG TIMES, Dec. 24, 1999, at 1B (describing a memo that asked Florida prisons to try to “avoid putting male officers where they would see undressed female inmates”).

242. See generally Miller, *supra* note 240, at 291 (discussing the assumptions made by the judicial system regarding gender and its place within the prison setting).

243. See *Daskalea v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000) (dismissing the District’s argument that because the abuse involved female correctional officers there could be no 42 U.S.C. § 1983 liability).

244. See *id.* at 439.

245. See Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (Dec. 1996) (“[M]ale officers . . . have used their near total authority to provide or deny goods and privileges to female prisoners, to compel them to have sex or, in other cases, to reward them for having done so.”), available at <http://www.hrw.org/summaries/S.US96d.htm> (last visited Nov. 14, 2001).

246. See Miller, *supra* note 240, at 292 (stating the intent of the article as a look into the failure of judges to consider the realities of sex in prison and its impact on cross-gender searches).

247. See Kuo, *supra* note 61, at B2 (“The fundamental question is whether the officials train guards to have proper behavior, ensure proper behavior, and hold guards accountable [for their] offense.”) (quoting Jamie Tellner, Assoc. Counsel, Human Rights Watch); cf. Ronald G. Turner, *Sex in Prison*, 36 TENN. B.J. 12, 28 (2000) (contending that the United States operates its correctional facilities under the incorrect assumption that a prisoner’s sexual energy disappears after incarceration).

248. See Becker, *supra* note 241, at 1B (explaining that more than half of the officers guarding female inmates in Florida are male).

249. See Bell et al., *supra* note 67, at 203 n.50 (internal citations omitted).

250. See Kuo, *supra* note 61, at B2 (quoting the Director of the New York State

When analyzed, removing male guards from specific areas in female housing units will not eradicate the sexual abuse of female inmates.²⁵¹ There is no guarantee that female officers can be recruited in the numbers necessary to fill the positions in female housing units,²⁵² or that sexual abuse would decrease if enough female officers were employed.²⁵³ Sex is power in prison.²⁵⁴ Both male and female correctional officers may subject female inmates to sexual abuse;²⁵⁵ prison administrators must realize that gender does not necessarily dictate their actions.

CONCLUSION

In 1993, women incarcerated in the District of Columbia came forward to fight against an epidemic of sexual abuse in the District's correctional facilities.²⁵⁶ At that time there were no sexual misconduct policies in place,²⁵⁷ and there were no boundaries to the sexual exploitation of female inmates in which correctional officers took part.²⁵⁸ One administrator in 1993 stated, "[Y]ou just get this sense that [sexual misconduct] has always happened and it is always going to happen."²⁵⁹ Today, it does not *have to*.²⁶⁰

This Comment has demonstrated that judicial remedies are lacking

Correctional Association's Women in Prison Project as indicating the state should offer more "incentives and benefits" to have female guards remain in female housing facilities, and should make an effort to hire more female guards).

251. See *id.* at B2 (noting the importance of training to ensure proper behavior and not simply removing male officers).

252. See Smith, *supra* note 2, at 95 (noting from 1994 to 1998, the D.C. Jail operated with more than 100 guard vacancies); cf. Miller, *supra* note 240, at 296 n.20 ("The national average for female correctional officers in 1996 was 18% of all correctional officers.").

253. Cf. *Daskalea*, 227 F.3d at 439 (discussing the involvement of female officers in the "strip-tease" incident).

254. See Miller, *supra* note 240, at 291 (arguing the focus on constitutional privacy issues in prison is misplaced because "sex, power and the sexualization of power through sexual violence" are the issues judges should analyze).

255. See discussion *supra* Part V.B (discussing female-on-female sexual abuse in *Daskalea*).

256. See *Women Prisoners I*, 877 F. Supp. 634, 639 (D.D.C. 1994) (describing the "sexualized environment" of the prisons), *rev'd in part and aff'd in part*, 93 F.3d 910 (D.C. Cir. 1996).

257. See *Women in Prison*, *supra* note 35, at 13 (noting the initial policy was implemented in March 1995).

258. See *Women Prisoners I*, 877 F. Supp. at 640-41 (describing the types of sexual abuse committed by correctional officers, including rape, sodomy, and verbal and physical harassment).

259. *Id.* at 639 (brackets in original).

260. Cf. *Women in Prison*, *supra* note 35, at 30 (indicating that the District has one of the most comprehensive sexual misconduct policies in the country).

for women who are sexually abused in prison. However, female inmates in the District should not be left without redress. The District of Columbia today has one of the “strictest and most comprehensive” sexual misconduct policies and set of sexual abuse laws in the United States.²⁶¹ The current policy encompasses sexual abuse as defined by the District’s criminal code and makes violators susceptible to criminal penalties.²⁶² It offers sexually abused female inmates a remedy that has the power to remove their attackers from the correctional setting.²⁶³ As demonstrated by this Comment, however, female inmates can only utilize this power if the sexual misconduct policy is enforced.²⁶⁴ That enforcement must not only come from the Department of Corrections, but from outside the prison walls in local law enforcement.²⁶⁵

Criminal prosecution of correctional officers who violate District of Columbia sexual abuse laws removes the officer from the correctional setting and may deter other sexual abuse.²⁶⁶ That criminal prosecution must be commenced, however, and not disregarded by law enforcement because the victims are prisoners.²⁶⁷ Together, the sexual misconduct policy of the Department of Corrections²⁶⁸ and criminal enforcement by local police, have the potential to significantly aid female inmates who have been sexually abused.²⁶⁹ However, without enforcement of the disciplinary and criminal penalties available against correctional officers, female inmates will

261. See *id.* (describing the specifics of the District’s policy according to the opinions of correctional experts).

262. See SEXUAL MISCONDUCT AGAINST INMATES 1998, *supra* note 187, at pt. VI(F)(1) (defining “sexual abuse” by using the D.C. Code sections, which define criminal sexual abuse in the District).

263. See *id.* at attach. 1 (outlining the penalties for the varying degrees of sexual misconduct, including suspension and termination).

264. Cf. *Daskalea* 227 F.3d at 442 (D.C. Cir. 2000) (“[A] ‘paper’ policy cannot insulate a municipality from liability.”).

265. See *Women in Prison*, *supra* note 35, at 15 (noting the District has been required by Court order since 1994 to report allegations of sexual abuse to the Metropolitan Police Department).

266. See D.C. CODE ANN. § 22-3002 (2001) (defining the penalty for criminal sexual abuse in the District as up to life in prison first-degree sexual abuse).

267. See Lezin, *supra* note 5, at 200 (“You know it’s wrong But you’re not going to be able to prove it.”) (quoting an interview with an inmate in C.T.F. in February 1994); cf. *Women in Prison*, *supra* note 35, at 15 (discussing the District’s policy of notifying local police of all sexual abuse allegations, but noting that the Department of Corrections had no information regarding the status of any police investigation).

268. See discussion *supra* Part IV.B.1 (describing the language of the sexual misconduct policy).

269. See discussion *supra* Part V.A (discussing the utility of criminal penalties for correctional officers who sexually abuse female inmates).

2002]

FEMALE INMATES LIVING IN FEAR

477

continue to suffer at the hands of the District of Columbia.