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Access Denied: Sexual Victimization of Juveniles in Correctional Facilities -- How Senate Bill 585 Could Have Helped

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ACCESS DENIED: SEXUAL VICTIMIZATION OF JUVENILES IN CORRECTIONAL FACILITIES—HOW SENATE BILL 585 COULD HAVE HELPED

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I. INTRODUCTION

The Constitution guarantees all *persons* the right to counsel.[1] But for many of Virginia's youth, when the doors to the juvenile correctional centers are closed, so does their ability to access counsel. Senate Bill 585 was introduced in the General Assembly to amend this wrong and ensure that juveniles in correctional facilities had access to counsel, even if they could not afford it.

Access to attorneys in correctional facilities is not a novel idea. The Supreme Court has required that inmates have access to legal services[2] and Virginia law complies with this ruling for their adult inmate population.[3] Virginia's youth, however, are overlooked; they are not afforded the constitutional rights that have been guaranteed to them.

The need for legal protection has become a desperate matter for a number of a Virginia's youth currently in correctional facilities. A study published by the Bureau of Justice Statistics ("BJS") of the United States Department of Justice has brought the need to the forefront.[4] According to the study, two of Virginia's juvenile correctional facilities ranked amongst the top thirteen facilities in the nation with "high rates" of sexual abuse.[5] Until this study was released, many of these children were silent victims. They had nowhere and no one to turn to since correctional center staff

1. U.S. CONST. amend. VI. (emphasis added).
2. *See* Bounds v. Smith, 430 U.S. 817, 822–23 (1977).
3. *See* VA. CODE ANN. § 53.1-40 (2009). 6 VA. ADMIN. CODE § 15-31-300 (2010)
4. ALLEN J. BECK, ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. SPECIAL REP.: SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf
5. *Id.* at 4.

committed most of the abuse. Senate Bill 585 could have helped by making children aware of their right to an attorney and ensuring access to legal services.

The right to counsel is a fundamental right, one the framers of our Constitution intended to apply to all American citizens. Virginia statutes and case law have protected the rights of incarcerated adults and it is now time to grant those same protections to the juveniles in their custody. Part II of this comment will review the requirement of a prisoner's right to "meaningful access" to the courts from both an adult and juvenile's perspective. An examination of jurisprudence from the Supreme Court of the United States, and Circuit Courts, reveals the history and importance of "meaningful access" and shows how different courts have applied the right. Part III will discuss how Virginia has interpreted "meaningful access" in the context of adult prisoners, Senate Bill 585 will also be evaluated and compared to similar statutes in other states. Part IV will discuss how in light of the exposure of sexual abuse in correctional facilities, Senate Bill 585 is critical legislation that could help keep children protected and give a voice to the victims. An examination of federal statutes and standards also shed light on what could and should be done in Virginia to keep juveniles in the State's custody free from sexual abuse.

II. "MEANINGFUL ACCESS" TO COURTS

A. Constitutional guarantees

The sixth amendment guarantees criminal defendants the right to counsel and is a critical component of procedural due process.[6] This fundamental right applies to the states through the Due Process Clause of the Fourteenth Amendment.[7] Even without a constitutional mandate, many states are passing laws that provide for the right to counsel in civil cases.[8] The Supreme Court has also included the right to access the courts as part of the

6. U.S. CONST. amend. VI. *See*, Gideon v. Wainwright, 372 U.S. 335 (1963).

7. U.S. CONST. amend. XIV, § 1; Gideon, 372 U.S. at 342.

8. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245.

First Amendment's right to petition.[9] These constitutional rights apply to incarcerated persons as they apply to all American citizens, "no iron curtain [is]drawn between the Constitution and the prisons of this country."[10]

Despite constitutional guarantees, counsel has been significantly harder to access once the trial and appeals process is over and a person is incarcerated. Since 1941, the Supreme Court of the United States recognized the right to access in regards to habeas petitions[11]— however, it was not until more than thirty years later that the Court made its pivotal ruling. In a per curium decision, the Supreme Court of the United States affirmed a Ninth Circuit case, *Younger v. Gilmore*.[12] In *Gilmore*, the court held a prison with a severely limited number of legal texts and a regulation that provided for only one copy of each of those texts denied prisoners meaningful access to the courts and was therefore unconstitutional.[13]

In the 1977 watershed case, *Bounds v. Smith*, the Supreme Court of the United States recognized "beyond doubt that prisoners have a constitutional right of access to the courts."[14] A group of prisoners in North Carolina brought suit under 42 U.S.C § 1983 claiming their right to access the courts through the Due Process Clause of the Fourteenth Amendment had been violated.[15] Only one library served all the inmates in the state of North Carolina, which the District Court held to be "severely inadequate" and therefore granted summary judgment in favor of the inmates on this claim.[16] The Court of Appeals for the Fourth Circuit affirmed.[17] The Supreme Court of the United States chose not to overturn its prior ruling in *Gilmore* and affirmed the judgment of Fourth Circuit.[18]

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9. *See* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (holding, "the right of access to the courts is indeed but one aspect of the right of petition."); U.S. CONST. amend. I. *See also* Johnson v. Avery, 393 U.S. 483, 485 (1969).

10. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

11. Ex parte Hull, 312 U.S. 546, 549 (1941).

12. Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam).

13. Gilmore v. Lynch, 319 F. Supp. 105, 111 (9th Cir. 1970) (per curium), *aff'd sub nom*. Younger v. Gilmore, 404 U.S. 15 (1971) (per curium). The court determined,

> 'Access to the courts,'…encompasses all the means a defendant or petitioner might require a fair hearing from the judiciary on all charges brought against him or grievances alleged against him. In some contexts this has been interpreted to require court appointed counsel for indigents…[S]ome provision must be made to ensure that prisoners have the assistance necessary to file petition and complaints which will in fact be fully considered by the courts.

Id. at 110.

14. *Bounds*, 430 U.S. 817, 822 (1977).

15. *Id.* at 818.

16. *Id.*

17. *Id.* at 821.

18. *Bounds*, 430 U.S. 817, 817–18. The Court starts its analysis by supporting its decision in *Gilmore*. *Id*. at 828–29. The Court reiterates the essential question in *Gilmore*: "Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to

The Court held "'meaningful access' to courts is the touchstone" behind which its precedent stood.[19] Meaningful access does not have a single definition—the Court offers various ways states can comply with the constitutional mandate.[20] The Court leaves states free to create individual regulations, but holds that "... the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[21]

Although it ultimately ended in a landmark Supreme Court case, *Bounds* originated in the Fourth Circuit Court of Appeals.[22] The Fourth Circuit upheld the district court's grant of summary judgment in favor of the inmates.[23] By holding that states are obligated to provide "adequate" legal research facilities for inmates,[24] the Fourth Circuit demonstrated a belief that incarcerated persons have a constitutional right to access the courts.

The Supreme Court addressed the issue of prisoners' right to access counsel again in the 1996 case, *Lewis v. Casey*.[25] In *Casey*, the Court upholds its decision in *Bounds* and clarifies the issue of standing.[26] The Court begins by reiterating the holding in *Bounds*, "the tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement."[27] Going one-step further than *Bounds*, however, the Court requires an inmate to show an "actual injury" in order for the courts

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provide inmates with profession or quasi-professional legal assistance?" *Id*. at 829. It once again answers in the affirmative, and notes that experience and substantial efforts by most states gives them no cause to depart from the previous holding. *Id*.

19. *Id*. at 823. (citing Ross v. Moffitt, 417 U.S. 600, 611 (1974)). In *Ross*, the Court overturned a Fourth Circuit decision and held that the state is not required to appoint counsel for indigent defendants making discretionary appeals. *Ross* 417 U.S. at 605. The *Bounds* Court distinguishes this case from *Ross* by noting the present issue largely involved original actions, seeking new trials, release from confinement, or vindication of fundamental civil rights. *Bounds* 430 U.S. at 827.

20. *Id*. at 831. Among the alternatives offered by the Court are:

> [T]he training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time [sic] consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organization or as part of public defender or legal services offices.

Id.

21. *Id.* at 828.

22. Smith v. Bounds, 538 F.2d 541 (4th Cir. 1975) *aff'd*, 430 U.S. 817 (1977).

23. *Id*. at 544.

24. *Id.*

25. Lewis v. Casey, 518 U.S. 343 (1996).

26. *Id*. at 351.

27. *Id.* at 355.

to be able to provide relief.[28] To demonstrate an actual injury, an inmate cannot only show that law libraries and legal services provided by prison authorities were inadequate, but he must also show those shortcomings hindered his efforts to pursue a legal claim.[29]

B. Juveniles' Right to "Meaningful Access" to the Courts

The Supreme Court recognized a juvenile's right to due process in the 1967 case of Gerald Gault.[30] *Gault* is often referred to as a watershed case in juvenile law because the Court unmistakably held that "... whatever their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[31] Unfortunately, *Gault* only applies to delinquency proceedings. The Court specifically noted the issue of pre-disposition and post-disposition due process rights was not present in the case.[32] However, Circuit Courts have built upon the Supreme Court's recognition of these due process rights during the adjudicatory phase and are now including the *incarcerated juveniles*' right to counsel among those protected by the Due Process Clause of the Fourteenth Amendment.

"...[P]laintiff's status as a juvenile offers no excuse."[33] The First Circuit refused the state's argument that *Bounds* did not apply to incarcerated juveniles and firmly held that due process requires access to an attorney.[34] Having found the existence of a special relationship, the court held the Division of Youth Services had an affirmative duty to ensure the youth in their custody had access to the courts.[35] The minor in custody is entitled to the same "adequate, effective, and meaningful" access to the courts as any adult in the custody of the state.[36]

The Sixth Circuit handed down the most decisive decision in *John L. v. Adams*.[37] The court adopted the view that the rights of incarcerated juveniles should be comparable to the rights of incarcerated adults.[38] The court relied in part on the reasoning given by the First Circuit, recognizing

28. *Id.* at 349.
29. *Id.* at 351.
30. *In re* Gault, 387 U.S. 1 (1967).
31. *Id.* at 13.
32. *Id.*
33. Germany v. Vance, 868 F.2d 9, 16 (1st Cir. 1989).
34. *Id.*
35. *Id*. The court wrote, "Indeed, custodians of a minor may well have a *greater* obligation to take action to ensure the minor's "meaningful access" to the courts than do the custodians of an adult inmate, because of the minor's greater reliance on the correctional system for care and protection." *Id*.
36. *Id.* at 15.
37. John L. v. Adams, 969 F.2d 228 (6th Cir. 1992).
38. *Id.* at 231.

"that the stigma of being found to have violated the law and the resulting incarceration are the key similarities between juveniles and adults that make it logical for juveniles to be entitled to the right of access to courts."[39]

The Sixth Circuit further relied on the holding in *Morgan v. Sproat*, where a Mississippi federal district court held that juveniles committed to state training schools had a constitutional right to an attorney.[40] The Sixth Circuit stated that the court in *Morgan* correctly interpreted *Bounds* by prohibiting the state from interfering with juvenile inmates' rights to access the courts, and furthermore, by placing an affirmative duty upon prison authorities to ensure inmates were able to access the courts.[41]

Access to courts must be "effective, adequate, and meaningful" as required by *Bounds*, but what constitutes "meaningful access" depends on the circumstances.[42] Prison authorities have discretion to determine how best to provide access for inmates.[43] The Sixth Circuit held that in order for juveniles to have meaningful access to courts, they must be afforded access to an attorney.[44] Adopting the reasoning given by the district court in *Morgan*, the Sixth Circuit held a law library would not provide adequate access to the courts for juveniles.[45]

> Even if there were [a law library] without assistance the students could not make use of legal materials. Furthermore, the students' ages, their lack of experience with the criminal system and their relatively short confinement means that there cannot be a system of writ writers for students who need them.[46]

The courts' concern is that juveniles lack the knowledge and capacity to adequately utilize legal materials even if they were provided with a law library. What they really need is a lawyer who can help navigate them through a system that they likely know very little about.

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39. *Id*. at 233 (citing Germany v. Vance, 868 F.2d 9, 16 (1st Cir. 1989).
40. Morgan v. Sproat, 432 F. Supp. 1130, 1158 (S.D. Miss. 1977).
41. *John L.*, 969 F.2d at 233.
42. *Id*. at 234.
43. *Id.* at 233-34.
44. *Id.* at 234.
45. *Id*.
46. Morgan v. Sproat, 432 F. Supp. 1130, 1158 (S.D. Miss. 1977).

III. SENATE BILL 585

A. The Right to Access in Virginia

The Virginia General Assembly has long recognized and upheld the right of adult inmates to have access to counsel.[47] Since 1950, indigent adult prisoners could have court appointed lawyers assist them in any legal matter "relating to their incarceration."[48] The Fourth Circuit has held that prisoners must have notice of their right to state-funded attorneys in order to satisfy the statute.[49]

The Fourth Circuit upheld the constitutional rights of incarcerated persons again in *Williams v. Leeke*.[50] Overall, Virginia's policies and procedures in assuring inmates access to the courts were good, but the court found flaws in the case of petitioner Brown.[51] Brown had only forty-five minutes, three times a week to access Richmond City Jail's law library.[52] The Fourth Circuit held this was insufficient to satisfy his constitutional rights.[53] Echoing the *Bounds* decision the court held, "...the state is duty bound to assure prisoners some form of meaningful access to the courts...[w]e believe that meaningful legal research on most legal problems cannot be done in forty-five minute intervals."[54] Prisoners' rights cases continue to come before the Fourth Circuit. Though each case is factually different, the Fourth Circuit has continued to recognize the right of incarcerated persons to have access to courts.[55]

The General Assembly also created a State Board of Corrections ("Board") whose duties include establishing programs for correctional facilities and making, adopting and promulgating rules and regulations.[56] Deriving its statutory authority from section 53.1-5 of the Code of Virginia,

47. VA. CODE ANN. § 53.1-40 (2009).
48. *Id.*
49. Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979).
50. *Id.* at 1340.
51. *Id.* In its opinion the court describes Virginia's response to its obligation to provide inmates with access to the courts. Paid for by a state-funded program, lawyers are regularly available to prisoners that may have claims arising from their incarceration. *Id.* at 1339. Essential to this policy is that inmates are aware of the availability of such counsel and it is the duty of prison authorities to give notice. *Id.*
52. *Id.* at 1338.
53. *Id.* at 1340.
54. *Id.* at 1339-40.
55. Strickler v. Waters, 989 F.2d 1375, 1382–87 (1993).
56. VA. CODE ANN. § 53.1-1, - 5. (2009).

the Board requires that in correctional facilities, "Inmates shall have access to federal and state courts through access to a court-appointed or private attorney, or an appropriate law library, or a combination thereof."[57]

Virginia has worked to protect the rights of its adult prison population. The General Assembly, courts, and state agencies have each played a role in ensuring these rights are not infringed upon. However, the incarcerated youth of Virginia still go overlooked.

B. Giving Access to Virginia's Youth—Senate Bill 585

Senator Dave Marsden offered Senate Bill 585 to the Virginia General Assembly on January 13, 2010.[58] The bill was set to be codified as section 16.1-226.3 of the Code of Virginia, under the heading "Appointment of counsel for juveniles in correctional facilities."[59] When Senate Bill 585 was first introduced, it provided that:

> The judge of a juvenile and domestic relations district court in whose county or city a state juvenile correctional facility is located shall appoint, for a period of one year at a time, one or more diligent and competent attorneys to counsel and assist juveniles confined to such facilities regarding any legal matter relating to their confinement.[60]

The bill provides for attorneys to be present in juvenile correctional facilities and to be paid "reasonable compensation on an hourly basis."[61] The budget bill introduced in 2010 already included money specifically granted to fund these attorneys in the correctional facilities.[62]

Senate Bill 585 was assigned to the Senate Committee for the Courts of Justice where it was first amended.[63] The committee re-codified the bill and overhauled the original language to reflect the language in the Code of Virginia that gives adult inmates the right to counsel.[64] The substitute also

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57. 6 VA. ADMIN. CODE § 15-31-300 (2000).

58. S.B. 585, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (introduced Jan. 13, 2010).

59. *Id.*

60. *Id.*

61. *Id.*

62. S.B. 30, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

63. *See* Legislative Information Services, Bill Tracking, S.B. 585, 2010 Sess., http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+SB585.

64. S.B. 585, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as reported by S. Comm. for Cts. of Just. on Jan. 25, 2010). *See* Va. Code Ann. § 53.1-40 (2009).

made Senate Bill 585 identical to House Bill 483, which was introduced on January 13, 2010.[65] Delegate BaCote was the chief patron of House Bill 483; Senator Locke and Senator Y.B. Miller also sponsored the bill.

With the substitute, Senate Bill 585 now provides that upon request of the superintendent of a state juvenile correctional facility, an attorney for the Commonwealth shall make a motion for a judge to appoint counsel for a juvenile "for a period of no less than 30 days nor more than one year."[66] The attorney is to "counsel and assist indigent individuals confined therein regarding any legal matter relating to their incarceration."[67] The amended language maintains the funding originally provided for.[68] The substantive difference between the original language and the amended language is that the superintendent of the correctional facility makes the request for counsel on behalf of the juvenile as opposed to having counsel present in each correctional facility in the state.

Senate Bill 585 and House Bill 483 required no additional budgetary amendments because all necessary monies had already been set aside in Senate Bill 30.[69] Despite its funding, Delegate BaCote recommended that House Bill 483 be continued until 2011 and the Criminal Subcommittee for the House Courts of Justice so recommended.[70] Senate Bill 585, however, made it out of the Senate Finance Committee with only one amendment—that the bill will not pass unless there is money provided for it in the appropriations bill passed by the General Assembly.[71] Senate Bill 585 passed the Senate on February 16, with 40 affirmative votes and no votes against it.[72]

65. H.B. 483, 2010 Gen. Assem., Reg. Sess. (Va. 2010); S.B. 585, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as reported by S. Comm. for Cts. of Just. on Jan. 25, 2010).

66. S.B. 585, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as reported by S. Comm. for Cts. of Just. on Jan. 25, 2010).

67. *Id.*

68. *Id.*

69. DEP'T OF PLANNING AND BUDGET, 2010 Va. Gen. Assem., 2010 FISCAL IMPACT STATEMENT: H.B. 483 (2010) (available at http://leg1.state.va.us/cgi-bin/legp504.exe?101+oth+HB483F122+PDF); S.B. 30, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

70. *See* Legislative Information Services, Bill Tracking, H.B. 483, 2010 Sess., http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+HB483

71. S.B. 585, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as engrossed Feb. 16, 2010).

72. *See* Legislative Information Systems, Bill Tracking, S.B. 585, 2010 Sess., http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+SB585

The bill entered the House and went to the Committee for the House Courts of Justice where it was assigned to the Criminal Subcommittee.[73] After a hearing before the subcommittee on February 26, Senate Bill 585 did not pass and was ultimately left in committee.[74]

C. A Juvenile's Right to Access Amongst the States

The courts give discretion to the states to determine how they will ensure inmates access to the courts.[75] As they have done with their adult inmate population, states have begun to recognize juveniles' rights and to protect them by statute. Each state has the right to create regulations that would best serve their prison population.

The Board of Juvenile Affairs in Oklahoma guarantees "... juveniles shall have the right to access the courts, counsel, and counsel substitutes."[76] Not only have their rights been recognized, but also the Board of Juvenile Affairs went to lengths to ensure that the youth in their custody have knowledge of their rights and are able to get help if they needed it. Staff members at the facilities, juvenile justice specialists, and student defenders are all available to assist the children; in addition, procedure requires that the juveniles are made aware of their rights when they first enter the facility.[77]

The State of Georgia, Department of Juvenile Justice, has also recognized juveniles' rights and mandated that "youth in Department facilities/programs shall not be denied access to the Courts."[78] Staff at juvenile facilities may inform the youth of the legal services available to them, but may not personally offer legal advice.[79]

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73. *Id.*

74. *Id.*

75. *See supra* note 41.

76. OKLA. ADMIN. CODE § 377:35-9-4 (2008). Juveniles have the right to:

> (1) present an issue, including the legality of their adjudications and their commitments or placements; (2) seek redress for illegal condition or treatment; (3) pursue legal remedies; and (4) assert a claim against [the Office of Juvenile Affairs] or other governmental authority for any rights protected by constitutional or statutory provision or by common law.

Id. See OKLA. STAT. ANN. tit. 10A, § 2-7-101 (West 2009) (giving the Board of Juvenile Affairs statutory authority to adopt and promulgate rules, regulations and policies for the Office of Juvenile Affairs).

77. OKLA. ADMIN. CODE § 377:35-9-4 (2008).

78. GEORGIA DEP'T OF JUVENILE JUST., POLICY MANUAL, RIGHTS OF YOUTH: ACCESS TO COURTS AND COUNSEL, (2007) (available at http://www.djj.state.ga.us/Policies/DJJPolicies/Chapter15/DJJ15.3YouthAccessToCourtsAndCounsel.pdf).

79. *Id.*

In *Williams v. McKeithen*, a Louisiana district court approved an agreement between United States Department of Justice and State of Louisiana that was a resolution to four pending actions against the State.[80] The agreement held that juveniles in correctional facilities shall have private access to their attorneys' in-person, by phone, and through the mail.[81] It also provided that the State fund three new staff attorneys and three new paralegal positions for the Louisiana Indigent Defense Assistance Board.[82] The new attorneys and paralegals are assigned only to represent juveniles in secure custody in connection with appeals of their adjudications and modifications of their disposition. If a juvenile has a claim arising out of his confinement, these attorneys and paralegals may refer them to other attorneys who can help them.[83]

States are recognizing many of the problems juveniles face while in custody. They have the ability to use discretion and to implement laws and procedures that would most benefit their youth populations and their juvenile justice systems. Senate Bill 585 provides Virginia a way to use their own laws to protect children and to implement policies and procedures that would work well for its institutions.

PART IV. SEX ABUSE IN JUVENILE CORRECTIONAL FACILITIES

A. The Report

On January 7, 2010, BJS released a study on sexual victimization in juvenile detention facilities; two of Virginia's facilities were ranked among the worst and received "high rates" of abuse.[84] The report surveyed over 25,000 youth nationwide, all who were held in state operated or privately funded correctional facilities.[85] The study uncovered that an estimated 12 percent of youth (or, 3,220) were victims of sexual abuse at least once in the past twelve months while being held in a juvenile correctional facility.[86] A majority of the abuse reported was between the youth and a staff member of

80. Williams v. McKeithen, 121 F.Supp.2d 943, 945 (M.D. La. 2000).
81. *Id.* at 959.
82. *Id.* 959-60.
83. *Id.* at 960.
84. ALLEN J. BECK, ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. SPECIAL REP.: SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf
85. *Id*. at 1.
86. *Id*.

the facility.[87] Of those youths who reported sexual abuse with a staff member 4.3% said some type of force was involved, 6.3% said there was none.[88]

In Virginia, Culpeper Juvenile Correctional Center and Bon Air Juvenile Correctional Center were among the 13 facilities that had the highest rates of sexual abuse.[89] At Culpeper 50 youth participated in the study, with a response rate of 42.9%— 30% of who reported some form of sexual abuse.[90] No juveniles at Culpeper reported abuse by other youth, all 30% reported sexual victimization by staff.[91] All 30% of the youth who reported sexual abuse at Culpeper reported sexual abuse excluding touching.[92] In addition, 12% reported staff sexual misconduct with force, and 20% reported staff sexual misconduct with no force.[93]

At Bon Air Juvenile Correctional Center, 40 juveniles participated in the study with a response rate of 29.4%.[94] Of those respondents, 25% of the youth reported some form of sexual abuse.[95] A total of 23.1% of Bon Airs

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87. *Id.* "About 2.6% of youth (700 nationwide) reported an incident involving another youth, and 10.3% (2,730) reported an incident involving facility staff." *Id*.

88. *Id.*

89. *Id*. at 4.

90. *Id.*

91. *Id.* at 8.

> Sexual Victimization includes any forced sexual activity with another youth (nonconsensual sexual acts and other sexual contacts) and all sexual activity with facility staff (staff sexual misconduct and staff sexual misconduct excluding touching).

Id. at 19.

92. *Id.* at 7.

> Staff sexual Misconduct Excluding Touching involves sexual activity with facility staff involving contact with the penis and the vagina or the penis and the anus; contact between the mouth and the penis, vagina or anus; penetration of the mouth anal or vaginal opening of another person by a hand, finger or other object; and rubbing of another person's penis or vagina by a hand.

Id. at 19.

93. *Id*. at 9.

> Staff Sexual Misconduct includes all sexual activity with facility staff including contact with the penis and the vagina or the penis and the anus; contact between the mouth and the penis, vagina, or anus; penetrations of the anal or vaginal opening of another person by a hand, finder or other object; rubbing of another person's penis or vagina by a hand; kissing on the lips or other part of the body; looking at private body parts; being shown something sexual like pictures or a movie; and engaging in some other sexual act that did not involve touching.

Id. at 19.

> Forced sexual activity includes sexual activity between youth and facility staff as a result of physical force or threat of physical force; force of pressure of some other type (e.g. threatening with harm, threatening to get the youth in trouble, pressuring the youth, or forcing or pressuring in some other way); and in return for money, favors protections, or other special treatment.

Id.

94. *Id.* at 4.

95. *Id.*

respondents report sexual acts excluding touching, none report other sexual contacts only.[96] Of those youth, 7.5% reported sexual victimization by another youth, and 22.5% reported sexual victimization by staff.[97] At Bon Air, 7.5% of youth reported staff sexual misconduct with force, while 15% reported staff sexual misconduct with no report of force.[98]

The reaction to these disturbing figures was immediate.[99] The Joint Legislative Audit and Review Commission ("JLARC") analyzed the survey at the request of the General Assembly.[100] JLARC's review concluded that parts of the study were flawed and may not "fairly reflect" conditions in correctional facilities.[101] Despite the problems they found with BJS report, JLARC recommended that Virginia's Department of Juvenile Justice ("DJJ") "...address the concerns the reports raises and ensure that juveniles in its care are afforded a safe environment."[102]

DJJ was quickly called to respond to the allegations—the Department's director, Barry Green, went before the Senate Finance Public Safety Subcommittee.[103] Green reported to the subcommittee many of the steps DJJ was taking to enhance security and provide mental health counseling for juveniles in its custody.[104] Efforts included installing new security cameras, extensive background checks on facility staff, and providing an independent grievance system for residents that would report to the Ombudsman.[105] However, for many youth advocates, it was too little too late.[106]

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96. *Id.* at 7. *See supra* text accompanying note 79.

97. *Id.* at 8. *See supra* text accompanying note 78.

98. *Id*. at 9. *See supra* text accompanying note 80.

99. *See* Letter from Senator Charles J. Colgan, Chairman, S. Finance Comm, to The Honorable M. Kirkland Cox, Chairman, Joint Legislative Audit and Review Commission (Jan. 15, 2010), *in* JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION, SPECIAL REPORT: ASSESSMENT OF THE U.S. BUREAU OF JUSTICE STATISTICS REPORT ON SEXUAL VICTIMIZATION IN JUVENILE CORRECTIONAL FACILITIES (Jan. 29, 2010).

100. *Id*.

101. JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION, SPECIAL REPORT: ASSESSMENT OF THE U.S. BUREAU OF JUSTICE STATISTICS REPORT ON SEXUAL VICTIMIZATION IN JUVENILE CORRECTIONAL FACILITIES, 2 (Jan. 29, 2010). The JLARC report identified several flaws with the BJS study, including a failure to accurately distinguish between allegations and actual abuse, the comparison of dissimilar state juvenile populations, and the fact that study's respondents may not have been a representative sample. *Id*. at 2-4.

102. *Id.* at 2.

103. *Response to Report on Sexual Victimization in Juvenile Facilities*: *Hearing Before the Subcomm. on Public Safety of the Senate Finance Comm.* 2010 Gen. Assem., Reg. Sess. (Va. 2010) (statement of Barry Green, Director, Virginia Department of Juvenile Justice).

104. *Id.*

105. *Id.*

106. *See* Editorial, *Sexual Abuse of Youths in Detention*, WASH. POST, Jan. 11, 2010, at A14; Editorial, *Juvenile Justice: Fix It*, RICH.TIMES DISPATCH, Jan. 11, 2010 at A8.

Months prior to the release of the BJS study, Claude Andrew Harris, the principal of Joseph T. Mastin High School at Bon Air Juvenile Correctional Center was convicted on four counts of carnal knowledge of a minor.[107] Harris was found guilty of having a sexual relationship with a seventeen-year-old high school student who was also a resident at Bon Air.[108] The girl testified that her relationship with her principal began in February 2007 and went until August of that year. It ended when Harris was transferred to another school.[109] The girl went four months without having any help or counsel from an attorney or mental health professional.[110]

Senate Bill 585 may not have been able to prevent these crimes, but it certainly could have given the young victim a voice. The victim had no family, no friends, and no access to the world outside of Bon Air.[111] Senate Bill 585 would have allowed the superintendent of the facility to contact legal counsel for her as soon as the abuse was uncovered.[112]

B. The Prison Rape Elimination Act—Creating National Standards

The federal government is also involved in resolving this nationwide problem. In 2003, Congress passed the National Prison Rape Elimination Act ("PREA") amongst its findings is that, "[p]rison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all."[113] In addition to the emotional and physical effect on the victim, PREA details a broader effect prison rape may have. Victims are more likely to commit crimes when they are released; racial tensions amongst prisoners are heightened; death, violence, and riots erupt between staff and prisoners; and the trauma may prevent the victim from successfully re-integrating into society, often leaving him homeless and dependent on government assistance.[114]

An important finding made by Congress in PREA, is that prison rape may be an actual and potential violation of the Eighth Amendment's Cruel and Unusual Punishments Clause.[115] A violation of the Eighth Amendment

107. Mark Bowes, *Former Principal Seeks Dismissal of Sex Verdicts*, RICH. TIMES DISPATCH, June 26, 2009, at B6.

108. *Id.*

109. *Id.*

110. Telephone Interview with Eileen Grey, Vice-President, Virginia Advisory Committee on Juvenile Justice (Mar. 13, 2010).

111. *Id.*

112. *See* S.B. 585, 2010 Gen. Assem., Reg. Sess., (Va. 2010) (as engrossed).

113. Prison Rape Elimination Act, 42 U.S.C. § 15601 (6) (2003).

114. 42 U.S.C. § 15601 (8)-(11).

115. 42 U.S.C. § 15601(13).

is found when inmates can demonstrate a "deliberate indifference" of a serious human need.[116] The Supreme Court of the United States has further held that the Eighth Amendment includes an element of intent, which requires prison officials to knowingly deprive inmates of a serious need.[117] Congress relied on the decision of the Supreme Court in *Farmer v. Brennan,* which held, "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[118] In PREA Congress reiterates its power to enforce Fourteenth Amendment rights[119] and warns that it will take action against states and officials that demonstrate deliberate indifference of prisoner's right to be free from sexual abuse.[120]

PREA created the National Prison Rape Elimination Commission ("Commission") whose duty was to create national standards "... for enhancing the detection, prevention, reduction, and punishment of prison rape."[121] In June 2009, the Commission published its report (the "NPREC Report") finding that, "[e]ven as courts and human rights standards increasingly confirmed that prisoners have the same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women, and children continued to be sexually victimized by other prisoners and corrections staff."[122]

The NPREC Report studied all correctional facilities including those for adults and juveniles.[123] The NPREC Report was published before the BJS study was released, but it still included data on sexual abuse in juvenile facilities using information from administrative records.[124] Amongst the findings were that juveniles are five times more likely than adults to be the victims of sexual abuse and nearly one out of every five juveniles reported

116. Wilson v. Seiter, 501 U.S. 294, 303 (1991).

117. *Id.* at 300.

118. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

119. U.S. Const. amend XIV, § 5

120. *See* 42 U.S.C. § 15601 (13). In Farmer v. Brennan, the Supreme Court held:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; 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.

Farmer, 511 U.S. at 837.

121. 42 U.S.C. § 15606 (e)(1).

122. National Prison Rape Elimination Comm., National Prison Rape Elimination Comm. Report 1 (2009) (available at http://www.ncjrs.gov/pdffiles1/226680.pdf).

123. *Id.*

124. *Id.* at 42.

nonconsensual sexual abuse.[125] The NPREC Report offered the final judgments of the Commission after many years of study. Providing youths with "unimpeded access to their or other legal representation..." was one of the conclusions of the NPREC Report for juvenile facilities.[126] Removing the barriers that prevent incarcerated persons from having access to courts is also an essential part of the Commission's findings and one of their recommendations to congress.[127] However, the task assigned to the Commission was not to only to issue a report, their mission was to develop standards and practices that will help victims and prevent future violence.

The Commission published the Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Juvenile Facilities (the "Standards") which establishes mandatory requirements for correctional facilities.[128] Resident access to outside support services and legal representation is one of the mandatory standards offered by the Committee.[129] Correctional facilities must provide residents with "...unimpeded access to their attorney or other legal representation..."[130] The discussion following the standard explained the need for such a requirement:

> Residents are often unaware of their rights in confinement, and most juvenile facilities do not provide residents with legal materials or a law library. Providing residents with unimpeded access to legal representation and to their families will not only help them navigate the legal process, if they need that help, but it will also give them greater access to adults in the community who may be able to help them if they're experiencing sexual threats or abuse.[131]

Senate Bill 585 would have put Virginia in compliance with this standard. Juveniles would be aware of their right to an attorney and would be able to access the courts. Staff at the facilities who were aware of the abuse could help the youth; they would no longer be silenced by regulations.[132]

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125. *Id.*

126. *Id.* at 227.

127. *Id.* at 328.

128. National Prison Rape Elimination Comm., Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Juvenile Facilities (2009) (available at http://www.ncjrs.gov/pdffiles1/226684.pdf) [hereinafter *Standards for the Prevention Detection, Response and Monitoring of Sexual Abuse in Juvenile Facilities*].

129. *Id.* at 33.

130. *Id.* at 35.

131. *Id.*

132. *See generally supra* note 127.

A category of standards mandated by the Commission relate to preventing sexual abuse from ever occurring.[133] One requirement made is a limitation on cross-gender searches.[134] The standard dictates that except in the case of emergency, nonmedical staff is prohibited from viewing residents of the opposite gender; this applies whether the resident is nude or performing a bodily function (i.e. showering, using the restroom).[135] Cross-gender pat-down searches are also expressly forbidden.[136]

The regulations currently in place in Virginia do not provide the necessary protections the Standards demands. Medical staff is not required to conduct strip searches and cavity searches and it allows for the presence of witnesses but is vague as to who these witnesses are.[137] Fortunately, the proposed regulations offer stricter guidelines for Virginia's correctional facilities. Including, that any strip search or cavity search shall be conducted in the presence of a witness of the same gender as the resident and qualified medical personnel are required to conduct these searches.[138]

Virginia's actions in compliance with Commission recommendations are crucial because the federal government has not yet adopted the Standards.[139] Attorney General, Eric Holder, only has until June 23, 2010 to adopt the Standards promulgated by the Commission.[140] While he has publically expressed support for the Standards, PREA requires that he does not "...impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities."[141] Although the NPREC Report and Standards have been on Holder's desk since June 23, 2009, it was not until March 10, 2010 that he issued a notice for public comments.[142] The public comment period is open until May 2010, it is unclear when Holder will make his final ruling.[143]

The studies, reports and other evidence indicate that delays in legislative action could result in more victimized youth. Virginia's Board of Juvenile Justice has taken proactive steps to help protect the youth in their custody.

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133. Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Juvenile Facilities, *supra* note 126, at 9.

134. *Id.* at 11.

135. *Id.*

136. *Id.*

137. 6 VA. ADMIN. CODE § 35-51-850 (2005).

138. 26 Va. Reg. Regs. 1588 (Feb. 1, 2010).

139. Just Detention Int'l, Federal Prison Rape Elimination Act,
http://www.justdetention.org/en/FPREA.aspx (last visited Apr. 11, 2010).

140. *Id.*

141. 42 U.S.C. § 15607(3).

142. National Standards to Prevent, Detect, and Respond to Prison Rape, 75 Fed. Reg. 11077 (proposed Mar. 10, 2010) (to be codified at 28 C.F.R. pt. 115).

143. *Id.*

Senate Bill 585 is another step towards correcting the injustices committed against Virginia's youth while they are in the custody of the state. The right to an attorney and right to access the courts belong to these children and it is the duty of the state to protect those in its care from harm.

C. Other Limitations to Access

In 1996, the Prison Litigation Reform Act ("PLRA") was enacted by the United States Congress.[144] The PLRA was a legislative move to limit prisoners' ability to access courts. Congress mandated that in order for a prisoner to bring a civil rights action under 42 U.S.C § 1983, he or she would first have to exhaust all administrative remedies.[145] Failure to do so would nullify a prisoner's right to seek relief for "egregious or flagrant conditions which deprive [prisoners] of any right privileges or immunities secured or protected by the Constitution or laws of the United States..."[146] The PLRA did not apply only to adults, however, it also applies to "any person incarcerated or detained in any facility who is accused of, convicted of, sentence for, or adjudicated delinquent for, violations of the criminal law..."[147] Juveniles are no exception.

The Criminal Justice Section of the American Bar Association ("ABA") has adopted policies that advocate revoking portions of the PLRA, especially as it applies to juveniles.[148] The ABA urges governments at every level to ensure prisoners have meaningful access to courts so they may vindicate their constitutional rights if necessary.[149] The ABA strongly recommends removing the PLRA as it applies to juveniles.[150] Applying the PLRA to juveniles in correctional facilities only places another procedural blockade in front of children who already do not know how to navigate the system. Children may be unaware of what an administrative remedy even *is* much less how to exhaust them.

Virginia Regulations provide for administrative procedures in juvenile correctional centers. If a juvenile in the correctional facility is accused of violating a "major rule" he has the option of pleading guilty or has the right to a hearing where he may present evidence and call witnesses on his

144. Prison Litigation Reform Act, 42 U.S.C. § 1997e (2006).
145. *Id.* at § 1997e(a).
146. *Id.* at § 1997a.
147. *Id.* at § 1997e(h).
148. American Bar Association: Criminal Justice Section, http://www.abanet.org/crimjust/juvjust/policy.html#102b (last visited June 28, 2010).
149. *Id.*
150. *Id.*

behalf.[151] In addition, the regulations as they currently exist, allow the youth to contact law enforcement personnel and/or an attorney, but *only* at the request of the juvenile.[152] Unfortunately, many children in these facilities do not know they have this right. Children who are the victim of rape may be scared, ashamed, and too embarrassed to consider about coming forward with some of this information. Forcing children to involve law enforcement and request counsel on their own is an unfair burden. Providing counsel in facilities may alleviate undue hardship and encourage victims to come forward.

The Board of Juvenile Justice ("BJJ") has proposed new regulations that will govern juvenile correctional facilities, as well as secure detention centers and halfway houses.[153] The proposed regulations governing correctional facilities include a juvenile's right to access the courts.[154] Unfortately, the BJJ goes no further by explaining how and to what degree juveniles will have access to the courts. The proposed regulations do allow for "uncensored, confidential contact"[155] with counsel, but this does not make it easier for juveniles to access a lawyer. In order for the juvenile to communicate with counsel under this regulation, evidence must be provided to show that the attorney has already been retained.[156] Yet another hurdle a juvenile must jump through. This regulation will severely limit a juvenile's ability to access counsel because in order for an attorney to communicate with them, the attorney must first be retained; but, in order for the attorney to be retained, he has must be able to communicate with the juvenile.

Applying this regulation to the case of rape victim in a correctional facility, the victim could spend months in silence before ever receiving any help—whether it is mental, medical or legal. The victim would first have to know she could seek help from facility staff, although the staff would not be able to offer her legal advice or recommend she get the advice of counsel. The current regulation does not require staff to report a "serious incident" to law enforcement personnel, it only requires reporting to: the

151. 6 VA. ADMIN. CODE § 35-140-550 (2005).

152. *Id.*

> No secure residential facility or employee of a secure residential facility may play a role in allowing contacts with law enforcement to which a resident does not consent. The secure residential facility shall have procedures for establishing a resident's consent to any given contact and for documenting the resident's decision. The procedures may provide for opportunities, at the resident's request, to confer with an attorney, parent or guardian or other person in making the decision.

Id.

153. 26 Va. Reg. Regs. 1571.

154. 26 Va. Reg. Regs. 1590.

155. *Id.*

156. *Id.*

agency, parents or legal guardians, if appropriate, and that a notation of the incident is made in the residents file.[157] The victim would have to know enough and be willing to voluntarily report the rape and ask for counsel. Unfortunately, if staff did know about the incident they could not contact an outside entity such as a non-profit children's advocacy group because they are prohibited by the regulation. Even people who want to help cannot. Senate Bill 585 would alleviate many of the problems created by administrative and procedural roadblocks. If the victim does report the rape, facility staff would be authorized to contact an attorney for the Commonwealth, who could then make a motion to have counsel appointed for the juvenile.[158]

V. CONCLUSION

Having access to courts is a fundamental constitutional right and it applies to all Americans— adults, juveniles, and incarcerated persons.[159] States legislatures and courts, both on the state and federal levels, are recognizing the rights of juveniles in detention centers.[160] Unfortunately, it has taken tragic events to bring the need to the forefront.

Prison rape is an ongoing issue—PREA was enacted in 2003, and the Standards still have not been approved in 2010. Incarcerated persons may have committed wrongs that put them in jails, prisons, or correctional facilities, but they are no less guaranteed to basic Constitutional rights than any person at liberty. The Supreme Court of the United States as expressly held that sexual abuse in prison is a violation of the Eighth Amendments Cruel and Unusual Punishments Clause, and it applies to the states through the Due Process Clause of the Fourteenth Amendment.[161] The National Prison Rape Elimination Commission issued standards that will help victims and prevent future abuse. Providing unimpeded access to legal counsel is one of the essential components of the Commissions report.

157. 6 VA. ADMIN. CODE § 35-51-1030 (2008). The regulations do not define what a "serious incident" is, leaving it open to interpretation. The proposed regulations tighten the reporting standards by requiring the facility staff to report amongst other things, "any serious illness, incident, injury, or accident involving injury or death of a resident" to "the parent or legal guardian" and "the supervising court services unit or agency." 26 Va. Reg. Regs. 1579.

158. *See supra* note 65.

159. *See supra* Part I.

160. *See supra* part II, B.

161. *See supra* note 7.

Once taken into the custody of the state, many youth lose contact with family and friends, they have very little contact with the world outside of the facility. The juvenile justice system is about rehabilitation, not punishment; allowing children to suffer in silence is punishment. Providing access to counsel could give a voice to the victims who are young and hurt, and have nowhere to turn.

In an editorial to the Richmond Times Dispatch, youth advocates Melissa Coretz Goemann and Lovisa Stannow wrote:

> In a year's time, thousands more youth would be sexually abused in juvenile detention across the country. Waiting another year would mean letting bureaucracy trump child safety. If the government delays needlessly, it will be failing its constitutional responsibility to protect the safety of those it locks up, who can no longer protect themselves.[162]

Senate Bill 585 is a measure that the Virginia General Assembly can take to help protect Virginia's youth from sexual abuse now and in the future.

162. Lovisa Stannow & Melissa Coretz Goemann, Op-Ed, *Virginia Should Stand for Children's Safety*, RICH. TIMES DISPATCH, Jan. 11, 2010, at A9.