# Impunity: Sexual Abuse in Women's Prisons

*Kim Shayo Buchanan*[*]

In the United States, sexual abuse by guards in women's prisons is so notorious and widespread that it has been described as "an institutionalized component of punishment behind prison walls."[1] Women in prisons[2] across the United States are subjected to diverse and systematic forms of sexual abuse: vaginal and anal rape; forced oral sex and forced digital penetration; quid pro quo coercion of sex for drugs, favors, or protection; abusive pat searches and strip searches; observation by male guards while naked or toileting; groping; verbal harassment; and sexual threats.[3] Guards

[*] J.S.D. Candidate, Columbia Law School; Sessional Assistant Professor, Criminology/Law and Society, York University. I am deeply grateful to Kimberlé Crenshaw, Philip Genty, Dori Lewis, Jim Phillips, Reva Siegel, and Susan Sturm for reviewing and commenting on drafts of this Article and for sharing their invaluable insights and wise advice. I am also grateful to Brenda Lee for her patient and thoughtful editorial skills.

[1] Angela Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 350 (1998).

[2] In this Article, I use the term "prison" to refer generally to all forms of institutional criminal incarceration, including federal and state prisons and local jails.

[3] *See* AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2006), *available at* http://www.amnestyusa.org/women/custody/custody_all.pdf [hereinafter ABUSE OF WOMEN IN CUSTODY] (highlighting general concern about assault in prison); AMNESTY INT'L, UNITED STATES OF AMERICA: "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999), *available at* http://web.amnesty.org/library/Index/engAMR510011999 [hereinafter NOT PART OF MY SENTENCE] (providing general information about women in prison); HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), *available at* http://www.hrw.org/reports/1996/US1.htm [hereinafter ALL TOO FAMILIAR] (detailing specific acts of abuse in prison); HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998), *available at* http://www.hrw.org/reports98/women/Mich.htm [hereinafter NOWHERE TO HIDE] (discussing privacy violations and abuse in prison); U.N. Comm. on Human Rights, *Report of the Human Rights Committee: Volume 1*, ¶¶ 285, 289, U.N. Doc. A/50/40 (Feb. 4, 1996), *available at* http://www.unhchr.ch/tbs/DOC.NSF/8e9c603f486cdf83802566f8003870e7/bbd592d8d48a76fec12563f000586adc?OpenDocument#A%2F50%2F40E (expressing Committee's concern regarding serious allegations of sexual abuse of female prisoners by male prison guards); U.N. Econ. & Soc. Council, Sub-Comm. on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999) (*prepared by* Radhka Coomaraswamy), *available at* http://www.unhchr.ch/HurIdocda/HurIdocda.nsf/0/7560a6237c67bb118025674c004406e9?Opendocument [hereinafter *Violence Against Women*] (noting prevalence of harassment and rape); U.N. High Comm'r for Human Rights, *Conclusions and Recommendations of the Committee Against Torture: United States of America* ¶ 179, U.N. Doc. A/55/44 (May 15, 2000), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.44,paras.175-180.En?OpenDocument (discussing humiliation of women in prison).

*See also* Davis, *supra* note 1, at 350–51; Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 42–43 (2004); Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 866–89 (2001); Brenda V. Smith, *Watching You, Watching Me*, 15

and prisoners openly joke about prisoner "girlfriends" and guard "boyfriends." Women prisoners become pregnant when the only men they have had contact with are guards and prison employees; often they are sent to solitary confinement—known as "the hole"—as punishment for having sexual contact with guards or for getting pregnant.[4] Such open and obvious abuses would seem relatively easy for a prison administration to detect and prevent if it chose to do so.

Prisons owe an affirmative legal duty to protect their inmates against abuse.[5] Congress and forty-four states have criminalized all sexual contact between guards and prisoners, regardless of consent.[6] Nonetheless, within

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YALE J.L. & FEMINISM 225, 230–33 (2003); Jennifer R. Weiser, *The Fourth Amendment Right of Female Inmates To Be Free from Cross-Gender Pat-Frisks*, 33 SETON HALL L. REV. 31, 32–33 (2002); Ashlie E. Case, Comment, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & FEMINISM 309, 309–12 (2005); Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 215 (2004); Ashley E. Day, Comment, *Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. § 1983*, 38 SANTA CLARA L. REV. 555, 555–56 (1998); Anthea Dinos, Note, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281 (2001) (discussing the inadequacy of remedies available for custodial sexual abuse); Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting To Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 338 (1998); Katherine C. Parker, Note and Comment, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia*, 10 AM. U. J. GENDER SOC. POL'Y & L. 443, 451, 460–61 (2002).

[4] CRISTINA RATHBONE, A WORLD APART: WOMEN, PRISON AND LIFE BEHIND BARS 42–65 (2005); Lori B. Girshick, *Abused Women and Incarceration*, *in* WOMEN IN PRISON: GENDER AND SOCIAL CONTROL 95, 109 (Barbara H. Zaitzow & Jim Thomas eds., 2003). *See generally* 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, 210 (1999) (discussing abuse of women in prison).

[5] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being."); Logan v. United States, 144 U.S. 263, 284 (1892) (holding that the government owes a duty to protect prisoners against "assault or injury from any quarter" and that prisoners have a corresponding substantive due process right to such protection); *see also* Helling v. McKinley, 509 U.S. 25, 32 (1993); Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

[6] *See* BRENDA V. SMITH, AM. UNIV., FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF PRISONERS (2001), http://www.nicic.org/Downloads/PDF/Video/statelaws.pdf. Amnesty International notes that every state has criminalized this contact except Alabama, Minnesota, Oregon, Utah, Vermont, and Wisconsin. As of March 1, 2006, a criminalization bill had passed both houses in Utah and was awaiting the governor's signature. ABUSE OF WOMEN IN CUSTODY, *supra* note 3, at 1, 13. It is important to note, however, that Colorado, Missouri, and Wyoming permit prisoner consent to mitigate the offense; in addition, Arizona, California, Delaware, and Nevada punish both the prisoner and the guard for this behavior. *Id.* at 5. Finally, in some states prison disciplinary rules establish that having sex with a guard is a disciplinary offense for which a prisoner can be punished. New York only abolished its version of such a disciplinary rule in 2006. E-mail from Dori Lewis to author, Litigator, Legal Aid Soc'y Prisoners' Rights Project (Apr. 18, 2006) (on file with author).

Moreover it is important to note that on its own, criminal liability often is an inadequate deterrent to sexual abuse. In a state where criminal liability exists, a prisoner must

women's prisons guards routinely commit serious sexual offenses against the women in their custody. Government administrators know that such abuse is occurring[7] and acknowledge their duty to prevent it.[8] However, they have generally neglected to do much about it, as most prisons have failed to adopt institutional and employment policies that effectively prevent or reduce custodial sexual abuse.[9]

In most workplaces, an employee who had sex on the job would be fired. In prison, a report of custodial sexual abuse is more likely to result in punishment or retaliation against the prisoner than in disciplinary consequences for the guard.[10] One might expect the law to furnish incentives for prisons to control such unlawful acts by their employees, as it does for other civil defendants. It does not.[11] Instead, as I demonstrate in this Arti-

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still convince prison authorities that her reports should be taken seriously enough to be investigated by the police. Prison administrators deem most prisoner reports unfounded and thus many cases are not investigated. *See* Preliminary Statement ¶¶ 24–37, Amador v. Dep't of Corr. Servs., No. 03 Civ. 0650, (S.D.N.Y. Jan. 28, 2003) [hereinafter Amador Statement]; Interview with Dori Lewis, Litigator, Legal Aid Soc'y Prisoners' Rights Project, in N.Y., N.Y. (Oct. 31, 2005).

[7] *See, e.g.*, AMNESTY INT'L, AMNESTY INTERNATIONAL USA: WOMEN (2006), http://www.amnestyusa.org/women/custody/ (providing state-by-state survey of policies and practices based on information obtained from state and federal attorneys general, correctional departments, court documents, and the Federal Bureau of Prisons); U.S. GEN. ACCOUNTING OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF 3 (1999), *available at* http://www.wcl.american.edu/faculty/smith/0303conf/gao_ggd99104.pdf?rd=1 [hereinafter SEXUAL MISCONDUCT BY CORRECTIONAL STAFF] (noting that by 1999, at least twenty-three correctional administrations had been named as defendants in class-action or individual lawsuits alleging sexual misconduct); *see also* Everson v. Mich. Dep't of Corr., 391 F.3d 737, 741 (6th Cir. 2005); Morris v. Eversley, 343 F. Supp. 2d 234, 242 (S.D.N.Y. 2004); Fisher v. Goord, 981 F. Supp. 140, 149 (W.D.N.Y. 1997); Nunn v. Mich. Dep't of Corr., No. 96-CV-71416, 1997 WL 33559323 at *1 (E.D. Mich. Feb. 4, 1997); Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994), *vacated in part*, *modified in part*, 899 F. Supp. 649 (D.D.C. 1995).

[8] *See, e.g.*, Prison Rape Elimination Act of 2003 §§ 1–9, 42 U.S.C.A. §§ 15601–15609 (2003); ALLEN J. BECK & TIMOTHY A. HUGHS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf [hereinafter SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES]; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 4 (2005), *available at* http://www.usdoj.gov/oig/special/0504/final.pdf [hereinafter DETERRING STAFF SEXUAL ABUSE]; SEXUAL MISCONDUCT BY CORRECTIONAL STAFF, *supra* note 7, at 3 ("In 1996, the National Association of Correctional Administrators identified staff sexual misconduct as one of its major management concerns."); *see also* NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, ADDRESSING STAFF SEXUAL MISCONDUCT WITH OFFENDERS, REMOTE CONFERENCE FOR INVESTIGATING AND PREVENTING STAFF SEXUAL MISCONDUCT IN A CORRECTIONS SETTING (2001); Louise Bill, *The Victimization and Revictimization of Female Offenders*, 60 CORRECTIONS TODAY, Dec. 1998, at 106.

[9] *See supra* note 3.

[10] *See* Girshick, *supra* note 4, at 109–10; *see also Violence Against Women*, *supra* note 3, at ¶¶ 74–75 (noting that inmates fear retaliation and that guards operate with impunity). *See generally* ALL TOO FAMILIAR, *supra* note 3 (documenting ineffective responses and retaliation in various states); NOWHERE TO HIDE, *supra* note 3 (noting that virtually all women interviewed for a previous report who had reported abuse faced retaliation).

[11] The misnamed Prison Rape Elimination Act of 2003 does not adequately punish or eliminate sexual abuse. It establishes no sanctions for guards who rape prisoners or for institu-

cle, a network of prison law rules—the Prison Litigation Reform Act of 1995 ("PLRA"),[12] governmental immunities, and constitutional deference—work together to confer near-complete immunity against prisoners' claims.

In the United States, both male and female prisoners are stereotyped as black;[13] more than two thirds of women in U.S. prisons are African American or Latina.[14] In this Article, I consider how the gendered racialization of women prisoners informs legal and institutional indifference to their treatment in prison. Like black women under slavery,[15] women in contemporary prisons are subjected to institutionalized sexual abuse, while the law refuses to protect them or provide redress.

I analyze this appalling anachronism as a concrete example of the modernization of status regimes described by Professor Reva Siegel,[16] and I suggest that the legal rules that structure prison law impunity are direct descendants of the status laws that overtly regulated the legal privileges and disabilities of race and gender hierarchy in nineteenth-century American society.

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tions that look the other way when prisoners are raped. Apart from threatening to name prisons that accept federal rape-prevention funds but subsequently fail to comply with as-yet-to-be-adopted national standards, the statute does not take any steps to limit the incidence of sexual abuse in prison. Instead, it establishes procedures for compiling prison rape statistics and allots funds to support prison rape prevention policies. The best that can be said of this legislation is that it at least acknowledges in the congressional findings that prison rape is unconstitutional. Prison Rape Elimination Act of 2003 § 15601.

[12] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified as amended at 11 U.S.C. § 523 (2000); 18 U.S.C. §§ 3624, 3626 (2000); 28 U.S.C. §§ 1346, 1915, 1915A (2000); 42 U.S.C. §§ 1997a–1997f, 1997h (2000)).

[13] *See* Zanita E. Fenton, *Silence Compounded—The Conjunction of Race and Gender Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 271, 278–79, 283–84 (2003) [hereinafter Fenton, *Silence Compounded*]; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1296 (2004); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 118 (2001).

[14] While reports differ as to the exact rates of incarceration by race, the plurality of U.S. women prisoners are black, and Latinas are also overrepresented in relation to the population. *Compare* NOT PART OF MY SENTENCE, *supra* note 3, § 3.1 (more than 52% of U.S. female prisoners African American), *and* ALL TOO FAMILIAR, *supra* note 3, at 17 ("Hispanic" women also grossly overrepresented), *with* LAWRENCE A. GREENFIELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 5–6 (1999) (revised 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf [hereinafter WOMEN OFFENDERS] (black women represent 35% of federal prisoners, 48% of state prisoners, and 44% of inmates of local jails; Hispanic women account for 32% of federal, 15% of state, and 15% of local prisoners; white women constitute 29% of federal, 33% of state, and 36% of local prisoners; other women make up 4% of federal, 4% of state, and 5% of local prisoners).

[15] *See* Davis, *supra* note 1, at 350 (noting the historical resonance between contemporary images of women prisoners and the treatment of black women under slavery).

[16] *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000) [hereinafter Siegel, *Color Blindness*]; Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) [hereinafter Siegel, *Rule of Love*]; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) [hereinafter Siegel, *Equal Protection*]; *see also* J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

Siegel observes that "status law is dynamic, and evolves in rule structure and rhetoric under the pressure of civil rights reform."[17] The evolution of such status laws results in the eventual adoption of new and more socially palatable rationales for continuing to distribute material and dignitary privileges along race and gender lines.[18] The result is that modernized status regimes "sanctio[n] new forms of status-enforcing state action as they repudiat[e] the old."[19]

For more than fifty years, the Supreme Court has condemned legal hierarchies based on race and, more recently and less affirmatively, gender.[20] Still, the two powerful examples of the modernization of race and gender status hierarchies that Siegel deploys continue to account for women's imprisonment today. Contemporary anti-drug laws sustain the disparate criminal surveillance and punishment of the black and Latino poor; at the same time, the lack of domestic violence law enforcement perpetuates the longstanding legal tradition of failing to protect women against family and relationship violence.[21] Part I.A of this Article demonstrates how the convergence of contemporary race and gender status regimes results in the imprisonment of low-income women of color who are survivors of sexual abuse. Part I.B describes the gendered and racialized sexual abuse to which these women are subjected once inside.

The Constitution forbids the deployment of law to maintain and perpetuate "unjust social hierarchies,"[22] including the paradigmatic hierarchies of race and gender. To determine whether the legal enforcement of a given social hierarchy is fair, "we have to examine the justice of a system of social meanings that create[s] and perpetuate[s] that status hierarchy."[23] Professor Siegel invites us to consider how the "reasonable and principled interpretation of constitutional doctrine justified status-enforcing state action in the nineteenth century" and to "ask whether it continues to do so in our own time."[24]

The rationales, rules, and results of contemporary prison law impunity evoke women's exposure to sexual and gender violence under nine-

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[17] Siegel, *Rule of Love*, *supra* note 16, at 2206.

[18] *Id.* at 2184.

[19] Siegel, *Equal Protection*, *supra* note 16, at 1148.

[20] *See* Siegel, *Rule of Love*, *supra* note 16, at 2184; *see also* Grutter v. Bollinger, 539 U.S. 306, 333, 341–42 (2003); Gratz v. Bollinger, 539 U.S. 244, 270–72 (2003); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); United States v. Virginia, 518 U.S. 515, 523 (1996); Frontiero v. Richardson, 411 U.S. 677, 682–84, 687–88 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971); Loving v. Virginia, 388 U.S. 1, 12 (1967); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[21] *See* LENORA LAPIDUS ET AL., ACLU, BRENNAN CTR. FOR JUSTICE, & BREAK THE CHAINS, CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 345 (2005), http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf [hereinafter CAUGHT IN THE NET]; *see also* BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN (1996).

[22] Balkin, *supra* note 16, at 2320, 2342–58.

[23] *Id.* at 2361.

[24] Siegel, *Equal Protection*, *supra* note 16, at 1148.

teenth-century status regimes that contemporary courts and legislatures have long purported to reject. In the nineteenth century, institutionalized systems of civil death, slavery, and segregation, and the common law of marriage and rape, exposed women of color (as well as many white women) to rampant sexual abuse and prevented women from petitioning the courts for protection or redress. As I describe in Part II of this Article, these historical status regimes constructed impunity in three main ways, each of which has a modern parallel in contemporary prison law: (1) blanket exclusionary rules based on the low status of the litigant; (2) nonenforcement of criminal prohibitions against status violence; and (3) a labyrinth of procedural and evidentiary rules, practices, and assumptions designed to deter civil claims regardless of their merit.

Part III explores the inter-relationship and cumulative effects of contemporary rules of prison law. Taken as a whole, these rules block nearly all claims against institutions for custodial sexual abuse. This remedial brick wall re-creates, within prison, discredited forms of impunity imposed by historical status regimes that our law now purports to reject. Like the nineteenth-century status regimes described in Part II, contemporary prison law underscores the degraded status of women in prison by creating a space in which exposure to guards' sexual violence "is effectively sanctioned as a routine aspect" of women's incarceration.[25] Prison law intensifies the racial and gender subordination of women prisoners in ways that evoke the discriminatory legal and social practices of an earlier era.

The rules that construct prison law impunity are designed to shield correctional authorities from the trouble and expense of litigating an anticipated flood of groundless prisoner litigation. The reach of these rules is not limited to sexual violence. They also vitiate the state's duty to protect prisoners against myriad other equally serious abuses that occur in men's and women's prisons.[26] This Article focuses on sexual abuse in women's prisons because such abuse highlights the injustice of the contemporary prison law regime of status-based impunity. This injustice, and the racialized and gendered assumptions upon which it rests, are especially salient in the case of custodial sexual abuse. The abusers are government actors, and their actions cannot be excused as the overzealous but

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[25] Davis, *supra* note 1, at 350.

[26] These human rights abuses include: racism; physical violence; arbitrary discipline; discriminatory security classification; inadequate health care; abusive conditions of incarceration (e.g., solitary confinement and supermax prison facilities); interference with privacy, religion, and expression; and failure to protect against inmate violence. *See* Girshick, *supra* note 4, at 105–08; James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527, 537–47 (2004) [hereinafter Robertson, *A Punk's Song*] (discussing state support of prison hierarchy involving abuse of punks and queens in men's prisons); Wil S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, HARPER'S, Aug. 2003, at 43, 54 (detailing inadequate and abusive medical care in prisons); *see also* William Bennett Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 484–90 (1971) (discussing violations of religious freedom, individual expression, and right to medical care in prison).

good-faith pursuit of any legitimate penological objective. Sexual abuse is well known to be severely underreported, both inside and outside prison.[27] Furthermore, women prisoners are generally far less likely than male prisoners to sue even when they have legitimate legal complaints.[28] In light of all this, there is no reason to preserve prison law impunity when we know that it facilitates and conceals widely acknowledged forms of abuse.

## I. Custodial Sexual Abuse in Women's Prisons

### *A. Women in Prison*

Professor Siegel has identified two modern status regimes that enforce longstanding racial hierarchies in contemporary form: a racially targeted "war on drugs"[29] and the failure of criminal law to protect women against physical and sexual violence. The intersection of these two modern status regimes results in the incarceration of large numbers of poor Latinas and black women who are survivors of past sexual abuse.[30]

Although U.S. drug laws are facially neutral with regard to race, they target drugs used and sold by low-income blacks and Latinos by exempting drugs used by wealthier whites, such as powder cocaine and club drugs, from the aggressive policing and draconian sentences deployed against users and sellers of crack.[31] "Urban black Americans . . . have

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[27] *See* Pub. L. No. 108-79 (codified as the Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2003)), Findings, § 2 ¶ 6 ("Prison 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."); Abuse of Women in Custody, *supra* note 3, at 12; Sexual Violence Reported by Correctional Authorities, *supra* note 8, at 2; Diana Majury, Women's Legal Educ. & Action Fund, The Tip of the Discrimination Iceberg: Barriers to Disclosure of the Abuse and Mistreatment of Federally Sentenced Women 8 (2003), *available at* http://www.elizabethfry.ca/submissn/leaf/leaf.pdf [hereinafter The Tip of the Discrimination Iceberg]; Deterring Staff Sexual Abuse, *supra* note 8, at 3.

[28] Rathbone, *supra* note 4, at 81; Telephone Interview with Philip Genty, Professor of Law, Columbia Law Sch., in N.Y., N.Y. (Aug. 4, 2005); Interview with Dori Lewis, *supra* note 6.

[29] As we have seen with the "wars" on drugs and, more recently, terrorism, the war metaphor often "indicates tacit approval of the fact that such processes sacrifice rights." Paula C. Johnson, Inner Lives: Voices of African American Women in Prison 48 (2003) (citing David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. Chi. Legal F. 237 (1994)).

[30] Caught in the Net, *supra* note 21, at 27–32. *See generally* Johnson, *supra* note 29.

[31] *Violence Against Women*, *supra* note 3, ¶ 26; Human Rights Watch, United States: Punishment and Prejudice: Racial Disparities in the War on Drugs (2000), *available at* http://www.hrw.org/reports/2000/usa/ [hereinafter War on Drugs]; Johnson, *supra* note 29, at 45–47. One Seattle study "revealed a significant level of white involvement in the crack cocaine market, [but] because police associated blacks with crack cocaine they were predisposed to focus on arresting blacks to the exclusion of whites engaged in the same behavior." Caught in the Net, *supra* note 21, at 30–31.

been arrested, prosecuted, convicted, and imprisoned at increasing rates since the early 1980s, and grossly out of proportion to their numbers in the general population or among drug users."[32] Although several studies demonstrate that African Americans use drugs at roughly the same or lower rates than whites,[33] African Americans constitute an overwhelming majority—by one account, over sixty-two percent—of Americans imprisoned for drug offenses.[34]

Since the advent of the war on drugs, imprisonment of women has increased even faster than the imprisonment of men.[35] Between 1986 and 2004, the number of women in prison for all crimes increased 400%, while the number of African American women in prison increased 800%.[36] Between 1986 and 1996, the number of women serving time in state prisons for drug crimes increased 888%, compared to 522% for men.[37] The war on drugs has racially targeted African American women and Latinas as it has their male counterparts; in New York State, 82% of Latinas and 65%

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[32] MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 105 (1995).

[33] *See, e.g.*, LLOYD D. JOHNSTON ET AL., MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS 2003 40, 41 (2004), *available at* http://www.monitoringthefuture.org/pubs/monographs/overview2003.pdf (showing that African Americans in high school use drugs at similar or lower rates than whites); CAUGHT IN THE NET, *supra* note 21, at 27 ("[W]omen of color are arrested for drug related offenses at far higher rates than white women, despite lower or equal rates of drug use."); Danice K. Eaton et al., *Youth Risk Behavior Surveillance—United States, 2005*, MORBIDITY & MORTALITY WEEKLY REPORT: SURVEILLANCE SUMMARIES (Ctrs. for Disease Control & Prevention, Atlanta, Ga.), June 9, 2006, at 1, *available at* http://www.cdc.gov/mmwr/PDF/ss/ss5505.pdf (showing that African Americans in high school do not tend to use drugs more than white students). *But see* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2005 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 22 (2006), *available at* http://oas.samhsa.gov/sduh/2k5nsduh/2kResults.pdf (reporting that 9.7% of African Americans are current users of illicit drugs, compared to 8.1% of whites).

[34] WAR ON DRUGS, *supra* note 31. Although studies repeatedly show that blacks use crack cocaine at only slightly higher per capita rates than whites, "black crack users are much more likely to be sentenced under . . . harsh [mandatory minimum sentencing] laws." CAUGHT IN THE NET, *supra* note 21, at 26.

[35] WAR ON DRUGS, *supra* note 31; CAUGHT IN THE NET, *supra* note 21, at 16–18. The "war on drugs" has introduced an increased reliance on incarceration to deal with the nonviolent crimes committed by women. Current drug laws criminalize "not just those who sell drugs, but also a wide range of people who help or merely associate with those who sell drugs." CAUGHT IN THE NET, *supra* note 21, at 35. Broad definitions of conspiracy, accomplice liability, and constructive possession expose women—as users, couriers, family members, or hangers-on—to criminal liability for partners' or relatives' conspiracies to trade in large amounts of drugs. Mandatory minimum sentences based on the amount of drugs involved rather than the nature of the accused's participation further expose women to lengthy drug sentences. Moreover, because women are more likely to serve in low-level capacities rather than as principals in the drug trade, women charged with drug offenses are unlikely to have information to trade with prosecutors in exchange for more lenient sentencing. *See id.* at 35–43.

[36] CAUGHT IN THE NET, *supra* note 21, at 16.

[37] MARC MAUER ET AL., GENDER AND JUSTICE: WOMEN, DRUGS, AND SENTENCING POLICY 5 (1999), *available at* http://www.sentencingproject.org/pdfs/9042.pdf.

of black women sentenced to prison were convicted of drug crimes, compared to only 40% of white women.[38]

Like their male counterparts, women prisoners are "demonized, impoverished, disenfranchised, and largely drawn from the underclass."[39] Each of these factors inform the indifference and hostility toward both male and female prisoners within society and in the courts. Women prisoners are especially vulnerable, however, because the overwhelming majority of them have been abused.[40] This prior abuse is central not only to their revictimization in prison,[41] but also to their likelihood of being incarcerated in the first place.[42] As teenagers and adults, these women are more likely to adopt maladaptive coping strategies, such as prostitution and drug use and alcohol, to deal with the pain of untreated or ongoing abuse.[43] Racial stereotypes of black women as promiscuous, criminal, and prone to violence make it more difficult for law and society to recognize their victimization and more likely that they will be scrutinized as sexual deviants and potential criminals.[44] Thus "the lives of poor, working-class, and racially marginalized women [are] overdetermined by punishment."[45]

Poor women, who are at heightened risk of relationship violence,[46] are vulnerable to many types of coercion by their partners. Sometimes this coer-

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[38] MAUER ET AL., *supra* note 37, at 10.

[39] James E. Robertson, *The Majority Opinion as the Construction of Social Reality: The Supreme Court and Prison Rules*, 53 OKLA. L. REV. 161, 187–88 (2000) [hereinafter Robertson, *Majority Opinion*].

[40] The Department of Justice estimates that two-thirds of women in state prisons have been physically or sexually abused prior to their incarceration. WOMEN OFFENDERS, *supra* note 14, at 1, 8; *see also* Jordan v. Gardner, 986 F.2d 1521, 1523 (9th Cir. 1992) (quoting the testimony of a California women's prison psychologist that eighty-five percent of female prisoners reported they had been sexually abused); *Violence Against Women*, *supra* note 3, ¶ 29 (noting that prison administrators had advised that "at least two thirds" of the female prisoners had been physically or sexually abused in the past); CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf; JEAN HARRIS, THEY ALWAYS CALL US LADIES: STORIES FROM PRISON 116 (1998); JOHNSON, *supra* note 29, at 7 ("Sixty-nine percent of women under correctional system authority reported that physical or sexual abuse occurred before they reached eighteen years of age."); CAUGHT IN THE NET, *supra* note 21, at 9; RATHBONE, *supra* note 4, at 22; Girshick, *supra* note 4, at 97–98 (citing several relevant studies); Lisa Krim, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Female Prisoners*, 6 UCLA WOMEN'S L.J. 85, 112–13 (1995) (citing an American Correctional Association published profile "indicating that the typical female prisoner was sexually abused between the ages of five and fourteen, usually by a male in her immediate family"); Laderberg, *supra* note 3, at 338 n.97.

[41] *See* CAUGHT IN THE NET, *supra* note 21, at 47–48; Girshick, *supra* note 4, at 96.

[42] *See* CAUGHT IN THE NET, *supra* note 21, at 9–10.

[43] *Id.* at 9.

[44] Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469–71 (1992) [hereinafter Crenshaw, *Sexual Harassment*]; Fenton, *Silence Compounded*, *supra* note 13, at 283–84.

[45] Davis, *supra* note 1, at 344.

[46] ROBERT BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/femvied.pdf [hereinafter ESTIMATES FROM THE REDESIGNED

cion takes the form of pressure to engage in criminal acts. Battered women often are not in a position to refuse their partners' direction that they use or sell drugs:[47]

> In some cases, abusive partners coerce women into using illegal substances as part of the pattern of violence, in an effort to render women more dependent on them and exert greater control in the relationship. . . . [W]omen who are battered by their drug abusing partners report that their partners abuse them less when they themselves begin using drugs.[48]

Typically, women are incarcerated for marginal involvement in their male partners' drug sales.[49] Increasingly broad definitions of criminal complicity have resulted in women going to jail merely for living with men who use or sell drugs or for engaging in normal dating behavior, such as letting men use their telephones.[50] Thus gender violence and the war on drugs intersect, resulting in the arrest and imprisonment of low-income women of color who are survivors of abuse.[51]

After conviction, black women and Latinas are likely to be sentenced to prison, while white women are likely to be released. Department of Justice figures reveal that white women constitute only 29% to 36% of American women in federal, state, and local prisons,[52] while more than two-thirds of incarcerated women are black or Latina.[53] By contrast, white women make up a substantial majority—62%—of women released on probation.[54] These statistics suggest either that many white women are being tried and convicted for minor crimes that do not warrant imprisonment, or that they are being spared imprisonment because they are white.[55]

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SURVEY]; *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251 n.35 (1991) [hereinafter Crenshaw, *Mapping the Margins*]; Davis, *supra* note 1, at 344.

[47] CAUGHT IN THE NET, *supra* note 21, at 9–10; Girshick, *supra* note 4, at 96–99.

[48] CAUGHT IN THE NET, *supra* note 21, at 9 (citing BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 125–27 (1996)).

[49] *See* RATHBONE, *supra* note 4, at 22 ("[These women] are frequently mere accessories to their crimes: girlfriends, wives, or lovers of drug dealers, even leaseholders of apartments in which drugs are stashed.").

[50] CAUGHT IN THE NET, *supra* note 21, at 35–37.

[51] *See id.* at 3, 24–25; *see also Violence Against Women*, *supra* note 3, ¶¶ 11–13, 18–20. *See generally* JOHNSON, *supra* note 29; RATHBONE, *supra* note 4.

[52] WOMEN OFFENDERS, *supra* note 14, at 7.

[53] *Id.*

[54] *Id.*

[55] *See* JOHNSON, *supra* note 29, at 32–34 (noting that in the immediate post–Civil War period, "[w]hite women were systematically channeled out of prisons, while African American women were systematically channeled into them"); *see also* KATHRYN WATTERSON BURKHART, WOMEN IN PRISON 32–35 (1973) (discussing same phenomenon in early 1970s).

### *B. Women's Experiences of Imprisonment*

Inside prison, it is as though the clock has been turned back to the nineteenth century. Women, especially women of color, are exposed to institutionalized sexual abuse, while a network of legal rules prevents them from seeking protection or redress in the courts.[56] Guards know that they can sexually exploit women prisoners without fear of institutional sanction or civil liability.[57] Journalist Cristina Rathbone, who interviewed hundreds of women prisoners in Massachusetts between 2000 and 2002, observes that while many male guards perform their work appropriately,[58] "[a] few . . . abuse their power appallingly and literally rape at will."[59]

Although the contemporary prison is characterized by myriad institutional rules,[60] guards enforce them selectively or disregard them altogether. Guards often extend unofficial accommodations to favored inmates and use illegal forms of intimidation and force on others.[61] In such a setting, the sticks and carrots guards may use to coerce sex from prisoners are plausible and effective.

Accordingly, although rape by guards is commonplace in U.S. women's prisons,[62] most custodial sexual abuse takes forms other than outright rape.[63] Prison officials report that "[m]ost allegations involved verbal harassment, improper visual surveillance, improper touching, and/or consensual sex."[64] More specifically, women prisoners are subjected to sexual comments, groping, and threats of rape; male guards watching them on the toilet or in the shower; physical searches by male guards;[65] demands for sex in exchange for goods or privileges or under threat of sanction; and guards taking advantage of their position to have "consensual" sex with prisoners without overt material exchange.[66]

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[56] NOT PART OF MY SENTENCE, *supra* note 3, at Part V.

[57] *See, e.g.*, NOWHERE TO HIDE, *supra* note 3; *see also* ABUSE OF WOMEN IN CUSTODY, *supra* note 3, at 17.

[58] RATHBONE, *supra* note 4, at 57.

[59] *Id*.

[60] Robertson, *Majority Opinion*, *supra* note 39, at 166–69.

[61] *Id*. at 184. *See* MICHAEL JACKSON, JUSTICE BEHIND THE WALLS: HUMAN RIGHTS IN CANADIAN PRISONS 616–17 (Barbara Pulling ed., 2002).

[62] *See* RATHBONE, *supra* note 4, at 44–65.

[63] *Violence Against Women*, *supra* note 3, ¶ 55.

[64] SEXUAL MISCONDUCT BY CORRECTIONAL STAFF, *supra* note 7, at 4.

[65] ABUSE OF WOMEN IN CUSTODY, *supra* note 3, at 6 (revealing that forty-five states allow pat-down searches of female prisoners by male guards in some circumstances and that in six states—Connecticut, Kansas, Michigan, New Hampshire, New York, and Pennsylvania—such cross-gender physical searches are routine). However, New York has recently issued a directive limiting cross-gender pat frisks. E-mail from Dori Lewis to author, *supra* note 6.

[66] *See* ALL TOO FAMILIAR, *supra* note 3; *Violence Against Women*, *supra* note 3, at ¶¶ 55–63.

Women prisoners' history of abuse heightens their risk of revictimization.[67] Egalitarian relationships have not been the norm in their lives prior to imprisonment. Because most prisoners have been sexually and physically abused in past family and romantic relationships, severe power imbalances may feel normal and familiar to a prisoner. Many prisoners have previously engaged in sex work in order to obtain money, drugs, or a roof over their heads.[68] Thus, quite predictably, some women prisoners seek out relationships with guards.[69] A prisoner may be lonely, or she might be attracted to the guard or his power; she might just want to have sex.[70] For some women, "it seems as if sex is the only thing that keeps time clicking by."[71] In an environment where there are no other men, some prisoners may even fall in love with guards.[72] A large part of the attraction in a relationship with a guard, though, is that it brings considerable benefits in the short term: visits, phone calls, cigarettes, protection, favorable work assignments, freedom to break prison rules, and other treatment that might mitigate the hardship and boredom of imprisonment.[73] Critically, when these unequal relationships end, guards often become abusive.[74] Guard retaliation may range from loss of privileges to disciplinary action, threats, and physical and sexual violence.[75]

When prisons fail to enforce prohibitions on sex between guards and prisoners, they create considerable pressure on women who do not cooperate with guards' sexual demands. "[I]t is not only actual physical and verbal sexual abuse but also the *potential* for this abuse that makes it so powerful a form of control over women inmates."[76] So-called protection from other predatory guards, for example, would be a meaningless incentive if sexual contact between guards and prisoners were effectively prohibited. The imbalance between guards and prisoners allows guards to coerce sex through material inducements that are strikingly petty.[77] One Framingham prisoner was given a piece of contraband bubblegum by a flirtatious guard, only to find out he expected sex in return.[78] She realized, belatedly, that "she might just have sold herself for a piece of gum."[79]

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[67] Bill, *supra* note 8, at 106–12; Laderberg, *supra* note 3, at 338; *see also* CAUGHT IN THE NET, *supra* note 21, at 15–16, 53–54.

[68] *See* JOHNSON, *supra* note 29, at 99–100, 110–11, 136, 144–46, 161–62, 186.

[69] *See* RATHBONE, *supra* note 4, at 58.

[70] RATHBONE, *supra* note 4, at 58.

[71] *Id.* at 49.

[72] *Id.* at 51.

[73] Girshick, *supra* note 4, at 108–10; *see also* RATHBONE, *supra* note 4, at 47–51.

[74] *See* Fisher v. Goord, 981 F. Supp. 140, 145–46 (W.D.N.Y. 1997); Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 666 (D.D.C. 1994), *vacated in part*, *modified in part*, 899 F. Supp. 659 (D.D.C. 1995); Amador Statement, *supra* note 6, ¶¶ 47(c), 51(g); RATHBONE, *supra* note 4, at 52.

[75] NOWHERE TO HIDE, *supra* note 3.

[76] Girshick, *supra* note 4, at 108.

[77] *See id*.

[78] RATHBONE, *supra* note 4, at 52–54.

[79] *Id.* at 54.

Finally, a prisoner who is propositioned by a guard, knowing that the guard will be able to rape or beat her if she refuses, might well judge it wise to comply to see what she can reap from her association with a guard.[80] In prison, as under slavery, such coercive purchase of consent reinforces preexisting racial and gender stereotypes that classify black women and other women of color as prostitutes and prostitutes as fair game, thus undermining public and judicial sympathy for abuse victims who are portrayed as sexually "loose."

## II. The Structure of Status Hierarchy

The intersection of two modern race and gender status regimes fills prisons with low-income women of color who are survivors of prior abuse. Once inside, these women find themselves subjected to forms of abuse that are remarkably similar to the sexual abuses perpetrated against women of color under slavery[81] and other nineteenth-century status regimes, and their abusers enjoy similar impunity. This Part discusses three ways in which nineteenth-century legal practices excluded low-status litigants from the courts, each of which has a modern parallel in contemporary prison law: (1) claims and testimony were barred from court on the basis of the low status of the claimant or witness, (2) criminal prohibitions on violence against low-status groups were ignored, and (3) specialized evidentiary and procedural rules were designed to deter litigation by low-status litigants, regardless of merit.

### *1. Status-Based Bars to Litigation*

Like modern-day prisoners under the Prison Litigation Reform Act, slaves, African Americans, and prisoners of the nineteenth century were subject to status-based bars to litigation that excluded them from access to the courts. Prisoners in the nineteenth century were subject to a regime of "civil death,"[82] under which they were excluded from citizenship and prohibited from contesting their treatment in court.[83] A prisoner "ha[d], as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him. He is for the time being the slave of the State."[84]

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[80] *See id.* at 58–59.

[81] *See* Davis, *supra* note 1, at 350 (noting resonances between contemporary imprisonment and slavery).

[82] George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895, 1899 (1999).

[83] Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. Rev. 1505, 1509 (2004); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa. L. Rev. 985, 985 (1962) [hereinafter *Constitutional Rights of Prisoners*].

[84] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

By the mid-twentieth century, the status-based notion of civil death had been gradually supplanted by a hands-off doctrine, in which courts refused to review the constitutionality of prison conditions on the basis that proper prison administration required complete immunity against prisoners' claims.[85] Unlike civil death, this doctrine did not expressly bar prisoners from court. However, under the hands-off doctrine, "all that a court in effect determines is that the complainant is a legally convicted prisoner. It then follows that his grievance is beyond the ken of judicial authority or competence."[86] Of course, to say that "the vindication of prisoners' rights is to be left to the discretion of the prison officials . . . is tantamount to denying that such rights exist."[87] As a result, prisoners were left with virtually no enforceable legal rights until the late twentieth century.[88]

The constitutional rights of prisoners and of African Americans have waxed and waned in tandem; throughout the history of race law in America, various status-based regimes have obstructed African Americans' access to the courts. As many commentators have pointed out, contemporary mass incarceration of African Americans forms part of a "historical lineage of 'peculiar institutions' that have served to define, confine, and control African Americans—slavery (1619–1865), the Jim Crow system in the South (1865–1965), the urban ghetto in the North (1915–1968), and the 'novel organizational compound formed by the vestiges of the ghetto and the expanding carceral system [(1968–present)].'"[89]

Slavery provides perhaps the most obvious example of an institutionalized status regime denying access to legal redress: African Americans, whether slave or free, were prohibited as noncitizens from bringing claims before American courts.[90]

Thus, slaves were barred from suing to enforce any moral duty of their masters to provide humane treatment.[91] Nineteenth-century courts viewed the "master-slave relation as a *private* one, at least from the law's point of view."[92] As held in *State v. Mann*:

> We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must

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[85] *See* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506, 508–09, 515–16 (1963) [hereinafter *Beyond the Ken of the Courts*].

[86] *Id.* at 507.

[87] *Constitutional Rights of Prisoners*, *supra* note 83, at 987 (emphasis omitted).

[88] See Turner, *supra* note 26, at 473, 503; *Beyond the Ken of the Courts*, *supra* note 85, at 507; *Constitutional Rights of Prisoners*, *supra* note 83, at 985, 1506.

[89] Wacquant, *supra* note 13, at 98–99; *see also* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22–39 (2003); Lewis R. Gordon, *Philosophical Anthropology, Race, and the Political Economy of Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 145, 156–60 (2004).

[90] Scott v. Sandford (Dred Scott), 60 U.S. (19 How.) 393 (1856).

[91] State v. Mann, 13 N.C. (2 Dev.) 263 (1829); MARK V. TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE 58 (2003).

[92] TUSHNET, *supra* note 91, at 25.

> be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God.[93]

After the abolition of slavery, "the first and most universal device" for subordinating African Americans "[was] to use the courts as a means of reënslaving the blacks."[94] One element of this subordination was the development in Southern states' post-abolition adoption of extensive legal and customary rules that barred African Americans from civil justice after the Civil War. In 1872, the Supreme Court upheld a Kentucky statute that excluded the testimony of any "slave, negro or Indian" from any criminal or civil proceeding involving a white person.[95] The explicit purpose of such exclusion was to maintain the racial authority of Southern whites, who "perceived the necessity of answering charges brought by former slaves as an indignity"[96] and were outraged that the Freedmen's Bureau "listened to the slightest complaint of the negroes, and dragged prominent white citizens before [the] court upon the mere accusation of a dissatisfied negro."[97] They further objected to the possibility that blacks could "ha[ve] 'white men arrested and carried to the Freedmen's court . . . where [former slaves'] testimony is taken as equal to a white man's.'"[98]

In addition excluding former slaves' testimony, the law prohibited both slaves and free black people from bringing claims before courts during the era of civil death.[99] Although the Reconstruction Amendments signaled a change in the legal status of African Americans from chattels to citizens,[100] and introduced the rights to vote and sue, they also excluded prisoners from their protection: the Thirteenth Amendment prohibits slavery and involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted."[101]

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[93] *Mann*, 13 N.C. at 263.

[94] W.E.B. DuBois, The Souls of Black Folk 200–01 (Signet Classics 1969) (1903); *see also* Eric Foner, Reconstruction: America's Unfinished Revolution 1863–1877, 593–94 (1988).

[95] Blyew v. United States, 80 U.S. (13 Wall.) 581, 592–93 (1872) (upholding statutory exclusion of three black witnesses' testimony against the accused white person on the basis that federal court had no jurisdiction over Thirteenth Amendment challenge to the statute because the witnesses, unlike the accused, were not persons "affected" by the criminal prosecution).

[96] Foner, *supra* note 94, at 150.

[97] *Id.*

[98] *Id.* at 151.

[99] Scott v. Sandford (Dred Scott), 60 U.S. (19 How.) 393 (1856); State v. Mann, 13 N.C. (2 Dev.) 263 (1829).

[100] Siegel, *Equal Protection*, *supra* note 16, at 1121–22; Foner, *supra* note 94, at 592.

[101] U.S. Const. amend. XIII, § 1.

*2. Nonenforcement of Criminal Prohibitions on Status Violence*

Status-based exclusionary rules accompanied and reinforced a pattern of failure to enforce criminal laws that prohibited status violence, that is, private violence that keeps low-status people in their place.[102] "[V]iolence against blacks generally went unpunished" in the South after Reconstruction,[103] and lynching was widely tolerated.[104] Police, juries, and judges notoriously refused to punish other unlawful forms of status violence, such as wife battering,[105] sexual assault,[106] gay bashing,[107] and prisoner abuse.[108]

Courts and legislatures resisted prosecution of such status violence almost as though the prosecution were "an invasion of the perpetrator's rights."[109] Status-based laws have historically established and maintained hierarchies between husbands and wives, men and women, slaveholders and slaves, and whites and blacks, in part by ignoring the prohibition of violence by the former against the latter.

Typically, these post-feudal laws acknowledged the master's obligation to take care of the subordinate, as well the subordinate's duty to submit.[110] Like contemporary criminal bans on custodial sexual abuse, such laws were enforced selectively to preserve the authority of the masters.[111]

In particular, prison law impunity draws upon many of the same justifications as the old law of domestic violence.[112] Perhaps the most prominent shared rationale is the notion that institutional needs require the courts to disregard violence committed by men in positions of authority.[113]

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[102] *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171–83 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY]; Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Zanita E. Fenton, *Mirrored Silence: Reflections on Judicial Complicity in Private Violence*, 78 OR. L. REV. 995, 1018, 1019 (1999) [hereinafter Fenton, *Mirrored Silence*]; Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1464–65, 1482–83 (1992).

[103] FONER, *supra* note 94, at 593.

[104] JOHNSON, *supra* note 29, at 23–24; Crenshaw, *Mapping the Margins*, *supra* note 46, at 1272.

[105] Fenton, *Mirrored Silence*, *supra* note 102, at 999; Siegel, *Rule of Love*, *supra* note 16, at 2118.

[106] MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 102, at 171–83; Estrich, *supra* note 102, at 1090.

[107] Thomas, *supra* note 102, at 1490–91.

[108] Robertson, *A Punk's Song*, *supra* note 26, at 540.

[109] Thomas, *supra* note 102, at 1484.

[110] *See* TUSHNET, *supra* note 91, at 32; Siegel, *Rule of Love*, *supra* note 16, at 2122–23.

[111] *See* Scott v. Sandford (Dred Scott), 60 U.S. (19 How.) 393, 427 (1856); State v. Rhodes, 61 N.C. (Phil.) 453, 459 (1868) ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."); State v. Mann, 13 N.C. (2 Dev.) 263, 263 (1829); TUSHNET, *supra* note 91, at 58; Siegel, *Rule of Love*, *supra* note 16, at 2123, 2132, 2157.

[112] *See, e.g.*, Fenton, *Mirrored Silence*, *supra* note 102, at 1018.

[113] Siegel, *Rule of Love*, *supra* note 16, at 2153–60.

> In the nature of things [assault and battery law] cannot apply to persons in the marriage state, it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign.[114]

At common law, a husband owed an obligation to support his wife and children financially, and not to physically abuse the wife (or at least not to beat her too severely). At the same time, the wife was obliged to obey and serve her husband, who had the right to physically "chastise" her to enforce that duty.[115] Nineteenth-century women's rights campaigners argued that the status of married women under such a legal regime was, in practice, civil death.[116] Even as nineteenth-century courts began to repudiate the law of chastisement, they continued to refuse to adjudicate wives' claims to enforce husbands' support obligations or to gain protection against husbands' violence.[117] To justify this inaction, the courts portrayed the family as a loving home to which violence was foreign and state intrusion unnecessary,[118] where the man was the unchallenged king, and the wife's altruistic love led to dutiful forbearance.[119] "[J]udicial involvement in adjudicating complaints arising from the internal affairs of the household was injurious because it encroached upon the authority of its master."[120]

Domestic violence immunity doctrines, such as coverture, chastisement, and marital privacy, functioned "to preserve authority relations . . . among men of different social classes as well."[121] As courts began addressing domestic violence during the late nineteenth and twentieth centuries, black men were selectively targeted for criminal wife-beating arrests and convictions as well as for consequent disenfranchisement.[122] Criminal prohibitions on wife beating were enforced in accordance with predominant social stereotypes that "consistently portray[ed] Black and other minority communities as pathologically violent."[123] These offenses, punishable by

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[114] *Id.* at 2153 (quoting State v. Hussey, 44 N.C. (Busb.) 123, 126–27 (1852)).

[115] *Id.* at 2122–23.

[116] *Id.* at 2128 (quoting REPORT OF THE WOMAN'S RIGHTS CONVENTION, HELD AT SENECA FALLS, N.Y., JULY 19TH & 20TH, 1848, at 6 (Rochester, John Dick 1848)).

[117] *Id.* at 2154.

[118] Fenton, *Mirrored Silence*, *supra* note 102, at 1034; Siegel, *Rule of Love*, *supra* note 16, at 2150–53.

[119] Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976–84 (1991); Siegel, *Rule of Love*, *supra* note 16, at 2155–56.

[120] Siegel, *Rule of Love*, *supra* note 16, at 2154–55.

[121] *Id.* at 2120.

[122] *Id.* at 2134–41; *see also* Fulgham v. State, 46 Ala. 143 (1871); Harris v. State, 14 So. 266 (Miss. 1894); Martha Hodes, *The Sexualization of Reconstruction Politics: White Women and Black Men in the South After the Civil War*, 3 J. HIST. SEXUALITY 402, 403 (1993).

[123] Crenshaw, *Mapping the Margins*, *supra* note 46, at 1256; *see also* Siegel, *Rule of Love*, *supra* note 16, at 2140.

flogging, were enforced almost exclusively against African American men and, in the North, recent European immigrants.[124] At the same time, the doctrine of marital privacy immunized propertied white men against wives' claims for protection against physical abuse.[125]

Thus the sovereignty of a white husband or slaveholder was nearly absolute; criminal laws prohibiting status violence were not enforced. Accordingly, the murder of a husband by a wife or a master by a slave was treated at common law as "petty treason,"[126] while the murders of slaves and wives were subject to extraordinary defenses such as provocation and the "crime of passion."[127] A husband's beating of his wife was private; a master's beating of his slave, however severe and unprovoked, was not a crime at all.[128]

Like contemporary laws against custodial sex, the antimiscegenation and rape laws of the nineteenth and twentieth centuries were selectively enforced in ways that preserved the sexual prerogatives of race and gender. An allegation that a black man had raped a white woman often resulted in a lynching.[129] Those involved in the lynchings were rarely prosecuted.[130] Even if he escaped lynching, an African American man accused of raping white women often received the death penalty.[131] In contrast, white men were penalized for rape only when their victims were respectable white women who were not their wives or acquaintances.[132] In large part because of racialized gender stereotypes that stigmatized black women and justified their rape,[133] white men's sexual abuse and exploitation of the black women who worked for them were ignored.[134] Rape of a slave woman was not a

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[124] Siegel, *Rule of Love*, *supra* note 16, at 2134–40.

[125] *Id.* at 2153.

[126] *See* Carlton F. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 870 (2006); *see also* Fenton, *Mirrored Silence*, *supra* note 102, at 1019; Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53, 64 (1983); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 628–29 (1980).

[127] Fenton, *Mirrored Silence*, *supra* note 102, at 1020–22. In practice, the murders of slaves were rarely prosecuted. *See* TUSHNET, *supra* note 91, at 13.

[128] State v. Mann, 13 N.C. (2 Dev.) 263 (1829); TUSHNET, *supra* note 91, at 33–36.

[129] JOHNSON, *supra* note 29, at 22–23.

[130] *Id.* at 23–24; Crenshaw, *Mapping the Margins*, *supra* note 46, at 1271–73.

[131] *See* Furman v. Georgia, 408 U.S. 238, 364–65 (1972) (Marshall, J., concurring); Adrien Katherine Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 27 (1993); Barbara Holden-Smith, *Inherently Unequal Justice: Interracial Rape and the Death Penalty*, 86 J. CRIM. L. & CRIMINOLOGY 1571 (2000) (reviewing ERIC W. RISE, THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT (1995)).

[132] *See* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 102, at 175–76, 179.

[133] *See* PATRICIA HILL-COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 166–68, 177–79 (1990); JOHNSON, *supra* note 29, at 23–24; Crenshaw, *Sexual Harassment*, *supra* note 44, at 1469–71.

[134] *See* ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS 175–76 (1981); HILL-COLLINS, *supra* note 133, at 178; Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 RACE & ETHNIC ANC. L.J. 11 (2001); Crenshaw,

crime, regardless of the race of the perpetrator.[135] Throughout the twentieth century rape of a black woman was "effectively legal."[136]

### *3. Status-Based Evidentiary and Procedural Rules*

A final aspect of prison law impunity that descends from earlier status regimes is the development of a specialized set of rules designed to protect courts and defendants against an anticipated flood of false and frivolous claims by a class of litigants believed to harbor a unique propensity to lie, as well as a penchant for wasting courts' time with complaints about "trifles"[137] inflicted by their social betters.[138]

Traditional rape law is the most notorious example of such a regime. At common law, rape was treated as "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."[139] Thus, courts developed specialized legal rules for women, "declar[ing] that they, uniquely in our criminal justice system, were not fully reliable witnesses."[140] These rules included fresh complaint rules, resistance and corroboration requirements, and special jury instructions regarding the danger of convicting based on the unreliable word of a woman.[141]

The use of evidentiary and procedural barriers to exclude women's testimony "eerily resemble[d] the infamous Black Codes that forbade the conviction of whites on the testimony of blacks."[142] Both the procedural rules governing rape and statutes excluding African Americans' testimony against whites were justified in part on the basis that women and black people were unreliable witnesses.[143] However, the exclusion of African Americans' testimony, like the procedural barriers imposed by con-

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*Mapping the Margins*, *supra* note 46, at 1276 n.118; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1719 (1993).

[135] JOHNSON, *supra* note 29, at 22.

[136] MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 102, at 175.

[137] State v. Rhodes, 61 N.C. (Phil.) 453, 454 (1868), *quoted in* Siegel, *Rule of Love*, *supra* note 16, at 2154.

[138] *See* Robertson, *Majority Opinion*, *supra* note 39, at 172; James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 109 (2000) [hereinafter Robertson, *Psychological Injury*]; Margot Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1565 (2003).

[139] 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1736).

[140] Akhil Reed Amar, *Concurring in Roe, Dissenting in Doe*, *in* WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 152, 165 (Jack M. Balkin ed., 2005).

[141] *See id.* at 165; Crenshaw, *Mapping the Margins*, *supra* note 46, at 1266; Estrich, *supra* note 102, at 1135.

[142] Amar, *supra* note 140, at 165; *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

[143] Crenshaw, *Sexual Harassment*, *supra* note 44, at 1469.

temporary prison law, was more explicitly based on the need to maintain the authority of those empowered by the status regime.[144]

Although prisoners are convicted criminals, the assumption that most are liars is unwarranted.[145] Prison administrators fear that a prisoner may lie in order to obtain a transfer or retaliate against a guard.[146] However, prisoners are aware that official reports are more likely to result in retribution than redress.[147] Thus, there is little incentive for prisoners to advance groundless claims. The presumption that women prisoners would lie about sexual exploitation or other abuse warrants particular skepticism because it so closely tracks existing racial and gender stereotypes that black people lie and that women lie about sexual assault.[148]

## III. Impunity: The Remedial Brick Wall

### *A. Reporting Abuse: The Prison Grievance Procedure*

Prisoners distrust the prison grievance procedure, and for good reason:[149] "by failure or design[,] grievance procedures are widely ineffective."[150] Prisoners are reluctant to report sexual abuse or harassment to prison authorities because filing a grievance "[i]s a risky step more likely to lead to harassment and retaliation than redress for a wrong done."[151] Prison staff often fail to keep prisoner grievances confidential: thus when a prisoner attempts to file a grievance, she often faces retaliatory harassment, discipline, or even assault by guards.[152]

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[144] *See* Foner, *supra* note 94, at 421.

[145] Relatively few prisoners are convicted of crimes that reflect dishonesty, such as fraud, embezzlement, or perjury; a plurality are imprisoned for drug crimes and most of the rest for violent crimes. Women Offenders, *supra* note 17, at 5–6.

[146] *See* Fisher v. Goord, 981 F. Supp. 140, 162 (W.D.N.Y. 1997).

[147] Girshick, *supra* note 4, at 109.

[148]

> In our own legal system, a connection was once drawn between chastity and . . . veracity. In other words, a women [sic] who was likely to have sex was not likely to tell the truth. Because Black women were not expected to be chaste, similarly, they were unlikely to tell the truth. Judges were known to instruct juries to take a Black woman's word with a grain of salt.

Crenshaw, *Sexual Harassment*, *supra* note 44, at 1469; *see also* Crenshaw, *Mapping the Margins*, *supra* note 46, at 1269, 1279–80.

[149] *See* Thérèse Lajeunesse et al., Cross Gender Monitoring Project: Third and Final Annual Report 36–37 (2000), *available at* http://www.csc-scc.gc.ca/text/prgrm/fsw/gender3/cg3_finalversion_e.rtf; David M. Adlerstein, Note, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 Colum. L. Rev. 1681, 1695–96 (2001).

[150] Adlerstein, *supra* note 149, at 1694.

[151] Girshick, *supra* note 4, at 109.

[152] *See id.*; *see also* Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 666 (D.D.C. 1994) ("By leaking private information [about grievances] prison officials coerce women prisoners and staff into silence and insulate themselves from

Outside prison, women who are raped often find that the experience of reporting their assault, or testifying at trial, is so humiliating that it is akin to a second rape.[153] Inside prison, women who use the grievance system to report guards' sexual abuse have been subjected to real second rapes in retaliation. For example, in California, the Bureau of Prisons placed women prisoners in a men's prison, where guards sexually harassed the women, opened their cells at night, and let male prisoners into the cells to rape them.[154] After a group of women prisoners reported this abuse, the white women were transferred, while the black women remained in the men's prison for an additional ten days.[155] One of these women was "beaten, raped and sodomized" by three men who told her "the attack was in retaliation for her complaint."[156]

Furthermore, some prison grievance procedures may effectively require that a prisoner endure an actual second (or additional) rape. According to the prisoner-plaintiffs in *Amador v. Department of Correctional Services*,[157] the policy of the New York correctional department is to take no action on a prisoner allegation of sexual abuse by a guard unless the prisoner provides either physical proof or DNA evidence.[158] Unless her abuser is foolish enough to describe his activities in writing, this corroboration requirement forces an abused prisoner to return to her abuser to undergo more sexual abuse until she either manages to obtain a semen sample or becomes pregnant.[159] Otherwise, she is told, nothing can be done.[160]

This corroboration requirement stems from many prison authorities' and courts' blanket reluctance to accept a prisoner's word over a guard's.[161] One grievance adjudicator testified, "[W]e don't just move inmates . . . based on allegations. If we did that, we'd have inmates moving all over the system—they would just make up allegations."[162] Like complainants at traditional rape law,[163] prisoners face an overt "presumption of incredi-

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scrutiny."), *vacated in part*, *modified in part*, 899 F. Supp. 659 (D.D.C. 1995); NOT PART OF MY SENTENCE, *supra* note 3, at Part V.5; ALL TOO FAMILIAR, *supra* note 3; NOWHERE TO HIDE, *supra* note 3; Bell, *supra* note 4, at 204–05; John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 431 & n.7 (2001); Adlerstein, *supra* note 149, at 1696.

[153] *See* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 102, at 179; LEE MADIGAN & NANCY GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM (1991).

[154] Lucas v. White, 63 F. Supp. 2d 1046, 1050 (N.D. Cal. 1999).

[155] NOT PART OF MY SENTENCE, *supra* note 3.

[156] *Lucas*, 63 F. Supp. 2d at 1050.

[157] Amador Statement, *supra* note 6, ¶¶ 34(a), 37, 39(d), 39(p), 49(l).

[158] *Id.* ¶ 34; E-mail from Dori Lewis to author, *supra* note 6.

[159] E-mail from Dori Lewis to author, *supra* note 6.

[160] *Id.*

[161] *See* RATHBONE, *supra* note 4, at 56–57; Laderberg, *supra* note 3, at 324.

[162] Fisher v. Goord, 981 F. Supp. 140, 162 (W.D.N.Y. 1997) (quoting Michael Urban, Assistant Inspector Gen. of N.Y. Dep't of Corr. Servs.).

[163] Under traditional rape law, there were special jury instructions about the danger of convicting on a woman's testimony alone. Estrich, *supra* note 102, at 1135, 1140.

bility" when they attempt to litigate their claims.[164] "[W]omen ask, who would believe a felon?"[165]

The experience of abuse by a person in authority, such as a prison guard, deters reporting by teaching the victim that "complaint is . . . not only useless but dangerous."[166] In prison, women are routinely placed in solitary confinement for making abuse allegations that prison authorities deem false,[167] for having broken the rules by having sex with a guard,[168] or ostensibly for their own protection.[169] Guards often tell their victims that if they report the abuse, no one will believe them.[170] Prisoners, knowing they are "stereotyped as liars and trouble makers,"[171] have every reason to believe them. Even in the outside world, where the law has abolished formal corroboration requirements and formal skepticism toward women's testimony, women are not likely to report their abuse to police, much less pursue civil or criminal proceedings.[172] The reasons for underreporting of sexual assault on the outside[173] are redoubled in prison.[174] Women cannot trust that their reports will remain confidential, concerns about retaliation

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[164] Adlerstein, *supra* note 149, at 1691.

[165] *Violence Against Women*, *supra* note 3, ¶ 62.

[166] THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 3 (citing Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 429 (1987)); *see also* LAJEUNESSE ET AL., *supra* note 149, at 80.

[167] Amador Statement, *supra* note 6, ¶ 45(f); NOWHERE TO HIDE, *supra* note 3.

[168] RATHBONE, *supra* note 4, at 55, 65; *see also* Amador Statement, *supra* note 6, ¶¶ 35, 39(q), 47(f) ("Women may be charged with disciplinary offenses for having sexual relations with staff, despite the fact that sexual acts by prisoners with staff are involuntary as a matter of state law.") (referring to N.Y. Penal Law § 130.05(e)); NOWHERE TO HIDE, *supra* note 3.

[169] Amador Statement, *supra* note 6, ¶ 49(h); ABUSE OF WOMEN IN CUSTODY, *supra* note 3, at 27; RATHBONE, *supra* note 4, at 55, 65.

[170] *See, e.g.*, NOWHERE TO HIDE, *supra* note 3; RATHBONE, *supra* note 4, at 61.

[171] THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 8; *see also* Girshick, *supra* note 4, at 107.

[172] ESTIMATES FROM THE REDESIGNED SURVEY, *supra* note 46, at 1; MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 102, at 179; Estrich, *supra* note 102, at 1140.

[173] These reasons include shame, fear of the abuser's revenge, concern that the woman will not be believed, certainty that her conduct will be judged against rape myths and stereotypes about appropriate feminine conduct, fear that the investigation will prove as humiliating as the assault, and concern that police or courts will be unsympathetic to her claims. *See* R. v. Ewanchuck, [1999] S.C.R. 330, 336 (L'Heureux-Dubé and Gonthier, JJ., agreeing with the judgment) (Can.); R. v. Seaboyer, [1991] 2 S.C.R. 577, 650 (L'Heureux-Dubé, J., dissenting in part) (Can.); THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 8; *see also* R. v. Osolin, [1993] 4 S.C.R. 595, 624–27 (L'Heureux-Dubé, J., dissenting) (Can.).

[174] *See* Amador Statement, *supra* note 6, ¶ 26 (noting that the threat of underreporting is exacerbated in prison); ABUSE OF WOMEN IN CUSTODY, *supra* note 3, at 13, 15 (discussing reasons victims of sexual assault may underreport abuse); THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 8 ("Allegations of abuse are complicated and compromised when they occur in institutional settings."); DETERRING STAFF SEXUAL ABUSE, *supra* note 8, at 2 ("Due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff, victims are often reluctant to report incidents to correctional authorities.").

are very real,[175] they feel that the process is stacked against them, and they continue to be at the mercy of their abusers, with no opportunity for escape.[176] Moreover, prisoners (and guards) are part of a prison culture whose "code of silence"[177] "frowns upon disclosure as weakness and betrayal and regards silence as strength and integrity."[178] In addition, guards and prison officials notoriously disregard institutional rules and procedures, often refusing to provide prisoners with the required forms within the grievance time limit or claiming not to have received the complaint or to have lost it.[179] In such an environment, it is no wonder that many assaults go unreported.

Furthermore, there is little incentive for a woman to report abuse while a relationship with a guard is ongoing.[180] The woman may be receiving some benefits from the relationship or be emotionally attached to the guard.[181] Indeed, Rathbone reports that a prisoner who had sex with guards told her the sex gave her a sense of "power"; the prisoner warned Rathbone "that if [she] wrote about any of this, [she] would only 'ruin it for everybody.'"[182] In prison, "where your every minute is controlled by the state," even a choice such as trading sex for favors is a precious commodity that many prisoners would not want to see taken away.[183] Thus many reports of sexual abuse arise only after a prisoner/guard relationship has gone sour, when the guard turns violent or begins to retaliate against his prisoner-ex.[184] At this point, since her relationship with the guard was likely to have been public knowledge within the prison,[185] a prisoner may reasonably anticipate that authorities will disbelieve her subsequent report of abuse. Additionally, prisoners know that the prison grievance process will often ex-

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[175] NOT PART OF MY SENTENCE, *supra* note 3; NOWHERE TO HIDE, *supra* note 3; *Violence Against Women*, *supra* note 3; Bell, *supra* note 4, 210–11.

[176] THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 7; Laderberg, *supra* note 3, at 362–63; *see also* Dinos, *supra* note 3, at 293.

[177] SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, *supra* note 8, at 2; THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 10.

[178] THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 10.

[179] *See* LOUISE ARBOUR, COMMISSION OF INQUIRY INTO CERTAIN EVENTS AT THE PRISON FOR WOMEN IN KINGSTON 162 (1996), *available at* http://www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm; JACKSON, *supra* note 61, at 616–17; SKYBLUE MORIN, FEDERALLY SENTENCED ABORIGINAL WOMEN IN MAXIMUM SECURITY: WHAT HAPPENED TO THE PROMISES OF "CREATING CHOICES"? (1999), *available at* http://www.csc-scc.gc.ca/text/prgrm/fsw/skyblue/toce_e.shtml; Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL'Y 249, 263 (2004); Andrea Jacobs, *Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability*, 41 CAL. W. L. REV. 277, 278 (2004); *see also* Adlerstein, *supra* note 149, at 1695.

[180] RATHBONE, *supra* note 4, at 57–58.

[181] *Id.* at 50–52, 58.

[182] *Id.* at 58–59.

[183] *Id.* at 59.

[184] *See, e.g.*, Fisher v. Goord, 981 F. Supp. 140, 145–46 (W.D.N.Y. 1997).

[185] *See* Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994), *vacated in part*, *modified in part*, 899 F. Supp. 659 (D.D.C. 1995); RATHBONE, *supra* note 4, at 62.

onerate the guard if the prisoner is deemed to have "consented" or "sold herself" to him.[186] In one Massachusetts prison, guards extorted women's consent to engage in sexual activity in exchange for cigarettes. The Department of Corrections investigation deemed this sex consensual in spite of state laws that criminalized prisoner/guard sex regardless of consent. The Department transferred the women to maximum security for breaking a prison rule against smoking. The guard, who had had sex with prisoners while on duty, kept his job.[187]

In prison as in the outside world, unofficial barriers to reporting race discrimination mirror the more widely acknowledged factors that deter reporting of sexual abuse. Like prison grievance processes for sexual assault or abuse, investigations into reports of race discrimination start from a "premise that allegations of mistreatment and abuse need to be proven,"[188] that is, "an assumption that there is no problem."[189] This starting point accompanies "an assumption that the complainant lacks objectivity,"[190] which triggers an informal corroboration requirement.[191] Investigations into reports of race discrimination tend to assume that "complainants often exaggerate the harm done."[192] In the prison context specifically, this corroboration requirement is one of the factors that deter women prisoners from reporting their sexual abuse because "these actions are purposely done without witnesses."[193]

Furthermore, investigations of race discrimination usually focus on individual actions rather than on systemic problems.[194] As a result, even though women of color are sexually assaulted more frequently than white women, they are less likely to report it.[195]

For all these reasons, women prisoners have "little reason to trust [governmental] authorities or to think that coming forward with their stories will have any positive impact."[196] Because of the risks of physical retaliation, disciplinary harassment, and retaliatory transfer to facilities far from their children and families, "it is amazing that any woman would come forward to tell of abuse or mistreatment experienced in that setting

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[186] RATHBONE, *supra* note 4, at 54.

[187] *Id.* at 60–61.

[188] THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 4.

[189] *Id.* at 4–5.

[190] *Id.* at 5.

[191] *Id.*

[192] *Id*. at 5–6 (quoting Donna Young, Memorandum on the Handling of Race Discrimination Complaints at the Ontario Human Rights Comm'n to the Anti-Racism Comm. (Oct. 23, 1992) [hereinafter Young Memo]).

[193] LAJEUNESSE ET AL., *supra* note 149, at 80; *see also* Amador Statement, *supra* note 6, ¶ 33(b).

[194] THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 5–6 (citing Young Memo, *supra* note 192).

[195] HILL-COLLINS, *supra* note 133, at 178.

[196] THE TIP OF THE DISCRIMINATION ICEBERG, *supra* note 27, at 10.

or to provide any information."[197] Thus the reports that women prisoners do make likely represent "only the tip of the abuse/mistreatment iceberg."[198]

Like the legal treatment of marriage, rape, and miscegenation under status rules of the past, sex between guards and prisoners is regulated in ways that secure the sexual entitlement of men in positions of authority to the bodies of the women in their custody. These forms of impunity construct sexual abuse as a sanctioned condition of women's confinement without any effective forum for grievances.

### *B. Civil Impunity: Barriers to Accountability*

Today, the race and gender hierarchies that land women in prison also inform the institutional and legal indifference that greets the abuses that they suffer there. This Section demonstrates that the rules, rationales, and results of contemporary prison law impunity, like those of the discredited historical race and gender status regimes discussed in Part II, impose near-insurmountable obstacles to litigation by low-status women (and men) of color. Taken as a whole these rules block nearly all prisoner claims to remedy or redress for custodial sexual abuse.

With few, if any, exceptions, prisoners' civil claims against correctional authorities for toleration of sexual abuse have succeeded only when a large number of women testify to widespread abuses, and some guard witnesses break ranks to corroborate the prisoners' accounts that severe custodial sexual abuse was both widespread and publicly known within the prison.[199] When prison administrators seek to restrict male guards' access to women prisoners in order to protect the prisoners against sexual abuse, courts generally have upheld these institutional policies against guards' employment discrimination claims,[200] at least at the appellate level.[201] However, when a prisoner brings civil claims on her own behalf, they are generally screened out or rejected.[202] Indeed, one commentator argues that juries are so reluctant to award any damages to prisoners that they will not

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[197] *Id.*

[198] *Id.* at 4.

[199] *See, e.g.*, Nunn v. Mich. Dep't of Corr., No. 96-CV-71416, 1997 WL 33559323, at *1 (E.D. Mich. Feb. 4, 1997); Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994), *vacated in part*, *modified in part*, 899 F. Supp. 659 (D.D.C. 1995).

[200] *See* Everson v. Mich. Dep't of Corr., 391 F.3d 737, 741 (6th Cir. 2004); Torres v. Wisconsin, 859 F.2d 1523 (7th Cir. 1988).

[201] *Everson*, 391 F.3d at 740.

[202] *See* Fisher v. Goord, 981 F. Supp. 140, 145–48, 150 (W.D.N.Y. 1997) (refusing injunction on basis that prisoner was "not credible" because she had formed a "plan" to get a transfer by reporting sexual activity with corrections officers; the court found some of this activity not to have happened because it was uncorroborated, and stated that other activity "could only reasonably be described as consensual" because the prisoner "never tried to fight [the guards] off, scream, or yell").

do so unless they believe the defendant has acted with such malice that punitive damages are appropriate.[203]

Even when prisoners are able to prove that they have been raped, juries may tend to "lowball prisoners' nonwage damages as an expression of disregard for them."[204] For example, in *Morris v. Eversley*,[205] a jury convicted a guard of sexually assaulting a female prisoner based on DNA evidence. A civil jury awarded the prisoner only $500 in compensatory damages and $7,500 in punitive damages.[206] The district court judge found the verdict generally inadequate, and ordered a new trial. The new jury awarded $1,000 for compensatory damages and $15,000 for punitive damages. The judge, apparently frustrated by this paltry award, wrote:

> I was baffled that the first jury awarded such low amounts, and yet the second jury did not award much more. It is hard to imagine that Morris could be made whole for the damages she suffered, including the loss of her dignity, by a mere $500 or $1,000 in compensatory damages. . . . [A] prisoner, even a former prisoner, is unable to recover a fair measure of damages.[207]

Such inadequate jury awards reflect the discredited prejudicial racial and gender stereotypes by which low-status women, especially black women, prostitutes, and prisoners, are viewed as less likely to be harmed by sexual assault.[208]

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[203] Schlanger, *supra* note 138, at 1603–07.

[204] *Id*. at 1622; *see, e.g.*, Butler v. Dowd, 979 F.2d 661 (8th Cir. 1992) (upholding jury award of one dollar nominal damages against prison administration for failing to protect male prisoners against rape by other inmates).

[205] 343 F. Supp. 2d 234, 238 (S.D.N.Y. 2004) (holding that a female prisoner who suffered sexual assault was entitled to compensation for attorney's fees, paralegal fees, and relevant costs, in addition to a jury award of compensatory and punitive damages).

[206] Outside of the prison context, damage awards for sexual assault are typically much higher. A recent survey of civil actions for sexual assault resolved in state appellate courts between 2001 and 2004 found that damage awards in sexual assault cases outside prison can range from nothing to well over one million dollars. But in cases involving institutional liability, "a significant number of cases award compensatory damages of $100,000 to $200,000." Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. Rev. 55, 96–97 & n.267 (2006) (listing cases).

As Bublick observes, "[i]nadequate damage awards may be a particular issue when the victim and the assailant are acquaintances or partners," as they are by definition in cases of custodial sexual abuse. *Id*. at 95 (citing Louviere v. Louviere, 839 So. 2d 57, 76 (La. Ct. App. 2002) (awarding assaulter's estranged wife less than twenty-five percent of damages awarded to unrelated victim who suffered similar sexual assaults); A.R.B. v. Elkin, 98 S.W.3d 99, 104–05 (Mo. Ct. App. 2003) (reversing trial award of $100 nominal damages to son abused by father, setting aside award of no damages to daughter abused by father, and remanding with instruction to consider compensatory and punitive damages for both children); Beaver v. Mont. Dep't of Natural Res. & Conservation, 78 P.3d 857, 874–75 (Mont. 2003) (holding that $9095 award for sexual assault by co-worker was not inadequate)).

[207] *Morris*, 343 F. Supp. 2d at 248.

[208] In the rare instances in which a man is incarcerated for raping a black woman, "the

*1. The Prison Litigation Reform Act*

The Prison Litigation Reform Act[209] ("PLRA") was expressly designed to deter prisoner lawsuits. It was introduced in 1995 to respond to congressional concern about the dramatic increase in prisoner litigation between 1980 and the mid-1990s—an increase that, as commentators have noted, coincided with a dramatic increase in the incarcerated population in the United States.[210]

The PLRA was not intentionally designed to block lawsuits for custodial sexual abuse; rather, it was designed to address the perceived problem of jailhouse lawyers who brought frivolous lawsuits. In 1995, during the Senate debate over the bill, Senator Bob Dole cited a notorious prisoner lawsuit in which a prisoner complained that the prison served chunky, rather than creamy, peanut butter.[211] Numerous other frivolous suits, such as claims arising from an unsatisfactory prison haircut and a desire for a particular brand of sneakers, were also used during the PLRA debates as examples of the pressing need for special barriers to prisoner litigation.[212]

During the congressional debates, Senator Joe Biden pointed out that the PLRA would erect "too many roadblocks to meritorious prison lawsuits."[213] He urged Congress not to "lose sight of the fact that some of these lawsuits have merit—some prisoners' rights are violated."[214] Senator Biden pointed out that hundreds of women prisoners had been sexually abused by dozens of guards, openly and for years, in Washington, D.C., prisons. He noted that this practice changed only after their class action was successful.[215] Despite Senator Biden's warnings, no amendment was adopted to protect the right of prisoners to sue in the event of sexual abuse by guards.

The PLRA is a status-based law that excludes almost all prisoner claims from the courts.[216] Like historical doctrines designed to deter rape

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average sentence given to Black women's assailants is two years. The average sentence given to white women's assailants is ten years." Crenshaw, *Sexual Harassment*, *supra* note 44, at 1471.

[209] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified as amended at 11 U.S.C. § 523 (2000); 18 U.S.C. §§ 3624, 3626 (2000); 28 U.S.C. §§ 1346, 1915, 1915A (2000); 42 U.S.C. §§ 1997a–1997f, 1997h (2000)).

[210] Schlanger, *supra* note 138, at 1557–58; Robertson, *Psychological Injury*, *supra* note 138, at 142 (pointing out that the "rate of filings per 1000 inmates *decreased* seventeen percent between 1980 and 1996").

[211] *See* 141 CONG. REC. S14611-01 (daily ed. Sept. 29, 1995).

[212] Jamie Ayers, Comment, *To Plead or Not To Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?*, 39 U.C. DAVIS L. REV. 247, 248 n.2 (2005) (describing frivolous claims, all of which were filed by male prisoners, discussed by Congress).

[213] 141 CONG. REC. S14611-01 (daily ed. Sept. 29, 1995).

[214] *Id.*

[215] Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994), *vacated in part*, *modified in part*, 899 F. Supp. 659 (D.D.C. 1995).

[216] Schlanger, *supra* note 138, at 1559.

complainants, black witnesses, and married women from bringing white men to court, the PLRA establishes unique hurdles that are nearly impossible for prisoner plaintiffs to overcome.

The most damaging hurdle imposed by the PLRA is its grievance-exhaustion requirement.[217] Like the marital privacy doctrine that excluded wives' claims from the courts in order to protect "family government,"[218] this provision values the peace of mind of those in power over the safety of those who are in their custody. The grievance-exhaustion provision requires inmates to exhaust internal prison grievance procedures before they may bring their claims to an outside authority, even if the procedures are complex, inefficient, unfair, or incapable of offering a remedy for the prisoner's claim.[219] If the prisoner has failed to do so, the litigation is dismissed. Thus a prison is virtually insulated from prisoner litigation to the extent that its grievance process is complex and time-consuming, its deadlines for filing a grievance are brief,[220] and the threat of retaliation deters prisoners from using the process at all. In practice the grievance-exhaustion requirement "invites technical mistakes resulting in inadvertent noncompliance with the exhaustion requirement, and bar[s] litigants from court because of their ignorance and uncounselled procedural errors."[221]

Unreasonably quick grievance deadlines evoke the "fresh complaint" requirements of traditional rape doctrine.[222] In New York, for example, the Department of Corrections imposes a fourteen-day limit for filing any prisoner grievance, unless the grievance authority determines that "mitigating circumstances" justify the delay.[223] If a prisoner is in a "consensual" sexual relationship with a guard, she is unlikely to express a grievance until well after the guard becomes threatening or abusive, thus miss-

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[217] *See id*. at 1650; Adlerstein, *supra* note 149, at 1694–95.

[218] Siegel, *Rule of Love*, *supra* note 16, at 2150 (quoting State v. Rhodes, 61 N.C. (Phil.) 453, 457 (1868)).

[219] 42 U.S.C. § 1997e(a) (2000); *see also* Booth v. Churner, 532 U.S. 731, 739 (2001); Schlanger, *supra* note 138, at 1649–54. Previously, the Civil Rights of Institutionalized Persons Act provided that a lawsuit could be "continue[d]" for ninety days for a prisoner (or other litigant subject to the Act) to exhaust "such plain, speedy and effective administrative remedies as are available," if the Attorney General certified that the available administrative remedies were in "substantial compliance with . . . minimum acceptable standards." Pub. L. No. 96-247, 94 Stat. 349, 352 (1980) (codified as amended at 42 U.S.C. § 1997e (2000)). The PLRA removed the requirements of administrative remedies that are "plain, speedy and effective" and of Attorney General certification for prisoners, but not for other institutionalized persons. *See* Schlanger, *supra* note 138, at 1695–96.

[220] Schlanger, *supra* note 138, at 1650–53.

[221] Boston, *supra* note 152, at 431.

[222] Schlanger, *supra* note 138, at 1653–54 (citing cases in which prisoner litigation was barred even though the missed grievance deadline resulted from the prisoner's hospitalization for the injury that gave rise to the lawsuit); Adlerstein, *supra* note 149, at 1695.

[223] N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7(a)(1) (2004). *See generally* Brief of the ACLU et al. as Amici Curiae Supporting Petitioner at 12–16, Booth v. Churner, 532 U.S. 731 (2001) (No.99-1964) (demonstrating other grievance processes impose even shorter deadlines).

ing the deadline.[224] If she misses the grievance deadline, her litigation is dismissed.

Furthermore, prison grievance procedures offer no prospective relief to protect the prisoner before she is raped. If a guard has merely threatened to assault the prisoner, offered a quid pro quo for sex, or groped her—or if she did not think to preserve a DNA sample during her rape—the grievance process will do nothing.[225] Even though filing a grievance is futile in such circumstances, the PLRA still requires the prisoner to report the abuse to her abuser's colleagues through an often-humiliating disciplinary procedure[226] that is likely to result in retaliation.

In addition to its grievance-exhaustion requirement, the PLRA further hinders prisoner litigation by prohibiting any prisoner lawsuit "without a prior showing of physical injury."[227] Some courts have raised this barrier even further by requiring that the physical injury be at least as serious as an injury that would meet the Eighth Amendment's "de minimis harm" requirement.[228] Presumably, vaginal or anal rape would suffice.[229] On its face, however, the physical injury requirement appears to bar prisoner claims for sexual abuse if no physical injury results.[230] For example, the text of this provision appears to bar claims that a prisoner was forced to perform or submit to oral sex, was digitally penetrated, or was coerced into sexual compliance through threats or inducements without a beating.

Fortunately, the courts have been reluctant to interpret this requirement in such a draconian way.[231] Many appellate courts have concluded that

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[224] E-mail from Dori Lewis to author, *supra* note 6.

[225] Amador Statement, *supra* note 6, ¶¶ 34(a), 37, 39(d), 39(p), 49(l); Interview with Dori Lewis, *supra* note 6.

[226] *See, e.g.*, Amador Statement, *supra* note 6, ¶ 49(g) ("During [the] investigation into Officer Gilbert's misconduct by Albion officials and by staff of the Inspector General's office, Ms. Rock was subjected to demeaning statements, including comments about her supposed sexual activities prior to her incarceration. She was threatened, including a threat that her parole date would be delayed. She was subjected to an intrusive strip frisk of her entire body and photographs were taken of her in her bra and panties.").

[227] 42 U.S.C. § 1997e(e) (2000); *see also* 28 U.S.C. § 1346(b)(2) (2000); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002); Searles v. Van Bebber, 251 F.3d 869, 876–77 (10th Cir. 2001); Allah v. Al-Hafeez, 226 F.3d 247, 250–51 (3d Cir. 2000); Zehner v. Trigg, 133 F.3d 459, 461–64 (7th Cir. 1997). *But see* Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998) (declining to apply injury requirement to First Amendment claims).

[228] *See* Siglar v. Hightower, 112 F.3d 191 (5th Cir. 1997) (leading case holding PLRA requires more than de minimis physical harm); *infra*, notes 314–318 and accompanying text; *see also* Oliver v. Keller, 289 F.3d 623 (9th Cir. 2002); Robertson, *Psychological Injury*, *supra* note 138, at 118–19; Schlanger, *supra* note 143, at 1630–31.

[229] *See* Golden, *supra* note 3, at 46.

[230] Boston, *supra* note 152, at 434–43; 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, 1201 (1997).

[231] *See, e.g.*, Williams v. Prudden, No. 02-1754, 2003 U.S. App. LEXIS 9553, at *4 (8th Cir. May 19, 2003); Liner v. Goord, 196 F.3d 132 (2d Cir. 1999); Boston, *supra* note 152, at 441, 434–43 (arguing that, in effect, courts "have rewritten a statute that bars the filing of a certain kind of civil action so that it bars the award of certain kinds of damages

the physical injury requirement bars only actions for compensatory damages, and does not apply to actions for declaratory or injunctive relief or for nominal or punitive damages.[232] Furthermore, many appellate courts have found that sexual touching that results in slight or only short-term physical injury may still satisfy the physical injury requirement.[233] At least one district court, however, has suggested that sexual assault short of penetration would not satisfy the physical injury requirement.[234]

The PLRA also imposes many additional barriers to prisoner litigation that have a particularly harsh impact on women prisoners who have been sexually abused. It imposes significant restrictions on prisoners' ability to retain counsel. Outside of the prison context, a successful plaintiff would recover a "reasonable attorney's fee," which would be calculated based on counsel's reasonable time spent on the case at a reasonable hourly rate.[235] However, attorneys' fees in prisoner litigation are arbitrarily capped at 150% of the damage award, and attorneys' hourly rates are capped at 150% of the Criminal Justice Act ("CJA") hourly rate.[236] Because prisoners have typically have not lost any income and because their nonpecuniary damage awards are typically so low,[237] these provisions deter counsel from representing prisoners, even on the most meritorious claims.[238] As an unrepresented litigant, a prisoner will have difficulty drafting an adequate pleading. If she fails to draft it properly, a court is authorized to dismiss her claim sua sponte without even requiring the defendant to respond to it.[239]

Finally, even if a prisoner is able to overcome each of these barriers to litigation, the PLRA substantially restricts any systemic or prospective relief she might obtain. Prospective relief with respect to prison condi-

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instead").

[232] *See, e.g.*, *Thompson*, 284 F.3d at 418; Herman v. Holiday, 238 F.3d 660, 665 (5th Cir. 2001); Harris v. Garner, 190 F.3d 1279, 1288 (11th Cir. 1999); Harper v. Showers, 174 F.3d 716, 719 (6th Cir. 1999); Perkins v. Kan. Dep't of Corr., 165 F.3d 803, 808 (10th Cir. 1999); Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998); Zehner v. Trigg, 133 F.3d 459, 462–63 (7th Cir. 1997).

[233] *See, e.g.*, *Williams*, 2003 U.S. App. LEXIS 9553, at *4; *Liner*, 196 F.3d at 135.

[234] Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1270 (N.D. Fla. 2002).

[235] City of Riverside v. Rivera, 477 U.S. 561, 568 (1986).

[236] As of January 1, 2006, the CJA hourly rate is $92. *See* INSTRUCTIONS FOR COMPLETING THE CJA FORM 20: APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL 2 (Mar. 22, 2006), *available at* http://www.moed.uscourts.gov/documents/cja Directions.pdf.

[237] *See supra* notes 204–207 and accompanying text.

[238] Schlanger, *supra* note 138, at 1641–42 (noting that in order to bypass PLRA attorney's fee barriers, prisoners' rights attorneys may seek to represent either persons who have been released or families of prisoners who have died).

[239] 28 U.S.C. § 1915A(a) (2000). A court must review and may dismiss a claim if it is frivolous or malicious, or fails to state a claim, without providing an opportunity for plaintiff to respond. *Id.* A defendant need not respond to the prisoner's claim unless the court determines that the claim has "reasonable opportunity to prevail on the merits" and orders defendant to respond. 42 U.S.C. § 1997e(g)(2) (2000); *see also* Schlanger, *supra* note 138, at 1629–30.

tions "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs," and the court must give "substantial weight" to the "adverse impact" any such relief may have on "public safety or the operation of a criminal justice system."[240] Furthermore, after two years have elapsed, the government may apply for termination of a consent decree, which the court must grant unless the plaintiff establishes an ongoing constitutional violation.[241] This may require repeated litigation if the constitutional violation has not been corrected within two years. Moreover, if the consent decree has been working to ameliorate the constitutional problem, all relief will end.

*2. Institutional Immunities*

The failure of many correctional systems to adequately address sexual abuse through internal grievance and employment policies demonstrates the need for external accountability. "Prisons would have a greater stake in enforcing prison policies if they were held liable for the actions of correctional officers."[242] However, 42 U.S.C. § 1983, which creates a cause of action for constitutional torts, and the *Monell* doctrine[243] immunize government authorities, including prisons and jails, against vicarious liability. Under *Monell*, institutional liability is available only if the prisoner can prove that the guard's unconstitutional conduct resulted from a governmental custom, policy, rule, or practice.[244] If the injury resulted from failure to train (a claim that could foreseeably arise in sexual abuse claims), the standard for liability is even higher: "deliberate indifference."[245] It seems likely that such customs, practices, and indifference prevail in prisons where custodial sexual abuse is widespread. However it would be exceedingly difficult for an unrepresented prisoner to plead such a case properly, much less obtain the appropriate evidence in the discovery process.

The courts' interpretation of Section 1983 limits supervisory liability even further. The Eleventh Amendment prohibits plaintiffs from naming either state agencies or state employees in their official capacities as defendants to Section 1983 actions.[246] Moreover, under Section 1983, supervi-

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[240] 18 U.S.C. § 3626(a)(1)(A) (2000).

[241] 18 U.S.C. §§ 3626(b)(1)(A)(iii), 3626(b)(3).

[242] Dinos, *supra* note 3, at 294; *see also* Adlerstein, *supra* note 149, at 1692.

[243] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978); *see also* Scott v. Moore, 85 F.3d 230 (3d Cir. 1996).

[244] *Monell*, 436 U.S. at 690–91; *see also Scott*, 85 F.3d at 233.

[245] Canton v. Harris, 489 U.S. 378, 390 (1989). For a discussion of the difficulties that "deliberate indifference" presents to prisoners' sexual abuse litigation, see *infra* notes 320–331 and accompanying text.

[246] "The Eleventh Amendment bars [Section 1983 suits against the state] unless the State has waived its immunity, or unless Congress has exercised its undoubted power under Section 5 of the Fourteenth Amendment to override that immunity." Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989). "[A] suit against a state official in his or her official capacity . . . is a suit against the official's office. As such it is no different from a suit

sory liability may not rely on the theory of vicarious liability and is only available if the supervisor was personally involved in the deprivation of the plaintiff's constitutional rights.[247] This narrow interpretation of "personal involvement" forces plaintiffs to attempt to assign personal responsibility to individual supervisors for systemic failures such as inadequate training, supervision, or investigation or the existence of a climate of toleration of sexual abuse.[248] Even where a prisoner can establish that an institutional policy or custom facilitated her sexual abuse, a supervisor cannot be held liable unless the plaintiff can prove that the supervisor was personally responsible for it.[249]

Meanwhile, a claim against an individual guard is unlikely to result in any compensation for the abused prisoner. Governments usually indemnify their employees when they are sued.[250] However, the exception to this rule substantially affects custodial sexual abuse claims: the government is likely to refuse to indemnify "flamboyantly bad actors" who commit intentional torts in the course of their employment, especially those torts that result in criminal prosecution.[251] The New York Department of Corrections, for example, will generally refuse to indemnify a guard if physical proof or a DNA sample is available. [252] In such cases, the only pocket available to satisfy a prisoner's civil judgment would be that of the guard, who is unlikely to be wealthy and thus may well be judgment proof.

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against the State itself." *Id.* at 71.

[247] *See, e.g.*, Ottman v. City of Independence, 341 F.3d 751, 761 (8th Cir. 2003); Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003); Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995); Copeland v. Machulis, 57 F.3d 476, 481 (6th Cir. 1995); Woodward v. City of Worland, 977 F.2d 1392, 1399 (10th Cir. 1992); Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982); Morris v. Eversley, 282 F. Supp. 2d 196, 203 (S.D.N.Y. 2003).

[248] For example, the Second Circuit has found that when a defendant did not participate directly in the constitutional violation, a plaintiff may only establish personal involvement by showing that a supervisor (1) failed to remedy a known wrong, (2) created an environment where the violation was tolerated, or (3) was grossly negligent in supervising the subordinates that caused the violation. *Williams*, 781 F.2d at 323. It is fairly easy for supervisors to satisfy their responsibilities under this doctrine to avoid liability. For example, a supervisor may fulfill his responsibility to take appropriate action to remedy a known wrong by referring the report to the correctional investigative agency. *See Morris*, 282 F. Supp. 2d at 205; Eng v. Coughlin, 684 F. Supp. 56, 66 (S.D.N.Y. 1988). For similar requirements in other circuits see, for example, *Ottman*, 341 F.3d at 761; *Cottone*, 326 F.3d at 1360; *Crowder*, 687 F.2d at 1005. For this reason, the Eleventh Circuit explained, "the standard by which a supervisor is liable in her individual capacity for the actions of a subordinate is extremely rigorous." Braddy v. Fla. Dep't of Labor & Employment Sec., 133 F.3d 797, 802 (11th Cir. 1998).

[249] *See Morris*, 282 F. Supp. 2d at 206 ("Morris presents no evidence . . . from which a reasonable jury could find that Dixon or Porter *created* an environment in which the violation of inmates' constitutional rights was encouraged and tolerated." (emphasis added)).

[250] John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 353 (2000).

[251] Jeffries, *supra* note 250, at 50.

[252] Interview with Dori Lewis, *supra* note 6.

Prison guards and institutions also enjoy qualified immunity for conduct that is not clearly unlawful:[253] prison guards and officials cannot be held liable for torts committed in the course of their employment unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known" under the law of that time.[254] Unfortunately, the law does not clearly prohibit all forms of custodial sexual abuse. Although the illegality of forcible rape is sufficiently clear to overcome qualified immunity,[255] it is not firmly established that other forms of sexual abuse, such as sexual harassment and sexual threats, are clearly unlawful.[256] Courts have held that many forms of sexual abuse short of rape, such as sexual harassment without touching[257] and sexual activity to which the guard alleges the prisoner consented,[258] are not clearly unlawful. In states that have not criminalized all sexual contact between guards and prisoners, even sexual touching and quid pro quo sexual exploitation short of rape may not be clearly unlawful. Qualified immunity may particularly impede allegations of institutional failure to investigate sexual abuse, as it is not clear how cursory an investigation must be before it will be found clearly unlawful.[259]

The usual justifications for the application of qualified immunity to government actors do not fit the context of civil claims for custodial sexual abuse. First, an important justification for the qualified immunity rule is to avoid "unwarranted timidity,"[260] or the fear that "government officials who are exposed to money damages for the full costs of their constitutional violations will become overly cautious or quiescent, reducing their activity to suboptimal levels and shying away from socially beneficial risks."[261] This concern is irrelevant within the context of sexual contact between prisoners and guards, as there is no optimal level of custodial sex which the threat of liability might overdeter.

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[253] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[254] *Harlow*, 457 U.S. at 818.

[255] *See* Schwenk v. Hartford, 204 F.3d 1187, 1205 (9th Cir. 2000) (finding it well established that raping an inmate "constitutes a violation of the Eighth Amendment and no reasonable prison guard could have believed otherwise").

[256] Day, *supra* note 3, at 580–81.

[257] *See* Bowie v. Cal. Dep't of Corr., No. 95-55539, 1996 WL 593182, at *2 (9th Cir. Oct. 8, 1996); Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995).

[258] In Vermont, consensual sex between prisoners and guards has not been banned by statute; in Colorado, New Hampshire, and Wyoming, prisoner "consent" mitigates the offense. ABUSE OF WOMEN IN CUSTODY, *supra* note 3.

[259] Current precedent suggests that the standard may not be very exacting. *See supra* note 248 and accompanying text.

[260] Richardson v. McKnight, 521 U.S. 399, 408–09 (1997) (analyzing a section 1983 claim against guards in a private prison, the Court described unwarranted timidity as "the most important special government immunity producing concern").

[261] Levinson, *supra* note 250, at 351.

A second, related rationale for qualified immunity is that governmental institutions must be spared the burden of litigation.[262] The Supreme Court has held that "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."[263] It has cautioned that "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues . . . can be peculiarly disruptive of government."[264]

This justification, like the discredited doctrine of marital privacy, seems to rest on the notion that the integrity of an institution requires that it be shielded from civil accountability for abuses committed under its authority. Common law courts justified noninterference in domestic violence cases by suggesting that "it is easier for an altruistic wife to forgive her husband's impulsive violence than it is for a husband to suffer the loss of authority entailed in having his exercise of prerogative reviewed by public authorities."[265] Similarly, by applying qualified immunity to prisoners' claims, courts apparently calculate that the inconvenience to prison authorities involved in defending inmate lawsuits outweighs the harm caused to prisoners by their toleration of systematic sexual abuse.

Judicial concern that prisoner litigation (or the fear of it) will result in governmental paralysis is overblown.[266] There is no compelling reason to believe that our legal system must abide by a strict no-vicarious-liability rule. For instance, Canadian statutory and judge-made law allow for governmental vicarious liability.[267] Finally, if sexual abuse by guards in prison has become so common that it would give rise to a deluge of cases whose defense would require great institutional time and expense, it would seem that the flood of litigation is urgently needed to bring about reform.

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[262] *See* Morris v. Eversley, 282 F. Supp. 2d 196, 204 (2003) ("The use of summary judgment by government officials claiming qualified immunity is expressly encouraged to reduce the burden of defending insubstantial suits.").

[263] Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982); *see also* Butz v. Economou, 438 U.S. 478, 504–05 (1978); Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

[264] *Harlow*, 457 U.S. at 817.

[265] Siegel, *Rule of Love*, *supra* note 16, at 2156.

[266] "Doubtless many correctional facilities are autonomously managed with due concern for inmates' rights—and do not foment costly litigation as a result." Adlerstein, *supra* note 149, at 1688.

[267] Canadian federal and provincial Crown liability acts provide that governments, their agents, and employees are liable in tort under the same liability rules as private actors. *See, e.g.*, Crown Liability and Proceedings Act, R.S.C., ch. C 50, ss. 3, 5, 35–36 (1985) (Can.); Crown Proceeding Act, R.S.B.C., ch. 89, s. 2(c) (1996) (Can.); Proceedings Against the Crown Act, R.S.O., ch. P.27, s. 5 (1990) (Can.). There are no exceptions for correctional administrators or employees, and no common law exceptions such as the *Monell* rule or qualified immunity.

Under Canadian law, a prison administration owes a common law duty of care to prisoners in its custody. Funk v. Clapp, [1986] 68 B.C.L.R. (2d) 222, 225, 231–32. Thus federal and provincial governments could be held liable, vicariously or in negligence, for intentional sexual abuse by a prison guard, or for sexual abuse that results from prison officials' negligent acts or omissions.

*3. Constitutional Deference*

*a. Rational-Basis Scrutiny of Prisoners' Claims*

A prisoner is more vulnerable to constitutional violations than any other American because every aspect of her life is governed by the state. Thus events that would give rise to private civil claims if they occurred outside prison give rise to constitutional claims within prison.[268] Yet the courts' usual skepticism of government power is suspended in prison,[269] where it is needed most.

In spite of prisoners' vulnerability and the government's affirmative duty to protect them,[270] the Supreme Court has adopted a status-based principle of deference that ensures that prisoners' constitutional rights are substantially diminished by their incarceration.[271] Courts subject the government's actions to strict scrutiny where the claimant is a non-prisoner alleging a violation of a fundamental right.[272] When the plaintiff is a prisoner, however, the standard of review is reduced to rational-basis scrutiny.[273] Any action by a prison or a guard will be upheld if it is "reasonably related to legitimate penological interests."[274] In other words, the federal courts will intervene to stop prisoner abuse only in cases where the government conduct is so irrational that no plausible justification can be offered in its defense.

Constitutional deference, like the PLRA, is justified in part on the perceived need to prevent prisoners from "squandering judicial resources"[275] on trivial claims whose "common subject," according to the Supreme Court, is "fine-tuning the ordinary incidents of prison life" by bringing claims about receiving lunch in a bag rather than on a tray,[276] or "transfers to a smaller cell without electrical outlets for television."[277]

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[268] The Supreme Court observed:

> For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.

Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

[269] *See* Robertson, *Majority Opinion*, *supra* note 39, at 182.

[270] *See supra* note 5 and accompanying text.

[271] Weidman, *supra* note 83, at 1514.

[272] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[273] Turner v. Safley, 482 U.S. 78, 89 (1987).

[274] *Id.*

[275] Sandin v. Connor, 515 U.S. 472, 482 (1995).

[276] *Id.* at 483 (citing Burgin v. Nix, 899 F.2d 733, 735 (8th Cir. 1990)).

[277] *Id.* (citing Lyon v. Farrier, 727 F.2d 766, 768–69 (8th Cir. 1984)).

Just as nineteenth-century courts invoked the doctrine of marital privacy to justify their noninterference in cases involving violence against women, contemporary courts invoke the principle of judicial deference to insulate institutional authority against judicial review. "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[278] In the Court's view, "[r]unning a prison is an inordinately difficult undertaking" that the Court ought not lightly disrupt by imposing constitutional standards. [279] For this reason, the Court emphasizes the importance of deference within the prison context.[280] "According to the Court, correctional staff invariably exercise 'considered' judgment, and their backgrounds ensure that they are 'trained' in prison administration."[281] Thus, as in its earlier marital privacy decisions, the Court portrays the defendant institution in an idealized light, invoking an image of a well-ordered, humane place of confinement in the face of allegations of institutionally sponsored violence. Noting the danger of this trend, Justice Thurgood Marshall warned in the 1980s:

> [G]uided by unwarranted confidence in the good faith and "expertise" of prison administrators and by a pinched conception of the meaning of the Due Process Clauses and the Eighth Amendment, a majority of the court increasingly appears willing to sanction any prison condition for which they can imagine a colorable rationale, no matter how oppressive or ill-justified that condition is in fact.[282]

During the zenith of prisoners' rights jurisprudence in the 1970s, the Supreme Court recognized that persons in prison have the right to access the courts to petition for a redress of grievances,[283] and that courts have a corresponding responsibility to adjudicate them.[284] The Supreme Court affirmed that "a prisoner is not wholly stripped of his constitutional protections when he is convicted of a crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[285] But just as

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[278] *Turner*, 482 U.S. at 89.

[279] *Id.* at 84–85.

[280] *Id.* at 84–85, 90.

[281] Robertson, *Majority Opinion*, *supra* note 39, at 182 (footnotes omitted) (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987); Bell v. Wolfish, 441 U.S. 529, 562 (1979)).

[282] Block v. Rutherford, 468 U.S. 576, 596 (1984) (Marshall, J., dissenting).

[283] Cruz v. Beto, 405 U.S. 319, 321 (1972); Johnson v. Avery, 393 U.S. 483, 485 (1969).

[284] Hudson v. Palmer, 468 U.S. 517, 523 (1984); Procunier v. Martinez, 416 U.S. 396, 405–06 (1974).

[285] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974); *see also Block*, 468 U.S. at 601 n.9; *Hudson*, 468 U.S. at 523.

nineteenth-century courts recognized the illegality of domestic violence while developing doctrinal justifications for continued refusal to intervene, the contemporary Court affirms the existence of prisoners' rights while adopting a rule of deference that ensures that prisoners' rights will rarely be enforced.

In 1979, the Supreme Court began the rollback of prisoners' rights, affirming the need for "wide-ranging deference" to prison administrators in the "adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[286] Since the late 1980s, the guiding interpretive principle for prisoners' constitutional rights has been deference to the "hard choices" made by prison administrators.[287] The shift toward constitutional deference has coincided with a shift in the racial composition of the U.S. prison population from seventy percent white in the 1960s to about seventy percent black and Latino by the 1990s.[288] It appears that contemporary prisoners "garne[r] less compassion than the previous, largely white inmate populations."[289] Arguably, the current "full-blown culture of judicial deference"[290] limits the federal courts' ability to protect prisoners even more than the traditional hands-off doctrine did.[291]

It should be noted that although the Supreme Court has used rational-basis review to countenance harsh treatment of prison populations that are overwhelmingly black and Latino, it will apply a stricter standard of review if prison authorities overreach by imposing overt racial segregation. In *Johnson v. California*,[292] the California Department of Corrections had adopted a policy of racial segregation in cell assignments. The Department argued that its policy was subject to rational-basis scrutiny. The Supreme Court rejected this contention and instead applied strict scrutiny to the prisoners' equal protection claims. Strict scrutiny, the Court held, "applied . . . *only* to rights that are 'inconsistent with proper incarceration.'"[293] Since the right to be free from government-imposed racial segregation "is not a right that need necessarily be compromised for the sake of proper prison administration,"[294] the Court concluded that rational-basis review was not warranted. Thus, when a prison overtly classifies pris-

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[286] *Bell*, 441 U.S. at 547.

[287] Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995); *see also* Turner v. Safley, 482 U.S. 78, 90 (1987); *Bell*, 441 U.S. at 547.

[288] *See* Wacquant, *supra* note 13, at 96; *see also supra* notes 52–55 and accompanying text.

[289] JOHNSON, *supra* note 29, at 31.

[290] Weidman, *supra* note 83, at 1521.

[291] *Id.* at 1550–51.

[292] 543 U.S. 499 (2005).

[293] *Johnson*, 543 U.S. at 510 (quoting Overton v. Bazzeta, 539 U.S. 126, 131 (2003)).

[294] *Id.*

oners on the basis of race, the policy is subject to the same strict scrutiny as would apply to a race-based equal protection claim outside prison.[295]

Sexual abuse, and institutional policies that confer impunity for it, are as "'pernicious in the administration of justice'"[296] as overt racial segregation. Nonetheless, *Johnson* offers little hope of raising the standard of review applicable to sexual abuse claims for three reasons. First, the PLRA grievance-exhaustion requirement would pose a substantial barrier to any such challenge.[297] Second, unlike the racial segregation policy of the California correctional department, the policies that give rise to custodial sexual abuse—inadequate restrictions on cross-gender surveillance, unresponsive grievance procedures, and indifference to known sexual misconduct—are far from anomalous. In fact, they are the norm in U.S. women's prisons.[298] Third, these policies are at least arguably facially neutral with respect to gender. Prison authorities' "awareness" that sexual abuse is a likely result of such policies does not establish their discriminatory purpose.[299] Unless the plaintiffs can show that such policies were adopted "at least in part 'because of,' not merely 'in spite of,' [their] adverse effects" on prisoners[300]—that is, that prison authorities were not only indifferent to sexual abuse but actually wanted it to happen—the prisoner plaintiff will likely continue to be stuck with rational-basis review.

*b. Privacy in Prison: Cross-Gender Search and Surveillance*

The Fourth Amendment provides a guarantee against unreasonable search and seizure. Although privacy is a fundamental right,[301] prisoners' Fourth Amendment claims, like their other constitutional claims, receive only rational-basis review.[302] Outside prison, courts have upheld privacy claims to protect relatively trivial interests. For example, one court upheld an occupational qualification that only male janitors be hired to clean men's bathrooms on the basis of male employees' privacy rights,[303] even though all a woman janitor would have to do is knock.

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[295] *Id.* at 505; *see also* Lee v. Washington, 390 U.S. 333, 333–34 (applying heightened standard of review when evaluating racial segregation in prison).

[296] *Id.* at 511 (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

[297] *See supra* notes 217–221 and accompanying text.

[298] *See supra* Part I.B.

[299] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[300] *Id.*

[301] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

[302] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

[303] *See* Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1271–72 (2003) (citing Norwood v. Dale Maint. Sys., 590 F. Supp. 1410 (N.D. Ill. 1984)).

Such jurisprudence contrasts sharply with the treatment of Fourth Amendment claims in prison. Within this context, constitutional privacy has been interpreted in uniquely narrow ways that allow male guards to conduct intrusive physical searches and surveillance of women prisoners that heighten the risk of sexual abuse.[304]

The courts have held that prisoners have no constitutional expectation of privacy regarding searches of their cells or property[305]—even if such searches are malicious or retaliatory.[306] Furthermore, not all circuits agree that prisoners even retain any vestigial privacy right against guards viewing or touching their genitals. The Courts of Appeal for the First, Second, Sixth, Ninth, and Eleventh Circuits have held that prisoners have a right of privacy that limits the right of opposite-sex guards to view or touch their genitals;[307] dicta in the Court of Appeals for the Seventh Circuit suggests that they do not.[308] The Supreme Court has left this issue open.[309] According to the Court, if prisoners have any Fourth Amendment rights in this context, these rights exist only to the degree that they can "be reconciled with the concept of incarceration and the needs and objectives of penal institutions."[310] Thus, whatever privacy rights prisoners retain, they must "always yield to what must be considered the paramount interest in institutional security."[311]

Nonetheless, the Court assured litigants in *Hudson v. Palmer* that its deferential Fourth Amendment jurisprudence does not leave prisoners entirely at the mercy of their keepers: "[t]he Eighth Amendment always stands as protection against 'cruel and unusual punishments.'"[312] This protection, however, is illusory.

### *c. Deliberate Indifference: The Eighth Amendment*

The Eighth Amendment guarantee against cruel and unusual punishment arguably protects prisoners against abuse while they are in government custody.[313] The courts' constraints on the scope of this protection,

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[304] Such practices include watching the prisoners in their housing units, viewing them in the shower and on the toilet, and performing intrusive body searches. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 763–73 (2005).

[305] Hudson v. Palmer, 468 U.S. 517, 526 (1984).

[306] *See* Rodriguez v. McClenning, 399 F. Supp. 2d 228, 239 (S.D.N.Y. 2005).

[307] Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993); Covino v. Patrissi, 967 F.2d 73, 78 (2d Cir. 1992); Cornwell v. Dahlberg, 963 F.2d 912, 916–17 (6th Cir. 1992); Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988); Bonitz v. Fair, 804 F.2d 164, 172–73 (1st Cir. 1986).

[308] Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995).

[309] Weiser, *supra* note 3, at 32.

[310] *Hudson*, 517 U.S. at 526.

[311] *Id.* at 528.

[312] *Id.* at 530.

[313] *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that deliberate indifference to prisoners' medical needs constitutes cruel and unusual punishment under the Eighth

however, reflect the familiar theme that courts must be protected against prisoners who are inclined to waste judicial time with complaints about trivial harm. Accordingly, appellate courts have grafted a somewhat superfluous "de minimis harm" criterion onto the Eighth Amendment requirement that a prisoner prove that the impugned treatment has deprived her of the "minimal civilized measure of life's necessities."[314] Courts have found that violent sexual assault is sufficiently serious to satisfy the Eighth Amendment threshold.[315] However, sexual harassment, touching, threats, and coerced "consensual" sex have often been held to fall short of the de minimis threshold.[316]

In *Adkins v. Rodriguez*,[317] the prisoner feared that she would be assaulted because the guard repeatedly commented on her body, boasted about his sexual prowess, entered her bedroom while she was sleeping, and told her she had "nice breasts."[318] The Court of Appeals for the Tenth Circuit found that these allegations did not meet the de minimis harm threshold.[319] Thus, as with the physical injury requirement of the PLRA and the physical-proof/DNA-evidence requirement of the New York State women's prisons, the judicial response to a prisoner seeking protection against sexual threats is, "Come back once you've been raped."

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Amendment).

[314] Rhodes v. Chapman, 452 U.S. 337, 347 (1981); *see also* Farmer v. Brennan, 511 U.S. 825, 834 (1994) ("Our cases have held that a prison official violates the Eighth Amendment only when . . . the deprivation alleged [is], objectively, 'sufficiently serious.'" (citation omitted)).

[315] Williams v. Prudden, No. 02-1754, 2003 U.S. App. LEXIS 953, at *4 (8th Cir. May 19, 2003) (finding allegations that male guard "forcibly ground his pelvis against" female inmate and "attempted to force himself upon her" stated an Eighth Amendment claim); Schwenk v. Hartford, 204 F.3d 1187, 1197–98 (9th Cir. 2000) (holding attempted rape stated Eighth Amendment claim).

[316] *See, e.g.*, Boxer X v. Harris, 437 F.3d 1107, 1111 (11th Cir. 2006) (holding female guard ordering male prisoner to masturbate under threat of reprisal not more than de minimis harm); Jackson v. Madery, 158 F. App'x 656, 661 (6th Cir. 2005) (holding "rubbing and grabbing Jackson's buttocks in a degrading and humiliating manner" not more than de minimis harm); Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997) (finding "welcome and voluntary sexual interactions," such as kissing and hugging, between female guard and male prisoner not more than de minimis harm); Boddie v. Schnieder, 105 F.3d 857, 861–62 (2d Cir. 1997) (holding that although female guard verbally sexually harassed, touched, and rubbed her body against male plaintiff, this was not "severe enough" to meet de minimis standard); Bowie v. Cal. Dep't of Corr., No. 95-55539, 1996 WL 593182, at *2 (9th Cir. Oct. 15, 1996) (concluding verbal sexual harassment and demands for sex, without touching, were not "clearly established" Eighth Amendment violation).

However, a trend of declining judicial tolerance of sexual harassment and threats may be emerging. *See* Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (finding that guards making "ribald comments" during strip search, making sexual gestures, and forcing male prisoner to "perform sexually provocative acts" stated Eighth Amendment claim); Rodriguez v. McClenning, 399 F. Supp. 2d 228 (S.D.N.Y. 2005) (finding Eighth Amendment violation for groping and implicit sexual threats during "pat-frisk" physical search without explicit discussion of "de minimis harm" standard).

[317] 59 F.3d 1034 (10th Cir. 1995).

[318] *Id.* at 1036–37.

[319] *Id.*

A prisoner not only must establish a deprivation of life's necessities that exceeds a rather high de minimis threshold, but also must prove that the defendant possessed a sufficiently capable state of mind: "'deliberate indifference' to inmate health or safety."[320] Like the intent requirement for equal protection claims,[321] this standard is akin to malice. Any abuse or oppression of prisoners, no matter how cruel or unusual, is constitutionally permitted unless the prisoner can prove that the prison official engaged in deliberate "unnecessary and wanton infliction of pain,"[322] or "kn[e]w[ ] of and disregard[ed] an excessive risk to inmate health or safety."[323] A purely objective showing of deliberate indifference—negligence or gross negligence—is not enough.[324]

A prison administrator can therefore defend against a prisoner's Eighth Amendment sexual abuse claim by pleading negligence or incompetence. Even if she knew of facts that would give rise to an inference that a prisoner was highly likely to be sexually assaulted by a guard or another prisoner, the administrator is not liable if she can persuade the court that she failed to draw the obvious inference.[325] By the same token, if a prison guard testifies that he thought the sex was consensual, it seems likely that he will escape liability for an Eighth Amendment violation.[326] Moreover, an appellate court has held that even if a prison administrator is subjectively aware of a general risk that male guards may sexually abuse women prisoners and nonetheless allows it to happen, an Eighth Amendment violation is not established unless the administrator knew that *that particular* guard might assault women.[327] Thus prison administrators are essentially free to make the counterfactual assumption that they need not take precautions against custodial sexual abuse because it is impossible to know in advance which guards might commit it.

This Eighth Amendment standard also creates institutional incentives for poor or nonexistent recording and investigation of prisoner alle-

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[320] Farmer v. Brennan, 511 U.S. 825, 835 (1994) (citations omitted).

[321] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); Washington v. Davis, 426 U.S. 229, 238–44 (1976).

[322] Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976).

[323] *Farmer*, 511 U.S. at 837.

[324] *Id.* at 838.

[325] *See id*. at 837 ("[T]he 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.").

[326] Dinos, *supra* note 3, at 291, 293. *But see Farmer*, 511 U.S. at 843 n.8 ("While the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him, he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist."); Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999) (holding proof of malice not necessary when clear that sex was forced); Carrigan v. Davis, 70 F. Supp. 2d 448, 454–55 (D. Del. 1999) (finding that criminal law banning guards' sex with prisoners establishes "deliberate indifference" regardless of whether guard had "consensual" sex with inmate or raped her).

[327] *See* Hovater v. Robinson, 1 F.3d 1063, 1067–68 (10th Cir. 1993).

gations of sexual abuse and for deterring prisoners from reporting their abuse at all.[328] It is no surprise, then, that "departments of corrections often fail to record complaints or even to investigate them in an organized and centralized manner."[329] Without such records, "it is almost impossible for a prisoner to demonstrate that a particular male guard poses a risk of sexual abuse."[330] Thus, the retaliation and negligent record keeping that typify prison grievance processes serve to immunize prisons from liability for custodial sexual assault.[331]

Despite the courts' acknowledgement of an obligation to adjudicate prisoners' constitutional claims, the PLRA excludes most of these claims from court altogether. Rational-basis review of prisoners' constitutional claims ensures that those lawsuits that do make it to court are likely to fail. Today, as under civil death and the hands-off doctrine, a plaintiff's status as a prisoner will often be fatal to an otherwise valid claim.

## Conclusion

To return to Professor Siegel's challenge, it is clear that "reasonable and principled" interpretation of prison law is "rationalizing practices that perpetuate historic forms of stratification."[332] Two modern race and gender status regimes lead to the imprisonment of low-income women of color who are survivors of abuse. Once inside they are treated, in law and in practice, as though the clock had been turned back to the nineteenth century. The race and gender hierarchies that land women in prison then shape the legal rules that institutionalize custodial abuse by conferring immunity for it. These hierarchies form a "system of social meanings"[333] that has prevented prison law impunity from being recognized as an unjust status hierarchy and which, consequently, has led to systematic sexual abuse of women prisoners to which the law is not obligated to respond.

The analysis presented in this Article does not lead directly to neat propositions for legal reform. There is no doctrinal magic bullet that will allow or force the courts to respond to this problem. Certainly, the PLRA should be abolished. Common law and statutory barriers to supervisory and institutional liability should be removed, at least with respect to prisoners' claims. Courts should accord the same robust protections to the constitutional rights of prisoners as to other litigants whose rights are infringed by government action. But many of the institutional policies and practices that construct impunity within prisons are already formally unlaw-

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[328] Adlerstein, *supra* note 149, at 1695 (observing that staff in some institutions actively discourage prisoners from filing internal grievances).

[329] Laderberg, *supra* note 3, at 323.

[330] Buchanan, *supra* note 304, at 807.

[331] *Id*. at 808.

[332] Siegel, *Equal Protection*, *supra* note 16, at 1148.

[333] Balkin, *supra* note 16, at 2323.

ful under contemporary legal rules; the impunity I discuss reflects a lack of political, institutional, and judicial will to do anything about it.

In any case, opening the courts to prisoners' claims will not in itself resolve the problem of custodial sexual abuse. Access to the courts has not eliminated sexual abuse of women or children outside prison and, on its own, is unlikely to do so in prison. Such access would, however, expose prison conditions to outside scrutiny and reaffirm that the government is responsible for what its employees do to prisoners in its custody. This, in turn, might create incentives for institutional reform.

By reframing impunity as a racialized and gendered status regime, I seek to expose the discriminatory values and biased legal frameworks that shape prisons' boys-will-be-boys approach to custodial sex. I seek to alert institutions, advocates, legislators, and judges to the dissonance between our constitutional ideals and the realities of prison life and law. I hope to renew the legal, political, and especially the institutional will to take women's safety seriously in prison.

This Article situates impunity for sexual abuse not merely as a set of rules unique to prisoners, but as part of a historical and contemporary pattern of legal enforcement of race and gender hierarchy, connecting the struggle for prison law reform to broader struggles against race and gender hierarchy in the outside world. Perhaps such connections may help galvanize the political momentum that courts seem to require before they will consider the doctrinal changes that are so sorely needed to challenge the legal enforcement of race and gender hierarchy,[334] both inside and outside prison.

I seek to open the kind of discussion that took place about sexual abuse in the outside world during the 1970s, 1980s, and 1990s.[335] These debates did not lead to the eradication of sexual abuse. They did, however, yield substantial improvements in both legal doctrine and social attitudes toward sexual assault in the outside world. A similar transformation is long overdue in prison law.

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[334] *Id.* at 2340.

[335] *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975) (exploring history and social understanding of rape and rape law); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (exposing the prevalence of sexual harassment in the workplace and arguing for legal recognition of such behavior as sex discrimination); DIANA E. H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1974) (providing a collection of women's accounts of their rapes that challenge common myths to reveal rape as rooted in sexism).