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Bars to Justice: The Impact of Rape Myths on Women in Prison

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ARTICLES

BARS TO JUSTICE: THE IMPACT OF RAPE MYTHS ON WOMEN IN PRISON

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INTRODUCTION

“I am a DOC inmate and I have rights. Some of them I gave up when I entered the prison system, but the right to say No . . . [was] not one of them.”¹

Sexual violence² is a frighteningly widespread and serious problem that spans across all sectors of society in the United States today.³ Recently, the mainstream media has illuminated the pervasiveness of sexual violence in many environments including college campuses⁴ and the military,⁵ and it has also shed light on its perpetration by a range of actors including high profile individuals like

1. Inmate #10, on file with the author. Sheryl P. Kubiak, Hannah Brenner, Deborah Bybee & Rebecca Campbell, *Using an Ecological Framework to Examine Reporting of Abuse during Incarceration*, National Science Award # 1429948. This article contains de-identified quotes extracted from files in the *Neal* case; due to confidentiality constraints, editors of the Georgetown Journal of Gender and Law were not permitted access to original documentation for verification and the authors assume responsibility for accuracy.

2. This article uses the term sexual violence and sexual victimization interchangeably to refer to a broad range of non-consensual contact and non-contact sexual offenses, up to and including rape. For a comprehensive overview of terminology related to sexual victimization generally see Rebecca Campbell & Stephanie Townsend, *Defining the Scope of Sexual Violence*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 95–109 (Renzetti et al., ed. 2011).

3. 18.3% of women reported experiencing an attempted or completed rape in their lifetime, and the numbers who don’t report are staggering. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUST., NCJ 172837, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (1998).

4. Nick Anderson, *Sex Offense Statistics Show U.S. College Reports are Rising*, WASH. POST (July 1, 2014), http://www.washingtonpost.com/local/education/sex-offense-statistics-show-us-college-reports-are-rising/2014/07/01/982ecf32-0137-11e4-b8ff-89afd3fad6bd_story.html (referencing Nick Anderson, *Sex Offenses on U.S. College Campuses*, WASH. POST, <http://apps.washingtonpost.com/g/page/local/sex-offenses-on-us-college-campuses/1077/>).

5. Robert Draper, *The Military’s Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html?ref=collection%2Ftimestopic%2FDraper%2C%20Robert&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=19&pgtype=collection.

politicians,⁶ athletes,⁷ and celebrities.⁸ The response from institutions and law enforcement has been widely criticized, as claims have historically not been taken seriously or adequately investigated and prosecuted.⁹

Society is beginning to recognize this pattern of ineffective response to sexual violence. For example, in 2014, the United States Department of Education, in an unprecedented move, publicized the identities of fifty-five colleges and universities under investigation for their failure to adhere to federal anti-discrimination law in rape investigations on campus.¹⁰ Thus, it appears that there is a developing understanding of the seriousness and complexity of sexual victimization.¹¹

Despite what might be described as a growing recognition of the complexity of sexual victimization, the problem of sexual violence in prison has attracted much less attention than campus rape; sexual victimization in prison life is rarely part of public discourse. This is somewhat surprising, particularly given that the U.S. prison system has garnered widespread attention in recent media coverage about the problems and heinous practices associated with incarceration, in addition to President Obama's outspoken critique of prison policies.¹² Prison life is even a subject of fascination in current popular culture, as evidenced by the popularity of the Netflix Original Series "Orange is the New Black" and the eponymous memoir upon which the series is loosely based.¹³ Some of the issues the show tackles are in fact closely linked to those that inmates experience on a daily basis, providing a public glimpse into a previously hidden place. These issues include concerns regarding privacy; difficulty with power imbalances between prisoners

6. Matt Hamilton, *Carson Mayor Accused by Daughter of Mervyn Dymally of Sexual Harassment*, L.A. TIMES (May 13, 2015), <http://www.latimes.com/local/lanow/la-me-ln-carson-mayor-sexual-harassment-suit-20150513-story.html>; Richard A. Serrano, *Former House Speaker Dennis Hastert Accused of Hiding Sex Abuse of Former Student*, L.A. TIMES (May 29, 2015), <http://www.latimes.com/nation/la-na-hastert-misconduct-20150529-story.html>.

7. Terrence McCoy, *Colts Linebacker Josh McNary Arrested on Rape Charges, Denies Allegations*, WASH. POST (Jan. 15, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/01/15/colts-linebacker-josh-mcnary-and-the-complexities-of-criminal-cases-against-professional-athletes/>; Veronica Rocha & Stephen Ceasar, *Darren Sharper to Serve 9 Years After Plea Deals in Sex Assault Cases*, L.A. TIMES (Mar. 23, 2015), <http://www.latimes.com/local/lanow/la-me-ln-nfl-star-darren-sharper-to-enter-plea-monday-2015032-story.html>.

8. Barbara Bowman, *Bill Cosby Raped Me. Why Did It Take 30 Years for People to Believe My Story?*, WASH. POST (Nov. 13, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/11/13/bill-cosby-raped-me-why-did-it-take-30-years-for-people-to-believe-my-story/>; Cathy Young, *Woody Allen, Feminism, and 'Believing the Survivor'*, TIME (Feb. 12, 2014), <http://time.com/7292/woody-allen-believe-the-victim-and-feminism/>.

9. Eliza Grat, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/>.

10. Jennifer Steinhauer & David S. Joachim, *55 Colleges Named in Federal Inquiry Into Handling of Sexual Assault Cases*, N.Y. TIMES (May 1, 2014), <http://www.nytimes.com/2014/05/02/us/politics/us-lists-colleges-under-inquiry-over-sex-assault-cases.html>.

11. Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html>.

12. The Editorial Board, *President Obama Takes on the Prison Crisis*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html>.

13. PIPER KERMAN, *ORANGE IS THE NEW BLACK: MY LIFE IN A WOMEN'S PRISON* (2011).

and prison staff; nearly absolute discretion on the part of guards; and system-wide corruption, homophobia, and even sexual victimization. As one critic noted about the series, “Prison life is sometimes brutal (guards sexually abuse inmates with impunity), often humiliating (the women are subject to strip searches at any time), and generally tedious.”¹⁴ However, the series falls short of addressing the seriousness and prevalence of sexual violence in prison. A recurring storyline about a sexual “relationship” between a male corrections officer and a female inmate is romanticized in the “made for TV” context.

What the series does get correct, however, is that the prison population in the United States is diverse and immense. Sexual victimization within prisons is occurring in an era of “mass incarceration,” which has attracted more attention, as “6,899,000 persons under the supervision of adult correctional systems at yearend 2013.”¹⁵ This means that 1 in 35 adults are under some form of correctional supervision, or 2.8% of the population.¹⁶ Females made up 1,256,300 of the total population in 2013.¹⁷ State prisons hold approximately 1,178,700 adults, for example, and Michigan’s total population under correctional supervision was 253,700.¹⁸

Among this total population, the U.S. Department of Justice estimates that there are between 149,200 and 209,400 inmate victims of sexual abuse annually in U.S. prisons and jails.¹⁹ Female inmates are disproportionately victimized by both staff and other inmates,²⁰ and it is estimated that only small percentage of those victimized ever report it to authorities.²¹ While there has been some research conducted on the specific issue of sexual violence perpetrated by

14. J. Courtney Sullivan, *Review: ‘Orange Is The New Black: My Year in a Women’s Prison,’ by Piper Kerman*, CHI. TRIBUNE (May 15, 2015) <http://www.chicagotribune.com/lifestyles/books/chi-books-orange-new-black-kerman-story.html>.

15. LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP’T OF JUST., NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 1 (2014).

16. *Id.* at 1. Correctional supervision includes adults in prisons, jails, probation, or parole. *Id.*

17. *Id.* at 11.

18. *Id.* at 11–12.

19. ALLEN BECK ET AL., U.S. DEP’T OF JUST., OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES 2011–12 (2013).

20. U.S. DEP’T OF JUSTICE, NCJ 231172, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007-2008 1 (2011) [hereinafter BJS Statistics 2011]. This article focuses exclusively on sexual violence perpetrated by male prison guards against female inmates, mirroring the dynamics inherent in the Neal lawsuit. Our focus is in no way meant to deny or downplay the existence of sexual victimization that is perpetrated between inmates and/or that perpetrated against male prisoners. However, “In addition to heterosexual assault, inmates are also at risk of sexual abuse by same-sex guards. Neither the BJS nor any other governmental agency attempts to collect data specifically related to homosexual sexual assaults by guards upon the inmates in their custody; thus, the scope of the problem is difficult to quantify.” M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 No. 3 CRIM. LAW BULL. 1, 4 (2010).

21. Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, BUREAU OF J. STATS (2002), <http://www.bjs.gov/content/pub/pdf/rsarp00.pdf>. “Most rapes and sexual assaults against females were not reported to the police. Thirty-six percent of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to police, 1992-2000.” *Id.*

corrections officers against female inmates, such research is sparse compared to other types of abuse.²² “Despite the apparent awareness and concern about sexual abuse of female inmates by correctional staff, little theoretical or empirical information exists to help understand this phenomenon, creating a paucity of interventions or preventive measures to protect the women.”²³

The Prison Rape Elimination Act (PREA) attempts to address this problem in prison vis-à-vis the creation of standards intended to lessen the prevalence and incidence of sexual abuse in incarceration settings and to encourage reporting when such abuse occurs.²⁴ Despite these important and well-intentioned measures, sexual victimization continues at shockingly high rates, and, perhaps even more problematically, low reporting of this abuse persists.²⁵ Even when abuse is reported, the rate at which internal investigations credit the victim’s account is surprisingly low.²⁶ A marked disconnect often exists between actual policy and resulting practice.²⁷

This article stems from a National Science Foundation-funded interdisciplinary research project that addresses a major gap in understanding the reporting of sexual victimization in prison and the confluence of factors that contribute to the ineffectiveness of internal laws and policies.²⁸ To this end, our cohort of experts in law, social work, and psychology are utilizing data, including personal narratives of inmate victims, from cases that formed the basis of the groundbreaking class action lawsuit *Neal v. Department of Corrections*.²⁹

22. See, e.g., Sheryl Pimlott Kubiak et al., “*I Came to Prison to Do My Time — Not to Get Raped*”: 8 STRESS, TRAUMA, & CRISIS: AN INT’L J. 157 (2005) (using a narrative case study approach to examine coping strategies of female inmate victims abused by male corrections officers).

23. Avery J. Calhoun & Heather D. Coleman, *Female Inmates’ Perspectives on Sexual Abuse by Correctional Personnel*, 13 WOMEN & CRIM. JUST. 101, 104 (2002).

24. Section 7 of the PREA created the National Prison Rape Reduction Commission, a primary goal of which is to create standards for the elimination of prison rape. Prison Rape Elimination Act of 2003, 42 U.S.C. §15606 (West, Westlaw through P. L. 114–114) [hereinafter PREA]. For additional information, see *Prison Rape Elimination Act*, NAT’L PREA RES. CTR., <http://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> (last visited Mar. 1, 2016).

25. In fact, the numbers may be higher than reported by the BJS. “The BJS’s estimates must be viewed with caution While these data provide a useful annual snapshot of prison sexual violence, they reflect only incidents reported by correctional authorities. Even prison administrators who report in good faith all of the incidents of staff-perpetrated sexual misconduct that come to their attention under-report these incidents by a significant margin because much of it goes unreported by inmates and is never discovered by prison authorities.” Self-report data from inmates indicates that there may be more than 20 times more staff sexual misconduct than captured by NJS’s estimates. McGuire, *supra* note 20, at 1, 4–5.

26. McGuire, *supra* note 20, at 8.

27. See discussion *infra* Section III(A)(2). This disconnect is also highlighted by Human Rights Watch. See *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, HUMAN RIGHTS WATCH (1996), <https://www.hrw.org/legacy/reports/1996/Us1.htm> [hereinafter *All Too Familiar*].

28. Sheryl P. Kubiak, Hannah Brenner, Deborah Bybee & Rebecca Campbell, Using an Ecological Framework to Examine Reporting of Abuse during Incarceration, National Science Award # 1429948.

29. *Neal v. Dep’t of Corr.*, 583 N.W.2d 249 (Mich. Ct. App. 1998). For a discussion of the case and its impacts, see Rachel Culley, “*The Judge Didn’t Sentence Me to Be Raped*”: Tracy Neal v. Michigan Department of Corrections: A 15-Year Battle Against the Sexual Abuse of Women Inmates in Michigan, 22 WOMEN & CRIM. JUST. 206 (2012).

In 1996, attorney Deborah LaBelle initiated a lawsuit on behalf of Tracey Neal, five other female prisoners, and those similarly situated, against the Michigan Department of Corrections (MDOC), its directors, and various wardens and deputies in the prison system. The plaintiffs alleged that MDOC had systematically engaged in a pattern of harassment of female inmates incarcerated by MDOC and specifically at the hands of male correctional staff.³⁰ The plaintiffs complained that MDOC assigned male officers to housing units without providing training on cross gender supervision; the officers violated the women's privacy rights; and officers performed improper body searches and committed offensive touching. Further, officers requested sexual acts as a condition for time credits, work details, and educational and rehabilitative program opportunities, and perpetrated sexual abuse. Female inmates who reported abuse were subject to patterns of retaliation by officers and other correctional staff.³¹ Plaintiffs claimed these actions, and defendants' failure to protect female inmates from this misconduct through proper supervision, investigation, or discipline of MDOC employees, constituted gender-based misconduct, sexual harassment, and retaliation in violation of Michigan's Elliot Larsen Civil Rights Act.³² In 2009, after years of grueling litigation, MDOC settled with the 809 plaintiffs for 100 million dollars.³³ The settlement was allocated according to level of severity of abuse: Pool 1 encompassed inmates subject to sexual intercourse, oral sex, or digital penetration; Pool 2 encompassed those who experienced cross-gender pat downs, groping by a male employee, or a male employee exposing genitals and/or masturbating; and Pool 3 encompassed members who were verbally sexually harassed or subjected to prurient viewing.³⁴

Our research team obtained access to the legal case files containing depositions, claim forms, and narratives from the women who suffered abuse. These materials were gathered by the Plaintiff's attorneys during the course of the trial. Here, we use these specific corrections cases, policies, and procedures as a case study, contrasting aspects of a victim inmate's identity with that of an "ideal victim" as identified by Norwegian sociologist Nils Christie.³⁵ Christie identifies the "ideal victim" as one having a specific set of characteristics that, when present, put her in the best position to have her claims considered favorably by the legal system.³⁶ We observe that the "ideal victim" framework is informed by

30. *Neal*, 583 N.W.2d at 250.

31. *Id.*

32. *Id.*

33. Class Settlement Agreement, *Neal v. Dep't of Corr.*, No. 96-6986-CZ (2009), <http://www.clearinghouse.net/chDocs/public/PC-MI-0021-0003.pdf>; *Neal v. Dep't of Corr.*, No. 96-6986-CZ (Mich. Cir. July 15, 2009).

34. Plan of Allocation of Settlement Proceeds, *Neal v. Dep't of Corr.*, No. 96-6986-CZ (2009), <http://www.clearinghouse.net/chDocs/public/PC-MI-0021-0006.pdf>.

35. *Id.* at 18.

36. Nils Christie, *The Ideal Victim*, FROM CRIME POL'Y TO VICTIM POL'Y: REORIENTING THE JUST. SYS. 17, 19 (1986).

the widespread adoption and internalization of often incorrect stereotypes about sexual victimization that are commonly referred to as rape myths.³⁷ Our research reveals that there is little, if any, understanding of precisely how rape myths function within the prison context to affect rape proclivity, acceptance, and reporting or to ensure success in legal claims/processes. We begin to examine here how rape myths operate in the closed prison system, a research question that scholars have not previously undertaken. Reflecting the interdisciplinary nature of our work, this article serves as a foundation for a future companion study *Prison-Specific Rape Myths for Staff Sexual Misconduct*, a social scientific content analysis of rape myths in the prison context as illustrated by the victims in *Neal*.³⁸ This companion analysis reveals the presence of prison-specific rape myths found within descriptions of perpetration of abuse, reporting decisions, and internal investigations and their outcomes.

As the law and policy-focused half of the same project, this article identifies the most prevalent rape myths we observed from the narratives of women involved in the *Neal* lawsuit and other similarly situated female inmates across the country. We explore how they shape notions of the “ideal victim,” discuss their specific impact, and explain why they matter. We then consider how, by virtue of their incarcerated status, it is impossible for women victimized in prison to comply with the ideal victim standards, ultimately rendering their attempts at seeking justice futile. Because of the interdisciplinary nature of our work, we pull rape myths from the community context, defined in community psychology as “that combination of social units and systems that perform the major social functions relevant to the meeting of people’s needs” and try to explore how they exist in prison.³⁹ We focus on the impact of rape myths on sexual violence perpetrated by prison staff against inmates and in particular, how rape myths occur across the closed prison system—from reporting to grievance outcomes. We ultimately argue for the acknowledgment and dismantling of these myths. We argue that the *Neal* lawsuit, its lessons learned, and the resulting remedies for Michigan class members, both on an individual and prison-wide level, provide a useful template that can be extrapolated to address similar issues that exist nationwide. We studied Michigan prisons for multiple reasons; while Michigan is home to some of the worst prisons for sexual violence, it is also taking steps to comply with PREA standards.⁴⁰ Finally, we are working to understand the reporting of sexual victimization in the prison setting, the limitations of internal

37. See generally Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. OF PERSONALITY & SOC. PSYCH. 217 (1980).

38. Gina Fedock et al., *Prison-Specific Rape Myths for Staff Sexual Misconduct* (forthcoming). This research is being conducted concurrently with this publication and is currently in progress.

39. R. J. WARREN, *THE COMMUNITY IN AMERICA* 9 (3d ed. 1978).

40. “Effective immediately, Wardens shall ensure all requirements set forth in the Manual are followed at their respective facilities. This includes ensuring procedures are developed as necessary to implement requirements set forth in the PREA Manual and appropriate policy directives.” Memorandum from Daniel H. Heyns, Director, Mich. Dep’t of Corr. to the Exec. Pol’y Team, Admin. Mgmt. Team &

policies, and the related positive impact of civil litigation, with the goal of recommending policy changes that best provide justice for victims of sexual violence.⁴¹

Part I explores the application of the influential and instructive discourse of the “ideal victim”⁴² to the prison setting to consider whether a female inmate can occupy this status. Part II considers how the prisoner identity of a victim makes successful reporting, investigation, and resolution of sexual violence nearly impossible. We argue this is in part due to the internalization and application of harmful rape myths and expectations of “ideal victimhood.” Part III explores the evolution of laws and policies like marital rape and rape shield laws passed in part due to an understanding of the harmful nature of rape myths on victims of sexual victimization. We put forth this preliminary analysis of rape myths in the prison context to inspire similar reactionary changes in prison law and policy as a response to the operation of these myths, and to prevent rape myths from interfering with pathways to justice. In addition to arguing for the dismantling of myths about rape during internal investigations, this article highlights the necessity for civil remedies as essential to serve the needs of this subset of victims.

We seek to inform law and policy makers, as well as those involved in the everyday implementation of these laws and policies, as to how to address these often unforeseen and sometimes implicit or informal barriers to justice. Our efforts are particularly timely given that many states have pledged to adopt PREA standards and to address flaws in their internal prison systems.⁴³ To be successful in their efforts, states must identify, understand, and challenge rape myths and the “ideal victim” discourse. The exploitation and rejection of myths and misperceptions about rape is an important goal; failure to do so may explain why prevention strategies and initiatives to increase reporting in other closed systems may similarly fail. However, the simultaneous preservation and accessibility of civil legal remedies, particularly the class action lawsuit, is necessary to ensure that victims have the opportunity to find justice outside the closed prison system.

Wardens (Dec. 23, 2014), https://www.michigan.gov/documents/corrections/DOM_2015-24_478874_7.pdf (discussing the Prison Rape Elimination Act (PREA)).

41. This project examines the factors that influence a female inmate victim’s willingness to report sexual victimization perpetrated by a staff member. We rely on the experiences of female inmates who reported their abuses to a law firm who successfully brought a class action lawsuit against the Michigan Department of Corrections, one of the nations’ prison systems with the highest rate of abuse and lowest levels of reporting.

42. Christie, *supra* note 36, at 19.

43. Press Release, Dep’t of Just., Department of Justice Announces That 48 States And Territories Have Committed To Ending Prison Rape (May 28, 2014) http://www.prearesourcecenter.org/sites/default/files/content/department_of_justice_prea_compliance_press_release.pdf. The State of Texas, however, refuses to implement the PREA, claiming unconstitutionality. Letter from Rick Perry, Governor, State of Tex., to Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice (Mar. 28, 2014), http://www.tdcjunion.com/research/rick_perry_letter.pdf. And those who critique the audits of PREA as not actually conforming with PREA. Gary Gately, *DOJ Faulted for Not Requiring PREA Audits*, JUVENILE JUST. INFO. EXCH. (June 26, 2014), <http://jjie.org/doj-faulted-for-not-requiring-prea-audits/>.

I. “IDEAL VICTIM” DISCOURSE

Cultural ideas about sexual violence center on a specific set of stereotypes and assumptions. These commonly held perceptions are often incorrect and are best described as myths, or, stated another way, “prejudicial, stereotyped or false beliefs about rape, rape victims, and rapists.”⁴⁴ Though false, rape myths are “[w]idely and persistently held, and . . . [s]erve to deny and justify male sexual aggression against women.”⁴⁵ Rape myths are interrelated; taken together, they inform a narrow definition of what victims, perpetrators, and crimes are expected to look like. The perpetuation of these false ideas about sexual violence is damaging, and it influences the ways in which victims see themselves (sometimes even failing to acknowledge their own victim status).⁴⁶ Rape myths also affect the way the community and legal system perceive the crime, usually by making sexual violence easier to accept or ignore, and by discrediting the legitimacy of victims and their claims.⁴⁷ The net effect of such myths is to “[d]eny or reduce perceived injury or to blame the victims for their own victimization.”⁴⁸ The acceptance and perpetuation of rape myths are cited as contributing factors to rape proclivity and sexual aggression.⁴⁹

A. HISTORY, RELEVANCE, AND IMPACT OF RAPE MYTHS

Formal labeling and identification of rape myths first occurred in the 1970s, and was instituted by feminist scholars, sociologists, and psychologists who described a complex set of cultural beliefs thought to support and perpetuate male sexual violence against women.⁵⁰ We focus on rape myths that surround male perpetration of sexual violence against female victims, but acknowledge that

44. Burt, *supra* note 37, at 217.

45. K.A. Lonsway and L.R. Fitzgerald, *Rape Myths: In Review*, 18 PSYCHOL. OF WOMEN Q. 133, 134 (1994).

46. ROBIN WARSHAW, I NEVER CALLED IT RAPE (1994).

47. Lonsway & Fitzgerald, *supra* note 45, at 136.

48. Burt, *supra* note 37, at 217; *see also*, F. Eyssel and G. Bohner, *Schema Effects of Rape Myth Acceptance on Judgments of Guilt and Blame in Rape Cases: The Role of Perceived Entitlement to Judge*, 26 J. OF INTERPERSONAL VIOLENCE 1579, 1580 (2011) (“At the core of the various types of myths is the overall negation of the crime of rape.”).

49. Edwards et al., *infra* note 59, at 761; Gerd Bohner et al., *The Causal Impact of Rape Myth Acceptance on Men’s Rape Proclivity: Comparing Sexually Coercive and Non-Coercive Men*, 35 EURO. J. OF SOC. PSYCH. 819 (2005) (citation omitted). Sexual violence is an endemic problem in U.S. society as evidenced by the fact that 18–25% of U.S. women report experiencing either an attempted or completed rape in their lifetimes. Bonnie Fisher et al., *The Sexual Victimization of College Women*, Research Report, U.S. DEP’T OF JUST. (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>; Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, Research Report, U.S. DEP’T OF JUST. (2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

50. Diana L. Payne et al., *Rape Myth Acceptance: Exploration of its Structure and its Measurement Using the Illinois Rape Myth Acceptance Scale*, 33 J. OF RES. IN PERSONALITY 27, 31–32 (1999).

numerous other equally detrimental rape myths exist that harm other victims. For instance, there are complicated rape myths specific to race,⁵¹ sexual orientation,⁵² and gender.⁵³ These myths, however, have only been studied in the context of the community, never in the context of a closed, isolated, system like prison.⁵⁴ We acknowledge that a majority of the population of our sample were members of racial minorities, and that race plays an important role in the interaction of “ideal victimhood” and in prisons.⁵⁵ However, since rape myths and ideal victimhood have yet to be studied in prisons, we limit our scope to exploring general rape myths about victims, perpetrators, and abuse. Although race is an important defining characteristic in attainment of “ideal victimhood,” our study focuses on the overarching identifier that all these women possess, despite race, age, socioeconomic status, or sexual orientation: their status as an inmate. We limit our discussion in this way because our focus is a novel attempt to provide a baseline for how rape myths operate generally in prisons as a result of certain characteristics unique to prisons such as power imbalances, complex dynamics of sexuality, and views of inmates as deviant. The ways in which community rape myths surrounding race, gender, and sexual orientation operate in the prison context are beyond the scope of this article, but it is a research question that we call on others to explore.

51. For example, black women are frequently perceived as overly sexual and as a result “unrapeable; this perception often influences their decisions to disclose sexual assault.” Gail Elizabeth Wyatt, *The Sociocultural Context of African American and White American Women’s Rape*, 48 J. SOC. ISSUES 77, 78 (1992). “If African American women perceive that society does not consider that they can be raped, and that they would not be believed if they disclosed their assault, the chances are minimal that they will disclose or seek help from authorities that represent societal views regarding ‘real rape.’ *Id.*

52. Further, “traditional gender role attitudes were positively related to victim blame and to more negative attitudes toward gay men and lesbians, which in turn, was related to more blame being assigned to homosexual victims.” Bradley H. White & Sharon E. Robinson Kurpius, *Effects of Victim Sex and Sexual Orientation on Perceptions of Rape*, 45 SEX ROLES 191, 196–97 (2002).

53. In a study that examined blame attributed to rape victims by males in females in scenarios that depicted the rape of a heterosexual male or female, a gay male, or a lesbian, the researchers concluded that “men assigned more blame to victims than did women, and they assigned greater blame to male than female victims.” White & Kurpius, *supra* note 52, at 196–97; *see also*, J.A. Turchik & K.M. Edwards, *Myths About Male Rape: A Literature Review*, 13 PSYCHOL. OF MEN & MASCULINITY 211 (2012); Guy R. Holmes et al., *See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?* 17 CLIN. PSYCHOL. REV. 69 (1997).

54. A closed system is defined as a system that is “sufficiently independent as to allow most of its problems to be analyzed with reference to its internal structure and without reference to its external environment.” “Closed organizations, such as residential care facilities, children’s homes and prisons, are relatively isolated from the out- side world, and as such, violations and violence are often contained and intensified.” Erving Goffman, *The Characteristics of Total Institutions*, in ORGANIZATION AND SOCIETY 312, 314 (1961).

55. *See* Kubiak et al., *supra* note 22.

The literature on rape myths is voluminous and extensive.⁵⁶ Author Martha Burt was one of the first scholars to explore rape myth acceptance.⁵⁷ Scholars Peterson and Muehlenhard categorize the existing literature into two strands, arguing that rape myths narrowly define rape while simultaneously blaming the victim.⁵⁸ Some of the most common rape myths that define and trivialize rape include: husbands cannot rape their wives, and rape is an insignificant event. Some of the most common myths blaming the victim include: women enjoy rape; women ask to be raped; women lie about being raped; and rape necessarily involves deviance on the part of the victim.⁵⁹ These categories serve as broad myths that allow for specific myths to be categorized according to their particular shared focus. For example, the broader myth “women ask to be raped” encompasses specific myths such as “she is promiscuous” or “she invited it because of how she was dressed.”⁶⁰ Some scholars have distinguished between overt myths like “she enjoyed it,” which is unlikely to garner significant societal support, and more subtle myths.⁶¹ The latter category includes ideas such as: if a woman goes to a man’s room alone, she is “asking” to be raped; if a perpetrator does not use a weapon, it cannot be rape; a man cannot “help” himself because of his strong biological desire for sex; and if she does not fight back it is not really rape.⁶² As discussed above, there are also complicated myths that are based on race, sexual orientation, and gender.⁶³ When internalized, these myths impact what a victim must do to succeed throughout the legal process.

Significant scholarship spawns from Burt’s introduction of rape myth acceptance. This scholarship has ranged from studies on myth influence on the

56. See *infra* note 78. Early notions of rape myths were expressed by the legal jurist Blackstone. For an in-depth discussion, see Hannah Brenner, *Beyond Seduction: Lessons Learned about Rape, Politics and Power from Dominique Strauss-Kahn and Moshe Katsav*, 20 MICH. J. GEND. & L. 225 (2013). For a literature review of rape myth research, see Lonsway & Fitzgerald, *supra* note 45.

57. Martha R. Burt & Rochelle Semmel Albin, *Rape Myths, Rape Definitions, and Probability of Conviction*, 11 J. OF APPLIED SOC. PSYCHOL. 212, 226 (1981) (finding the more accepting of interpersonal violence the less willing to convict, and acceptance of interpersonal violence is the strongest predictor of rape myth acceptance).

58. Zoe Peterson & Charlene Muehlenhard, *Was it Rape? The Function of Women’s Rape Myth Acceptance and Definitions of Sex in Labeling their Own Experiences*, 51 SEX ROLES 129 (2004).

59. See *Common Rape Myths and the Questions to Test Them*, END VAW NOW, http://www.endvawnow.org/uploads/browser/files/Rape%20Myths_Questions.pdf (citing Payne et al., *supra* note 50 at 27–68; Burt, *supra* note 37, at 217–30). Other scholars concur. In their historical overview of rape myths, one set of scholars selected a sample based on their repeated appearance in the literature: husbands cannot rape their wives, women enjoy rape, women asked to be raped, and women lie about being raped. Katie M. Edwards et al., *Rape Myths: History, Individual and Institution-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 763–68 (2011).

60. Edwards et al., *supra* note 59, at 766, (citing J.A. ALLISON & L.S. WRIGHTSMAN, *RAPE, THE MISUNDERSTOOD CRIME* (Sage 1993)); D.C. Carmody & L.M. Washington, *Rape Myth Acceptance Among College Women: The Impact of Race and Prior Victimization*, 16 J. OF INTERPERSONAL VIOLENCE 424 (2001).

61. Sarah McMahon & G. Lawrence Farmer, *An Updated Measure for Assessing Subtle Rape Myths*, 35 SOCIAL WORK RES. 71, 71–72 (2011).

62. *Id.* at 73–74, 77.

63. See discussion *supra* notes 51–53 and accompanying text.

conviction of perpetrators,⁶⁴ recovery of victims,⁶⁵ gender role attitudes and sexual scripts,⁶⁶ and even rape myth acceptance by the media.⁶⁷ Researchers have also consistently documented that “men’s engagement in sexual violence is predicted by rape myth acceptance.”⁶⁸ While myths are not the only influence on proclivity for rape or an acceptance of sexual violence, they are indeed significant. In 2011, reassessing all the studies that stemmed from Burt’s original project, scholars Lonsway and Fitzgerald reframed the discussion on rape myths by conceptualizing them as stereotypes. They noted that isolated incidents in accordance with these myths tend to be widely publicized, but that “the vast majority of rapes that contradict the myth . . . are overlooked.”⁶⁹ Taken together with the victim’s internalization of these myths, damaging stereotypes lead to decreased reporting, investigation, and litigation of rape claims.

Over time, these rape myths became embedded in the United States legal system, prescribing what was necessary for a woman to bring a successful rape claim. Scholars have noted that the rape myths are damaging to the victim in many ways: “Not only are such myths prejudicial to the victim, they are often illogical, highlighting the contradictory behavioral expectations required of the female complainant from society in general, and the courtroom in particular.”⁷⁰ Further, “[t]he conscious acceptance of such rape myths into the courtroom, often

64. McMahon & Farmer, *supra* note 61.

65. Juliette Zanni, Rape Myths as Cultural Mandate and Their Impact on the Recovery of Sexual Assault Victims 7 (2009) (honors project submitted in partial fulfillment of the requirements for honors in the Dep’t of Anthro. at Rhode Island Coll.).

66. Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 *SEX ROLES* 385 (2005); see also Kathryn M. Ryan, *The Relationship Between Rape Myths and Sexual Scripts: Social Construction of Rape*, 65 *SEX ROLES* 774, 775 (2011).

67. See generally Renae Franiuk et al., *Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case*, 14 *VIOLENCE AGAINST WOMEN* 287 (2008); Renae Franiuk, *Prevalence of Rape Myths in Headlines and their Effects on Attitudes Toward Rape*, 58 *SEX ROLES* 790 (2008); LeeAnn Kahlor & Dan Morrison, *Television Viewing and Rape Myth Acceptance Among College Women*, 56 *SEX ROLES* 729 (2007); Rebecca Ripley Turkewitz, *All the News that’s Fit to Print? A Content Analysis of Newspapers’ Portrayal of Rape and Sexual Assault* (April 2010) (unpublished B.A. thesis, Wesleyan University) (on file with Wesleyan University).

68. Edwards et al., *supra* note 59, at 761 (citing A. Desai et al., *Testing an Integrative Model of Sexual Aggression in College Men*, in *SEXUAL VIOLENCE PERPETRATION: INDIVIDUAL AND CONTEXTUAL FACTORS*, SYMPOSIUM CONDUCTED AT THE ANNUAL MEETING OF THE ASS’N FOR BEHAV. & COGNITIVE THERAPIES, Orlando, FL (2008); C. Loh et al., *A Prospective Analysis of Sexual Assault Perpetration: Risk Factors Related to Perpetrator Characteristics*, 20 *J. OF INTERPERSONAL VIOLENCE* 1325, 1326–27 (2005)).

Although the majority of rape myth research has been conducted with college students, studies with non-college samples generally find similar rates of rape myth endorsement. Edwards et al., *supra* note 59, at 761 (citing K.C. Basile, *Attitudes Toward Wife Rape: Effects of Social Background and Victim Status*, 17 *VIOLENCE & VICTIMS* 341 (2002); H.S. Feild, *Attitudes Toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors, and Citizens*, 36 *J. OF PERSONALITY & SOC. PSYCHOL.* 156 (1978)).

69. Lonsway & Fitzgerald, *supra* note 46, at 134–35; McMahon & Farmer, *supra* note 59, at 29–30; Payne et al., *supra* note 50, at 31–32 (Authors sought to address the shortcomings in structure of the rape myth construct and conduct the first large-scale investigation into the question of rape myth structure using individual differences scaling).

70. K. Stevenson, *Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases*, 8 *FEMINIST LEGAL STUD.* 343, 350 (2000).

unchecked and unchallenged, has allowed their influence to exist and endure, exacerbating their negative impact and effect.” In the courts, then, “women alleging rape were expected to act and portray themselves as *unequivocal victims* (*i.e.*, Caucasian, middle or upper class, pious, submissive) if their allegations were to have any credibility.”⁷¹ This historical understanding of the “unequivocal victim,” as shaped by myths and misunderstandings about sexual victimization, persists today and contributes to the modern requirements of a victim within both society and the legal system.⁷² Today, the unequivocal victim is often discussed and framed as the “ideal victim.”⁷³

B. IS THERE AN “IDEAL” RAPE VICTIM?

Christie defines the “ideal victim” as “a person or category of individuals who—when hit by crime—is most readily given the complete and legitimate status of being a victim.”⁷⁴ “The ‘ideal victim’ is ‘sort of a public status of the same type and level of abstraction as that of a ‘hero’ or ‘traitor.’”⁷⁵ He characterizes the “ideal victim” of sexual violence as possessing six attributes that encompass the victim’s behavior as well as that of the perpetrator and the details of the assault. These include: (1) she is weak, (2) carrying out a respectable project, and (3) not to be blamed, (4) who is also powerful enough to make her case known without threatening strong countervailing vested interests, who is victimized by (5) a big bad offender, and (6) the victim and perpetrator are unknown to each other.⁷⁶ Christie argues that when individuals reflect these preferred characteristics, they are viewed as “true victims” and therefore more likely to be successful in their pursuit of justice.⁷⁷

Assumptions about victims of sexual violence reach far back in time. In fact, the famous jurist Blackstone wrote about them in the 1700s:

If she be of evil fame and stand unsupported by others, if she concealed the injury for any considerable time after she had the opportunity to complain, if the place where the act was alleged to be committed was where it was possible she might have been heard and she made no outcry, these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned.⁷⁸

71. Edwards et al., *supra* note 59, at 766–67 (citing Stevenson, *supra* note 70, at 345).

72. *See id.* at 767.

73. We rely on Nils Christie’s definition and related discussion of the “ideal victim.” Christie, *supra* note 36, at 19.

74. Christie, *supra* note 36, at 18; *see also* Joris Van Wijk, *Who is the Little Old Lady of International Crimes? Nils Christie’s Concept of the Ideal Victim Reinterpreted*, 19 INT’L REV. VICTIMOLOGY 159, 160 (2013).

75. Van Wijk, *supra* note 74, at 160.

76. *Id.*

77. JAMES DIGNAN, UNDERSTANDING VICTIMS AND RESTORATIVE JUSTICE 17 (2004).

78. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 22 (1975) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 213 (1787)).

According to Blackstone in his myth-filled descriptions of rape, victims ought to act a certain way or risk becoming subject to a presumption of dishonesty. Blackstone's requirements, reflecting and incorporating the rape myths of his time, were integrated into statutory and common laws. Hundreds of years later, similar ideas still permeate the legal system.

Scholars, in constructing their own victim-based theories, widely rely upon, and cite, Christie's framework.⁷⁹ For example, professor of Criminology James Dignan explains the impact of Christie's work: "Christie perceptively identified six attributes that—at the level of social policy—are most likely to result in the conferring of complete, legitimate and unambiguous victim status on someone who has had a crime committed against them."⁸⁰ Political scientist Bouris explains how Christie's theory operates in the courtroom, noting that juries are more sympathetic to victims perceived as possessing "innocence, purity, lack of responsibility, absence of guilt and moral superiority."⁸¹ Incorporating rape myths, the "ideal victim" has also been "portrayed as a morally upright White woman who is physically injured while resisting."⁸² Christie proposes a Eurocentric view of the "ideal victim" that precludes entire classes of victims and thus may not be representative across cultures.

The very concept of the "ideal victim" bars certain classes of victims from ever attaining "ideal victimhood" and ultimately justice. Applied psychologist and scientist Janice Du Mont studies dichotomies of victims and how the justice system perceives them: white vs. visible minority; employed vs. unemployed; no mental health difficulties vs. mental health difficulties; no previous adult sexual assault vs. previous adult sexual assault; no use of alcohol prior to the assault vs. use of alcohol prior to the assault; and emotively expressed subsequent to the assault vs. emotively controlled subsequent to the assault.⁸³ In a similar fashion, Professor Wendy Larcombe describes these types of dichotomies as resulting in "rapeable and unrapeable women."⁸⁴ It is not truly the case that a particular woman is incapable of being raped, rather even a forcible sexual act committed against her will is unlikely to be construed as such. In other words, those who do

79. For an extensive discussion of the operationalization of Christie's "ideal victim" in the context of powerful political figures who engage in patterns of sexual violence, see Brenner, *supra* note 56; see also Van Wijk, *supra* note 74, at 160.

80. DIGNAN, *supra* note 77, at 17.

81. Erica Bouris, COMPLEX POLITICAL VICTIMS 35 (2007); see also Janice Du Mont et al., *The Role of Real Rape and Real Victim Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466 (2003).

82. Du Mont et al., *supra* note 81, at 469 (citing G. Steketee & A. Austin, *Rape Victims and the Justice System: Utilization and Impact*, SOC. SERV. REV. 285 (1989); K. Weis & S.S. Borges, *Victimology and Rape: The Case of the Legitimate Victim*, 8 ISSUES IN CRIMINOLOGY 71 (1973); L.S. Williams, *The Classic Rape: When Do Victims Report?* 31 SOC. PROBS. 459 (1984)).

83. *Id.* at 473–74. Despite the dichotomies, Du Mont found that victims, regardless of their ideal vs. non ideal status, were equally likely to report to police in Canadian jurisdictions.

84. Wendy Larcombe, *The 'Ideal' Victim v. Successful Rape Complainants: Not What You Might Expect*, 10 FEMINIST LEGAL STUD. 131, 137–38 (2002).

not conform to a set of expected characteristics of what a victim of sexual violence should look like are never afforded victim status.”⁸⁵

Women inmate victims of sexual violence at a threshold level, are unable to meet the requirements of “ideal victimhood.” By virtue of their status as inmates, they are unemployed and lack innocence—in fact, they are guilty of a crime. They all share one important element in the eyes of society: deviance. One of the innate barriers for all inmate victims, regardless of gender or race, is the brand of “deviance.” Sociologist Kai Erikson defined deviance as “a vagrant form of human activity, moving outside the more orderly currents of social life.”⁸⁶ An individual is branded as deviant by the community through certain “ceremonies,” one of which is through a criminal trial, conviction, and placement in a deviant role, such as prisoner.⁸⁷ “Traditional notions of chastity and respectability have been seen as effectively disqualifying the ‘experienced’ and ‘misbehaved’ from claiming or achieving real victim status, including lesbians, sex trade workers, psychiatrized women, low-income women, hitchhikers, and those who frequent nightclubs and/or have been drinking.”⁸⁸ Logically included in this group, we argue, are female inmates, given their status as “misbehaving” and deviant women.⁸⁹

Statistically, female inmates are disproportionately minorities, experience high rates of mental health problems, may have committed an alcohol related crime, and very likely have experienced some prior sexual violence in their lifetime. Pursuant to the Eurocentric view of the “ideal victim,” minorities and men are automatically excluded. Importantly, as discussed above, minorities are disproportionately represented in prison.⁹⁰ In 2013, the United States held an estimated 1,574,700 persons in state and federal prisons. 37.5% of all inmates in federal prisons are classified as black, and 22% of all females in state and federal prisons are classified as Black. However, “the imprisonment rate for black females (113 per 100,000) was twice the rate of white females (51 per 100,000).”⁹¹ Race plays an important role in the “ideal victim” discourse, “with Black and Aboriginal women considered ‘less inherently worthy than White women.’”⁹² Thus, Black female inmate victims of sexual violence face especially stringent barriers in attaining “ideal victimhood.” The way that racialized rape myths interact with constructions of deviance for black inmate victims of sexual violence is

85. *Id.*

86. Kai Erikson, *Notes on the Sociology of Deviance*, 9 SOC. PROBS. 307 (1962).

87. *Id.* at 311.

88. Du Mont et al., *supra* note 81, at 469–70 (citations omitted).

89. Erikson, *supra* note 86, at 307.

90. See *supra* note 55 and accompanying text.

91. ANN CARSON, U.S. DEP’T OF JUST., PRISONERS IN 2013 NCJ 247282 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>; *Inmate Statistics*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited Mar. 2, 2016). Females comprise 6.7% of inmates. *Inmate Gender*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_gender.jsp (last visited Mar. 2, 2016).

92. Du Mont et al., *supra* note 81, at 470.

deserving of its own research, but it is beyond the scope of our discussion. Often female inmates fit into multiple categories that preclude them from attaining “ideal victimhood” at a far higher level than women in the community. Studies estimate that: “forty to eighty-eight percent of female prisoners have histories of sexual or physical abuse”; they have experience with drugs and alcohol; have mental health issues; are low-income and low education; or have past sexual experience or have been sex trade workers—elements that strip a victim of “ideal victimhood” in the community.⁹³ As such, women who are or have been in prison face barriers that ultimately thwart their ability to attain “ideal victim” status in the United States legal system.

II. HOW RAPE MYTHS INTERACT WITH PRISON CULTURE AND PRECLUDE “IDEAL VICTIMHOOD”

The factors discussed above would bar an inmate victim of sexual violence from attaining “ideal victimhood” if she brought her claim outside of the prison context. However, for women prisoners who are victims of sexual violence, the usual avenues of justice available to such victims are closed off. These victims are not permitted to contact law enforcement officers to report the crime, except through the prison’s internal processes.⁹⁴ We focus exclusively on how rape myths and “ideal victim” discourse impact internal reporting and investigation, but this is not to discount the impact such myths have on inmate victims in relation to police investigation and prosecution for the same sexual abuse. As discussed above, most inmates are de facto denied “ideal victimhood” if they were to pursue a sexual violence action in court by virtue of a variety of standards that they cannot meet. What we examine and expose is that inmate victims of sexual abuse are also barred from justice within the prison system, based on how rape myths and “ideal victimhood” interact with the culture inside the prison. Therefore, these women are effectively deprived of access to justice, both inside and outside the prison.

Our discussion here focuses on the factors influenced by rape myths that contribute to “ideal victimhood” in the closed system of a prison. These factors bear some relation to, but are also somewhat unique from, those that exist in the broader community. The prison-specific factors include the systematic and inherent power imbalance between guard and inmate,⁹⁵ the complexity of

93. Barbara Owen et al., *Gendered Violence and Safety: A Contextual Approach to Improving Security in Women’s Facilities Part I of III*, NCJRS (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225338.pdf>.

94. MICH. DEPT. OF CORR., POLICY DIRECTIVE 03.02.130, PRISONER/PAROLEE GRIEVANCES (2007), https://www.michigan.gov/documents/corrections/03_02_130_200872_7.pdf [hereinafter MICH. DIRECTIVE].

95. The prevalence of sexual abuse in prison is alarmingly widespread, and although this article is limited to sexual abuse perpetrated by male staff against female inmates, this is not to deny the rampant sexual abuse that occurs among inmates, all of which contributes to a widely-recognized “rape culture” within prisons. BJS Statistics 2011, *supra* note 20.

sexuality in prison, as well as factors unique to an inmate's identity. We argue that an inmate's identity as "deviant" carries with it automatic assumptions of untruthfulness and manipulation, as well as judgments based on the type of crime she committed, and behaviors she engaged in before entering prison.⁹⁶ These prison-setting and inmate character factors effectively work in tandem to deny female inmates any hope of attaining the status of "ideal victims" if they try to report abuse within the prison.

Scholars discuss "ideal victimhood" in the context of society and conventional crimes generally, but some researchers have examined how this "famous stereotype" operates in other contexts.⁹⁷ As an example, Criminologist Joris van Wijk discusses the extent to which Christie's "ideal victim" is applicable in the realm of international crime.⁹⁸ In line with these scholars, we unpack and discuss "ideal victimhood" as it relates to sexual violence in prison, considering whether there is, in fact, an "ideal victim" here and to what extent Christie's attributes are sufficient and applicable. Criminologists argue, "[t]here still exist areas where the victim has yet to obtain formal victim status."⁹⁹ They examine how the "famous stereotype" operates in other contexts, such as international crime victims.¹⁰⁰ Researchers acknowledge mitigating circumstances that deny a victim "ideal victimhood."¹⁰¹ It is easy to ignore women who are raped in prison as victims, as they are effectively removed from the consciousness of our communities. As Van Wijk reminds us, it is only when potential status givers are aware of the victims' existence that the victim status can be granted.¹⁰² We begin the conversation here.

A. SEXUAL VIOLENCE IN PRISON: DEFINITIONS AND BACKGROUND

Approximately one in four women report sexual abuse while residing in correctional facilities.¹⁰³ However, researchers estimate that the number of sexual violence is much higher, because inmates may not report abuse for myriad reasons.¹⁰⁴ Although the kinds of sexual victimization that occur in prison vary, we focus our discussion here on sexual violence perpetrated by male staff

96. Erikson, *supra* note 86, at 307.

97. Mirka Smolej, *Constructing Ideal Victims? Violence Narratives in Finnish Crime-Appeal Programming*, 6 CRIME MEDIA CULTURE 69 (2010); Magnus Lindgren & Vesna Nikolic-Ristanovic, *Crime Victims: International and Serbian Perspective*, OSCE (2011), <http://www.osce.org/serbia/85268?download=true>.

98. Specifically, he "argues that the characteristics of the ideal victim of genocide, crimes against humanity and war crimes largely overlap with the ideal victim of conventional crimes." Van Wijk, *supra* note 74, at 159.

99. "Examples are adult bullying and children who witness violence in the home." Lindgren, *supra* note 97, at 21.

100. Van Wijk, *supra* note 74, at 159.

101. Lindgren, *supra* note 97, at 21–23.

102. Van Wijk, *supra* note 74, at 159.

103. SILJIA J. A. TALVI, *WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM* (2007).

104. Samiera Saliba, *Rape by the System: The Existence and Effects of Sexual Abuse of Women in United States Prisons*, 10 HASTINGS RACE & POVERTY L. J. 293, 294 (2013) (citing BJS Statistics 2011, *supra* note 20, at 2).

(primarily corrections officers)¹⁰⁵ against female inmate victims. Because female inmates are disproportionately victimized, correctional staff-perpetrated sexual violence is a significant concern for incarcerated women.¹⁰⁶ One study found that 41% of women experience sexual victimization by a correctional officer in prison.¹⁰⁷

Historically, men were not permitted to work in female prison facilities, but this changed in the 1970s as a result of employment discrimination litigation.¹⁰⁸ Prison policy bars sexual relationships and/or interactions between corrections staff and inmates, not unlike more traditional statutory rape in the community.¹⁰⁹ “Staff sexual misconduct is defined as ‘any act of a sexual nature directed toward an inmate.’”¹¹⁰ More specifically, the Bureau of Justice Statistics (BJS) states, “Staff sexual misconduct includes any behavior or act of a sexual nature, either consensual or nonconsensual, directed toward an inmate by an employee, volunteer, official visitor, or agency representative.”¹¹¹ These staff-specific definitions of sexual violence against female inmates are important because they convey that female inmates may not legally give consent due to the inherent

105. According to most state correctional facility definitions, “sexual assault of inmates by correctional staff may be committed by anyone who works for the prison or is at the prison in an official capacity. However, most of these incident involve employees who are functioning as guards.” McGuire, *supra* note 20, at 2. Therefore, in this paper we will refer to those staff members who commit sexual abuse against inmates as “corrections officers.”

106. Indeed, in a recent study, researchers found that “[f]emale inmates were disproportionately victimized by both other inmates and staff in federal and state prisons, as well as local jails.” BJS Statistics 2011, *supra* note 20, at 1.

107. See Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. INTERPERS. VIOLENCE, 1591 (2006). Research supports that the majority of sexual abuse of female inmates is perpetrated by male corrections officers. “[M]ale staff are reportedly the perpetrators of ‘the overwhelming majority of complaints of sexual abuse by female inmates against staff.’” Flynn L. Flesher, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free from Rape*, 13 WM. & MARY J. WOMEN & L. 841, 865 (2007), “Federal statistical series obtaining data on arrested or convicted persons - Uniform Crime Reports, National Judicial Reporting Program, and National Corrections Reporting Program - show a remarkable similarity in the characteristics of those categorized as rapists: 99 in 100 are male . . .” *Id.* at 866.

108. “From the early 1900s to the late 1970s, female officers guarded most female prisoners in this country. Since the late 1970s, most states have allowed male officers to work in prisons for women.” Owen et al., *supra* note 93.

109. McGuire, *supra* note 20, at 2.

110. However, this is not to discount the existence of female perpetrators of sexual abuse in similar situations. “It should be noted that female officers working in both men’s and women’s prisons have also been found to be involved in sexual misconduct. About half of all verified staff sexual misconduct is perpetrated by female staff members guarding male inmates.” James W. Marquart et al., *Fatal Attraction: An Analysis of Employee Boundary Violations in a Southern Prison System*, 18 JUST. Q. 877 (2001). “However, the problem of more coercive and/or assaultive offenses appears to occur between male staff and female inmates.” Owen et al., *supra* note 93, at 24–25.

111. McGuire, *supra* note 20, at 2. (“Such acts include: intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse, or gratify sexual desire; or completed, attempted, threatened, or requested sexual acts; or occurrences of indecent exposure, invasion of privacy, or staff voyeurism for sexual gratification.”)

power imbalance.¹¹² As feminist Susan Brownmiller remarks, “All rape is an exercise in power, but some rapists have an edge that is more than physical. They operate within an institutional setting that works to their advantage and in which a victim has little chance to redress her grievance.”¹¹³

We focus primarily on penetrative offenses, but much discussion and litigation has occurred regarding inmate privacy violations and other non-penetrative abuses by opposite gendered guards.¹¹⁴ We do not discount the harmful impact of these non-penetrative violations, and we acknowledge that the “ideal victim” narrative harms victims who endure abuse across the spectrum. Staff-inmate sexual abuse is connected with other forms of victimization.¹¹⁵ Our discussion will show that the rape myth and “ideal victim” discourse are employed in these staff-inmate sexual abuse cases in a particularly flawed and troublingly way, ultimately prohibiting recourse.

B. “IDEAL VICTIMS” AND PRISON CULTURE

Researchers point out that the study of rape myths requires a culture-specific investigation, since common rape myths include culturally influenced ideas, attitudes, and norms.¹¹⁶ Therefore, an examination of the unique aspects of prison culture is integral to understanding how prison-specific rape myths influence “ideal victimhood.” We don’t claim that our discussion is exhaustive of all rape myth and aspects of prison culture that impact inmate victims of sexual violence. However, we seek to begin the conversation by taking into account prison-specific factors such as of power imbalance between guard and inmate, sexuality in prison, and deviance. We then examine how these factors form rape myths and the “ideal victim” discourse. However, even in the context of prison, the “ideal

112. One complexity is the nature of the prison atmosphere including privacy violations and improper pat downs. These are often sexual abuses perpetrated by corrections officers but are also an inherent part of their duties. When a line is crossed, it is much more difficult to argue on behalf of an inmate. We do not focus on this type of victimization here, but we acknowledge its prevalence, far reaching consequences, and need for reform. For more discussion see Flesher, *supra* note 107, at 844 (arguing that there is a causal link between opposite gender supervision and prison sexual assault against female inmates).

113. BROWNMILLER, *supra* note 78, at 283.

114. “The bulk of cross-gender jurisprudence involves male inmates’ challenges to female supervision. Generally, male inmates have argued that supervision or intrusive searches by female staff violate important privacy rights protected by the Fourth Amendment and the more general right to privacy under the Fourteenth Amendment. Female inmates, on the other hand, have not only argued that supervision by male staff violates their Fourth Amendment right to privacy and their right to be free from unreasonable searches, but also that it exacerbates past traumatic experiences and constitutes cruel and unusual punishment under the Eighth Amendment.” Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 249 (2003).

115. “Our findings show that staff-inmate relationships are interrelated with other forms of victimization. For instance, situations described included cases where a staff member in a relationship with an inmate became jealous over her relationship with another inmate and so used excessive force on her; a staff member in a relationship with an inmate was married to another correctional officer, who found out and retaliated against inmate; and, a staff member had relationships with two inmates who found out and assaulted each other.” Owen et al., *supra* note 93, at 46.

116. Payne et al., *supra* note 50, at 30.

victim” discourse encompasses expectations about more than just the victim. It shapes expectations about the horror of sexual violence in three pivotal ways: (1) attributes of the victim’s character and behavior; (2) attributes of the perpetrator and (3) attributes of the crime itself.

1. Attributes of the Victim’s Character and Behavior

Four elements of Christie’s “ideal victim” archetype describe the victim’s character and behavior: (1) weakness; (2) carrying out a respectable project; (3) blamelessness; and (4) powerful enough to make her case known.¹¹⁷ In examining how these elements may be translated into the prison context, we must look at how they operate in the community and then examine how prison culture impacts them. The complex requirements of an “ideal victim’s” “weakness” prescribe her behavior—she must have been weak enough to be overpowered and unable to fight back.¹¹⁸ Weakness can be interpreted in various ways, but to this end, Christie expounds that “sick, old or very young people are particularly well suited as ideal victims.”¹¹⁹ Rape myths inform the “ideal victimhood” requirement that a victim be “carrying out a respectable project” and is “not to be blamed.” The most powerful overarching rape myth that influences these elements is that “she was asking for it.” In the community, the blameworthy rape myth encompasses problematic character questions like: “Does she have an immoral character?” “Does she have a history of promiscuity?” “Is she known as a liar or manipulator?” An affirmative answer to these questions directly correlates with attributions of fault. The blameworthy myth also implicates behavioral questions as rationale for her blame such as: “Was she drinking alcohol or using drugs at the time of the assault?” “What was she wearing?” “Was she walking alone?” These questions speak to a victim’s culpability for the assault.

Prisoners face a societal brand of deviance that carries with it assumptions about their behavior because they committed a crime for which they are serving time. These assumptions are powerful enough to bar them from attaining the characteristics of “ideal victimhood.” Upon commission of a crime, sociological theory argues that inmates have moved “outside the more orderly currents of social life” and are then viewed as deviant.¹²⁰ A general theory of crime put forth by criminologists Michael Gottfredson and Travis Hirschi explains how “the

117. See Christie, *supra* note 36, at 19.

118. It is important to note here that because our discussion focuses on staff-perpetrated sexual violence, “ideal victim” requirements (and their corresponding rape myths) may operate very differently in the prison context for violence perpetrated by one inmate against another. (For example—“Alarid’s (2000) respondent described preferential treatment by correctional officers toward “femmes” who looked more feminine. If no other evidence was available, “femmes” were more likely to be considered the victim rather than the aggressor, and “studs” spent more time in punitive segregation for fighting.”) Owen et al, *supra* note 93, at 22.

119. Christie, *supra* note 36, at 19.

120. See *infra* discussion of deviance.

operation of a single mechanism, low self-control, accounts for ‘all crime, at all times.’”¹²¹ Low self-control is defined as a proclivity for impulsivity, risk-taking, carelessness and temper.¹²² All of these personality traits are therefore de facto associated with female prisoners.¹²³

The association with low self-control is at odds with prescribed “ideal victim” requirements of weakness, blamelessness, and respectability. Impliedly, these inmates do not possess the moral superiority, chastity, and respectability that stem from the rape myths that shape these “ideal victim” requirements.¹²⁴ Certain rape myths and character assumptions about prisoners bar even sick, old, or very young inmates from benefiting from the presumption of weakness of the “ideal victim.” Necessarily (regardless of age or health) a female inmate is not innocent—in fact, she was found guilty of crime, or more so, guilty of deviance that warranted imposition of a prison sentence by a court of law.

Further, we argue that serving a prison sentence for conviction of a crime is, de facto, not “carrying out a respectable project,” as would be the case if a victim were working at her place of employment, caring for her children, or attending college. Serving a sentence is a far cry from the “innocence” of the little old lady visiting her sick sister that Christie uses as an archetype of the “ideal victim.”¹²⁵ Many prison administrators even admit that they identify women prisoners as “manipulative,” a character trait that is directly at odds with the morality required of the “ideal victim.”¹²⁶ A presumption of manipulative behavior almost automatically makes it such that prison officials will not take an inmate seriously or view her claim as credible if she reports an assault.

Prison culture and inmate status bar a victim’s ability to be viewed as blameless and innocent. “Rather than being sympathetic victims, these inmates

121. Teresa C. Lagrange & Robert A. Silverman, *Low Self-Control and Opportunity: Testing the General Theory of Crime as an Explanation for Gender Differences in Delinquency*, 37 CRIMINOLOGY 41, 41 (1999).

122. *Id.* at 49.

123. ANNE WORRALL, OFFENDING WOMEN: FEMALE LAWBREAKERS AND THE CRIMINAL JUSTICE SYSTEM 2–3 (Routledge 1990). “Traditional theories of female crime have all been fundamentally positivistic in their nature. They have premised that it is possible to distinguish female law-breakers from non-law-breakers by characteristics other than their acts of law-breaking. These characteristics have been seen to reside within the individual physiology and psychology of generalized woman and/or specific women . . . In other words, the observed category, ‘women who break the law’, is assumed to correspond with an abstract category, part of a pre-existing universe of phenomena, about which ‘knowledge’ can be discovered through the classification of symptoms, the diagnosis of a syndrome, and the search for an etiology.” *Id.*

124. “[A] great deal of research interest has focused on how prisons for women have attempted to reinforce traditional female roles.” Pamela Schram et al., *Management Strategies When Working with Female Prisoners*, 15 WOMEN & CRIM. J. 25, 29 (2004) (discussing and exploring how “the long-standing tradition of women’s prisons attempting to change women to conform to stereotyped gender roles” impacts women prisoners).

125. Christie, *supra* note 36, at 18.

126. “In addition, several administrators reported that incarcerated women were more likely to try to manipulate staff or challenge those who are in positions of authority.” Schram et al., *supra* note 124, at 40.

have already been judged guilty by society: they have faced conviction and sentencing for their criminal conduct.”¹²⁷ Much of the public at large also accepts the notion that whatever happens to these inmates in prison is deserved. In one survey, half of those questioned stated that “society accepts prison rape as ‘part of the price criminals pay for wrongdoing.’”¹²⁸ Attorney Deborah Labelle explains the public perception of those inside prison: “Having violated the social contract [inmates] are regarded as diminished beings, not entitled to the rights that are accorded to good citizens. The common official terms used are ‘inmate,’ ‘offender,’ ‘prisoner,’ or ‘criminal,’ and never the designation of ‘citizen.’”¹²⁹ Women in prisons have expressed that correctional staff respond to reports of violence and abuse with sentiments like: “This is prison—deal with it.”¹³⁰

Some members of prison correctional staff also believe that women inmates deserve sexual abuse; their perspective is informed by rape myths. At least some prison staff reportedly view “rape as a legitimate deterrent to crime and a just desert for its commission.”¹³¹ Despite the U.S. Supreme Court’s rejection of rape as punishment in *Farmer v. Brennan*, female inmates remain easy targets for manipulation and abuse within the prison system.¹³² Importantly, many inmates view sexual violence as part of their punishment:

Stripped of their rights, money, and contact with the outside world, [inmates] feel powerless, helpless, and easy to manipulate. As a result, women behind bars are saddled with an extra level of punishment, which is, of course, not sanctioned by any prison system, but is so overlooked and so common as to be essentially institutionalized.¹³³

127. Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 135 (2009).

128. Charles M. Sennott, *Poll Finds Wide Concern About Prison Rape; Most Favor Condoms for Inmates*, BOST. GLOBE, May 17, 1994, at 22; see also Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 581 (2006).

129. Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 83 (2008).

130. Owen et al., *supra* note 93, at viii.

131. James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 446 (2003); Sigler, *supra* note 128, at 581.

132. [T]he Supreme Court has taken a firm rhetorical stand against rape as a form of punishment: “Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” Sigler, *supra* note 128, at 588 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))).

133. Barbara Zaitzow, “*Doing Gender*” in a Women’s Prison, in *WOMEN IN PRISON: GEND. & SOC. CONTROL* 21 (2003); Amy Laderberg, *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, 342–43 (1998) (“Sexual abuse of women prisoners by their male guards unfortunately has become an accepted reality. Prison administrators allowed this whole culture of abuse (to develop). Abuse was OK. It didn’t matter . . . Everybody became sort of inoculated to the abuse that was ongoing.”).

The powerlessness and related feelings experienced by women prisoners may help explain why sexual violence is so rampant and why staff members have little, if any, incentive to address it.

Inmates are rarely powerful enough to navigate the prison reporting system to report abuse. “Ideal victimhood” rests not only on the victim’s character and behavior but also on the perpetrator’s character and behavior.¹³⁴ We must consider both the victim and the perpetrator here because impliedly, a victim must be powerful enough make a case that is strong enough and will stand up against the word of the perpetrator. In the community, suspicions about a woman lying can act as a strong barrier for victims and influence the outcome of allegations made against a powerful perpetrator.¹³⁵ By virtue of his status, a corrections officer is often *de facto* believed over the inmate.¹³⁶ The power of corrections officers to punish inmates, combined with assumptions about inmates’ innate deviance, creates a ready-made “explanation” for why an inmate would lie. As such, the prison setting both reflects and distorts one of the most commonly held rape myths in the community: “women lie about rape to get back at men.”¹³⁷ One of the most common assumptions about accusations of sexual violence is that the inmate is attempting retribution towards an officer for some punishment he imposed. In practice, mistrust of the female inmate’s motives significantly undercuts her ability to prove credibility or to obtain “ideal victimhood.”¹³⁸

2. Attributes of the Perpetrator

The attainment of “ideal” victimhood depends on factors beyond that of the victim herself; in fact, characteristics of the perpetrator play an equally important role. Victims in the community who accuse a particularly powerful perpetrator of rape sometimes encounter unique barriers.¹³⁹ For example, accusing a political individual like Dominique Strauss Kahn (former head of the International Monetary Fund and hopeful French presidential candidate) of sexual violence subjects a victim to widespread media scrutiny and critique based on positive

134. See *infra* discussion of perpetrator’s impact of victim’s ability to make her case known.

135. Brenner, *supra* note 56.

136. “An inmate’s word alone will not suffice as grounds for disciplining a staff member . . .” Laderberg, *supra* note 133, at 324 (citing Dan Morain, *Sex in Prison - Too Often a Guard Plays a Role in Affair*, L.A. TIMES, Feb. 8, 1988, at 3, available in 1988 WL 229743 (quoting Jerry Williford, Western Regional Director of the federal prison system)).

137. “Burt (1980) found that 50% of participants believe that women lie about rape either to get back at a man or cover up a pregnancy. Kahlor & Morrison (2007) found that among their sample of college women, participants thought, on average, that 19% of rape accusations are false. Edwards et al (2010) found that 22% of college men believe that “women lie about rape to get back at men.” A study of police officers found that they believe between 16% and 25% of rape accusations are false. Edwards et al., *supra* note 59, at 767–68.

138. See discussion at *infra* note 158.

139. For a comprehensive discussion of several high profile cases in the community involving politically powerful perpetrators, see Brenner, *supra* note 56.

presumptions afforded to the perpetrator.¹⁴⁰ In prison, victims face not only the brand of deviance, but also the task of overcoming the relatively high social standing of the corrections officer perpetrator in relation to their lowly status as inmates. Working in tandem, these factors essentially act as a double bar to an inmate's ability to attain "ideal victimhood" status.

While the criminalization of sexual violence has long been the norm, there are certain circumstances in the community that render the perpetrators of sexual violence less likely to face prosecution. According to the "ideal victim" discourse, the perpetrator must be "big and bad."¹⁴¹ A complicated combination of rape myths about the victim (she was asking for it) and the perpetrator (assumptions that only deviant men abuse women) interact to influence assumptions about the perpetrator's character and behavior in the "ideal victim" discourse in prison. By virtue of their relative positions, the benefit of the doubt favors the corrections officer, not the inmate.

Society juxtaposes the presumed moral and upstanding character of corrections officers against the negative character traits of the inmates, making it difficult to characterize corrections officers as "big and bad" pursuant to "ideal victim" requirements. In fact, a core condition of the guards' employment is their lack of involvement in criminal behavior.¹⁴² They are instead actors of the state who are protecting and overseeing the "big bad" inmates. In fact, "Important Qualities" noted by the BJS for corrections officers favor good judgment, interpersonal skills, negotiating skills, physical strength, resourcefulness, and self-discipline. These factors serve as a contrast to the low self-control associated with those who commit crimes.¹⁴³

The contrast between the presumptions about inmate character and corrections officer character finds its way into prison discourse, thwarting attempts to report and bring attention to the issue of sexual violence. For example, when one inmate tried to report abuse, she was told, "I don't understand, he's such a nice man;" from the outset, the staff to whom she reported did not take her claim seriously.¹⁴⁴

140. For a discussion of sexual violence perpetrated by the politically powerful, see *id.*

141. Christie, *supra* note 36, at 19.

142. The Bureau of Labor Statistics notes that, "[c]orrectional officers usually must be at least 18 to 21 years of age, must be a U.S. citizen or permanent resident, and must have no felony convictions." *Occupational Outlook Handbook, 2016–17 Edition*, BUREAU OF LABOR STATS., <http://www.bls.gov/ooh/protective-service/correctional-officers.htm#tab-4>.

143. These can be compared to the low self-control characteristics associated with those who commit crime: impulsivity, risk-taking, carelessness, temper, and present oriented. Lagrange & Silverman, *supra* note 121.

144. One inmate sought to terminate her therapy sessions within the prison because her perpetrator worked in the trailer where the therapy sessions took place. When her therapist asked why she was terminating the sessions and the inmate told her the reason, not only did the therapist not report the alleged abuse, the therapist responded, "I don't understand, he's such a nice man." Inmate #17, on file with author. The number of times the character of an officer is cited as a reason to question the victim inmate's attempts to report and because the corrections officer perpetrator "has a family" is horrifying. See Fedock et al., *supra* note 38.

The power structure of a prison presumes that officers are distinct from the convicted criminals they supervise, although, in reality, this might not be the case.¹⁴⁵ For example, the Department of Investigation found that in some prisons, shoddy screening processes result in applicants with questionable backgrounds. Despite the fact that applicants may have gang affiliations, criminal histories, and significant psychological problems, some nonetheless become correction officers.¹⁴⁶

Second, perceptions about relative social standing of victim and perpetrator influence how seriously investigators consider a claim of sexual victimization and may also predict its success. An accused perpetrator's high social standing is a factor that prevents the prison from considering an allegation of sexual abuse as legitimate. A study by Australian scholars illustrated this phenomenon in the context of sexual abuse perpetrated by football players.¹⁴⁷ Concerns about "the good name of football" is but one illustration of how "there are some circumstances in which many people find rape understandable, even excusable."¹⁴⁸

Comparable to football players who enjoy a "prized" social status, corrections officers are the arbiters of justice, tasked with protecting society and controlling inmates; to the contrary, society views prisoners as individuals who deserve to be discarded and inherently distrusted.¹⁴⁹ The "deviance" brand makes female inmates particularly vulnerable to sexual victimization within the closed prison system. This reality has not gone unnoticed. In fact, "[w]omen's prisons were first established in response to the sexual abuse at the hands of male prison guards."¹⁵⁰

145. It should be noted that one of the most major issues identified with prison hiring practices by PREA is that correctional facilities were hiring corrections officers with criminal convictions and histories of sexual abuse, thus contributing to the failure of their duty to protect inmates from sexual abuse. See Ronald J. Hansen et al., *State Keeps Guards with Past Crimes: Officials Do Little to Address Complaints or Weed Out Those Who Pose Risk to Women*, THE DETROIT NEWS, May 23, 2005, at 1. (d) The agency shall also perform a criminal background records check before enlisting the services of any contractor who may have contact with inmates. (e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with inmates or have in place a system for otherwise capturing such information for current employees. (f) The agency shall ask all applicants and employees who may have contact with inmates directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct. 28 C.F.R. § 115.17 (2012).

146. Michael Schwirtz & Michael Winerip, *Warning Signs Overlooked in Hiring for City's Jails*, N.Y. TIMES, Jan. 15, 2015, at A1.

147. Camille Nurka, *Shame and Disgrace in Australian Football Culture: Rape Claims and Public Affect*, 38 WOMEN'S STUD. INT'L F. 43 (2003).

148. Peter A. Newcombe et al., *Attributions of Responsibility for Rape: Differences Across Familiarity of Situation, Gender, and Acceptance of Rape Myths*, 38 J. OF APPLIED SOC. PSYCHOL. 1736, 1737 (2008).

149. *Id.*

150. Saliba, *supra* note 104, at 323 (citing Laurie A. Hanson, *Women Prisoners: Freedom from Sexual Harassment—A Constitutional Analysis*, 13 GOLDEN GATE U. L. REV. 667, 672 (1983)).

Lawmakers have responded to the reality that inmates are vulnerable to abuse. “The reason why the federal government and almost every state has [*sic*] laws banning even ostensibly voluntary sexual contact between inmates and prison staff is that prisoners are deemed legally incapable of giving voluntary consent to sexual contact with their ‘keepers.’”¹⁵¹ The motivation behind these virtually universal statutory rape provisions stems from an understanding of an inherent power imbalance between guard and inmate, analogous to the inherent power imbalance between adult and child. In fact, “Many female inmates view the rules and regulations of prisons as willful efforts to ‘diminish their maturity’ by ‘treating them like children and fostering dependency.’”¹⁵² Corrections officers control every aspect of the inmates whom they supervise, from privacy to opportunities to eat or bathe or interact with others,¹⁵³ culminating in the ultimate amount of time the inmates must stay in prison. For example, “[g]uards . . . use their power within the prison to provide goods and privileges as a method of compelling sexual relations or withholding goods and privileges as punishment for not engaging in sexual contact.”¹⁵⁴

While the exploitative nature of the power differential between corrections officers and female inmates varies widely, the nature of the relationship nevertheless allows for rampant abuse.¹⁵⁵ Troublingly, “the stronger the mental association between power and sex, the more participants endorsed rape myths

151. McGuire, *supra* note 20, at 2. Most of these statutes flat out forbid engaging in sexual intercourse between an inmate and corrections officer, regardless of consent. However, “[t]hree states, Arizona, Nevada, and Delaware, have passed legislation providing for the prosecution of inmates who willingly engage in sexual misconduct with staff. These states have also codified inmate consent into their statutes.” Smith, *supra* note 114, at 238 (citing ARIZ. REV. STAT. § 13-419(B) (West, Westlaw through the 1st Reg. Sess. & 1st Spec. Sess. of the 52nd Leg.)) (“A prisoner who is in the custody of the state department of corrections or an offender who is on release status and who is under the supervision of the state department of corrections commits unlawful sexual conduct by engaging in oral sexual contact, sexual contact or sexual intercourse with a person who is employed by the state department of corrections or a private prison facility or who contracts to provide services with the state department of corrections or a private prison facility”); DEL. CODE ANN. tit. 11, §§ 1259, 4205 (West, Westlaw through 80 Laws 2015, ch. 194); NEV. REV. STAT. ANN. § 212.187 (West, Westlaw through 2015 78th Reg. Sess. and 2015 29th Spec. Sess.).

152. Zaitzow, *supra* note 133, at 25 (citing CORAMAE R. MANN, FEMALE CRIME AND DELINQUENCY 210 (1984)).

153. Saliba, *supra* note 104, at 297–98 (“The power dynamic of cross-gender supervision is visible in the everyday lives of female prisoners. Male prison guards have complete control over the daily activities of the female inmates. This control includes the authority to be present during private moments such as using the restroom and shower, dressing and undressing, and receiving medical care. The prison guards also have the power to withhold necessities from the women such as feminine items, food, and visitation rights.”).

154. Anthena Dinos, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y. SCH. L. REV. 281, 284 (2001).

155. *Id.* (“[C]orrectional officers use mandatory frisks or cell searches as opportunities to touch women’s breasts, buttocks, and vaginal area.”).

and reported a higher likelihood that they would rape.”¹⁵⁶ For certain men, dominance in the power structure may trigger arousal, which may, in turn, lead to a misattribution of blame to the victim.¹⁵⁷ In the prison context, therefore, an implicit association between power and sex may lead to proclivity of rape, as well as the perpetrator’s acceptance of rape myths and “ideal victim” characteristics.¹⁵⁸ Due to the incarcerated status of victims; inmates do not have the ability to leave a relationship, even one described as “consensual.” This power imbalance is exploited in order to perpetrate sexual abuse, and is used to retaliate against inmates who report abuse.¹⁵⁹ Inmates repeatedly describe acts of retaliation utilized to dissuade them from reporting, ranging from physical abuse, to threats, to the issuance of misconduct tickets or time added to their sentences.¹⁶⁰ Courts have regularly upheld these statutes governing consent and have denied defendant-guard’s attempts to raise the consent defense.¹⁶¹

The juxtaposition of the “lawful” corrections officers against the “deviant” inmates makes it very difficult for both internal actors and the public at large to believe that the officers could perpetrate such crimes. Therefore, presumptions about perpetrators’ morally upstanding character, perceptions of prized social

156. Kristine M. Chapleau & Debra L. Oswald, *Power, Sex, and Rape Myth Acceptance: Testing Two Models of Rape Proclivity*, 47 J. OF SEX RES. 66, 75 (2009). Chapleau & Oswald also found that explicit association between power and sex was associated with RMA and rape proclivity. *Id.*

157. First, if a guard is a sexually aggressive man, “being in a position of power may automatically activate thoughts of sex and, conversely, sexual arousal may activate thoughts of domination.” *Id.* at 68 (citing John A. Bargh et al., *Attractiveness of the Underling: An Automatic Power → Sex Association and its Consequences for Sexual Harassment and Aggression*, 68 J. OF PERSONALITY & SOC. PSYCHOL. 768 (1995)). “Because an implicit power-sex association is activated pre-consciously, these men would perceive their reactions as part of the environmental stimuli.” *Id.* (citing Eliot Smith & Jamie Decoster, *Dual-Process Models in Social and Cognitive Psychology: Conceptual Integration and Links to Underlying Memory Systems*, 4 J. OF PERSONALITY & SOC. PSYCHOL. 108 (2000)).

158. Bargh et al., described a situation in which a sexually aggressive man could become sexually aroused when he is in charge of a female underling due to an implicit power-sex association. Bargh et al., *supra* note 157, at 774. Unaware that his power over the woman triggered his arousal “he will tend to misattribute these feelings as being caused by qualities of the female target, as this is the only explanation he has consciously available,” perhaps blaming the woman’s appearance or misinterpreting her deferential behavior toward him as sexually motivated. *Id.*

159. “Retaliation, for the purposes of this report, is any act by a corrections officer, corrections employee, or official aimed at an inmate in order to punish her for having reported abuse or in order to keep her from reporting abuse.” *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, HUMAN RIGHTS WATCH (1998), <http://www.hrw.org/legacy/reports98/women/> [hereinafter *Nowhere to Hide*].

160. For a full discussion on the realities of retaliation in Michigan prisons and the impact on inmates decision to report, see generally *id.*

161. See e.g. Carrigan v. Davis, 70 F. Supp. 2d 448 (D. Del. 1999). For an in depth discussion of possible defenses, see Brenda V. Smith & Jaime M. Yarussi, *Legal Responses to Sexual Violence in Custody: State Criminal Laws Prohibiting Staff Sexual Abuse of Individuals under Custodial Supervision*, ARTS. IN L. REVS. & OTHER ACAD. JS. 1, 11 (2009). For a full discussion on criminal laws prohibiting sexual abuse of inmates, see *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody*, PREA RES. CTR. (Aug. 2009), <http://www.prearesourcecenter.org/sites/default/files/library/50statesurveyofssmlawsfinal2009update.pdf>.

status, and an extreme power imbalance combine to make attainment of “ideal victim” status extremely difficult for the inmate victim.

3. Attributes of the Crime Itself

Rape myths usually depict a sudden, outdoor attack, offender violence, victim resistance, and lack of a prior relationship between victim and perpetrator.¹⁶² However, “[r]esearch indicates that the sexual behaviors practiced in women’s prisons are diverse.”¹⁶³ Attempting to translate Christie’s community based “ideal victimhood” requirements and expectations regarding the sexual act into the unique context of prison is impossible. By virtue of the closed and controlled prison system, there is no “alleyway,” or sudden outdoor setting, in which an assault can occur- there is no unfamiliar place that is neutral and unknown to both the perpetrator and victim. The assaults that take place occur within the prison. Therefore, it is difficult for outsiders, as well as prison officials, to find validity in a reported assault that occurs in a place where an inmate is required to be housed, even if the assault was committed with physical violence.

Next, the “ideal victim” requirement that the perpetrator be unknown to the victim correlates with the previously described rape myth that there be no prior relationship between victim and perpetrator. There is a paucity of legal discussion on prison sexuality, so the way rape myths interplay with this sexuality is unexplored.¹⁶⁴ However, the unique prison setting does share similarities to the complexities of acquaintance rape, where society has a difficult time overcoming rape myths to find an “ideal victim.”¹⁶⁵ That is, despite the well-documented reality that 70% of sexual assaults are committed by someone known to the

162. See Irina Anderson, *What is a typical rape? Effects of victim and participant gender in female and male rape perception*, 46 BRITISH J. OF SOC. PSYCHOL. 225, 225 (2007); see also SUSAN ESTRICH, REAL RAPE 8 (1987); Barry Bondurant, *University Women’s Acknowledgment of Rape: Individual, Situational, and Social Factors*, 7 VIOLENCE AGAINST WOMEN 294 (2001); Arnold S. Kahn, *2003 Carolyn Sheriff Award Address: What College Women Do and Do Not Experience as Rape*, 28 PSYCHOL. OF WOMEN Q. 9 (2004); Kathryn Ryan, *Rape and Seduction Scripts*, 12 PSYCHOL. OF WOMEN Q. 237 (1988).

163. We limit our discussion here to the most relevant types of sexuality to our study, namely those involving inmates and corrections officers. However, there are a significant number of other types of sexuality discussed by the authors, exhibiting just how complex sexuality is in the prison context. Nicole M. Heath et al., *Rape Myth Acceptance Impacts the Reporting of Rape to the Police: A Study of Incarcerated Women*, 19 VIOLENCE AGAINST WOMEN 1065 (2013); Angel Pardue et al., *Sexuality in Women’s Prisons: A Preliminary Typological Investigation*, 91 THE PRISON J. 279, 282 (2011).

164. “However, while there has been little scholarly legal discussion of consensual sex in prisons, there has been robust scholarly discussion by social scientists about consent and agency in institutional settings, including prisons.” Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 195–96 (2006).

165. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 254–73 (1998) (discussing what counts as consent in the context of dating/acquaintance rape); Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 484–90 (2005) (discussing the definition of consent used in acquaintance rape cases and the distinction between seduction and assault); see also Smith, *supra* note 114, at 234.

victim, rape is still widely thought to be committed by strangers.¹⁶⁶ “It is the physically violent aspect of rape (often excluding acquaintance rape) that is criminalized and prosecuted.”¹⁶⁷ Like acquaintance rape victims, inmates have a difficult time attaining “ideal victimhood” and finding justice.

A situation in which an inmate does not know her perpetrator is simply not possible in the prison context. In fact, officers and inmates often form informal friendships, or trust-based relationships, mirroring the difficulty associated with societal acceptance of acquaintance rape, or of child sexual abuse by non-strangers.¹⁶⁸ Certain guards may be more lenient or more friendly toward inmates overall, and an accusation of rape against such a beloved guard would not only be unbelievable to the administration, but also cause backlash from other inmates.

“The study of sexuality in prison is somewhat distinct from its investigation in society in that incarceration involves the loss of liberty, including the deprivation of heterosexual [and homosexual] activity.”¹⁶⁹ The complexity and inimitable atmosphere of the closed prison system impacts the type of sexual activity that occurs within a prison, thus influencing the type of sexual crimes that occur. Very often, sexual victimization in prison is nonviolent, may have some element of consent (implicit or explicit), may be ongoing, and may display little or no victim resistance.¹⁷⁰ Sexual activity is something denied to inmates upon their entrance to prison and scholars note how this deprivation may “facilitate sexual bartering and exploitation.”¹⁷¹ It is very likely that an inmate may seek intimate or sexual contact with a corrections officer.¹⁷² However, acknowledging the complicated power imbalance discussed above, most states forbid even this type of “consensual” sexual relationship.¹⁷³

166. John Hamlin, *List of Rape Myths*, UNIV. OF MINN. DULUTH, <http://www.d.umn.edu/cla/faculty/jhamlin/3925/myths.html> (last visited Feb. 26, 2016).

167. Zanni, *supra* note 65 (citing M.J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV., 1 1–13 (2005)); *see, e.g.*, Laura Hengehold, *Remapping the Event: Institutional Discourses and the Trauma of Rape*, 26 SIGNS: J. OF WOMEN IN CULTURE & SOC’Y 189 (2000).

168. *See* Anne-Marie McA Linden, ‘Setting ‘Em Up’: Personal, Familial and Institutional Grooming in the Sexual Abuse of Children, 15 SOCIAL & LEGAL STUD. 339, 340 (2006) (“In particular, the recent association of the term with the Internet and on-line abuse in both the popular imagination and official discourses is based on the image of the sex offender as a sexual predator or so-called ‘stranger danger.’ In fact, it has been well documented that children are most likely to be sexually abused by those with whom they have a family relationship.”).

169. Pardue et al., *supra* note 163, at 280.

170. *All Too Familiar supra* note 27.

171. “[I]n women’s prisons, sexual violence encompasses an even wider variety of behaviors that are specific to and typical of the particular correctional milieu in question. Ranging from least to most aggressive, three principal forms of sexual violence are discernible in female correctional institutions: (a) manipulation (b) compliance and (c) coercion.” Pardue et al., *supra* note 163, at 289.

172. “Indeed, they may be inclined to pursue sexual relationships with correctional authorities for a variety of reasons. Some explanations include pleasure, trade, transgression, procreation, safety, and love.” *Id.* at 280 (internal citations omitted). Further, “convicts may view sex as an expression of freedom, especially as sexual intimacy is one of the few aspects of their lives that they can still control.” *Id.* at 291.

173. *Id.* at 294.

The unique power dynamic between officers and inmates also facilitates opportunities for a spectrum of sexual victimization, some aspects of which are excused or even mandated by an officer's duties.¹⁷⁴ For example, an officer is required to pat down prisoners and observe prisoners, even in situations which, outside the prison, would be a violation of privacy, or even classified as voyeurism. "Even male officers have admitted to discomfort from the invasive nature of the pat downs on female inmates."¹⁷⁵ Other researchers have posited that there is a "coercion continuum" for sexual victimization.¹⁷⁶ In our own research on Michigan prisoners involved in the *Neal* suit, sexual relationships did not take the form of the brutal, violent crimes that inform stereotypes of what constitutes an "ideal victim" in the community.¹⁷⁷

A disproportionate number of female inmates have suffered prior sexual victimization, shaping their expectations and acceptance of treatment by male corrections officers.¹⁷⁸ Because many of the inmates are likely to have been abused before entering prison, one author argues that they may "respond to abusive male authority in prison in the same manner as they did before their confinement in prison. 'The women are so needy and in need of love, they are set up for oppression. The only way they know is to exchange their bodies [to meet this need.]'"¹⁷⁹ Another interpretation is that for women in prison, abuse has been normalized, thus masking the wrongness of the correctional officers' abusive acts.

It is certain that the "ideal victim" discourse surrounding victim, perpetrator, characteristics of the crime, combined with essential elements of prison culture, significantly impacts an inmate victim's ability to seek recourse for abuse during incarceration from within the closed system. At the victim level, presumptions about an inmate's deviance, morality, and assumptions that sexual violence is part of her punishment affect her ability to attain "ideal victimhood." At the

174. Saliba, *supra* note 104, at 297; *see also* Pardue et al., *supra* note 163, at 325 n.30 (citing Smith, *supra* note 114, at 281–82)“(Interviewing an officer: “Q: And you start at the genital area, is that correct? A: Right. You come down with the crotch area here then work your way down. Q: And in going up into the crotch and genital area you need to touch it to make sure there’s no contraband there, correct? A: Exactly. Q: Did it make you uncomfortable because you were touching the most private areas of a woman’s body? A: I think so, I think so; at least I did. I felt very uncomfortable. Q: But some women, you—some women felt uncomfortable? A: I think so, I think they did. I think they felt degraded to a certain point. I know I would. When we come into the institution, they search us coming through the gate. We feel a little degraded at that point.”).

175. Saliba, *supra* note 104, at 297 (citing Smith, *supra* note 114, at 281–82).

176. The continuum reflects a complex range of interactions between staff and inmate. It ranges from: “love and seduction; inappropriate comments and conversation; sexual requests; ‘flashing,’ voyeurism and touching; abuse of search authority; sexual exchange; sexual intimidation; sex without physical violence; sex with physical violence.” Owen et al., *supra* note 93, at viii.

177. Kubiak, *supra* note 28.

178. “Statistics indicate that anywhere from forty to eighty-eight percent of these women have been the victims of domestic violence and sexual or physical abuse before their arrival in prison.” Laderberg, *supra* note 133, at 338.

179. *Id.* at 339.

perpetrator level, power imbalance, discretion, and prized social status are juxtaposed against presumptions about the victim. At the assault level, the prison setting mandates touching (pat downs) and violation of privacy (observation) as part of the punishment. This creates a situation ripe for guards to abuse their positions of power and excuse abuse as part of their job.

If inmates are aware of the difficulty in attaining “ideal victim” status, they may be deterred from reporting, investigators may not believe them, and they may find it unlikely that their perpetrator will be punished under the internal prison processes. This may have an effect on women throughout the prison—this shared knowledge of unattainability. “If the exposed individual is not classified as a “victim” despite the existence of psychological, physical or economic damages, then he or she risks receiving less protection, or even no protection, because he or she is not encompassed by the ‘standard’ view of a crime victim.”¹⁸⁰ Without success in pursuing internal processes, it is very difficult for a victim to sustain an external legal action (especially an individual legal action).¹⁸¹

Class action lawsuits are integral in bringing about justice for a victim because these lawsuits bolster her testimony with similarly situated women with similarly complicated abuses.¹⁸² In the following section, we go beyond just exploring how rape myths and “ideal victimhood” interact with elements of prison culture. We examine how rape myths and “ideal victimhood” actually operate in self-identifying, reporting, and investigation inside prisons to bar victims’ justice, and we discuss the essential value of external legal actions like the class action lawsuit.

III. RESPONDING TO THE PREVALENCE OF RAPE MYTHS AND LIMITATIONS OF THE “IDEAL VICTIM” DISCOURSE: RECOMMENDATIONS FOR CHANGE

Community-based legal and legislative rape reforms are due, in large part, to the exposure of myths that inform the pervasive notion of “ideal victimhood.” These reforms have taken shape both as changes to existing laws and the passage of new laws designed specifically to respond to the special characteristics surrounding sexual violence. In particular, advocates and lawmakers targeted two

180. Lindgren, *supra* note 97, at 22.

181. See generally Phillips v. Bird, U.S. Dist. LEXIS 22418, No. 03-247-KAJ, 2003, 2003 WL 22953175 (D. Del. Dec. 1, 2003) (inmate agreed to engage in sexual relations with prison guard, and later claimed that the sexual relations were a violation of her right to be free from cruel and unusual punishment); Carrigan v. Davis, 70 F. Supp. 2d 448 (D. Del. 1999) (prison inmate alleged that a sexual encounter with the defendant—a former corrections officer at the prison—was not consensual, as defendant contended, but was in fact a sexual assault that violated her constitutional rights); Fisher v. Goord, 981 F. Supp. 140 (W.D.N.Y. 1997) (the court held that there was no credible evidence that the prisoner was raped, and that the evidence showed that the action was part of a plan by plaintiffs to get the prisoner transferred out of the state facility to one closer to home); see also CRISTINA RATHBONE, A WORLD APART, WOMEN, PRISON AND LIFE BEHIND BARS 49–54 (2005) (narrating non-fictional accounts of women inmates in Framingham penitentiary and their relationships with male staff); Smith, *supra* note 114, at 234.

182. For full discussion, see *infra* part III.

powerful myths: that a woman could not be raped by her husband, and that a woman's past sexual history made her "unrapeable."¹⁸³ Acknowledging these ideas as false, states enacted legislation that precluded a victim's sexual history from coming into evidence during a criminal trial (rape shield laws)¹⁸⁴ and that eliminated spousal immunity as a defense to rape allegations.¹⁸⁵

Research on the complex impact of rape myths on the community, the perpetrator, juries, media, law enforcement officers, and the victim informed serious attempts to remedy harmful assumptions about sexual violence through legal reform. It was an expectation that this research result in an increase in reporting to yield justice for rape victims.¹⁸⁶

Changes in public conceptions about what rape "really is" and who rape "really victimizes" were expected to lead to more reports of rape. Simultaneously, jurors were expected to become more sensitive to both the victimization and stigmatization of rape victims. Consequently, rape reports, arrests, convictions and rates of imprisonment (especially for "non-stereotypical" acquaintance rapes) were all expected to increase.¹⁸⁷

To be sure, these legal innovations addressed some of the significant shortcomings that reflected myths about sexual violence and made justice seeking for victims impossible. By logical extension, then, there are many places where existing laws and policies governing issues related to sexual violence in prison similarly demand reform.¹⁸⁸ In many ways PREA has attempted to provide this reform by adopting zero tolerance policies for sexual victimization; prohibiting cross gender viewing and searches; implementing employee and inmate training;

183. Larcombe, *supra* note 84, at 137.

184. Rape shield laws exist today in almost every jurisdiction and govern what evidence is admissible regarding a victim's past sexual history. For an in depth summary of the evolution of relevance in rape cases and other evidentiary laws, see Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to A Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709 (1995); see generally Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1608 (2007).

185. See, e.g., Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 352 (1995). However, not every state has wholly eliminated the marital rape exemption in every situation. For a discussion on the necessity of further reform, see Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1468-73 (2003).

186. Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 555 (1993).

187. *Id.*

188. As one example, Michigan prison policies require that a grievance for sexual assault be filed with 48 hours after it occurs, and embedded in this process is the requirement that victims must confront their abusers. Both of these requirements illustrate a fundamental lack of understanding about the dynamics of sexual assault, and are made even more complicated by federal law, the PLRA, which requires prisoners to comply with and exhaust these administrative remedies in order to preserve their subsequent right to file a civil lawsuit. See MICH. DIRECTIVE, *supra* note 94.

screening for risk of victimization; streamlining reporting procedures (including providing an external source to the prison for reporting); clarifying staff reporting duties; and offering protection against retaliation.¹⁸⁹

However, as important as these and other policies and procedures are, informal internalization and perpetuation of rape myths bar their successful application. Examining in depth the experiences of inmate victims of sexual violence in our research has exposed how the influence of rape myths operate in much more complex and elusive ways in the closed prison setting, both in terms of victim perception, and in the application of laws and policies as part of the internal investigative process. In the section above, we sought to explore how rape myths, “ideal victimhood,” and prison culture all interact to make it inherently more difficult for inmate victims to attain “ideal victimhood” by virtue of being in prison.

In this section, we explore the specific ways “ideal victim” discourse and rape myths influence internal processes and procedures to bar victims from attaining justice. In exposing how rape myths and “ideal victimhood” operate in the prisons, we seek to accomplish two things: first, we seek to educate those who create and implement laws and policies to protect inmates and prevent victimization. Second, we seek to show that the use of civil remedies, in particular the class action lawsuit, is necessary as a companion mechanism allowing inmate victims to seek recompense from an external source, especially if such internal policies fail.

A. FAILURES OF CLOSED PRISON SYSTEM ADMINISTRATIVE RESPONSE

1. Victim Perceptions of Sexual violence and the Decision to Report

The threshold inquiry of an inmate’s ability to attain “ideal victimhood” status and ultimately find justice is whether she identifies the incident as sexual violence. The pivotal text, *I Never Called it Rape*, illustrates how victims often fail to identify their experiences as legally actionable:¹⁹⁰

A number of studies have found that many women who have experienced rape subscribe to rape myths and are likely to interpret their own behavior in line with these myths. As a consequence, many victims feel guilty about their own behavior leading up to the offence, may blame themselves for not resisting during the offence, or may not label their experiences as rape.¹⁹¹

189. PREA, *supra* note 24.

190. See WARSHAW, *supra* note 46.

191. See Nina Burrowes, *Responding to the Challenges of Rape Myths in Court: A Guide for Prosecutors*, NB RES. 9 (Mar. 2013), http://www.nb-research.com/wp-content/uploads/2015/01/Responding-to-the-challenge-of-rape-myths-in-court_Nina-Burrowes.pdf; see also Peterson & Muehlenhard, *supra* note 58 (discussing as a primary reasons for victims not reporting to police that they did not know a crime had been committed); Nicole M. Heath et al., *Silent Survivors: Rape Myth Acceptance in*

Research also illuminates how the particular characteristics of an assault impact a victim's decision to report.¹⁹² When victims see themselves as conforming to ideas of a typical rape scenario, one that includes perhaps abduction by a stranger, the use of force or a weapon, and resulting injury, they are more likely to report because they perceive themselves as authentic crime victims.¹⁹³ On the other hand, victims who did not self-identify as "real" or "ideal" victims were less likely to report their experiences to the police.¹⁹⁴

Women in prison experience an even greater difficulty labeling their experiences as legally actionable than those in the community. "Not defining an incident as sexual assault is a significant reason for not reporting."¹⁹⁵

At the time, I didn't even know that what he'd done was rape, because I'd always had a thought that rape was when someone puts a gun to your head. It was just like when I was a child being abused. The difference was that when I was a child, those things were done in private, and even if people did know, it wasn't something that was talked about. But in prison, nothing is private, and so people talk about it.¹⁹⁶

As discussed earlier, certain inherent attributes of the prison culture, brands of deviance, dynamics of power imbalance, and complex prison sexuality all interfere with an inmate's ability to reach "ideal victim" status. Further, upon entering prison, women forfeit a complicated bundle of their rights, including the right to privacy and the freedom of movement and speech. Pat downs, cavity searches, and observation while eating, showering, using the bathroom, and sleeping are all permitted—and even *required*—in the prison system, whereas in the community these actions would constitute abuse, harassment, and privacy violations.¹⁹⁷ Thus, women in prison have a greater difficulty understanding what is legally actionable. Testimonials of sexually assaulted female inmates illustrate a perceived lack of remedy: "I wasn't aware there was anything that could be done."¹⁹⁸

Identifying an experience as sexual violence becomes even more complex in the prison context where sex, consensual or otherwise, is statutorily criminal-

Incarcerated Women's Narratives of Disclosure and Reporting of Rape, 35 *PSYCHOL. OF WOMEN Q.* 596, 597 (2011).

192. Heath et al., *supra* note 192.

193. *Id.* at 597.

194. Du Mont et al., *supra* note 81, at 477.

195. Shannon K. Fowler, et al., *Would They Officially Report an In-Prison Sexual Assault? An Examination of Inmate Perceptions*, 90 *THE PRISON J.* 220, 224 (2010).

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

197. Flesher, *supra* note 107, at 844.

198. Inmate #5, on file with the author; *see also All Too Familiar*, *supra* note 27.

ized.¹⁹⁹ By law, a victim cannot consent to a sexual relationship with a corrections officer even if a female inmate desires such an interaction. One inmate expressed, “I wanted a relationship with this officer because I thought it would make me happy and this is what people did in prison.”²⁰⁰ As in the community, a woman inmate may decline to label her experience as sexual assault if she perceived some element of “consent, regardless of statutory prohibition.”²⁰¹ Troublingly, “some women inside and staff report that there are few ‘real victims’ and that most sexual behavior in prison is consensual.”²⁰² Exemplifying this problematic disconnect, internal investigators required one woman to sign a statement saying, “I do not wish to press criminal charges against [corrections officer perpetrator]. I was not force [*sic*] into doing anything that I did not want to do.”²⁰³

It is difficult, based on existing research, to identify the profile of a woman more likely to report sexual violence to the police, especially in the prison context.²⁰⁴ In fact, the few socio-demographic characteristics that scholars identify as factors favoring reporting are largely at odds with the characteristics of the majority of the population of female inmates.²⁰⁵ The reality both inside and outside prison is that sexual violence is a highly underreported crime.²⁰⁶ National data suggests that only 8% of prisoners report their sexual victimization during incarceration.²⁰⁷

As a practical matter, an inmate may not even know *how* to report a sexual offense. Victims, especially those targeted during the beginning of their sentences, are unlikely to understand how to navigate the extremely complicated system of internal prison reporting (which varies greatly from the reporting

199. *State Rape Statutes*, AM. PROSECUTORS RES. INST., http://www.arte-sana.com/articles/rape_statutes.pdf (last visited Feb. 26, 2016).

200. Inmate #12, on file with the author.

201. Inmate #9, on file with the author.

202. Saliba, *supra* note 104, at 305.

203. Inmate #9, on file with the author.

204. Further, “sexual assaults committed by non-strangers [are] less likely to be reported than those committed by strangers;” and victims with a greater severity of the assault (whether the offender used a weapon or whether serious injuries were sustained by the victim) are further more likely to report. Fowler et al., *supra* note 196, at 223.

205. See discussion *supra* notes 51–53 and accompanying text. Further, “race complicates the relationship between gender and violence” particularly as relates to reporting (white girls more likely to report abuse than black girls). Owen et al., *supra* note 93, at 11. Female prisoners who embody these characteristics and others then end up on the “wrong” side of explicit dichotomies: white vs. visible minority; single vs. married/cohabitating; employed vs. unemployed; no mental health difficulties vs. mental health difficulties; no previous adult sexual assault vs. previous adult sexual assault. Du Mont et al., *supra* note 81, at 473–74. As a result, they are put at a further disadvantage in their ability to attain “ideal victimhood.”

206. A major issue is that sexual assault has been found to be a highly underreported crime inside and outside the correctional context, with 22% of men and 34% of women inmates reporting their assaults. Fowler et al., *supra* note 196, at 221.

207. BECK, *supra* note 19.

procedures in the community).²⁰⁸ The procedures to formally report any behavior that violates prison policy normally require an inmate to write a “grievance” and turn it in to the grievance coordinator, an internal actor employed by Department of Corrections.²⁰⁹ If the matter concerns alleged sexual misconduct, it may go to an internal investigator, again, employed by the correctional facility.²¹⁰ If the allegation, if true, would constitute criminal sexual contact pursuant to statute, the internal investigator is tasked to inform state police.²¹¹ The policies for reporting are often extremely complicated; inmates and officers alike are often under educated on how to utilize reporting procedures. For example, a recent MDOC policy regarding the “grievance” process used for reporting conduct in violation of “Prohibited Sexual Conduct Involving Prisoners” includes complicated legalese and provides for dismissal of grievances for factors such as “vagueness” or “timeliness” that give to the department a great deal of discretion.²¹²

The few studies on victims of sexual abuse in prison show that these victims “are silent for several reasons.”²¹³ For example, “[t]hey fear that no one will believe them, prison officials will punish them, or they simply blame themselves for somehow provoking the abuse.”²¹⁴ Prison victims ultimately face both community reporting barriers and barriers that result from the prison culture generally.

Many of the same reasons given to explain the underreporting of sexual assault in the free community apply to in-prison assaults: (a) feelings of guilt, shame, embarrassment . . . ; (b) lack of proof, fear of not being credible . . . ; (c) officials are ineffective, biased, wouldn’t want to be bothered . . . ; (d) fear of reprisal . . . ; (e) don’t want to be put into protective custody . . . ; and (f) didn’t want to be labeled a “snitch.”²¹⁵

At their core, a victim’s reasons for keeping silent reflect the realization that she will be unsuccessful in attaining “ideal victimhood.”²¹⁶ “[T]he majority of

208. See, e.g., MICH. DIRECTIVE, *supra* note 94 (detailing the internal prison reporting system for Michigan).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Laderberg, *supra* note 133, at 343.

214. *Id.*; see also Eric Harrison, *Nearly 200 Women Have Told of Being Raped, Abused in a Georgia Prison Scandal So Broad Even Officials Say It’s . . . a 13-Year Nightmare*, L.A. TIMES, Dec. 30, 1992, at 1; Judith I. Avner, *Sexual Harassment: Building a Consensus for Change*, 3 KAN. J.L. & PUB. POL’Y 57, 58 (1994).

215. Fowler et al., *supra* note 195, at 224–25.

216. Biases about race, mental health, socioeconomic status, and past sexual history are influential. Disproportionate numbers of the female prison population fit into categories that are essentially “disqualifying” in regards to reaching “ideal victim” status due to these background factors. See discussion *supra* note 94; see also, Flesher, *supra* note 107, at 844; Du Mont et al., *supra* note 81, at 469.

factors that negatively influence police reporting . . . ‘stem directly from rape myths that are deeply embedded in our general culture.’”²¹⁷ One woman’s story reflects the powerful relationship of these concepts: “Gina did not know whether she liked it or not. She didn’t know if it was rape. All she knew was that she felt alone, afraid, and unsure of herself.”²¹⁸

Feelings of shame, guilt, and embarrassment tie into the victim’s perceptions of sexual victimization in prison.²¹⁹ Our own work with the testimonials of inmates shows that many felt, by virtue of being in prison, that they “deserved” the abuse.²²⁰ In considering whether to report, women inmates consciously or unconsciously consider whether they will be able to meet the “ideal victim” characteristics. One woman noted, “I didn’t tell anyone because they had seen us talking.”²²¹ She further reflected that if she reported the abuse, prison officials would have blamed her or suggested that she was “asking for it.”²²²

It is particularly difficult for a female inmate to meet the “weakness” requirement.²²³ She must on one hand appear “tough” enough so that correctional staff will not view her as a target.²²⁴ One inmate reflects, that she “first had sex with Everett in 1992 after he resolved a major disciplinary ticket another guard had written her. It was just a barter for sex,” Curtis said, “I was young, I was very scared, and all I wanted was to go home. If I had that ticket on my record, I would have been flopped for parole. If it took exchanging sex with a guard [to get home], that’s what you did.”²²⁵ On the other hand, however, in order to attain “ideal victim” status, she must also appear weak in order to elicit sympathy. One reason female inmates who are victims of sexual abuse choose not to report

217. Du Mont et al., *supra* note 81, at 469 (quoting DEBRA TOMLINSON, POLICE-REPORTING DECISIONS OF SEXUAL ASSAULT SURVIVORS (1999)).

218. VICTORIA LAW, RESISTANCE BEHIND BARS: THE STRUGGLES OF INCARCERATED WOMEN 59 (2012).

219. Fowler et al., *supra* note 196, at 224–25.

220. “For a long time, I kept quiet because I felt like I was responsible for the situation.” Michael Rigby, *Michigan’s Dirty Little Secret: Sexual Abuse of Female Prisoners Pervasive, Ongoing*, PRISON LEGAL NEWS, (2006) <https://www.prisonlegalnews.org/news/2006/jan/15/michigans-dirty-little-secret-sexual-abuse-of-female-prisoners-pervasive-ongoing/>.

221. LEVI & WALDMAN, *supra* note 196, at 113.

222. *Id.*

223. Research on perceptions of women’s vulnerabilities by women in prison and prison staff describes women who are seen as weak as either “younger or older, a slighter build, mental or physical disabilities” Owen et al., *supra* note 93, at 17. Specifically, women describe vulnerable women as those who are physically “petite” or “very little” and emotionally or mentally as women who are young “and are still children” in terms of maturity. “Weak” is a term commonly used by prison staff to describe women who might be victims and is equated with “displaying fear” and being non-threatening in statue and behavior. *Id.* at 21. Even before women experience assault, prescribed notions exist regarding who could be a potential victim. These notions center on a perception of a “weak” woman. Both women in prison and custodial staff share this perception; if an inmate doesn’t see herself as meeting these prescriptions, she will likely view reporting as futile.

224. “This officer obviously had issues with women, and he had to prove his manhood by demeaning them. Most women wouldn’t allow that, but he preyed on the weak ones who’d been in abusive relationships all their lives. I fit that category.” LEVI & WALDMAN, *supra* note 196, at 144.

225. Rigby, *supra* note 220. “Curtis concurred with the notion that sexually abusive guards tend to prey on weak or vulnerable prisoners.” *Id.*

sexual abuse is their desire to avoid being seen as weak.²²⁶ This places female inmates in a kind of “double bind,” whereby neither option is desirable.²²⁷

Concerns about lack of proof and fear of not being viewed as credible act as powerful deterrents that bar inmates from ever reporting abuse. They observe the fact that other victims of the same types of assault receive no help and thus assume that no help is available to them. One woman states, “[T]here was no place to go to report him, because what he was doing to me, I had seen it happen to other women and nobody had helped them, so why would I think anyone would help me?”²²⁸ Concerns about lack of proof and fear of not being believed mirror the rape myths and presumptions of deviance that strip inmates of the ability to be seen as carrying out a respectable project, not be blamed for what happened, and be powerful enough to make their case known. In Michigan, the inmates were aware that “a number of vicious stereotypes dogged female prisoners: They were viewed as manipulative, drug addicts, prostitutes, and liars.”²²⁹ In fact, some prisons actually indoctrinate stereotypes into the training of correctional staff: “Some of the staff would tell us that, in their training, they were taught that basically we were all animals and they shouldn’t trust us with anything.”²³⁰

Stereotypes about credibility deter women from reporting. Concerns about retaliation by the offender are not baseless; evidence supports that this is a very real risk.²³¹ “Several factors discouraged women from speaking up, including fear of punishment or confrontation.”²³² “When women did report abuse, it was often met with no response—or retaliation: ‘[T]he staff would be believed, and the woman would be retaliated against.’”²³³ “Everyone knew that you couldn’t go to the prison officials and give a report, because the prison officials wouldn’t do anything other than retaliate against you.”²³⁴ To make matters worse, policy dictates that before filing a grievance, an inmate victim has to *confront* her abuser,

226. “Hensley, Tewksbury, and Koscheski (2002) suggest that the lack of female inmate’s reporting sexual coercion may be due to fear of repercussions, and wanting to protect their social image or reputation to other inmates *because being a victim may be seen as a sign of weakness*.” Owen et al., *supra* note 93, at 26 (emphasis added).

227. The term “double bind” was described in the 1980s by philosopher Marilyn Frey as referring to “situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation.” MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 2* (1983). More recently, communications scholar Kathleen Hall Jamieson developed a comprehensive framework of the myriad ways in which double binds manifest for women. See generally KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND: WOMEN AND LEADERSHIP* (1995).

228. LEVI & WALDMAN, *supra* note 196, at 64.

229. Culley, *supra* note 29, at 215.

230. LEVI & WALDMAN, *supra* note 196, at 156.

231. *Nowhere to Hide*, *supra* note 159; see also *All Too Familiar*, *supra* note 27.

232. Culley, *supra* note 29, at 211 (citing Jeff Seidel, *Hostages to Justice: Detroit Free Press Special Report on Female Inmates in Michigan Prisons*, DET. FREE PRESS, Jan. 1, 2009).

233. *Id.*

234. LEVI & WALDMAN, *supra* note 196, at 65.

thus giving him notice of her intent to report and spurring retaliation.²³⁵ In fact, due to the closed prison system, the offender often has other officers willing to retaliate on his behalf.²³⁶

Inmates' fears of punishment—often accomplished by assignment to segregation—are real, in part due to their inherent labeling as “guilty” or “deviant.” The starting presumption that an inmate is lying suggests she risks punishment if she reports and the resulting investigation does not substantiate her claim.²³⁷ One inmate commented on conditions of confinement in segregation as punishment for reporting abuse:

I've seen that [sexual abuse] go on for years, since the men came into the system, the women's system. Oh yeah, it goes on. And then if, you know, if it happens and you tell it, then you're in danger of being harassed or even worse, is what we called segregation, is where they put you for punishment. They'll put you in there and they leave you, however long they want to leave you, and it could be months.²³⁸

The barriers created by a lack of “ideal victimhood” significantly decrease an inmate's willingness to report. Although “[t]heoretically, [administrative segregation] is not intended as punishment,” it operates very similarly to punitive segregation.²³⁹ However, “prisoners subjected to extensive segregation in Special Housing Units (SHUs) have additional difficulties severe enough to cause near permanent mental and emotional damage.”²⁴⁰ Many scholars argue such solitary confinement constitutes human rights abuse.²⁴¹

Inmates often avoid reporting for fear of others labeling them a “snitch.” The unique system of prison imposes informal penalties and punishment, both from other inmates as well as from staff and administration.²⁴² One woman explains,

235. “The grievant did not attempt to resolve the issue with the staff member involved prior to filing the grievance unless prevented by circumstances beyond his/her control or if the issue falls within the jurisdiction of the Internal Affairs Division in Operations Support Administration.” *Taking Action*, YOUTUBE (May 15, 2015), <https://www.youtube.com/watch?v=WGxptXBdYQE> [hereinafter MDOC].

236. *See Nowhere to Hide*, *supra* note 158 (“If a guard has been reported by an inmate for sexual abuse, he may turn to his colleagues for assistance in retaliating against her, and she may be issued tickets for violations which never occurred or for violations which do not typically result in misconduct tickets' being issued. As long as the accused guard does not issue the tickets himself, he can insulate himself from any suspicion of retaliating against the inmate.”).

237. “If a grievant intentionally files a grievance which is investigated and determined to be unfounded which, if proven true, may have caused an employee or a prisoner to be disciplined or an employee to receive corrective action, the grievant may be issued a misconduct report if approved by the Warden or FOA Area Manager . . .” MDOC, *supra* note 235.

238. Culley, *supra* note 29, at 211 (quoting *Sentenced*, YOUTUBE (2002), https://www.youtube.com/watch?v=BMEC_6-APe8).

239. Elizabeth Valisades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 75 (2005).

240. *Id.* at 76–77.

241. *Id.* at 77–78.

242. Fowler et al., *supra* note 195, at 226.

“Prisoners who reported the sexual abuse where [*sic*] placed in segregation while the claim was investigated, then labeled a snitch by staff and inmates.”²⁴³

Multi-faceted sexual interactions between inmates and corrections officers further complicate reporting efforts. In some cases, women inmates view their sexual relationships with officers as consensual, or receive benefits from the “relationship.” A perpetrator may also be having “relationships” with or doing favors for other prisoners, which would strongly deter one victim from coming forward. For example, in Michigan, one officer

had a lot of clout with the prisoners, because he was—he was doing a lot of favors for a lot of the prisoners. He was bringing drugs in for them. He was having sexual relationships with a lot of them . . . And if I would have attempted to complain about him or say anything bad about him—he was very popular . . . I would have had problems not only with the staff but the prisoners, which is what I’d be more worried about.²⁴⁴

These unique concerns influence strongly an inmate’s decision to report in the first place. Without a report, no investigation will follow, and there is no chance of finding justice in any form for inmate victims.

2. Investigation: Informal Operation of Rape Myths

An inmate’s interaction with prison investigators is another place where rape myths and ideal victim discourse come into play. Assuming she can transcend issues related to her own perception of what occurred, the prison investigation is arguably where rape myths and the corresponding “ideal victim” discourse damage the inmate victim most severely. The investigation of a claim of sexual violence often reveals a disconnect between laws and policies as they are written as opposed to how they are actually applied.²⁴⁵ Even in the community, the adoption of rape myths and perceptions of law enforcement officers can act as a powerful bar to a victim coming forward.²⁴⁶

During the process of investigation, an internal investigator, a specialized member of the staff, notifies state police; interviews the victim, perpetrator, and witnesses; and assesses evidence.²⁴⁷ Staff that lack proper training may

243. *Id.*

244. Inmate #20, on file with the author.

245. Another way to frame this discussion is as a rule of law issue. See Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, CARNEGIE ENDOWMENT (Jan 2005), <http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>.

246. “[R]esearch demonstrates that rape myths affect police officers’ interactions with victims of rape, such that police officers were less likely to believe victims whose characteristics were not consistent with a stereotypical rape victim (e.g., are not virgins, had a prior relationship with the suspect.” Edwards et al., *supra* note 59, at 763.

247. MDOC, *supra* note 235.

consciously or unconsciously be influenced by rape myths, look for “ideal victim” characteristics, or fail to account for trauma responses of the victim.²⁴⁸ The “ideal victim” discourse, then, informally operates to bar inmates from obtaining a successful “sustained” finding.²⁴⁹ The low rate of success may act as a deterrent for inmates in seeking a formal report or investigation. This prevents inmates from utilizing the Prisoner Litigation Reform Act (PLRA), which requires an inmate to “exhaust all administrative remedies,” referring to formal grievance procedures, in order to preserve her right to sue civilly.²⁵⁰ The results of an investigation are integral; they may result in discipline for the perpetrator if investigators find him guilty, or, in many cases, may result in discipline for the victim if evidence exists to suggest that she fabricated the claim.²⁵¹ In these cases, prison policies reflect the impermissibility of sexual violence, often using “zero tolerance” language, but the application of these policies reflects implicit or informal adoption of rape myths that allow abuse to persist unpunished. This reality underscores the importance of the availability of alternative, civil remedies for victims.

Recommendations from the Prison Rape Elimination Act (PREA) may unknowingly adopt rape myths. PREA is concerned with prevention strategies, and MDOC interpreted these strategies for prevention by incorporating suggestions that are inherently victim-blaming. For example, a video that MDOC released in an attempt to comply with PREA recommendations provided strategies to avoid sexual abuse during incarceration. While on its face, this video sought to educate prisoners toward an end of preventing rape in prison, it nonetheless perpetuated rape myths. Some of the recommendations include victim-blaming rape myths: “Avoid talking about sex;” “don’t be alone;” and

248. Rebecca Campbell, *The Role of Work Experience and Individual Beliefs in Police Officers’ Perceptions of Date Rape: An Integration of Quantitative and Qualitative Methods*, 23 AM. J. CMTY. PSYCHOL. 249 (1995); Edwards et al., *supra* note 59, at 763. Further, studies have found that many of the cases that are reported are unlikely to be made into official reports, “police officers believed that between 16% and 25% of rape cases reported to them were false.” Worryingly, even those professionals who are trained to interact with survivors may hold wrongful assumptions about the victim’s behavior, the perpetrator’s behavior, and the sexual assault act that interfere with their ability to help sexual assault survivors who seek help. “The literature suggests that although mental health personnel generally have a significantly more sympathetic view of rape victims as compared with laypersons, even counselor professionals may hold blaming attitudes or make myth-based judgments concerning victims of sexual assault.” Ellen Dye & Susan Roth, *Psychotherapists’ Knowledge About and Attitudes Toward Sexual Assault Victim Clients*, 14 PSYCHOL. WOMEN Q. 191 (1990); *see also* Cheryl S. Alexander, *The Responsible Victim: Nurses’ Perceptions of Victims of Rape*, 21 J. HEALTH & SOC. BEHAV. 22 (1980); Leslee R. Kassing & Loreto R. Prieto, *The Rape Myth and Blame-Based Beliefs of Counselors-in-Training Toward Male Victims of Rape*, 81 J. COUNSELING & DEV. 455 (2003).

249. *National Prison Rape Elimination Commission Report*, NCJRS (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [hereinafter NCJRS 2009].

250. Prison Litigation Reform Act, 42 U.S.C.A § 1997e(a) (2013) (West, Westlaw through P.L. 114-114 (excluding 114-92, 114-94, 114-95, and 114-113)).

251. NCJRS 2009, *supra* note 249.

“walk with confidence.”²⁵² An MDOC Sexual Assault Handbook includes similar recommendations on “avoiding” sexual abuse.

Research related to PREA uncovered worrisome statistics related to sexual assault investigations. “In 2006, the BJS indicated that only 18% of staff sexual misconduct complaints and 6% of staff sexual harassment complaints were substantiated.”²⁵³ With statistics referring to both staff and inmate sexual abuse, the BJS found that “[i]n 29 percent of the alleged incidents, investigators concluded that sexual abuse did not occur. But in the majority of allegations (55 percent) investigators could not determine whether or not the abuse occurred.”²⁵⁴ Research reveals that rates of substantiation are significantly lower than the already low national average.²⁵⁵ The high number of “unsubstantiated” findings (*i.e.*, findings that the investigators could not determine if the abuse occurred) is not necessarily attributable to a high number of false allegations.²⁵⁶ The list of possible explanations is lengthy and includes unclear policies that govern reporting of sexual victimization and the resulting investigations, including a “[f]ailure to establish a coordinated response.”²⁵⁷ A lack of resources, training, and evidence collection protocol also contribute to the high rate of unsubstantiated findings.²⁵⁸ “Zero tolerance” policies against sexual assaults may not, in practice, prevent all sexual assaults.²⁵⁹ Conflicts of interests and strong presumptions against inmate credibility thwart zero tolerance policies. When officers are assigned to investigate cases themselves, this undermines the validity of grievance and investigatory procedures. “According to Joan Yukins, the warden of Scott Correctional Facility, as late as 1995 it was departmental policy to allow an employee to participate in the investigation of a grievance against him or her.”²⁶⁰ The officers’ “views about inmates’ ulterior motives in filing reports can also impede the integrity of the reporting process.”²⁶¹ Or, troublingly, investiga-

252. “The Michigan Department of Corrections premiered a different set of films in 2007. Made in the wake of the Prison Rape Elimination Act with funds from the National Institute of Corrections, these films continue to be shown to new prisoners in Michigan.” Maurice Chamman, *The ‘Candy Bar Movie’ Why Michigan Prisoners Aren’t Taking a Video about Prison Rape Seriously*, THE MARSHALL PROJ. (May 15, 2015, 7:15 AM), https://www.themarshallproject.org/2015/05/15/the-candy-bar-movie?utm_medium=email (citing MDOC, *supra* note 235).

253. NCJRS 2009, *supra* note 249, at 13.

254. *Id.*

255. *Id.*

256. *Id.* at 118.

257. *Id.*

258. *Id.*; see also, *Nowhere to Hide*, *supra* note 159 (“Often, the MDOC skirts protocol when investigating complaints of sexual abuse by employees—especially high-ranking ones. Willis Chapman, Assistant Deputy Warden at the Robert Scott prison is one example. He was accused of having sex with a prisoner in 2002. Yet, without even interviewing Chapman, and despite overwhelming evidence, investigators concluded the case was unfounded. Tammy LaCross, the accuser, was punished for lying.”).

259. See *supra* notes 247–251 and accompanying text.

260. *All Too Familiar*, *supra* note 27.

261. Fowler et al., *supra* note 195, at 221.

tors may themselves have strong protective ties to perpetrators.²⁶² Preconceptions about an inmate's predisposition to lie implicitly undercut her ability to have a fair investigation. The Human Rights Watch found that, "[w]here women prisoners do decide to lodge a formal grievance of sexual misconduct, they face a review and investigatory procedure that is tainted by a pervasive bias against prisoner testimony."²⁶³ These various views held by prison staff essentially translate into informal presumptions of guilt on the part of the victim inmate and innocence on the part of the accused corrections officer.

a. Informal Presumptions of Guilt and Innocence. Among the most significant challenges an inmate faces during an investigation is the automatic presumption of guilt. The dynamics of prison place an informal presumption of innocence on the corrections officer and guilt on the inmate. Prisoner status is the primary and often exclusive quality examined; it fundamentally labels a female inmate as "deviant" and is incongruent with a simultaneous identity of "victim." Advocates of clemency for battered women who kill their abusers in self-defense similarly rely on this incongruence argument.²⁶⁴ Fundamentally, the legal and correctional systems have been unable to view women who engaged in violence through self-defense as both victims and isolated perpetrators of violence.

In the case of many inmates, prison authorities use the brand of deviance conferred on her upon entering prison against her if she chooses to report. The assumption that all inmates are manipulative, untruthful, and vindictive serves to undercut the victim's ability to be taken seriously in an investigation.²⁶⁵ One inmate stated, "If you ever get involved with staff it's always your fault. You did it, you manipulated."²⁶⁶ An official from MDOC underscores this perception: "Prisoners have a Ph.D. in manipulation."²⁶⁷ Alternatively, prison investigators afford corrections officers, upholders of the law within the justice system, a presumption of credibility and morality. The presumption of innocence of correctional officers creates a hurdle towards accusation, even when there are

262. One inmate was told that "that Inspector Howard was 'out to get her,' because he was friends with the correction officer who had been accused of sexual assault by Barker in 1990, subsequently found guilty, and lost his job. *Nowhere to Hide*, *supra* note 158.

263. *All Too Familiar*, *supra* note 27.

264. Carol Jacobsen, *Defending Survivors: Case Studies of the Michigan Women's Justice & Clemency Project*, 18 U. PA. J. L. & SOC. CHANGE 1, 30 (2015).

265. Addressing corrections staff, MDOC argued, "[a]nyone who has worked in a prison knows that prisoners are skilled manipulators who can turn a seemingly innocent encounter into a serious violation of work rules. Unchecked, that minor infraction can lead to serious problems. *Overfamiliarity, is Your Team at Risk?*, MICH. DEP'T OF CORR. (2006), http://www.michigan.gov/corrections/0,1607,7-119-1441_1476-136016--,00.html [hereinafter *Overfamiliarity*].

266. LEVI & WALDMAN, *supra* note 196, at 180.

267. Bill Hudson, Office of Training and Recruitment administrator, said, "[t]hey have the ability to mirror someone's likes and dislikes and clone themselves to be like the staff person so they can get away with things." *Overfamiliarity*, *supra* note 265.

multiple accusations of abuse made by multiple women against an officer.²⁶⁸ Human Rights Watch observes that MDOC proceeds on the assumption that any statement made by a prisoner is *per se* not credible and insufficient on its own to support a charge against a corrections employee.²⁶⁹ “Documentation we obtained reveals that MDOC has repeatedly stated that it will not uphold an employee’s dismissal where the only evidence of inappropriate or illegal conduct is the prisoner’s testimony.”²⁷⁰

If, during an investigation of sexual victimization, there is any evidence of previous punishment that an inmate was unhappy with, or the issuance of a misconduct ticket, investigators may challenge her motives.²⁷¹ A perpetrator guard can use his discretion to issue tickets as a way to retaliate against an inmate or to protect himself by casting doubt on the victim.²⁷² Further, “evidence” of previous punishment strengthens the presumption that an inmate is lying, perhaps motivated by her perception of previous unfair punishment. This ready-made evidence of her vindictiveness undercuts her ability to report and denies her the “ideal victimhood” characteristic of being powerful enough to make her case known without threatening strong countervailing stakes.

In addition to informal barriers, some states place impossible evidentiary burdens on inmates to substantiate their claims, reflecting the assumption that the inmates are lying. In practice, these evidentiary burdens “virtually assure complaints will not succeed.”²⁷³ “For example, reportedly ‘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.’”²⁷⁴ In Michigan, the *Neal* case uncovered that investigations imposed often impossible requirements, and that evidence of corroborating witnesses, successful polygraphs, and DNA evidence were often insufficient to overcome the evidentiary burdens.²⁷⁵ Investigations require evidence that is near impossible to collect, essentially barring victims from finding justice internally. As one example: “Based on the . . . investigative report, there is question that C/S

268. “Three years before prison guard Edmond Hook sexually assaulted and impregnated inmate T’Nasa Harris, officials at the Camp Brighton facility near Pinckney [MI] received an anonymous letter claiming he was a ‘sexual predator.’ Four months after Michigan Department of Corrections officials got the letter, 18 women complained that Hook leered at them in the shower or groped them during pat downs. Corrections officers made no effort to closely monitor Hook.” Ronald J. Hansen et al., *Pregnant Inmates Name Guards as Dads*, THE DET. NEWS, May 23, 2005, at 1. “Hook eventually pleaded guilty to two misdemeanor charges of sexual misconduct. He was sentenced to a year in jail in 2003.” *Id.* at 6.

269. *All Too Familiar*, *supra* note 27.

270. *Id.*

271. *See Nowhere to Hide*, *supra* note 158.

272. One woman in Michigan details how her abuser apologized for being rude to her and writing her a ticket to throw others off the track of the love letters he was writing her. Inmate #8, on file with the author; *see also id.*

273. McGuire, *supra* note 20, at 8.

274. *Id.*

275. *See Nowhere to Hide*, *supra* note 158; *see also Neal v. Dep’t of Corr.*, 583 N.W.2d 249 (Mich. Ct. App. 1998).

[omitted] may have been less than truthful about his involvement with some of the fore mentioned prisoners that alleged that he had been sexually involved with them. *Our problem is that there is no physical evidence to substantiate the claims.*²⁷⁶

One scholar compares the troubling presumptions of innocence and guilt in investigations into corrections officer/inmate allegations of rape to that in the military, of children, and sexual harassment in the workplace. She argues:

[T]he physical environment and established power structures foster opportunities for sexual abuse in prisons: most sexual harassment takes place without witnesses between people of unequal power in a highly structured, hierarchical organization. If there are no witnesses, the tendency of most people in that organization, and in our society, will be to believe the more highly-ranked and credentialed person in any contest between the two as to what happened.²⁷⁷

In practice, both officers and inmates are well aware of the informal presumption of innocence on the part of the corrections officers, as well as the presumption of deviance on the part of the inmate. Often, perpetrators are cognizant of these physical evidence requirements and take steps to ensure that no physical evidence remains of the abuse (*e.g.*, one perpetrator forced his victim to launder her clothing immediately).²⁷⁸ In the words of one Michigan officer, “Who do you think they’re gonna believe? I’m the officer. You’re just an inmate bitch.”²⁷⁹ In many cases, perpetrators take advantage of such presumptions.²⁸⁰ One MDOC officer, Albert Moon, was accused of abusing multiple inmates to the point where his behavior was classified as “widespread knowledge.”²⁸¹ “He’s got a long reputation here, former officer Julie Kennedy-Carpenter testified about Moon in a 1999 deposition. ‘When I first got here, they warned me about him. He figured he was going to get away with things forever. He used to brag about that all the time.’”²⁸²

b. Informal Use of Crime as Proxy for Sexual History. “Ideal victimhood” presumes a woman with no past sexual history, someone who embodies notions of chastity. Rape myths inform the notion that a woman who has previously

276. Cornell M. Howard, SCF Internal Investigator 324716, IA Report (Sept. 20, 1996) (emphasis added).

277. Laderberg, *supra* note 133, at 324–25 (citing Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451, 1451 (1992)).

278. Inmate #10, on file with the author.

279. *See Nowhere to Hide*, *supra* note 159.

280. Ronald J. Hansen, Norman Sinclair & Melvin Claxton, *Inmates Struggle to File Charges Against Officers; Investigations of Allegation Favor Guards, Prisoner Advocates Say*, THE DET. NEWS, May 22, 2005, at 2.

281. *Id.*

282. *See Nowhere to Hide*, *supra* note 158.

engaged in sexual activity is more inclined toward promiscuity, more likely to “ask” to be raped, or more likely to have consensual sex and subsequently lie about what really occurred.²⁸³ Despite laws that attempt to flag the power imbalance that makes inmates vulnerable to sexual abuse by corrections officers, the complex nature of sexuality as it operates in prison is simply not taken into account by correctional facility reporting and investigation systems, nor by the courts in sentencing.²⁸⁴

The type of crime for which an inmate is imprisoned—which is a proxy for many parts of her identity—also influences a victim’s ability to meet Christie’s requirements that she be “carrying out a respectable project” and is “not to be blamed.”²⁸⁵ Her sentence for the crime she committed carries with it an automatic and inherent deprivation of “ideal victimhood” in prison, particularly if it mirrors a rape myth about using alcohol, promiscuity, and other stereotypes about victim behavior.

Historically, rape shield laws emerged due to lawmakers’ recognition that evidence about a victim’s past sexual history as a proxy for rape reflected myths about sexuality and was extremely damaging. No such formal protections exist in prison, and the informal permeation of rape myths creep into investigations. In fact, if a woman is convicted of a crime involving sex, prostitution, or criminal sexual conduct, the myth that “she was asking for it” or that she is inherently “unrapeable”²⁸⁶ due to her “pre-incarceration” behavior, may influence the ability of those to whom she reports to take her complaint seriously.

Disproportionate numbers of women inmates have been associated with or imprisoned for crimes like prostitution and drug use—behaviors that heavily play into the perpetuation of rape myths and “ideal victimhood.”²⁸⁷ Administrators, corrections officers, health officials, and wardens often have access to the woman’s criminal, sexual, and mental health history. Thus, a victim *knows*, before she even considers reporting, that they assume she lacks credibility, or embodies promiscuity or insanity.²⁸⁸

The devastating impact that a victim’s past sexual history could have in the community setting, as well as the resulting steps that lawmakers have taken to create rape shield laws to alleviate this potential, should offer support to address

283. See Michele Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002) (discussing the history of rape myths, dating back to the Bible).

284. See McGuire, *supra* note 20, at 2.

285. Christie, *supra* note 36, at 19.

286. For a discussion of what makes a woman “unrapeable,” see Larcombe, *supra* note 84, at 137–38.

287. “Research also shows that women in prison have experienced unusually high rates of extremely abusive “discipline” from parents, involvement in drugs, and prostitution, whether they were imprisoned for these crimes or not.” Zaitzow, *supra* note 133, at 22 (internal citations omitted).

288. When one woman reported, the officer claimed she had “been ‘acting strange’ and was delusional. Her charges against him, he contended, were part of her sexual fantasies about him. He had her committed to the mental services unit. After a prison psychologist determined that [she] was not mentally ill, she was transferred to another facility.” LAW, *supra* note 218, at 65.

this impact in prison. While PREA and similar laws strive to protect inmate victims, they do not explicitly consider how the victim's crime as a proxy for sexual history may informally thwart her ability to obtain a sustained investigation.

c. Informal Assumptions of Consent. The inherent acceptance and tolerance of sexual victimization in prison plays a role in characterizing sexual encounters as "consensual," even though a prisoner cannot legally give consent. In Michigan, one inmate reported to the officer in charge of her unit that the guard with whom she was having a sexual relationship withheld her mail after they had a falling out.²⁸⁹ The officer in charge of her unit "downplayed the matter and encouraged her not to report."²⁹⁰ He stated: "He might just be in love with you and don't know how to act."²⁹¹ This response—downplaying the seriousness and, importantly, failing to acknowledge the illegality of this type of alleged relationship—reflects an incorporation of troublesome rape myths. Ultimately, this type of response denies the victim "ideal victimhood" and reflects troublesome rape myths even *before* a formal investigation could ensue.²⁹² While this interaction took place before the successful *Neal* class action lawsuit, it nonetheless highlights an important and complicated flaw in policy enforcement. While the policy of MDOC on overfamiliarity and sexual relationships between officers and prisoners is in fact reflective of best practices, the atmosphere of acceptance and the operation of rape myths as illustrated by this example impede victims' ability to successfully report violations or even initiate an investigation.

Questions about consent and force that exist in the perceptions of inmates and prison staff further reflect these types of rape myths. Such myths crop up during formal investigations of sexual victimization. As mentioned earlier, victims attempt to live up to the "ideal victim" requirements and conform their stories to show some level of force or lack of consent, even if the circumstances were otherwise.²⁹³ Internal investigations reiterate the necessity of adhering to "ideal victim" requirements about consent very subtly through the types of questions asked.

Prison investigations into sexual abuse often rely on state police forces' initial interviews with the victim and base their assessment on them.²⁹⁴ However, the

289. Norman Sinclair et al., *Sexual Abuse Behind Bars: Detroit News Special Report*, THE DETROIT NEWS (May 22–25, 2005).

290. *Id.*

291. *Id.*; see also LAW, *supra* note 218, at 64.

292. MICH. DEPT. OF CORR., POLICY DIRECTIVE 03.03.140 PROHIBITED SEXUAL CONDUCT INVOLVING PRISONERS 1, https://www.michigan.gov/documents/corrections/03_03_140_481633_7.pdf (Definitions, E: "Staff Overfamiliarity - Conduct between an employee and a prisoner which has resulted in or is likely to result in intimacy, including but not limited to a kiss or a hug, or a close personal or non-work related association.").

293. *See id.*

294. *All Too Familiar*, *supra* note 27. ("An employee that the state decides not to prosecute may, as a result of the department of correction's failure to pursue its own investigation, also escape sanction for a violation of prison rules.").

legal standards differ greatly between police and internal investigations. Simply adopting the answers to state police questions about “consent” is against prison policy, procedurally irrelevant, and may seriously impact the victim’s ability to seek justice. Questions by state police may mirror rape myths: “Well I guess what I’m saying, why didn’t you tell him no. Why didn’t you say stop get the hell out of there?”²⁹⁵ These questions and the corresponding answers are then directly adopted into internal investigations (instead of conducted as a separate interview). Conclusions drawn from these interviews often yield a finding of “not sustained” in the internal investigation, despite different evidentiary standards.²⁹⁶

Even if internal investigators conduct their own interviews, questions such as “Did you cry out?;” “What were you wearing when you went down to the officers’ desk?;” and, “Did you flirt back with him?”²⁹⁷ additionally reflect rape myths. Such questions reflect the types of rape myths that reinforce to the victim that she will not reach “ideal victim” status and be taken seriously for this type of abuse.²⁹⁸ Investigators often pose questions about the “consensuality” of the alleged relationship, ignoring the fact that this type of question is legally irrelevant.²⁹⁹

It is integral to acknowledge the complex motivations or explanations for a sexual encounter to seem consensual, where the encounter actually includes the aspects of manipulation, compliance, or coercion in prison. The unique setting of prison has a significant influence on an individual’s autonomy or ability to give consent. One woman succinctly summarizes this notion:

I had no one and he acted like my knight. But as the relationship continued, I began to realize that he was taking advantage of my situation. I realized that, in the real world, I probably wouldn’t have looked twice at him, and if a man his age pursued me I would probably have been afraid and got help.³⁰⁰

The power dynamics are such that even “consensual” relationships inevitably change.³⁰¹ The same woman realized the danger of the power dynamic and “tried distancing [her]self. When that happened, he got scary.”³⁰² This is a hard-learned lesson for inmates in a setting where they maintain very little control and feel reluctant to seek help: “Sexual assault between staff and inmates happens fairly

295. Inmate #23, on file with the author.

296. *Id.*

297. Inmate #25, on file with the author; *see also* Lonsway, *supra* note 45.

298. *Id.*

299. *See Fifty-State Survey, supra* note 161.

300. LEVI & WALDMAN, *supra* note 196, at 81.

301. “Although some guards have claimed these relationships to be consensual, there are often abusive consequences of a woman attempting to end these arrangements.” Saliba, *supra* note 104, at 298 (citing Kim S. Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C. L. L. REV. 46, 56 (2007).

302. LEVI & WALDMAN, *supra* note 196, at 81.

frequently, but it is all undercover. Sometimes it starts off being consensual, but then later it becomes an abusive situation.”³⁰³ Therefore, for this and other reasons, an inmate’s “consent” should not play a role in deciding the outcome of an investigation.

Nonetheless, if investigators find that an inmate initiated or welcomed sexual contact with a guard, the guard is likely to be charged with a substantially lesser offense that carries only minimal penalties.³⁰⁴ On the other hand, officials are more likely to charge an officer who uses physical force to make a prisoner submit to him with aggravated sexual assault, and the potential sentence is much more serious.³⁰⁵ However, an internal prison investigation is entirely separate from a criminal investigation, and investigators incorporating rape myths about consent is a particularly troublesome practice. Our observation that prison investigations rely on criminal investigation findings identifies a serious, informal barrier to a victim obtaining justice within the closed system to which she reported. Instead of taking issue with policy language, here we identify a substantial barrier in the *enforcement* of policy and expose a serious weakness in the laws and policies intended to protect inmates from sexual violence, and address issues with reporting and investigation. Despite efforts to change law and policy to help victims, rape myths and presumptions of an “ideal victim” informally interfere with application of policy and undercut what advocates are trying to accomplish in the first place. Therefore, in addition to uncovering and challenging these myths, additional legal remedies must be preserved and made readily available for sexual violence victims.

B. THE NECESSITY OF CIVIL REMEDIES

1. Limitations at the Federal Level

Congress recognized the importance of civil causes of action for victims of gender-based violence when it passed the original Violence Against Women Act, which included a provision that made available a federal civil rights remedy to those affected by gender-motivated violence.³⁰⁶ The federal civil rights remedy afforded victims a way to seek justice in conjunction with or in lieu of criminal charges the state might have brought. The Supreme Court swiftly invalidated this remedy, however, in its decision in *United States v. Morrison*.³⁰⁷ In *Morrison*, the Court refused to find a constitutional basis for a victim’s private cause of action against two men who brutally sexually assaulted her while she was a college student.³⁰⁸ Striking down a key provision in the Violence Against Women Act,

303. *Id.* at 156.

304. McGuire, *supra* note 20, at 2.

305. *Id.*

306. 42 U.S.C.A. § 13981(c) (West, Westlaw through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113)).

307. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

308. *Id.*

the Court left remediless female victims of gender-motivated violence.³⁰⁹ Separate from whatever criminal charges the state might pursue, the availability of civil remedies for victims of sexual violence serves multiple important ends of justice; it provides an essential therapeutic benefit, serves the overall goals of tort law, and pushes back on social norms by acknowledging the harm that derives from such cases even when the criminal law falls short.³¹⁰

Writing the Court's opinion in *Morrison*, Justice Rehnquist declared, "If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."³¹¹ Despite Rehnquist's impassioned directive to the states, few actually responded, and the availability of civil remedies for many victims of sexual violence in the community context remains extremely limited. These limitations are even more pronounced, however, when considering a specific subset of victims who, by definition, are essentially invisible: women prisoners who are victimized during incarceration by prison staff. What we argue here is that, despite their limitations, civil remedies—and specifically the class action lawsuit—are essential tools for victims. Using our insight from studying the successes and struggles of the brilliant litigation in Michigan's *Neal v. MDOC*, two related issues become strikingly clear: first, rape myths and "ideal victim" discourse pervade even the best-intentioned attempts to enact change within the prison system; and second, civil remedies, specifically the class action lawsuit, help ensure that inmate victims can find recompense in the courts. The lessons learned from *Neal* apply directly in prisons and other similarly situated institutions across the nation in which sexual victimization occurs.

2. Exploring Civil Remedies

Legal scholars have written extensively on the importance of civil remedies for victims of sexual violence generally,³¹² but discussion of these issues as they relate specifically to victims in prison has remained largely unexplored.³¹³ In examining in depth the experiences of individual women involved in the *Neal* class action lawsuit, we uncovered the troubling ways in which the "ideal victim"

309. *Id.*

310. JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* (2016); Yifat Bitton, *Reclaiming Power?: Women Victims of Sexual Violence and the Civil Legal System*, in NATTI RONEL, *TRENDS & ISSUES IN VICTIMOLOGY* 131 (Natti Ronel et al. 2008); Daniel W. Shuman, *Making the World A Better Place Through Tort Law?: Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739, 743 (1993).

311. *Morrison*, 529 U.S. at 627.

312. See e.g., 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 (2006); Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403 (2013).

313. We intend to take up this issue in a subsequent research paper. However, see Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the PLRA*, 11 CARDOZO WOMEN'S L. J. 37, 38 (2004).

discourse and accompanying rape myths have found their way into prisons. What we discovered is that the “ideal victim” myth creates a barrier for inmate victims in identifying their experiences as abuse, in reporting the abuse, and in investigating the abuse. Essentially, this myth informally bars inmate victims from discovering justice within the prison’s closed system. This research has provided a novel opportunity to develop an understanding of the impact, importance, and even limitations of civil remedies. An inmate survivor effectively captures the value of the civil suit:

When you’re a prisoner in that environment you don’t feel like you have the power to say no. Your life, your every move, is controlled by these people. When you eat, when you sleep, everything is known. At the beginning of my prison term, I didn’t feel like I had any rights. I didn’t feel like anyone cared. I never felt like I had the power to say no, until I met my lawyer.³¹⁴

This inmate went on to express how being a part of a civil action against the prison situated her in a much larger effort and made her proud. She stated, “It made me feel strong and powerful. It also helped me deal with my demons. It helped me to not continue to blame myself.”³¹⁵

Rape myths and the flawed “ideal victim” discourse continue to impede inter-prison practices and make justice for victims difficult or nearly impossible to attain. Therefore, due to the significant barriers that remain in prisons, civil remedies outside the prison are *essential* to this specific subset of victims. Civil claims avoid some of the secondary victimization associated with criminal prosecutions.³¹⁶ In general, scholars critique criminal prosecutions in terms of their impact on the victim. “Feminist criticism has identified the criminal justice system as being complicit in the re-victimization of women who are victims of sex crimes. The criminal justice system has been characterized by some as going through another rape experience, this time at the hands of the legal system.”³¹⁷

Despite their relevance and importance, legal options for inmate victims outside the closed system of prison are limited and elusive. Arguably, the “ideal victimhood” framework, and associated rape myths, operate less strongly in the civil context where evidentiary thresholds are less stringent, making it potentially easier for a victim’s claim to succeed. There is also a level of control over the proceedings in a civil claim that may be therapeutic to the victim. For example, feminist, activist, and law professor Catherine McKinnon “has argued that the civil legal litigation, mainly the tort law mechanism, would allow the victim to better regain power or more accurately reclaim power within this legal

314. LEVI & WALDMAN, *supra* note 196, at 66.

315. *Id.* at 67.

316. RONEL, *supra* note 310, at 131.

317. *Id.*

process.”³¹⁸ To this end, in tort law proceedings, “the victim is presumed to be the master of her claim by initiating, conducting, and relatively dominating the legal process, thus reclaiming some of the power that has been taken from her by the sexual assault.”³¹⁹ It stands to follow that participating in a civil action against the closed prison system that had deterred or prevented the victim from coming forward would allow the victim to assert control and regain some power in a similar way. Furthering the goals of tort law, civil remedies seek to deter similar offenses, make the victim whole, and restore her to the place she was in prior to the harm she experienced.³²⁰ In the context of inmate victims of sexual violence, civil remedies not only provide monetary benefits to inmate victims, but also provide injunctive relief within the closed prison system. Further, civil remedies have significant psychological benefits³²¹ that may not accompany criminal remedies.

Legal scholars identify the strengths and weaknesses of civil remedies for inmates who experience sexual victimization.³²² The primary sources of legal action are the Federal Tort Claims Act, PLRA, state torts suits, and claims brought under the Eighth Amendment, Fourteenth Amendment, and civil rights statutes.³²³ Scholars and others have not, however, rigorously analyzed the actual applicability of these remedies to inmate victims of sexual violence. As our discussion uncovers, the “ideal victimhood” discourse precludes victims from seeking justice within prison. Thus, civil remedies operate as an essential forum for these victims to have a voice and to force change within the system. One woman who participated in a successful class action lawsuit expressed: “Participating in the case made me and so many others feel safe. Things have changed around here and I feel like I can turn my life around . . .”³²⁴ To allow victims in prison the best chance of finding justice there must be both a recognition and rejection of rape myths as relates to what makes a victim “ideal” as well as making available the option of seeking justice outside the prison through civil causes of action.

CONCLUSION

In recent months, the mainstream news media has brought the fundamentally flawed state of the American prison system to the forefront of our collective

318. Bitton, *supra* note 310, at 130–31.

319. *Id.*

320. Shuman, *supra* note 310, at 743 (“The goals of tort law have been articulated in numerous ways that share two common, conjunctive elements—deterrence and compensation.”).

321. See ROBBENOLT & HANS, *supra* note 310, at 140.

322. Brenda V. Smith, Professor, Presentation at the Nat’l PREA Res. Ctr. Regional Training: Legal Liability for Sexual Abuse of Individuals Under Custodial Supervision, (Dec. 2012), https://www.wcl.american.edu/endsilence/documents/Module10_LegalLiabilityFINAL.pdf.

323. *Id.*

324. *Protecting Prisoners from Sexual Abuse*, COLUM. LEGAL SERVS., <http://www.columbialegal.org/protecting-prisoners-sexual-abuse> (last visited Feb. 21, 2016) (quoting a CLS Client).

consciousness. President Obama made history as the first sitting President to tour a federal prison in the summer of 2015.³²⁵ He subsequently called for sweeping reforms that address mass incarceration for non-violent offenses, sentencing guidelines imposing mandatory minimums, widespread and ongoing use of solitary confinement, and mental health issues that plague a large percentage of inmates.³²⁶ Even with this increased attention, however, the pervasive sexual victimization perpetrated against female inmates goes relatively unnoticed.

Despite the omission of sexual victimization from the national conversation, our research is, in many ways, occurring at an ideal time, against this backdrop of increased interest in prison life. When Deborah La Belle brilliantly litigated the *Neal* case, initially filed in 1996, the country was perhaps not ready to grapple with the troubling reality that was occurring behind bars. However, her work and that of her legal team started to change the landscape for incarcerated women, and they continue to make a difference for a population who is almost by definition denied access to justice. Access to the data from the *Neal* class action lawsuit has enabled our interdisciplinary team of academic partners to explore important questions like the impact of civil litigation on women who were sexually victimized while in prison, as well as untangling and developing an understanding of the complexities of reporting such victimization during incarceration. Our project is an example of the importance of and value in developing strategic partnerships across disciplines and among stakeholders to change the terrifying landscape of sexual victimization that characterizes our prison system. Lawyers, social scientists, activists, prisoners, victim advocates, academics, legislators, and others must continue to work together to effect real social change and eliminate bars to justice for incarcerated women who are victims of sexual violence.

325. Peter Baker, *President Visits Federal Prison*, N.Y. TIMES (July 17, 2015), http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html?_r=0.

326. NY Times Editorial Board, *supra* note 12.

