Developments in Policy Article

Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret

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"Jane," a female inmate in her early twenties, has a story not dissimilar to that of countless inmates within the American prison system. Serving time for petty larceny and prostitution at the Woman's House of Detention in New York City, she experienced the gross atrocities of life in a correctional facility. She describes the guards in her prison[1] as relentless sexual abusers, wielding the powerful weapon of their authoritative positions to take advantage of any inmate they desired. The guards, male and female alike, forced sexual relationships upon the female inmates and offered special privileges for inmates in return for coerced sexual favors.

As the guard's sexual victim, "Jane" was repeatedly violated. Now, years after her release from prison, she speaks in public of the ubiquitous terror of sexual violence in correctional facilities. She finds that "[p]eople are stunned when they learned what happened to me . . . that made me a violent, dangerous person. But it's simple—violence means your survival inside. . . . You're living in a violent atmosphere there . . . ."[2] The psychological and emotional injuries suffered as a result of sexual assaults by prison staff as well as by other prisoners are often overlooked by authorities while inmates are still inside the prison walls. The scars such trauma leaves behind dramatically alter the lives of scores of women and men, and, once outside prison, they can also negatively affect the public at-large.

The unfortunate reality of Jane's story is that it continues to be told in many prisons throughout the United States. Brought before the federal

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1. The authors of this text are using the terms "prison" and "correctional facility" interchangeably throughout this text. However, we recognize that typically a "prison" is a place for post-conviction confinement only, whereas jails and houses of correction typically hold pre-trial detainees and those serving very short sentences.

2. CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT, 119 (1974).

courts, cases from New Mexico[3] to South Dakota,[4] from Delaware[5] to Texas[6] illustrate the tragic consequences of rape and sexual assault on inmates. This situation is bleaker in some correctional facilities, where the prison environment can be more like a state of sexual chaos than an institution of social order and rehabilitation.[7] In facilities such as these, prison rape is a subject of which no one speaks. Raped male prisoners often will not discuss it for fear of having their manhood questioned, while raped female prisoners often want to avoid the embarrassment of "sharing the highly intimate, sexual details of their rape with [primarily] male investigators."[8]

In many American prisons, rape and sexual misconduct are often ignored by prison administrators. The intricate web of sexual favors and violence against inmates pervades the entire prison system, while the basic human rights guaranteed by the Constitution are seemingly disregarded. The Eighth Amendment's prohibition against cruel and unusual punishment is a constitutional protection deeply rooted in our legal tradition. Yet, as we embark upon a new millennium, the state of affairs within the prison system suggests that this protection is not taken as seriously as it deserves to be taken. Both federal and state courts have decided that sexual harassment, sexual assault, and rape fall within the rubric of cruel and unusual punishment.[9] Nevertheless, the reasoning of the judiciary has done very little to mitigate the widespread legal and personal repercussions of America's most open secret.

Because the evolutionary status of a society perhaps may be best evaluated by its treatment of its prisoners,[10] the chaotic scenarios unfold-

3. *See* Giron v. Corrections Corp. of Am., 14 F. Supp. 2d 1252 (D.N.M. 1998), *aff'd in part, rev'd in part*, No. 98-2231, 1999 U.S. App. LEXIS 21646 (10th Cir. Sept. 10, 1999).

4. *See* Webb v. Lawrence County, 950 F. Supp. 960 (W.D.S.D. 1996), *aff'd*, 144 F.3d 1131 (8th Cir. 1998). For a description, see *Women Prisoners v. District of Columbia*, 877 F. Supp. 634, 639-42 (D.D.C. 1994).

5. *See* Carrigan v. Delaware, 957 F. Supp. 1376 (D. Del. 1997).

6. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd*, 178 F.3d 385 (5th Cir. 1999), *reh'g denied*, No. 98-20233, 1999 U.S. App. LEXIS 22034 (5th Cir. Aug. 24, 1999).

7. *See, e.g.*, *Women Prisoners*, 877 F. Supp. at 639-42 (describing, in detail, the state of District of Columbia women's prisons).

8. WEISS & FRIAR, *supra* note 2 (1974).

9. For an elaboration of the reasoning and holdings of the federal courts in this area, see text below and accompanying notes 124-129.

10. This is a careful paraphrasing of Chief Justice Earl Warren's statement in *Trop v. Dulles*, 356 U.S. 86, 101 (1958): "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Upon analyzing the historical basis for the Amendment, the Court favored a dynamic interpretation of cruel and unusual punishment because "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100.

For a richer discussion of the constitutional obligations owed to prison inmates, see generally Lynn M. Burley, *History Repeats Itself in the Resurrection of Prison Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 L. & INEQ. J. 127 (1997).

ing in a number of American prisons compels us to ask: How can a nation of such broad democratic principles and Constitutional protections permit rape and rampant sexual misconduct to continue unabated in its correctional systems? How do we resolve this problem? The answers to these questions will not come easily, and they certainly will not be answered in one article. However, an analysis of legal doctrine that precludes the expansion of legal rights for sexually abused inmates may serve as an important step toward the resolution of these queries.

This Article will articulate several of the shortcomings of current legal doctrine on the issue of rape and sexual misconduct in prison, focusing especially on *Farmer v. Brennan*,[11] the bedrock Supreme Court case on this topic. Specifically, this Article will discuss the inflexibility of the Court's adherence to its "deliberate indifference" and qualified immunity standards for prison officials. Because a modification of the case law is not the only manner in which prison reform can be effectuated, this Article will also provide several legislative proposals. Based on various successful reform projects, these proposals and analysis are proffered in an effort to begin the debate on improving the protection of prison inmates against sexual predators.

I. EMPIRICAL EVIDENCE: WHAT IS THE EXTENT OF THE PROBLEM?

A. Male Inmate Rape

For many of the almost two million men behind bars,[12] prison means more than just a loss of physical liberty. It is also an acute violation of their physical autonomy. Each year, thousands of men are forcibly raped and/or subjected to other sexual misconduct while confined in prisons. Though the horrors of rape in prison have become a part of the public's collective conscience,[13] only recently have some academic researchers devoted considerable attention to this problem.[14] Law- and public policymakers continue to respond sluggishly. Perhaps due to the historically

11. 511 U.S. 825 (1994).

12. At the end of 1998, the Bureau of Justice Statistics estimated that more than 1,825,000 U.S. residents were either in jail or in prison. *See* Allen J. Beck & Christopher J. Mumola, U.S. DEP'T OF JUSTICE, BULLETIN NCJ 175687, PRISONERS IN 1998, at 1 (1999). A small percentage of these were women. *See id.* at 5, tbl. 6.

13. *See, e.g.*, THE SHAWSHANK REDEMPTION (Columbia-TriStar 1994).

14. *Compare* WEISS & FRIAR, *supra* note 8, at 10 (commenting on the dearth of research and attention granted to rape in prison), and Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. OF SEX RES. 67, 67 (1996) (calling the absence of systematic research on prison rape "conspicuous"), *with* Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. OF THE SOC. OF L. 135, 135-38 (1992) (discussing the recent, groundbreaking studies of sexual victimization in prison settings).

scant attention to this subject, no consensus exists on the extent of rape of male prison inmates.

1. Conflicting Studies

One of the most influential recent studies of male prison rape used anonymous surveys of inmates in one Midwest state prison. This study, by Cindy Struckman-Johnson, reported that 22% of male inmates had been coerced or persuaded into some form of sexual contact in prison, sometimes by guards.[15] A little more than half of those inmates were forced or persuaded into having actual intercourse (13% of the total male inmate population).[16] The study also found that throughout their time in custody, many inmates were subjected to multiple counts of sexual coercion. On average, those male inmates who had been victimized at least once were at a significant risk of repeat violation (this particular study reported an average of nine non-consensual incidents of sexual contact per victim).[17]

The Struckman-Johnson study is a reliable measure of the extent of male prison rape for several reasons. First, its results are similar to the findings in two other contemporary studies. Don Lockwood's 1986 study of New York state prison inmates revealed that 22% of these maximum-security prisoners had been the victims of attempts to coerce them into a sexual act, compared to 23% in the Struckman-Johnson study.[18] Further, the 14% sexual assault rate documented by Wayne S. Wooden and Jay Parker in their 1982 study is similar to the Struckman-Johnson rate of 12% for forced penetration.[19]

It is important to mention that there are several contradictory reports as well. For example, a recent study of sexual activity among male Delaware inmates found the prevalence of forced sexual contact to be much lower. No inmates in Christine Saum's anonymous survey sample of 101 inmates reported having been raped in 1993, the year prior to the survey.[20] Only five participants in the survey admitted that they had even been victims of attempted rape.[21] Other studies also characterized forced

15. *See* Struckman-Johnson et al., *supra* note 14, at 71. Prison guards perpetrated one-fifth (18%) of the victimizations. *See id.* at 71 tbl.4.

16. *See id.* at 71.

17. *See id.* at 75. Half the inmates, however, had three or fewer such incidents.

18. *See* DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 18 (1980). Only one inmate in Lockwood's sample reported actually being coerced into sex. *See id.* Lockwood based these rates on his study of inmates in two New York State prisons, Coxsackie and Attica. *See id.* at 17.

19. *See* WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS 18 (1982).

20. *See* Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 PRISON J. 413, 425 (1995).

21. *See id.*

sexual contact among male inmates as "low,"[22] "not . . . frequent,"[23] and "[one percent]."[24] Further, different studies simply employ different measurements of what constitutes rape, from a broad definition including any unwanted sexual contact (the Struckman-Johnson study),[25] to a more limited definition including only unwanted oral or anal sex (the Saum study).[26] Some prison rape experts argue that the prison culture is too coercive to consider any inmate sexual contact to be consensual; thus, these experts define rape as *any* sex, "consensual" or not.[27]

Second, prison rape experts have a low opinion of the reliability of official prison records on inmate rape. One critical comparative study found that for the 2,000 sexual incidents that were estimated to have occurred in the Philadelphia prison system, only 156 were documented, 96 were reported, 64 were listed in prison records, and 40 actually resulted in internal disciplinary actions taken against the offenders.[28]

Third, the social pressures among inmates themselves make it very difficult to get reliable self-reports of sexual misconduct and rape.[29] Social stigma attached to being a rape victim and fear of violent consequences for "ratting on," or naming, assailants keep many inmates from reporting honestly on surveys.[30] In addition, variability in the sample composition of different studies makes the numbers difficult to compare. For example, the interviewers for the Saum study surveyed inmates in a medium-security setting who were currently in a drug treatment program, and admitted that the different prison conditions may have affected the

22. LOCKWOOD, *supra* note 18, at 18.

23. C. Scott Moss et al., *Sexual Assault in a Prison*, 44 PSYCHOL. REP. 823, 823 (1979) ("The fact that only 12 of 1100 inmates were identified by staff as having sexually assaulted other inmates over a 12-month period suggests that sexual assault may not be a frequent problem in federal prisons.").

24. Peter L. Nacci & Thomas R. Kane, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, 47 FED. PROBATION 31, 31 (1983). Nacci and Kane found just one of the 330 sample members was forced to have sex and two (0.6%) were forced to perform an unwanted sex act in prison. These categories are exclusive, allowing the inference that 1% were forced to have oral or anal sex. *See id.* at 35 tbl.1. Nacci and Kane found that 9% were sexual "targets," meaning that they had been forced or someone attempted to force them to have sex against their will. *See id.*

25. *See* Struckman-Johnson et al., *supra* note 14, at 71.

26. *See* Saum et al., *supra* note 20, at 420.

27. *See* H. Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers: Attitudes Toward Rape in Prison*, 69 PRISON J. 39, 56 (1989).

28. *See* Alan J. Davis, *Sexual Assaults in Philadelphia Prison System and Sheriff's Vans*, 6 TRANS-ACTION 8, 13 (1968).

29. *See* Saum et al., *supra* note 20, at 418.

30. Saum's study tried to mitigate as many of these factors as possible. She anonymously surveyed and asked inmates to discuss their perceptions of and experiences with sex and sexual assault in a prison setting that they had already left; thus they should not have had to fear repercussions from fellow inmates for naming their assailants. *See* Saum et al., *supra* note 20, at 419. However, the social stigma against admitting rape may have prevented some inmates from being honest. *See id.* at 418.

prevalence of rape.[31]

It is important to highlight the disparity in these figures to help illustrate some of the difficulties of addressing the problem of male inmate rape. We have chosen to rely most heavily on the Struckman-Johnson study (and other studies that have similar findings), because it is well-regarded by most prison rape experts.[32] However, even if the prevalence of male inmate rape is lower than Stuckman-Johnson proposes, it is still a terrible evil that is well worth addressing.

2. *Conflicting Themes*

Another considerable difficulty that arises when addressing the problem of male inmate rape is that of accurately targeting the source of the problem. Researchers have discussed the role that power and status play in prison rape, and many of them find it reasonable to expect that maximum-security facilities, housing more aggressive inmates, will have higher rates of sexual coercion than lower-security prisons. The Wooden and Parker study, for instance, posits that the status hierarchy in prison feeds on aggressive behavior. Sexual coercion, they argue, is a tool used to maintain position in that status hierarchy.[33] Prison rape expert Robert Dumond has proposed that the prison inmate hierarchy that exists is rooted in "sociosexual" status.[34] At the top of this hierarchy are the most aggressive inmates; at the bottom are passive inmates, often exhibiting "feminine" traits.[35] Thus, the greater the aggressiveness of inmates within a prison facility, or the more extreme behavior needed to rise to the top of the hierarchy, the more sex will be used in the power play.

The Wooden and Parker analysis, on the other hand, explains hierarchical behavior of male inmates with two theories of prison behavioral patterns. The first theory, called the "deprivation model," posits that the nature of the prison environment molds behavior, and that inmates must adapt their behavior to the kind of coercive institution that prisons represent.[36] The second, called the "importation model," theorizes that the in-

31. *See id.*

32. *See* Interview with Robert Dumond, Licensed Mental Health Clinician, Massachusetts Department of Correction, in New Haven, Conn. (Apr. 28, 1999) (on file with YALE L. & POL'Y REV.).

33. *See* WOODEN & PARKER, *supra* note 19, at 24 ("[S]ex in a men's prison is used by the aggressive convicts as a means of control, intimidation, and manipulation.").

34. Dumond has based his proposal upon several studies of prison dynamics, including the Wooden and Parker study. *See* Dumond, *supra* note 14, at 139.

35. *See* Dumond, *supra* note 14, at 139 tbl.2.

36. *See* Charles Thomas, *Theoretical Perspectives on Prisonization: A Comparison of the Importation and Deprivation Models*, 68 J. CRIM. L. & CRIMINOLOGY 135, 136-37 (1977).

mates bring behavioral or sexual patterns into the prison.[37] Instead of factors endemic to the prison institution itself, the codes of behavior that rule those individuals who become inmates shape prison behavior. The Wooden and Parker study asserts that, in fact, both of these processes can help explain the prison hierarchy.[38] The prison experience heightens aggressive tendencies and creates a hierarchy where the strong control the weak; also, the codes of masculinity that dominate particular demographic groups, such as street gangs, often equate power with aggressive masculinity and machismo.[39] Thus, these two sources help explain a prison hierarchy in which aggressive sexual behavior is understood as "powerful."

3. Ameliorative Measures

A few federal legal measures have addressed the horrors of male inmate rape in prison. In 1986, Congress passed legislation that expanded the definition of rape in federal criminal statutes to include the rape of men, and expanded the jurisdictional scope of the law to include all inmates in federal detention.[40] In 1997, Representative Sheila Jackson-Lee sponsored and introduced the Juvenile Rape in Prison Protection Act into the House. This bill would have amended the federal criminal code to require a sentence of life in prison for anyone who committed aggravated sexual abuse upon a federal juvenile prisoner.[41]

Other legislative measures have included provisions that would change conditions surrounding male inmate rape, even if not directly targeted at the problem. For example, Senator Jesse Helms introduced a version of the AIDS Control Act into numerous legislative sessions.[42] It included mandatory HIV testing of prisoners as one of its provisions.[43] In part, Senator Helms argued for this provision because of the prevalence of sexual assault in prisons.[44] The evidence clearly indicates that the presence of AIDS in prisons only makes the threat of unwanted sexual contact more potent. For example, although the percentage of inmates with a confirmed HIV infection did not grow in the early part of the 1990s, the prison AIDS rate was more than six times that of the general population.

37. *See id.* at 137.

38. *See* WOODEN & PARKER, *supra* note 19, at 44.

39. *See id.* at 20-24, 43-45.

40. *See* The Sexual Abuse Act of 1986, 18 U.S.C. § 2241 (1994); *see also* 132 CONG. REC. H2598 (daily ed. May 12, 1986) (statements of Reps. Bryant and Conyers).

41. *See* H.R. 1898, 105th Cong. (1997).

42. *See* S. 42, 103d Cong. (1993); S. 59, 103d Cong. (1993); S. 185, 102d Cong. (1991); S. 70, 101st Cong. (1989).

43. *See* S. 42 § 14; S. 59 § 14; S. 185 §14; S. 70 § 14.

44. *See* 137 CONG. REC. S878, S880-81 (daily ed. Jan. 3, 1991) (statement of Sen. Helms).

Further, between 1991 and 1995, AIDS was responsible for one in three inmate deaths.[45]

Prisoners also have used the law on their own behalf, suing prison officials and guards for violating their constitutional rights; however, many of these efforts have been unsuccessful. In 1999, Judge Justice of Texas declared the Texas prison system unconstitutional in *Ruiz v. Johnson*, partly because the prison system was an "underworld in which rapes, beatings, and servitude are the currency of power."[46] This decision, however, was reversed by the Court of Appeals. In *Webb v. Lawrence County*, Douglas Webb, a 5'4", 120-pound male alleged that he was placed in a cell with a maximum-security prisoner imprisoned for rape. The cellmate forced Webb to have oral and anal sex with him, under threat of death. Webb then sued the county and its officials for violating his civil rights. The trial court upheld a qualified immunity defense by the officials and granted the defendants' motion for summary judgment, however, because Webb failed to provide enough evidence that the defendants had a reason to suspect that Webb would be in danger from other inmates.[47] Even though these decisions serve a good purpose by helping protect prison officials from being sued for things they cannot prevent with 100% reliability, the negative consequence of these decisions is that they also may limit the remedies available to sexually victimized inmates.

B. Female Inmate Rape

Contrary to what may be popular thought, the horrors of prison rape are not solely limited to male inmates. Like their male counterparts, many female inmates pay penalties for their crimes that far exceed their sentences. Unlike male prison rape, though, which usually stems from abuse at the hands of other inmates, sexual abuse of female inmates tends to take a different form. In some ways, the sexual abuse experienced by female prisoners is more repugnant from a legal and policy standpoint, as the abusers are often actors of the state, usually male prison officials.

In recent years, the number of women in prisons has burgeoned dramatically. In 1980, only approximately 13,000 women were incarcerated,[48]

45. *See* LAURA MARUSCHAK, U.S. DEP'T OF JUSTICE BULLETIN NCJ-164260, HIV IN PRISONS AND JAILS, 1995, at 1 (1997).

46. Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd* 178 F.3d 385 (5th Cir. 1999), *reh'g denied*, 1999 U.S. App. LEXIS 22034 (5th Cir. Aug. 24, 1999).

47. *See* Webb v. Lawrence County, 950 F. Supp. 960, 967 (W.D.S.D. 1996), *aff'd*, 144 F.3d 1131 (8th Cir. 1998).

48. *See* Lawrence A. Greenfeld & Stephanie Minor-Harper, *Women in Prison*, U.S. Dep't of Justice, Mar. 1991 (last visited 11/9/99) <http://www.soci.niu.edu/~critcrim/prisons/wom93>.

while nearly 138,000 women were in jail and prison in 1998.[49] The prison guards who oversee these female inmates are predominantly male,[50] creating what some consider a highly sexualized and hostile environment that invites disaster.[51] Unfortunately, this presentiment of danger too often becomes a reality for many female inmates. A recent study of inmates in a Midwestern state prison system, for example, revealed that seven percent of female inmates reported an incident of sexual coercion.[52]

Sexual abuse takes various forms in American prisons. Allegations by female inmates of sexual abuse include reports of guards forcing sex on female inmates,[53] and of prison staff demanding sex in exchange for drugs, favors and promises of more lenient treatment.[54] Prison officials have also been accused of leering at female inmates while the inmates undress, take showers, and use the toilet.[55] Female inmates have also reported that guards improperly touch them while performing body searches.[56] Further allegations of abuse extend beyond prison walls. At the Women's Community Correctional Center in Oahu, Hawaii, for example, inmates charged that guards ran a prostitution ring at a nearby hotel and used female inmates as call girls.[57]

1. Increased Attention in Recent Years

Recently, the sexual abuse of female prisoners has attracted the public attention that such a serious issue deserves. The international commu-

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49. *See* AMNESTY INTERNATIONAL USA, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (Amnesty International 1999). The precise total of female prisoners, however, remains unclear. One report revealed that in 1998, there were 80,000 female inmates. *See Preview to Sunday's "Dateline NBC's" Report on Sexual Abuse of Female Inmates*, (NBC television broadcast, Nov. 1, 1998).

50. Seventy percent of guards in U.S. federal women's institutions are men. *See* AMNESTY INTERNATIONAL USA, *supra* note 49. Conversely, in Canada, 91% of guards in women's facilities are women. *See id.*

51. *See Honor Guard?: Women Who Suffer Sexual Abuse at the Hands of Guards While in Prison* (NBC television broadcast, Nov. 1, 1998) (interviewing Dorothy Thomas, of Human Rights Watch, who described the situation as "a highly sexualized, often very hostile environment in which all kinds of inappropriate sexual conduct [is] occurring and very [few] steps are being taken to do anything about it").

52. *See* Struckman-Johnson et al., *supra* note 14, at 71.

53. *See* 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 E1.

54. *See* Michael Meyer, *Coercing Sex Behind Bars*, NEWSWEEK, Nov. 9, 1992, at 76.

55. *See* AMNESTY INTERNATIONAL USA, *supra* note 49.

56. *See* California Prison Focus, Press Release, *California Prison Focus Exposes Sexual Abuse at Valley State Prison*, June 8, 1998 (last visited Apr. 18, 1999) <http://www.prisonactivist.org/news/6-98/sexual-abuse-at-valley-state.html>.

57. *See* Harrison, *supra* note 53, at E1 (reporting that guards at the Georgia Women's Correctional Institute would take female inmates off the grounds to serve as prostitutes); Meyer, *supra* note 54, at 76 (discussing a former inmate's allegation that guards rented rooms at the Pagoda Hotel in downtown Honolulu and used female inmates as call girls).

nity has come to acknowledge the severity of sexual abuse of inmates. Inmate rape is considered torturous according to the United Nations Convention Against Torture and the International Covenant on Civil and Political Rights, both of which the United States has ratified.[58]

In addition, various human rights watchdog groups have published reports exposing the horrors of life in female prisons. In December 1996, Human Rights Watch, a leader in the fight to end sexual abuse in prisons, released *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*. This report documented pervasive sexual harassment, sexual abuse and privacy violations by male guards against female inmates at eleven state prisons.[59] According to the report, "male officers have not only used actual or threatened physical force, but have also used their near total authority to provide or deny goods and privileges to female prisoners, to compel them to have sex or, in other cases, to reward them for having done so."[60] The report criticized the United States government's failure to conduct impartial investigations of the inmates' allegations of sexual abuse and its failure to protect the women who report these abuses, thereby leaving them vulnerable to retaliation. Further, the Human Rights Watch report also emphasized that our government is compelled to take steps to prevent this abuse, under both our own Constitution and international human rights treaties.[61] Human Rights Watch further proposed recommendations on how to address this problem more effectively to Congress, the Department of Justice, and the Executive Branch.[62]

Dissatisfied with the scant progress made after the release of *All Too Familiar*, Human Rights Watch conducted further research, publishing the follow-up report *Nowhere To Hide: Retaliation Against Women in Michigan State Prisons*.[63] Focusing on allegations of sexual abuse by female inmates, *Nowhere To Hide* documented widespread sexual abuse of female prison inmates, particularly exposing the acts of retaliation by prison guards in Michigan state prisons. Such retaliation occurs when a prison official harms an inmate in order to punish her for reporting abuse or to deter her from reporting abuse.[64] The report offered recommendations, this time both to the federal and Michigan governments to help rec-

58. *See* AMNESTY INTERNATIONAL USA, *supra* note 49.

59. *See* HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (last visited Oct. 21, 1999) <http://www.hrw.org/summaries/s.us96d.html>.

60. *Id.*

61. *See id.*

62. *See id.* These recommendations will be discussed in further detail in Part IV.

63. HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (Human Rights Watch 1998).

64. *See id.* (in Summary).

tify this problem.[65]

In March 1998, Amnesty International released *"Not Part of My Sentence:" Violations of the Human Rights of Women in Custody.*[66] a report which documented rampant violations of internationally recognized human rights of women incarcerated in the United States. While the report exposed a range of rights violations, it found particularly notable problems with sexual abuse, revealing unpunished rape and other sexual assaults committed by prison officials.[67] *"Not Part of My Sentence"* further exposed sexually improper actions by male prison officials toward female inmates, including: routinely conducting strip and pat searches, watching female inmates in showers, and monitoring female inmates by video.[68] Of equal concern, Amnesty found that in the rare occurrence when a prison official is found guilty,[69] he is often simply transferred to another facility rather than being fired.[70] While the report calls for enforcement of existing laws protecting women from sexual abuse, it also duly notes that, at the time of the 1998 report, twelve states still lacked laws prohibiting sexual contact between female inmates and prison staff.[71]

2. *Department of Justice Investigation*

The incidence of sexual abuse of female prisoners has also attracted the attention of the United States Department of Justice (DOJ). The DOJ began looking at Michigan's Crane and Scott correctional facilities in 1994, after receiving complaints about alleged misconduct by staff.[72] On March 10, 1997, the DOJ brought suit under the Civil Rights of Institutionalized Persons Act against the State of Michigan, alleging that the female inmates at those prisons were subjected to unlawful invasions of privacy and sexual assaults by guards.[73] The lawsuit sought a court order that would require Michigan's correctional facilities to protect female inmates from rape, sexual assaults and other improper sexual contact by

65. *See id.*

66. AMNESTY INTERNATIONAL USA, *supra* note 49.

67. *See id.* (in Overview).

68. *See id.* (in Overview).

69. In 1997, for example, the Department of Justice reported that only ten prison employees in the entire federal system were disciplined and only seven were prosecuted. *See id.* (in Factsheet #5: Sexual Abuse & Women in Prison).

70. *See id.*

71. *See id.* Those states without laws prohibiting sexual contact were Alabama, Kentucky, Massachusetts, Minnesota, Montana, Oregon, Nebraska, Utah, Vermont, Washington, West Virginia, and Wisconsin. *See id.*

72. *See* Department of Justice, *Michigan Women's Prisons Settle Allegations of Sexual Misconduct Under Justice Department Agreement*, FDCH Fed. Dep't & Agency Documents, May 25, 1999, at *2, *available in* LEXIS.

73. *See id.*

prison staff and to ensure that inmates and staff do not engage in sexual relations.[74]

On May 25, 1999, the suit settled, with an agreement reached between the Justice Department and the State of Michigan that should protect female inmates in Michigan prisons from sexual assaults and sexual harassment, and unnecessary invasions of privacy.[75] Under this settlement, the State of Michigan agreed to take measures to prevent opportunities for sexual misconduct by prison guards[76] and to strengthen investigative techniques, including requiring face-to-face interviews of both victims and suspects, and searching for past allegations of misconduct by suspects.[77] Moreover, pursuant to the agreement, an expert would tour the facilities both three and six months after the execution of the agreement, and if the facilities were not found to be in substantial compliance, the Justice Department would resume litigating its original complaint.[78]

3. *Individual Suits by Female Inmates*

Individual inmates who have been victims of sexual abuse have also taken action. On August 13, 1996, three female inmates alleged that they were sexually assaulted, beaten and "sold" by guards as sex slaves for male prisoners during their stay at an Alameda County, California federal penitentiary.[79] These inmates filed suit in the federal court for the Northern District of California, seeking damages and injunctive relief from the past and current officials of the Department of Justice, Bureau of Prisons ("BOP").[80] The parties agreed to mediate the case through the court's alternative dispute resolution program and reached an agreement

74. *See id.*

75. *See id.*

76. Under the agreement, the State of Michigan will:

> 1) institute a six-month moratorium on cross-gender pat-down searches on female inmates to determine the effectiveness of the policy; 2) prohibit male staff from being alone with female inmates in settings that are not clearly visible to other staff or inmates; 3) require male officers to announce their presence in any areas where inmates could be in a state of undress; 4) strengthen its pre-employment screening of correctional staff to include search for domestic violence history and revise its screening for non-correctional staff, so that those employees will undergo the same rigorous preemployment screening as correctional staff; 5) conduct background checks after every five years of an employee's service; 6) educate employees and inmates about reporting and prevention of sexual misconduct and unnecessary invasions of inmate privacy; and 7) hire a Special Administrator, who will be responsible for addressing female offender issues, including sexual misconduct and invasions of privacy, and will conduct random interviews with inmates.

Id. at **3-4.

77. *See id.* at *4.

78. *See id.*

79. *See* Dennis J. Opatrny, *3 Women Sue, Allege Sex Slavery in Prison; Warden, Guards at East Bay Facility Among the Accused*, SAN FRANCISCO EXAMINER, Sept. 29, 1996, at C1.

80. *See* Lucas v. White, No. C96-2906, 1999 WL 692340, at *1 (N.D. Cal. Apr. 14, 1999).

in February 1998.[81] The agreement requires the BOP to implement changes at federal prisons nationwide, including reforms to policies, procedures, and personnel training.[82] These reforms are aimed at reducing the risk to female prisoners of sexual assaults and harassment by correctional staff and male prisoners and at providing appropriate programming, counseling, and services to female prisoners who are victims of sexual assault.[83] Furthermore, the government agreed to monitor the effectiveness of these reforms.[84] Lastly, the defendants agreed to pay the plaintiffs $500,000.[85]

Another recent allegation of sexual abuse has attracted national headlines. A very well known female inmate, Amy Fisher,[86] brought a $220 million lawsuit against the upstate New York Albion Correctional Facility, alleging rape and abuse by state corrections officers.[87] While her claim appeared strong,[88] Fisher has recently decided to drop her claim.[89]

In 1995, the Tenth Circuit addressed the question of whether the actions of a prison guard violated a female inmate's rights to privacy and to be free of sexual intimidation in *Adkins v. Rodriguez*.[90] In this case, a jail deputy made comments to a female inmate about "her body, his own sexual prowess, and his sexual conquests."[91] He also entered her cell, stood over her bed, and commented, "[Y]ou have nice breasts."[92] The court noted that the inmate's claim was governed by the Eighth Amend-

81. *See id.* at *2.

82. *See id.*

83. *See id.* Specifically, these national reforms entailed:

> 1) establishment of a national training program to prevent the sexual assault of female prisoners; 2) provision of psychological and medical services for victims of sexual assault; 3) revision and amendment of the program statement for victims of sexual assault; and 4) adoption of measures to protect victim confidentiality.

84. *See id.* The BOP also agreed to reforms at the local level. These changes targeted the Federal Detention Center at Pleasonton, California, the penitentiary where the alleged abuse occurred. These reforms included: "1) discontinu[ing] [the] housing [of] women prisoners in the J-2 SHU where plaintiffs were housed; 2) establish[ing] a confidential mechanism for inmates to report sexual assaults; and 3) establish[ing] a specialized training program at FCI Dublin to prevent further sexual assaults." *Id.*

85. *See id.*

86. In 1992, Amy Fisher shot Mary Jo Buttafuocco, the wife of her then-lover Joey Buttafuocco. She was convicted for the shooting and was recently paroled after serving almost seven years in prison. *See, e.g.*, Arnold Braeske, *Amy's Better with Mary Jo—and Without Joey*, STAR-LEDGER, Sep. 24, 1999, at 1.

87. *See* Chau Lam, *Lawyer: DNA Tests Prove Rape / Says Prison Guard Assaulted Fisher*, NEWSDAY, Jun. 7, 1997, at A19.

88. *See id.* (establishing that DNA tests of stains on Fisher's underwear have supported her claim of sexual relations).

89. *See* Melanie Carroll, *Amy Fisher Talks with Larry King About Her Past and the Future*, ASSOCIATED PRESS, Sep. 22, 1999, at 1.

90. 59 F.3d 1034 (10th Cir. 1995).

91. *Id.* at 1035.

92. *Id.* at 1036.

ment, which serves as the "explicit textual source of constitutional protection" in the prison context.[93] Moreover, the court held that an Eighth Amendment violation in the prison context only occurs when the deprivation is "objectively, 'sufficiently serious,'" and when the prison official acts with "'deliberate indifference' to an inmate's health or safety."[94] While the court agreed that the deputy's actions were "outrageous and unacceptable," it still decided that the deputy's sexually inappropriate actions did not reach the level of an Eighth Amendment violation.[95]

II. EFFECTS OF PRISON RAPE

A. Harms to Prisoners

1. Psychological Harms

One of the most common psychological effects of sexual abuse in prison is rape trauma syndrome,[96] which most often results in a loss of self-esteem and an inability to trust others.[97] The 1994 study of a state prison in the Midwest conducted by Cindy Struckman-Johnson, found that nearly 80% of inmates who were pressured or forced to have sexual contact suffered significant emotional harms, half experienced depression, and one-third contemplated suicide.[98] Further, prison rape victims are seventeen times more likely to attempt suicide than prisoners who have not suffered such abuse.[99]

Anecdotal evidence reinforces the empirical findings that inmates who experience sexual abuse in prison face an increased risk of suicide. Three of the women involved in a lawsuit against the Michigan Department of Corrections for alleged sexual abuse by guards attempted suicide,[100] and a Florida inmate hanged herself from her cell door after writing to her sentencing judge and to her mother about sexual abuse by

93. *Id.* at 1037 (quoting Graham v. Connor, 490 U.S. 386, 195 (1989)) (internal quotations omitted).

94. *Id.* (quoting Farmer v. Brennan, 511 U.S. 825 (1994) (quoting Wilson v. Seiter, 501 U.S. 294-98, 302-03 (1991).

95. *Id.*

96. *See* Amicus Brief for Stop Prisoner Rape, Appendix, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247) (discussing rape trauma syndrome, as experienced in particular by male prison rape victims); Mary Dallao, *Fighting Prison Rape: How To Make Your Facility Safer*, 58 CORRECTIONS TODAY 100, 106 (1996);.

97. *See* HUMAN RIGHTS WATCH, *supra* note 59, at Summary.

98. *See* Struckman-Johnson et al., *supra* note 14, at 73.

99. *See* LOCKWOOD, *supra* note 18, at 18.

100. *See* HUMAN RIGHTS WATCH, *supra* note 59, at Section VI: The Chilling Effect of Retaliation.

prison guards.[101]

Prison rape also makes its victims become more prone to violence, as a study of male prisoners in New York revealed.[102] Even previously nonviolent prisoners often turn to violence after having been sexually assaulted.[103] This increased tendency toward violence and crime frequently comes in the form of aggression toward women and children.[104]

These effects are particularly pronounced for prisoners who experienced abuse prior to incarceration,[105] and prisoners are much more likely to have been the victims of abuse than the population at large. According to a recent Department of Justice study, 23-37% of female offenders and 6-14% of male offenders were sexually abused as children, compared with 12-17% of women in the general population and 5-8% of men.[106] Other studies of women prisoners have found much higher rates of abuse, with one study finding that 67% experienced abuse as children and another reporting that 88% experienced abuse either as children or as adults.[107]

2. *Physical Harm*

In addition to suffering psychological harms, inmates are often physically injured by prison rape and other forms of sexual assault. Sixteen percent of sexually assaulted male prisoners suffer physical injuries, according to the Struckman-Johnson study.[108] Prisoners who are raped also run a high risk of contracting HIV[109] and other sexually transmitted diseases.[110]

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101. *See* AMNESTY INTERNATIONAL USA, *supra* note 49, at Section V: Sexual Abuse.

102. *See* LOCKWOOD, *supra* note 18, at 100 (stating that "the experience of being a [prison rape] victim trains men *to raise* the level of violence they have been accustomed to employing.") (emphasis in original).

103. *See* Dallao, *supra* note 96, at 106.

104. *See* Jason Ziedenberg & Vincent Schiraldi, *The Risks Juveniles Face: Housing Juveniles in Adult Institutions Is Self-Destructive and Self-Defeating*, 60 CORRECTIONS TODAY 22 (1998).

105. *See* HUMAN RIGHTS WATCH, *supra* note 59, at Summary.

106. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999).

107. *See* HUMAN RIGHTS WATCH, *supra* note 59, at Summary (summarizing survey data). *See also Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Addendum: Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, U.N. Economic and Social Council, 55th Sess., Provisional Agenda Item 12(a), at ¶16, U.N. Doc. E/CN.4/1999/68/Add.2 (1999) (reporting that 85% of women in U.S. prisons have been physically or sexually abused at some point in their lives).

108. *See* Struckman-Johnson et al., *supra* note 14, at 74, tbl.7.

109. *See* Brief of Stop Prisoner Rape, Amicus Curiae In Support of Petitioner at Section C, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247) ("prisoner rape is usually perpetrated by multiple rapists, and anal rape commonly involves tearing of the rectal lining and bleeding, thus affording easy transmission of the HIV virus.").

110. *See* Dumond, *supra* note 14, at 146.

Female prisoners who are raped by male guards face the added risk of pregnancy. There is ample anecdotal evidence of these pregnancies. In Washington state, for example, several lawsuits have been brought by women who allege that they were raped and impregnated by prison guards.[111] Inmates in Travis County, Texas[112] and New Castle, Delaware[113] have also given birth to children allegedly fathered by guards during a sexual assault. Pregnancy can be difficult in the best of circumstances; pregnancy under highly-restrictive prison conditions is certainly worse. Inmates cannot easily obtain abortions if they choose to terminate a pregnancy. Added to this, of course, is the trauma that the expectant mother experiences knowing that her child was fathered by a rapist.

B. Retaliation Against Prisoners Who Report Sexual Abuse

Retaliation against prisoners who report sexual abuse is all too common and can sometimes result in prisoners having to serve longer terms. In Michigan, for example, researchers found that corrections officials retaliate against women prisoners who complain about sexual harassment or abuse by writing up disciplinary "tickets" for specious violations of prison rules or regulations. A guard will sometimes force a confrontation to occur in order to create a minor violation for which he can write a ticket. For example, a guard could refuse to give a female inmate permission to go to the bathroom, so that he can write her up for insubordination when she insists that she needs to go.[114] Another tactic is for a guard to ask a colleague to write up a ticket, whether for a false violation or for a minor one, so that the retaliation cannot be traced back to him.[115] A prisoner with several tickets may be punished in a number of ways, including a loss of "good time" accrued toward early release.[116]

Guards also threaten to retaliate against women prisoners who dare to report sexual abuse by denying them visitation rights with their children.[117] This can be devastating, not only for the women prisoners, but also for their children. More than two-thirds of all incarcerated women have at least one child under eighteen, and the majority of those women

111. *See* AMNESTY INTERNATIONAL USA, *supra* note 49, at Section V: Sexual Abuse.

112. *See Controversy in Texas over the Privatization of Prisons* (National Public Radio broadcast, September 13, 1999).

113. *See* Steven A. Holmes, *With More Women in Prison, Sexual Abuse by Guards Becomes Greater Concern*, N.Y. TIMES, Dec. 27, 1996, at A18.

114. *See* HUMAN RIGHTS WATCH, *supra* note 59, at Section III.

115. *See id.*

116. *See* HUMAN RIGHTS WATCH, *supra* note 59, at Section I.

117. *See* AMNESTY INTERNATIONAL USA, *supra* note 49, at Fact Sheet #5: Sexual Abuse & Women in Prison.

are single mothers.[118]

C. *Harms to Society*

Society at-large also pays a high price for the sexual assaults that occur behind the walls of American prisons. Each year, hundreds of prisoners are released, many of whom have been sexually abused while behind bars. As a result, many released prisoners carry with them the heavy baggage of psychological trauma and an increased propensity toward violence. One expert has described these released prisoners as "time bombs waiting to explode."[119] When they do "explode," prison sexual abuse claims yet more innocent victims, this time outside the prison walls.

Ours is currently a "correctional" system that puts people back on the streets who, rather than being prepared to make a fresh start in life, are so traumatized and enraged by sexual abuse that they perpetrate violence on the people around them. Even from a purely economic perspective, it is a scandalous waste of taxpayer funds to pay the high costs of incarcerating people, when incarceration only makes them more likely to commit acts of violence when they are finally released.

III. RAPE AND SEXUAL MISCONDUCT IN PRISON: CONTROLLING LEGAL PRECEDENT

The controlling Supreme Court ruling in the area of rape and sexual misconduct in prisons is the oft-cited *Farmer v. Brennan*.[120] Plaintiff Dee Farmer, a transsexual, sued various federal prison officials, claiming that they showed deliberate indifference to his safety, in violation of the Eighth Amendment, by placing him within the general male prison population.[121] Farmer was beaten and raped within his first two weeks in the United States Penitentiary in Indiana.[122] Several days later, after reporting his rape, he was placed in "segregation" by the prison officials.[123]

Farmer argued that the officials should never have placed him in the general population of the prison, given their knowledge that the facility had a history of sexual violence.[124] He further argued that prison officials knew that as a transsexual, he would be particularly vulnerable to sexual attack by the inmates.[125] He concluded that, all together, the prison offi-

118. *See* HUMAN RIGHTS WATCH, *supra* note 59, at Summary.
119. Dumond, *supra* note 14, at 147.
120. 511 U.S. 825 (1994).
121. *See id.* at 828.
122. *See id.* at 830.
123. *See id.*
124. *See id.* at 830-31.
125. *See id.*

cials' failure to protect his safety amounted to deliberate indifference, a violation of the Eighth Amendment.[126]

The issue on appeal was the correct legal standard for defining deliberate indifference.[127] The lower courts of appeals were split; some required an objective standard of recklessness, while others construed indifference as a subjective measure of an official's state of mind; whether he knew or should have known of the danger to the inmate.[128] The Supreme Court in *Farmer* first explained the two-part test for plaintiffs to establish an Eighth Amendment violation: the injury itself must be "objectively, and sufficiently serious,"[129] and the prison official must have "a sufficiently culpable state of mind," defined as "'deliberate indifference' to inmate health or safety."[130]

The Court then expressly rejected an objective test for deliberate indifference, with a majority holding that an official can only be liable if the official "knows of and disregards an excessive risk to inmate health or safety."[131] Further, the Court decided that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[132] This subjective standard substantially raised the bar of proof for plaintiffs in these cases.

A. Federal Courts' Application of the Farmer *Test*

Applying the *Farmer* test in subsequent litigation, federal courts have, for the most part, severely limited the liability of prison officials for permitting sexual misconduct within their correctional facilities.[133] For victims of rape or sexual misconduct by prison guards, the difficulty lies in proving that prison administrators were aware of the risk and ignored it. The plaintiff in *Giron v. Corrections Corporation of America*[134] asserted that the design of the correctional facility created a risk of male guards' intrusion into the women's quarters,[135] and that the administrators were

126. *See id.*
127. *See id.* at 832.
128. *See id.*
129. *Id.* at 834 (citations omitted).
130. *Id.*
131. *Id.* at 837.
132. *Id.*
133. *See, e.g.*, Barney v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998); Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997); Giron v. Corrections Corp. of America, 14 F. Supp. 2d 1252, 1259 (D.N.M. 1998); Carrigan v. Delaware, 957 F. Supp. 1376, 1382 (D. Del. 1997); *see also* Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997).
134. 14 F. Supp. 2d 1225 (D.N.M. 1988).
135. *See id.* at 1257.

aware of this design problem.[136] The district court refused to accept this argument, holding that there was no obvious danger to the women and that even if these circumstances "constituted objectively inhumane prison conditions (which they do not) without evidence of the sufficiently culpable state of mind . . . there can be no liability under the Eighth Amendment."[137]

In *Carrigan v. Delaware*, even when an official was aware of incidents of sexual harassment within his prison, that awareness was not sufficient to constitute "deliberate indifference to a substantial risk of serious harm."[138] The rationale that the court adopted was that because this was the first *rape* that the specific plaintiff had brought to the attention of the official, there was "no display of deliberate indifference."[139] Therefore, as interpreted by the circuit courts, *Farmer* has significantly limited the circumstances in which judges can hold prison officials accountable.

The doctrine of qualified immunity also limits the liability of prison administrators. Qualified immunity balances the constitutional rights of inmates against a reasonable deference to prison administrators' policy determinations within their particular facilities.[140] In *Carrigan*, the court ruled that the defendants enjoyed qualified immunity under the *Harlow-Anderson*[141] formula. Under *Harlow-Anderson*, defendants have qualified immunity unless the plaintiffs: 1) state a claim that their constitutional rights have been violated; 2) demonstrate that the rights and law at issue are clearly established; and 3) show that a reasonably competent official should have known that his or her conduct was unlawful.[142]

The *Carrigan* court ruled that the administrator was entitled to qualified immunity because the law was not clearly established in the area of sexual assault by a prison guard, rape counseling, training policies, or procedures the prison officials must follow to avoid incidents.[143] Consistent with this holding, plaintiffs must further prove that the law making defendants' conduct unconstitutional is clearly established, thereby in-

136. *See Giron*, 14 F. Supp. 2d at 1258-59. On appeal, the Tenth Circuit affirmed most of the district court's findings except for one. *See* Giron v. Corrections Corp. of America, No. 98-2231, 1999 U.S. App. LEXIS 21646, at **22-23 (10th Cir. Sept. 10, 1999) (reversing and remanding the lower court's holding that plaintiffs must show "malicious intent" by the prison guard in addition to a proof of sexual coercion).

137. *Giron*, 14 F. Supp. 2d at 1259.

138. *Carrigan*, 957 F. Supp. at 1382.

139. *Id.*

140. *See id.*

141. *See* Harlow v. Fitzgerald, 456 U.S. 800, 818 (1982); Anderson v. Creighton, 483 U.S. 635, 639 (1987).

142. *See id.* at 1387.

143. *See id.* at 1388.

creasing the difficulty of holding officials responsible.[144]

B. Possible Legal Remedies

The majority of prison rape cases are litigated in the federal courts. When claims are brought against state prison systems, inmates base their claims of violations on section 1983 of Title 42 of the United States Code.[145] Section 1983 is available to all individuals, both male and female, suffering any violation of constitutional rights while detained or incarcerated in state prisons.[146] The courts have held prison administrators liable under section 1983, when prison guards inflict injury on inmates while executing a "government custom" (that is, when guards execute procedures in a way that is likely to result in the violation of constitutional rights, due to inadequate training).[147]

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144. Obstacles to individual plaintiffs' success have also come from the legislative arena. The Prison Litigation Reform Act of 1995 (PLRA) governs all civil litigation, whether in a federal or state court, with respect to federal, state, or local conditions, that are alleged to violate a federal right. *See* 18 U.S.C. § 3626a(1)(A) (1999). The PLRA specifically modified 42 U.S.C. § 1997e(a) to require plaintiffs to exhaust their available administrative grievances before litigation. The section provides that: "no action shall be brought with respect to prison conditions under § 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *Id.* Consequently, plaintiffs have routinely lost on summary judgment because they have not exhausted these remedies. It is important to note, however, that many courts have held that excessive force/sexual assault cases are not covered by the PLRA.

145. This section stipulates:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983 (1999). Under § 1983, punitive damages may be awarded against prison administrators. *See* Smith v. Wade, 461 U.S. 30 (1983) (involving a prison inmate allowed to be severely beaten while prison guard watched).

146. *See generally* Women Prisoners of District of Columbia Department of Corrections v. District of Columbia, 877 F. Supp. 634, 664-66 (D.D.C. 1994) (*Women Prisoners I*) (discussing the rights of inmates under § 1983 to prevent violations of the Eighth Amendment), *stay denied and motion to modify granted in part*, 899 F. Supp. 659 (D.D.C. 1995) (*Women Prisoners II*), vacated in part, remanded, 93 F.3d 910 (D.C. Cir. 1996) (*Women Prisoners III*). However, a number of recent § 1983 cases brought by inmates alleging sexual impropriety on differing levels have not been sustained by the lower courts. *See* Scott v. Moore, 114 F.3d 51, 52 (5th Cir. 1997) (denying a female detainee's § 1983 claim after asserting that the sexual attacks she suffered were due to an outnumbering of male guards to female guards); Jones v. Oldt, 30 F. Supp. 2d 491 (E.D. Pa. 1998) (holding that a male prisoner did not have a § 1983 claim when a prison official "grinded" his genitals on his body and made lewd sexual comments); Giron v. Corrections Corp. of America, 14 F. Supp. 2d 1252-54 (D.N.M. 1998) (finding a lack of deliberate indifference toward a female inmate who had been raped by a "control officer," thereby eliminating her § 1983 claim); Fisher v. Goord, 981 F. Supp. 140, 174 (W.D.N.Y. 1997) (stating that "on her claims of rape under § 1983, Fisher has the burden of showing lack of consent" and that she failed to do so); Carrigan v. Delaware, 957 F. Supp. 1376, 1382 (D. Del. 1997) (arguing that the plaintiff failed to display deliberate indifference, therefore denying her Eighth and Fourteenth Amendment claims under § 1983).

147. *See Women Prisoners I*, 877 F. Supp. at 666.

The case law for women prisoners bringing claims of prisoner rape include both these *Farmer*-derived standards,[148] as well as other, more novel, causes of action. In *Boddie v. Schneider*,[149] the Second Circuit held that sexual abuse constitutes cruel and unusual punishment in violation of the Eighth Amendment. The *Boddie* court reasoned, "[L]ike the rape of an inmate by another inmate, sexual abuse of a prisoner by a corrections officer has no legitimate penological purpose, and is 'simply not part of the penalty that criminal offenders pay for their offenses against society.'"[150] Given this analysis, sexual abuse by prison staff can pass both prongs of the *Farmer* test, as the sexual abuse can be "objectively sufficiently serious" and a prison official has "sufficiently culpable state of mind." Thus, the court concluded, allegations of sexual abuse as a result are "recognized as Eighth Amendment claims."[151]

It is without question that prison conditions such as sexual harassment are also subject to Eighth Amendment scrutiny.[152] Sexual harassment, under the objective standard, amounts to "a wanton and unnecessary infliction of pain," since "rape, coerced sodomy, [and] unsolicited touching . . . by prison employees are simply not part of the penalty that criminal offenders pay for their offenses against society."[153] Female inmates, under section 1983, have a specific claim under the Eighth Amendment should prison guards violate their bodily integrity.[154]

C. *Successful claims*

Women's claims have differed from the ones brought by male plaintiffs in one important respect—women tend to make privacy claims in

148. *See supra* notes 129-43 and accompanying text.

149. 105 F.3d 857 (2d Cir. 1997).

150. *Id.* at 861 (quoting *Farmer*, 114 S. Ct. at 1977).

151. *Id.* at 860-61.

152. *See, e.g., Farmer*, 511 U.S. at 832 (requiring prison officials to "provide humane conditions of confinement," which includes taking "reasonable measures to guarantee the safety of inmates"); Helling v. McKinney, 509 U.S. 25 (1993).

153. *Women Prisoners I*, 877 F. Supp. at 664 n.38 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

154. One other possible remedy stems from the Violence Against Women Act ("the VAWA"), which provides a federal civil cause of action to protect women from violent acts of gender animus. The cause of action pursuant to the VAWA is analogous to that of § 1983, and one court has found the VAWA applies to instances of sexual misconduct by prison guards. *See* Peddle v. Sawyer, No. 3:98cv2364 (WWE) DW, 1999 U.S. Dist. LEXIS 12778, at*17-20 (D. Conn. July 21, 1999). Although the court dismissed one of the plaintiff inmate's claims, it accepted her VAWA argument, finding that she had "established that the defendants created a policy or custom of tolerating violations of inmates' rights." *Id.* at *18-*20. This could all be rendered moot, however, as the ultimate viability of the VAWA on federalism grounds will be determined in a highly-anticipated Supreme Court decision. *See* Brzonkala v. Virginia Polytechnical & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted sub nom.* Brzonkala v. Morrison, No. 99-29, 1999 U.S. LEXIS 4935 (Sept. 28, 1999).

addition to their Eighth Amendment arguments.[155] Perhaps this difference explains the relative lack of success met by male prison inmates seeking relief from guard-initiated sexual misconduct.[156]

Another possible explanation for the lack of success on the part of male claimants is that their cases may be taken less seriously than those of women, as the notion that only women can be victims of rape continues to pervade the legal culture. The lack of sympathy for convicted criminals and homophobic sentiment are other explanations for the courtroom losses suffered by male victims of sexual misconduct in the prisons.

As a result of privacy claims made by women inmates, courts have enjoined male staff in all-female correctional facilities from performing certain duties. For example, in *Forts v. Ward*,[157] a Pennsylvania district court permanently enjoined male guards from performing certain nighttime duties such as observing inmates through their cell windows.[158] The court balanced the equal employment claims of men against the privacy needs of female inmates and concluded that the privacy concerns predominated under these circumstances. The *Women Prisoners v. District of Columbia* class action cases mark a significant point of departure from prevailing case law involving the rape of female inmates by male prison guards. In *Women Prisoners I*,[159] the district court described a general sense of sexual chaos within the three District of Columbia correctional facilities housing women.

The factual record showed countless incidents of sexual misconduct between prison employees and female prisoners. The court found a pattern of harassment including forced sexual activity, unsolicited sexual touching, exposure of body parts or genitals, and sexual comments. A general acceptance of sexual relationships between staff members and inmates created a sexualized environment where "boundaries and expectations [were] not clear."[160]

One of the most disturbing pieces of evidence showed that correctional officers had displayed an utter disregard for female prisoners, failing to respond reasonably when instances of sexual harassment were discovered. [161] Staff training on sexual harassment was non-existent.[162]

155. *See, e.g.*, Forts v. Ward, 471 F. Supp. 1095 (S.D.N.Y. 1978).

156. *See* Jones v. Oldt, 30 F. Supp. 2d 491 (E.D. Pa. 1998) (granting motion for summary judgment in male prisoner's claim).

157. 471 F. Supp. 1095 (S.D.N.Y. 1978).

158. *See id.* at 1102.

159. 877 F. Supp. 634 (D.D.C. 1994).

160. *Id.*

161. *See id.* at 639.

162. *See id.* at 640.

Internal grievance procedures and instructions for reporting claims were neither promulgated nor enforced.[163] Meanwhile, female inmates became targets of retaliation, as prison officers coerced women into not reporting assaults by threatening transfers or further physical assaults.[164]

The district court ruled in favor of the plaintiffs, finding prison administrators liable under section 1983 for various infringements of the Eighth Amendment.[165] District Court Judge June Green issued an extensive order for declaratory and injunctive relief which covered, among other things, sexual harassment within the prison. While the D.C. Court of Appeals in *Women Prisoners III* vacated several provisions of Judge Green's order, a final order from the district court in 1997 reiterated the necessity of reform within the D.C. women's correctional system.[166]

Judge Green's decision defined sexual harassment as:

> (1) all unwelcome sexual activity directed by any DCDC employee at a prisoner including acts of sexual intercourse, oral sex, or sexual touching and any attempt to commit these acts; and (2) all unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature directed by any DCDC employee at a prisoner.[167]

It prohibited sexual harassment of inmates by guards, invasions of inmate privacy, breach of inmate confidentiality, and retaliatory conduct.[168] Any violation would be cause for disciplinary action.[169]

The remedial order also stipulated that a telephone hotline be established for women to report instances of sexual misconduct, and that the defendants write and follow a policy on sexual harassment within the prison.[170] The order further mandated that D.C. Corrections administrators institute training on sexual harassment for all employees within the prison system, and that an Inmate Grievance Procedure be established and followed.[171]

D. Conclusion

The *Women Prisoners* litigation represents a revolutionary step toward correcting the epidemic of rape and sexual misconduct within women's correctional facilities in the District of Columbia.[172] District

163. *See id.*
164. *See id.* at 639.
165. *See id.* at 665-66.
166. *See* Women Prisoners v. District of Columbia, 968 F. Supp. 744, 745 (D.D.C. 1997).
167. *Id.* at 745.
168. *See id.* at 746.
169. *See id.*
170. *See id.*
171. *See id.*
172. For an example of more recent reforms, see Newby v. District of Columbia, No. 98-429,

Judge Green's assessment of the situation and her response provide insight into possible policy recommendations to prevent future sexual violations in both women's and men's correctional facilities. However, the Tenth Circuit has distinguished the facts in *Women Prisoners* from other instances of sexual impropriety within prisons. The court found that the *Women Prisoners* litigation, involving "repeated reports and instances of prison guards sexually assaulting and harassing women inmates," was "far more extensive and serious" than other instances of sexual impropriety.[173] As the Tenth Circuit indicated, the applicability of *Women Prisoners* may be limited to situations facing female inmates in inmate-guard sexual assaults, or to circumstances involving longstanding and widespread sexual abuse that are amenable to class action lawsuits. Prison guard misconduct cases such as *Giron* and *Carrigan* suggest that the evolving standard of proof has made success for individual plaintiffs less probable.

IV. SUGGESTED REFORMS: ANOTHER LOOK AT *FARMER*'S STANDARDS

Traditional legal scholarship notes a distinctive evolution in the courts' general approach to prisons and prisoners. Initially, the courts (led by the *Ruffin v. Commonwealth*[174] decision in Virginia) declared prisoners to be nothing more than "slaves of the state,"[175] and adopted a "hands-off" policy that encouraged judges to ignore post-conviction rights of criminals.[176] Today, courts purport to have a more enlightened vision of prisoners as persons who enjoy basic Constitutional rights.[177] However, the empirical evidence revealing a significant percentage of the nearly two million citizens behind bars as victims of rape and/or other sexual misconduct belies these tenuous distinctions. Further, the grim reality of rape and other sexual violations facing many of our nation's inmates forces us to reconsider how far *Farmer* really brings us from *Ruffin*, and whether we should re-evaluate some of *Farmer*'s standards in the name of justice.

1999 U.S. Dist. LEXIS 10428 (D.D.C. July 8, 1999) (awarding damages to the plaintiff in a case in which prison guards ordered female inmates to perform in strip shows and exotic dancing among other overt sexual acts).

173. Barney v. Pulsipher, 143 F.3d 1299, 1312 n.14 (10th Cir. 1998).

174. 62 Va. (21 Gratt.) 790, 796 (1871).

175. *Id.* at 796.

176. *See* 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1.02, at 7 (2d ed. 1993).

177. *See* LYNN S. BRANHAM & SHELDON KRANTZ, SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS IN A NUTSHELL 132 (4th ed. 1994).

A. Reassessing "Deliberate Indifference"

Although the Court first employed the term "deliberate indifference" two decades ago in *Estelle v. Gamble*,[178] it has given precious little attention to actually defining it. We might understand well enough what "deliberate" and "indifference" convey as separate legal terms,[179] but precisely what the Court meant to express by its combination of the concepts still remains an unsolved mystery. In *Farmer*, the Court set out a two-pronged test to define deliberate indifference for the purposes of deciding what constitutes cruel and unusual punishment. Despite the relative clarity of the "objectively inhumane conditions" prong, it still managed to erect a seemingly insurmountable barrier to inmates' claims against rape and sexual misconduct with its nebulous "subjective state of mind" prong.

The obvious problem with the subjective part of this test is underscored by the four-Justice dissent in *Wilson v. Seiter*,[180] a pivotal case in this area that relied upon the deliberate indifference standard. Dissenting Justices asserted that the level of inmates' suffering from horrible confinement conditions is the same, regardless of the subjective state of mind of the prison officials responsible for monitoring those conditions.[181] As Mushlin puts it in his book *Rights of Prisoners*, incorporating such subjectivity into Eighth Amendment scrutiny "opens up the possibility that courts will refuse to remedy prison conditions that objectively fall below civilized standards on the ground that the defendants did not act with deliberate indifference in causing them."[182]

The case history in this area is littered with the flimsy skeletons of the Eighth Amendment claims that have been soundly defeated by the deliberate indifference standard.[183] This was the case, for example, in two decisions mentioned earlier in our empirical evidence section—*Ruiz v. Johnson*[184] and *Webb v. Lawrence County*[185]—despite a preponderence of objective evidence indicating inhumane conditions. By so liberally utilizing the deliberate indifference standard, the courts over-protect the rights of state actors at the expense of the rights of individuals.

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178. 429 U.S. 97 (1976).

179. BLACK'S LAW DICTIONARY 294-95, 532 (6th ed. 1991) (defining "deliberate" as "well advised; carefully considered . . ." and "indifferent" as "impartial; unbiased; disinterested").

180. 471 US 294 (1991).

181. *See Id.*

182. MUSHLIN, *supra* note 176, at 36.

183. *See, e.g.*, Langston v. Peters, 100 F.3d 1235 (7th Cir. 1996); Taylor v. Michigan Dep't of Corrections, 69 F.3d 76 (6th Cir. 1995); Miller v. Neathery, 52 F.3d 634 (7th Cir. 1995); Giron v. Corrections Corp. of America, 14 F. Supp. 2d 1252 (D.N.M. 1998).

184. 37 F. Supp. 2d 855 (S.D. Tex. 1999)

185. 950 F. Supp. 960 (D.S.D. 1996).

There are several concrete reforms that federal and state legislatures could adopt that would have a *de facto* effect of narrowing the definition of deliberate indifference. These reforms would make the argument that an official "must have known" substantially easier to maintain convincingly, because they require a common level of attentiveness and care on the part of prison staff and officials regarding the prevention of prison rape and other sexual misconduct. First, legislatures can mandate education and training programs for prison officials, informing them of ways in which officials can both prevent potential sexual violations and respond effectively to any violations that might occur. Second, legislatures should also require that new inmates attend a prison orientation session that teaches them what to do to avoid being targeted for rape or other sexual assault and what to do in the event that they should become victims. Both of these policies are relatively simple and inexpensive to implement, and yet they remain two of the most effective ways to reduce prison rape and sexual misconduct.[186]

Further, federal and state legislatures can commit themselves to allocating more resources toward common-sense measures such as: reducing overcrowding in prisons; prosecuting prison officials who commit rapes and other sexual assaults; stocking rape kits within prisons to collect forensic evidence more effectively; and/or keeping statistics on the number and types of sexual assaults in prison. Other tactics include: segregating sexual offenders from the rest of the prison population; increasing the monitoring efforts of vacant areas within prisons; designing better methods to protect inmates who report rapes against retaliation; and installing better lighting.[187] All of these methods are specific steps that prisons can take that will increase inmates' safety. Further, they can help increase prison officials' general knowledge and awareness, thereby strengthening inmates' claims against officials' denial of "deliberate indifference."

B. Deconstructing Qualified Immunity

Another seemingly impervious barrier that inmates face when bringing claims of cruel and unusual punishment is the one presented by the modern interpretation of the qualified immunity defense. Historically in prisoners' rights cases, the qualified immunity standard effectively balanced government's administrative interests in keeping the "fear of being sued . . . from unduly hampering official decisionmaking"[188] against an in-

186. Interview with Robert Dumond, Licensed Mental Health Clinician, Massachusetts Department of Correction, in New Haven, Conn. (Apr. 28, 1999) (on file with YALE L. & POL'Y REV.).

187. *See id.*

188. BRANHAM & KRANTZ, *supra* note 177, at 293.

dividual's interests in protecting her/his constitutional rights. However, the recent decision by the *Carrigan* court has severely compromised this balance by placing an arguably unrealistic burden upon inmates to prove that there is established law invalidating a prison official's qualified immunity protections.[189]

Before *Carrigan*, the Court in *Scheuer v. Rhodes*[190] declared that if an official has no "reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief," her/his claim to a qualified-immunity defense would fail.[191] Further, in *Wood v. Strickland*,[192] the Court tweaked its reasoning to establish that qualified immunity depended on whether an official knew *or reasonably should have known* that s/he violated a constitutional right.[193]

After *Wood*, a series of cases seemed to reiterate the Court's commitment to balancing the scale equitably by giving as much weight to individual inmates' rights as to government officials' rights. *Procunier v. Navarette*[194] extended *Wood*'s high standards, helping define a legitimate qualified immunity defense for prison officials being sued under section 1983 by inmates. *Knell v. Bensinger*[195] imposed personal liability upon those prison officials who disregarded the constitutional rights of inmates and the clearly established legal developments in inmates' rights.

During this period (the late 1960s through the early 1980s), individual inmates won a fair number of judicial victories. They made several successful section 1983 claims against prison officials,[196] and the courts began setting limits on how far claims of ignorance by prison officials could go unchallenged.[197]

The debilitating impact of *Carrigan* on inmates' claims of rape and sexual misconduct is clear. Before *Carrigan*, individual inmates could make viable Eighth Amendment and section 1983 claims based largely on meeting the first "objectively inhumane conditions" prong set forth in *Farmer v. Brennan*, because the Court had already outlined some circum-

189. *See* Carrigan v. Delaware, 957 F. Supp. 1376, 1388 (D.C. Del. 1997).

190. 416 U.S. 232 (1974).

191. *Id.* at 247-48.

192. 420 U.S. 308 (1975).

193. *Id.* at 322 (1975); *see also* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

194. 434 U.S. 555 (1978).

195. 522 F.2d 720 (7th Cir. 1975).

196. *See* Estelle v. Gamble, 429 U.S. 97 (1976); Withers v. Levine, 615 F.2d 158 (4th Cir. 1980); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Wiltsie v. California Dep't of Corrections, 406 F.2d 515 (9th Cir. 1968); *see also* Collins v. Cundy, 603 F.2d 824 (10th Cir. 1979); Harris v. Chanclor, 537 F.2d 203 (5th Cir. 1976); Meredith v. State of Arizona, 523 F. 2d 481 (9th Cir. 1975).

197. *See, e.g.*, Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982) (extinguishing prison officials' qualified immunity defense, in cases where there has already been prior litigation involving similar allegations of violations of inmates' Eighth Amendment rights).

stances under which the subjective "state of mind" prong would necessarily fail. Also, simple legislative reforms[198] could have worked to buttress an inmate's claims against a qualified immunity defense. However, the Court has all but upset the equity it had been trying to establish in its previous prisoners' rights cases, by creating a qualified immunity defense that functions like absolute immunity. Even if an inmate can decisively prove the first prong of the *Farmer* test, without law that limits a prison official's qualified immunity defense, an inmate can never successfully meet the second prong of the *Farmer* test. In the interest of justice, the Court would do well to reassess its current *Carrigan* standard and bring it more in line with the precedent it set in its earlier cases—thus bringing individual inmates' rights back in balance with those of government officials.

C. Following the Ladies' Lead

The final reform that the courts should consider taking to ameliorate the serious concern of rape and sexual misconduct in prisons is less a response to *Farmer v. Brennan* than it is a general response to the gender stratification of current judicial rulings on this issue. The courts have displayed a willingness to recognize the privacy rights of female inmates who are victims of sexual misconduct although they are not yet willing to extend that recognition to male inmates who are victimized in this way. A likely reason for the courts' reluctance to make such a concession may simply be that it is easier for most members of our society, judges included, to view rape as a woman's burden and not a man's. The fact remains, however, that while this may most often be the case in "free society," it is clearly not the case in prisons.

To reduce sexual abuse in all correctional facilities alike, the reform ideas that originated in *Women's Prisoners* also should be applied in male correctional facilities.[199] Male inmates also have a strong privacy claim to be free from physical assault by other inmates and male guards. Likewise, flagrant sexual harassment and inadequate educational and health-related services are omnipresent in men's correctional facilities and should, therefore, also strengthen *men's* claims for declaratory and injunctive relief. Also, the sexual harassment definition that Judge Green provided, if modified to recognize harassment among inmates, can be a very powerful tool for male inmates as well. Finally, the policy charges that the *Women's Prisoners* remedial order stipulated—establishing a telephone hotline, having prison officials write and follow a sexual har-

198. *See supra* Section IV.A.

199. *See supra* notes 139-146.

assment policy, and instituting an Inmate Grievance Procedure and sexual harassment training for prison employees—are applicable to male correctional facilities. One of the most powerful tools we may have in redressing this problem may come from simply extending equitable rights to male as well as female inmates.

V. CONCLUSION

Every day, thousands of human beings are subjected to or threatened with rape and sexual misconduct while in prison. This may be a "secret" that everybody knows, but it is certainly not one that we as a society can afford to keep. By continuing to neglect the plight of prisoners in this regard, we jeopardize the health and safety of prisoners, as well as that of the communities into which prisoners will reintegrate after their release from prison.

Although the courts have extended some rights to such prisoners, most significantly through the interpretation of Eighth Amendment protections in the *Farmer v. Brennan* Supreme Court decision, they have stopped short of doing all that they can to help rectify the problem. By reassessing the deliberate indifference and qualified immunity standards used in *Farmer*, and by applying to male prisoners some of the legal innovations made in the *Women's Prisoners* decision, the courts can substantially advance the goal of eradicating the problem of rape and sexual misconduct in prisons.