Impunity: Sexual Abuse in Women’s Prisons

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

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


See also Davis, supra note 1, at 350–51; Deborah M. Golden, It’s Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act, 11 Cardozo Women’s L.J. 37, 42–43 (2004); Teresa A. Miller, Keeping the Government’s Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches, 4 Buff. Crim. L. Rev. 861, 866–89 (2001); Brenda V. Smith, Watching You, Watching Me, 15
and prisoners openly joke about prisoner “girlfriends” and guard “boyfriends.” Women prisoners become pregnant when the only men they have had contact with are guards and prison employees; often they are sent to solitary confinement—known as “the hole”—as punishment for having sexual contact with guards or for getting pregnant. Such open and obvious abuses would seem relatively easy for a prison administration to detect and prevent if it chose to do so.

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


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

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

Moreover it is important to note that on its own, criminal liability often is an inadequate deterrent to sexual abuse. In a state where criminal liability exists, a prisoner must
women’s prisons guards routinely commit serious sexual offenses against the women in their custody. Government administrators know that such abuse is occurring and acknowledge their duty to prevent it. However, they have generally neglected to do much about it, as most prisons have failed to adopt institutional and employment policies that effectively prevent or reduce custodial sexual abuse.

In most workplaces, an employee who had sex on the job would be fired. In prison, a report of custodial sexual abuse is more likely to result in punishment or retaliation against the prisoner than in disciplinary consequences for the guard. One might expect the law to furnish incentives for prisons to control such unlawful acts by their employees, as it does for other civil defendants. It does not. Instead, as I demonstrate in this Arti-
icle, a network of prison law rules—the Prison Litigation Reform Act of 1995 ("PLRA"), governmental immunities, and constitutional deference—work together to confer near-complete immunity against prisoners’ claims.

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

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


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

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

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

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

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

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

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17 Siegel, Rule of Love, supra note 16, at 2206.
18 Id. at 2184.
19 Siegel, Equal Protection, supra note 16, at 1148.
23 Id. at 2361.
teenth-century status regimes that contemporary courts and legislatures have long purported to reject. In the nineteenth century, institutionalized systems of civil death, slavery, and segregation, and the common law of marriage and rape, exposed women of color (as well as many white women) to rampant sexual abuse and prevented women from petitioning the courts for protection or redress. As I describe in Part II of this Article, these historical status regimes constructed impunity in three main ways, each of which has a modern parallel in contemporary prison law: (1) blanket exclusionary rules based on the low status of the litigant; (2) nonenforcement of criminal prohibitions against status violence; and (3) a labyrinth of procedural and evidentiary rules, practices, and assumptions designed to deter civil claims regardless of their merit.

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

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

\(^{25}\) Davis, \textit{supra} note 1, at 350.

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

I. CUSTODIAL SEXUAL ABUSE IN WOMEN’S PRISONS

A. Women in Prison

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

Although U.S. drug laws are facially neutral with regard to race, they target drugs used and sold by low-income blacks and Latinos by exempting drugs used by wealthier whites, such as powder cocaine and club drugs, from the aggressive policing and draconian sentences deployed against users and sellers of crack.31 “Urban black Americans . . . have
been arrested, prosecuted, convicted, and imprisoned at increasing rates since the early 1980s, and grossly out of proportion to their numbers in the general population or among drug users. 32 Although several studies demonstrate that African Americans use drugs at roughly the same or lower rates than whites, 33 African Americans constitute an overwhelming majority—by one account, over sixty-two percent—of Americans imprisoned for drug offenses. 34

Since the advent of the war on drugs, imprisonment of women has increased even faster than the imprisonment of men. 35 Between 1986 and 2004, the number of women in prison for all crimes increased 400%, while the number of African American women in prison increased 800%. 36 Between 1986 and 1996, the number of women serving time in state prisons for drug crimes increased 888%, compared to 522% for men. 37 The war on drugs has racially targeted African American women and Latinas as it has their male counterparts; in New York State, 82% of Latinas and 65%
of black women sentenced to prison were convicted of drug crimes, compared to only 40% of white women.\footnote{Mauer et al., supra note 37, at 10.}

Like their male counterparts, women prisoners are “demonized, impoverished, disenfranchised, and largely drawn from the underclass.”\footnote{James E. Robertson, The Majority Opinion as the Construction of Social Reality: The Supreme Court and Prison Rules, 53 Okla. L. Rev. 161, 187–88 (2000) [hereinafter Robertson, Majority Opinion].} Each of these factors inform the indifference and hostility toward both male and female prisoners within society and in the courts. Women prisoners are especially vulnerable, however, because the overwhelming majority of them have been abused.\footnote{The Department of Justice estimates that two-thirds of women in state prisons have been physically or sexually abused prior to their incarceration. Women Offenders, supra note 14, at 1, 8; see also Jordan v. Gardner, 986 F.2d 1521, 1523 (9th Cir. 1992) (quoting the testimony of a California women’s prison psychologist that eighty-five percent of female prisoners reported they had been sexually abused); Violence Against Women, supra note 3, ¶ 29 (noting that prison administrators had advised that “at least two thirds” of the female prisoners had been physically or sexually abused in the past); Caroline Wolf Harlow, U.S. Dep’t of Justice, Prior Abuse Reported by Inmates and Probationers (1999), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf; Jean Harris, They Always Call Us Ladies: Stories From Prison (1998); Johnson, supra note 29, at 7 (“Sixty-nine percent of women under correctional system authority reported that physical or sexual abuse occurred before they reached eighteen years of age.”); CAUGHT IN THE NET, supra note 21, at 9; Rathborne, supra note 4, at 22; Girshick, supra note 4, at 97–98 (citing several relevant studies); Lisa Krim, A Reasonable Woman’s Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Female Prisoners, 6 UCLA Women’s L.J. 85, 112–13 (1995) (citing an American Correctional Association published profile “indicating that the typical female prisoner was sexually abused between the ages of five and fourteen, usually by a male in her immediate family”); Laderberg, supra note 3, at 338 n.97.}

This prior abuse is central not only to their revictimization in prison,\footnote{See CAUGHT IN THE NET, supra note 21, at 47–48; Girshick, supra note 4, at 96.} but also to their likelihood of being incarcerated in the first place.\footnote{See CAUGHT IN THE NET, supra note 21, at 9–10.} As teenagers and adults, these women are more likely to adopt maladaptive coping strategies, such as prostitution and drug use and alcohol, to deal with the pain of untreated or ongoing abuse.\footnote{Id. at 9.} Racial stereotypes of black women as promiscuous, criminal, and prone to violence make it more difficult for law and society to recognize their victimization and more likely that they will be scrutinized as sexual deviants and potential criminals.\footnote{Kimberlé Crenshaw, Race, Gender, and Sexual Harassment, 65 S. Cal. L. Rev. 1467, 1469–71 (1992) [hereinafter Crenshaw, Sexual Harassment]; Fenton, Silence Compounded, supra note 13, at 283–84.}

Thus “the lives of poor, working-class, and racially marginalized women [are] overdetermined by punishment.”\footnote{Davis, supra note 1, at 344.}

cition takes the form of pressure to engage in criminal acts. Battered women often are not in a position to refuse their partners’ direction that they use or sell drugs.\footnote{Caught in the Net, supra note 21, at 9–10; Girshick, supra note 4, at 96–99.}

In some cases, abusive partners coerce women into using illegal substances as part of the pattern of violence, in an effort to render women more dependent on them and exert greater control in the relationship. . . . \footnote{Caught in the Net, supra note 21, at 9 (citing Beth E. Richie, Compelled to Crime: The Gender Entrapment of Battered Black Women 125–27 (1996)).} Women who are battered by their drug-abusing partners report that their partners abuse them less when they themselves begin using drugs.\footnote{Caught in the Net, supra note 21, at 22 ("[These women] are frequently mere accessories to their crimes: girlfriends, wives, or lovers of drug dealers, even leaseholders of apartments in which drugs are stashed.").}

Typically, women are incarcerated for marginal involvement in their male partners’ drug sales.\footnote{See Rathbone, supra note 4, at 22 ([These women] are frequently mere accessories to their crimes: girlfriends, wives, or lovers of drug dealers, even leaseholders of apartments in which drugs are stashed.").} Increasingly broad definitions of criminal complicity have resulted in women going to jail merely for living with men who use or sell drugs or for engaging in normal dating behavior, such as letting men use their telephones.\footnote{See Rathbone, supra note 4, at 22 ("[These women] are frequently mere accessories to their crimes: girlfriends, wives, or lovers of drug dealers, even leaseholders of apartments in which drugs are stashed.").} Thus gender violence and the war on drugs intersect, resulting in the arrest and imprisonment of low-income women of color who are survivors of abuse.\footnote{Women Offenders, supra note 21, at 35–37.}

After conviction, black women and Latinas are likely to be sentenced to prison, while white women are likely to be released. Department of Justice figures reveal that white women constitute only 29% to 36% of American women in federal, state, and local prisons,\footnote{See id. at 3, 24–25; see also Violence Against Women, supra note 3, ¶¶ 11–13, 18–20. See generally Johnson, supra note 29; Rathbone, supra note 4.} while more than two-thirds of incarcerated women are black or Latina.\footnote{See Johnson, supra note 29, at 32–34 (noting that in the immediate post–Civil War period, “[w]hite women were systematically channeled out of prisons, while African American women were systematically channeled into them”); see also Kathryn Watterson Burk- hart, Women in Prison 32–35 (1973) (discussing same phenomenon in early 1970s).} By contrast, white women make up a substantial majority—62%—of women released on probation.\footnote{Id.} These statistics suggest either that many white women are being tried and convicted for minor crimes that do not warrant imprisonment, or that they are being spared imprisonment because they are white.\footnote{Id.}
B. Women’s Experiences of Imprisonment

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

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

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

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56 Not Part of My Sentence, supra note 3, at Part V.
57 See, e.g., Nowhere to Hide, supra note 3; see also Abuse of Women in Custody, supra note 3, at 17.
58 Rathbone, supra note 4, at 57.
59 Id.
60 Robertson, Majority Opinion, supra note 39, at 166–69.
61 Id. at 184. See Michael Jackson, Justice Behind the Walls: Human Rights in Canadian Prisons 616–17 (Barbara Pulling ed., 2002).
62 See Rathbone, supra note 4, at 44–65.
63 Violence Against Women, supra note 3, ¶ 55.
64 Sexual Misconduct by Correctional Staff, supra note 7, at 4.
65 Abuse of Women in Custody, supra note 3, at 6 (revealing that forty-five states allow pat-down searches of female prisoners by male guards in some circumstances and that in six states—Connecticut, Kansas, Michigan, New Hampshire, New York, and Pennsylvania—such cross-gender physical searches are routine). However, New York has recently issued a directive limiting cross-gender pat frisks. E-mail from Dori Lewis to author, supra note 6.
66 See All Too Familiar, supra note 3; Violence Against Women, supra note 3, at ¶¶ 55–63.
Women prisoners’ history of abuse heightens their risk of revictimization. Egalitarian relationships have not been the norm in their lives prior to imprisonment. Because most prisoners have been sexually and physically abused in past family and romantic relationships, severe power imbalances may feel normal and familiar to a prisoner. Many prisoners have previously engaged in sex work in order to obtain money, drugs, or a roof over their heads. Thus, quite predictably, some women prisoners seek out relationships with guards. A prisoner may be lonely, or she might be attracted to the guard or his power; she might just want to have sex. For some women, “it seems as if sex is the only thing that keeps time clicking by.” In an environment where there are no other men, some prisoners may even fall in love with guards. A large part of the attraction in a relationship with a guard, though, is that it brings considerable benefits in the short term: visits, phone calls, cigarettes, protection, favorable work assignments, freedom to break prison rules, and other treatment that might mitigate the hardship and boredom of imprisonment. Critically, when these unequal relationships end, guards often become abusive. Guard retaliation may range from loss of privileges to disciplinary action, threats, and physical and sexual violence.

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

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67 Bill, supra note 8, at 106–12; Laderberg, supra note 3, at 338; see also Caught in the Net, supra note 21, at 15–16, 53–54.
69 See Rathbone, supra note 4, at 58.
70 Rathbone, supra note 4, at 58.
71 Id. at 49.
72 Id. at 51.
73 Girshick, supra note 4, at 108–10; see also Rathbone, supra note 4, at 47–51.
75 Nowhere to Hide, supra note 3.
76 Girshick, supra note 4, at 108.
77 See id.
78 Rathbone, supra note 4, at 52–54.
79 Id. at 54.
Finally, a prisoner who is propositioned by a guard, knowing that the guard will be able to rape or beat her if she refuses, might well judge it wise to comply to see what she can reap from her association with a guard. In prison, as under slavery, such coercive purchase of consent reinforces preexisting racial and gender stereotypes that classify black women and other women of color as prostitutes and prostitutes as fair game, thus undermining public and judicial sympathy for abuse victims who are portrayed as sexually “loose.”

II. The Structure of Status Hierarchy

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

1. Status-Based Bars to Litigation

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

80 See id. at 58–59.
81 See Davis, supra note 1, at 350 (noting resonances between contemporary imprisonment and slavery).
By the mid-twentieth century, the status-based notion of civil death had been gradually supplanted by a hands-off doctrine, in which courts refused to review the constitutionality of prison conditions on the basis that proper prison administration required complete immunity against prisoners’ claims. Unlike civil death, this doctrine did not expressly bar prisoners from court. However, under the hands-off doctrine, “all that a court in effect determines is that the complainant is a legally convicted prisoner. It then follows that his grievance is beyond the ken of judicial authority or competence.” Of course, to say that “the vindication of prisoners’ rights is to be left to the discretion of the prison officials . . . is tantamount to denying that such rights exist.” As a result, prisoners were left with virtually no enforceable legal rights until the late twentieth century.

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

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

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

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

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86 Id. at 507.
87 *Constitutional Rights of Prisoners*, supra note 83, at 987 (emphasis omitted).
88 See Turner, supra note 26, at 473, 503; *Beyond the Ken of the Courts*, supra note 85, at 507; *Constitutional Rights of Prisoners*, supra note 83, at 985, 1506.
91 State v. Mann, 13 N.C. (2 Dev.) 263 (1829); Mark V. Tushnet, *Slave Law in the American South: State v. Mann in History and Literature* 58 (2003).
92 Tushnet, supra note 91, at 25.
be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God. 93

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

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

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93 Mann, 13 N.C. at 263.
95 Blyew v. United States, 80 U.S. (13 Wall.) 581, 592–93 (1872) (upholding statutory exclusion of three black witnesses’ testimony against the accused white person on the basis that federal court had no jurisdiction over Thirteenth Amendment challenge to the statute because the witnesses, unlike the accused, were not persons “affected” by the criminal prosecution).
96 Foner, supra note 94, at 150.
97 Id.
98 Id. at 151.
99 Scott v. Sandford (Dred Scott), 60 U.S. (19 How.) 393 (1856); State v. Mann, 13 N.C. (2 Dev.) 263 (1829).
100 Siegel, Equal Protection, supra note 16, at 1121–22; Foner, supra note 94, at 592.
101 U.S. Const. amend. XIII, § 1.
2. Nonenforcement of Criminal Prohibitions on Status Violence

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

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

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

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

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103 Foner, supra note 94, at 593.
104 Johnson, supra note 29, at 23–24; Crenshaw, Mapping the Margins, supra note 46, at 1272.
105 Fenton, Mirrored Silence, supra note 102, at 999; Siegel, Rule of Love, supra note 16, at 2118.
106 MacKinnon, Toward a Feminist Theory, supra note 102, at 171–83; Estrich, supra note 102, at 1090.
107 Thomas, supra note 102, at 1490–91.
108 Robertson, A Punk’s Song, supra note 26, at 540.
109 Siegel, supra note 102, at 1484.
110 See Tushnet, supra note 91, at 32; Siegel, Rule of Love, supra note 16, at 2122–23.
111 See Scott v. Sandford (Dred Scott), 60 U.S. (19 How.) 393, 427 (1856); State v. Rhodes, 61 N.C. (Phil.) 453, 459 (1868) (“We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”); State v. Mann, 13 N.C. (2 Dev.) 263, 263 (1829); Tushnet, supra note 91, at 58; Siegel, Rule of Love, supra note 16, at 2123, 2132, 2157.
112 See, e.g., Fenton, Mirrored Silence, supra note 102, at 1018.
In the nature of things [assault and battery law] cannot apply to persons in the marriage state, it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign.\textsuperscript{114}

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

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

\begin{thebibliography}{99}
\bibitem{114} Id. at 2153 (quoting State v. Hussey, 44 N.C. (Busb.) 123, 126–27 (1852)).
\bibitem{115} Id. at 2122–23.
\bibitem{116} Id. at 2128 (quoting \textit{REPORT OF THE WOMAN’S RIGHTS CONVENTION, HELD AT SE-NECA FALLS, N.Y., JULY 19TH & 20TH, 1848}, at 6 (Rochester, John Dick 1848)).
\bibitem{117} Id. at 2154.
\bibitem{118} Fenton, \textit{Mirrored Silence}, supra note 102, at 1034; Siegel, \textit{Rule of Love}, supra note 16, at 2150–53.
\bibitem{121} Id. at 2120.
\bibitem{122} Id. at 2134–41; see also Fulgham v. State, 46 Ala. 143 (1871); Harris v. State, 14 So. 266 (Miss. 1894); Martha Hodes, \textit{The Sexualization of Reconstruction Politics: White Women and Black Men in the South After the Civil War}, 3 \textit{J. HIST. SEXUALITY} 402, 403 (1993).
\bibitem{123} Crenshaw, \textit{Mapping the Margins}, supra note 46, at 1256; see also Siegel, \textit{Rule of Love}, supra note 16, at 2140.
\end{thebibliography}
flogging, were enforced almost exclusively against African American men and, in the North, recent European immigrants. At the same time, the doctrine of marital privacy immunized propertied white men against wives’ claims for protection against physical abuse.

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

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

125 Id. at 2153.
127 Fenton, Mirrored Silence, supra note 102, at 1020–22. In practice, the murders of slaves were rarely prosecuted. See Tushnet, supra note 91, at 13.
128 State v. Mann, 13 N.C. (2 Dev.) 263 (1829); Tushnet, supra note 91, at 33–36.
129 Johnson, supra note 29, at 22–23.
130 Id. at 23–24; Crenshaw, Mapping the Margins, supra note 46, at 1271–73.
132 See MacKinnon, Toward a Feminist Theory, supra note 102, at 175–76, 179.
134 See Angela Y. Davis, Women, Race, and Class 175–76 (1981); Hill-Collins, supra note 133, at 178; Pamela D. Bridgewater, Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence, 7 RACE & ETHNIC ANC. L.J. 11 (2001); Crenshaw,
crime, regardless of the race of the perpetrator. Throughout the twentieth century rape of a black woman was “effectively legal.”

3. Status-Based Evidentiary and Procedural Rules

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

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

The use of evidentiary and procedural barriers to exclude women’s testimony “eerily resemble[d] the infamous Black Codes that forbade the conviction of whites on the testimony of blacks.” Both the procedural rules governing rape and statutes excluding African Americans’ testimony against whites were justified in part on the basis that women and black people were unreliable witnesses. However, the exclusion of African Americans’ testimony, like the procedural barriers imposed by con-
temporary prison law, was more explicitly based on the need to maintain 
the authority of those empowered by the status regime. 144

Although prisoners are convicted criminals, the assumption that most 
are liars is unwarranted. 145 Prison administrators fear that a prisoner may 
lie in order to obtain a transfer or retaliate against a guard. 146 However, pris-

oners are aware that official reports are more likely to result in retribution 
than redress. 147 Thus, there is little incentive for prisoners to advance 
groundless claims. The presumption that women prisoners would lie about 
sexual exploitation or other abuse warrants particular skepticism because 
it so closely tracks existing racial and gender stereotypes that black peo-

ple lie and that women lie about sexual assault. 148

III. IMPUNITY: THE REMEDIAL BRICK WALL

A. Reporting Abuse: The Prison Grievance Procedure

Prisoners distrust the prison grievance procedure, and for good rea-

son: 149 "by failure or design[,] grievance procedures are widely ineffec-
tive." 150 Prisoners are reluctant to report sexual abuse or harassment to prison 
authorities because filing a grievance "[i]s a risky step more likely to lead 
to harassment and retaliation than redress for a wrong done." 151 Prison 
staff often fail to keep prisoner grievances confidential: thus when a pris-

oner attempts to file a grievance, she often faces retaliatory harassment, 
discipline, or even assault by guards. 152

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144 See Foner, supra note 94, at 421.
145 Relatively few prisoners are convicted of crimes that reflect dishonesty, such as 

fraud, embezzlement, or perjury; a plurality are imprisoned for drug crimes and most of 

the rest for violent crimes. Women Offenders, supra note 17, at 5–6.
147 Girshick, supra note 4, at 109.
148 In our own legal system, a connection was once drawn between chastity and . . . 

veracity. In other words, a women [sic] who was likely to have sex was not likely 
to tell the truth. Because Black women were not expected to be chaste, similarly, 

they were unlikely to tell the truth. Judges were known to instruct juries to take a 

Black woman’s word with a grain of salt.

Crenshaw, Sexual Harassment, supra note 44, at 1469; see also Crenshaw, Mapping the 
149 See Thérèse Lajeunesse et al., Cross Gender Monitoring Project: Third 


fsw/gender3/cg3_finalversion_e.rtf; David M. Adlerstein, Note, In Need of Correction: The 

"Iron Triangle" of the Prison Litigation Reform Act, 101 Colum. L. Rev. 1681, 1695–96 

150 Adlerstein, supra note 149, at 1694.
151 Girshick, supra note 4, at 109.
152 See id.; see also Women Prisoners of D.C. Dep’t of Corr. v. District of Columbia, 


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

Furthermore, some prison grievance procedures may effectively require that a prisoner endure an actual second (or additional) rape. According to the prisoner-plaintiffs in Amador v. Department of Correctional Services, 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. Unless her abuser is foolish enough to describe his activities in writing, this corroboration requirement forces an abused prisoner to return to her abuser to undergo more sexual abuse until she either manages to obtain a semen sample or becomes pregnant. Otherwise, she is told, nothing can be done.

This corroboration requirement stems from many prison authorities’ and courts’ blanket reluctance to accept a prisoner’s word over a guard’s. One grievance adjudicator testified, “[W]e don’t just move inmates . . . based on allegations. If we did that, we’d have inmates moving all over the system—they would just make up allegations.” Like complainants at traditional rape law, prisoners face an overt “presumption of incredibility.”
bility” when they attempt to litigate their claims. “[W]omen ask, who would believe a felon?”

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

164 Adlerstein, supra note 149, at 1691.
165 Violence Against Women, supra note 3, ¶ 62.
167 Amador Statement, supra note 6, ¶ 45(f); Nowhere to Hide, supra note 3.
168 Rathbone, supra note 4, at 55, 65; see also Amador Statement, supra note 6, ¶¶ 35, 39(q), 47(f) (“Women may be charged with disciplinary offenses for having sexual relations with staff, despite the fact that sexual acts by prisoners with staff are involuntary as a matter of state law.”) (referring to N.Y. Penal Law § 130.05(e)); Nowhere to Hide, supra note 3.
169 Amador Statement, supra note 6, ¶ 49(h); Abuse of Women in Custody, supra note 3, at 27; Rathbone, supra note 4, at 55, 65.
170 See, e.g., Nowhere to Hide, supra note 3; Rathbone, supra note 4, at 61.
171 The Tip of the Discrimination Iceberg, supra note 27, at 8; see also Girshick, supra note 4, at 107.
172 Estimates from the Redesigned Survey, supra note 46, at 1; MacKinnon, Toward a Feminist Theory, supra note 102, at 179; Estrich, supra note 102, at 1140.
173 These reasons include shame, fear of the abuser’s revenge, concern that the woman will not be believed, certainty that her conduct will be judged against rape myths and stereotypes about appropriate feminine conduct, fear that the investigation will prove as humiliating as the assault, and concern that police or courts will be unsympathetic to her claims. See R. v. Ewanchuck, [1999] S.C.R. 330, 336 (L’Heureux-Dubé and Gonthier, JJ., agreeing with the judgment) (Can.); R. v. Seaboyer, [1991] 2 S.C.R. 577, 650 (L’Heureux-Dubé, J., dissenting in part) (Can.); The Tip of the Discrimination Iceberg, supra note 27, at 8; see also R. v. Osolin, [1993] 4 S.C.R. 595, 624–27 (L’Heureux-Dubé, J., dissenting) (Can.).
174 See Amador Statement, supra note 6, ¶ 26 (noting that the threat of underreporting is exacerbated in prison); Abuse of Women in Custody, supra note 3, at 13, 15 (discussing reasons victims of sexual assault may underreport abuse); The Tip of the Discrimination Iceberg, supra note 27, at 8 (“Allegations of abuse are complicated and compromised when they occur in institutional settings.”); Deterring Staff Sexual Abuse, supra note 8, at 2 (“Due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff, victims are often reluctant to report incidents to correctional authorities.”).
are very real; they feel that the process is stacked against them, and they continue to be at the mercy of their abusers, with no opportunity for escape. Moreover, prisoners (and guards) are part of a prison culture whose “code of silence” frowns upon disclosure as weakness and betrayal and regards silence as strength and integrity. In addition, guards and prison officials notoriously disregard institutional rules and procedures, often refusing to provide prisoners with the required forms within the grievance time limit or claiming not to have received the complaint or to have lost it. In such an environment, it is no wonder that many assaults go unreported.

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

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175 Not Part of My Sentence, supra note 3; Nowhere to Hide, supra note 3; Violence Against Women, supra note 3; Bell, supra note 4, 210–11.
176 The Tip of the Discrimination Iceberg, supra note 27, at 7; Laderberg, supra note 3, at 362–63; see also Dinos, supra note 3, at 293.
177 Sexual Violence Reported by Correctional Authorities, supra note 8, at 2; The Tip of the Discrimination Iceberg, supra note 27, at 10.
180 Rathbone, supra note 4, at 57–58.
181 Id. at 50–52, 58.
182 Id. at 58–59.
183 Id. at 59.
onorate the guard if the prisoner is deemed to have “consented” or “sold herself” to him.\textsuperscript{186} In one Massachusetts prison, guards extorted women’s consent to engage in sexual activity in exchange for cigarettes. The Department of Corrections investigation deemed this sex consensual in spite of state laws that criminalized prisoner/guard sex regardless of consent. The Department transferred the women to maximum security for breaking a prison rule against smoking. The guard, who had had sex with prisoners while on duty, kept his job.\textsuperscript{187}

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

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

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

\begin{itemize}
\item\textsuperscript{186} Rathbone, supra note 4, at 54.
\item\textsuperscript{187} Id. at 60–61.
\item\textsuperscript{188} The Tip of the Discrimination Iceberg, supra note 27, at 4.
\item\textsuperscript{189} Id. at 4–5.
\item\textsuperscript{190} Id. at 5.
\item\textsuperscript{191} Id.
\item\textsuperscript{192} Id. at 5–6 (quoting Donna Young, Memorandum on the Handling of Race Discrimination Complaints at the Ontario Human Rights Comm’n to the Anti-Racism Comm. (Oct. 23, 1992) [hereinafter Young Memo]).
\item\textsuperscript{193} Lajeunesse et al., supra note 149, at 80; see also Amador Statement, supra note 6, ¶ 33(b).
\item\textsuperscript{194} The Tip of the Discrimination Iceberg, supra note 27, at 5–6 (citing Young Memo, supra note 192).
\item\textsuperscript{195} Hill-Collins, supra note 133, at 178.
\item\textsuperscript{196} The Tip of the Discrimination Iceberg, supra note 27, at 10.
\end{itemize}
or to provide any information." Thus the reports that women prisoners do make likely represent "only the tip of the abuse/mistreatment iceberg." Like the legal treatment of marriage, rape, and miscegenation under status rules of the past, sex between guards and prisoners is regulated in ways that secure the sexual entitlement of men in positions of authority to the bodies of the women in their custody. These forms of impunity construct sexual abuse as a sanctioned condition of women's confinement without any effective forum for grievances.

B. Civil Impunity: Barriers to Accountability

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

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

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197 Id.
198 Id. at 4.
200 See Everson v. Mich. Dep't of Corr., 391 F.3d 737, 741 (6th Cir. 2004); Torres v. Wisconsin, 859 F.2d 1523 (7th Cir. 1988).
201 Everson, 391 F.3d at 740.
202 See Fisher v. Goord, 981 F. Supp. 140, 145–48, 150 (W.D.N.Y. 1997) (refusing injunction on basis that prisoner was "not credible" because she had formed a "plan" to get a transfer by reporting sexual activity with corrections officers; the court found some of this activity not to have happened because it was uncorroborated, and stated that other activity "could only reasonably be described as consensual" because the prisoner "never tried to fight [the guards] off, scream, or yell").
do so unless they believe the defendant has acted with such malice that punitive damages are appropriate. 203

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

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

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

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204 *Id.* at 1622; see, e.g., *Butler v. Dowd*, 979 F.2d 661 (8th Cir. 1992) (upholding jury award of one dollar nominal damages against prison administration for failing to protect male prisoners against rape by other inmates).
205 343 F. Supp. 2d 234, 238 (S.D.N.Y. 2004) (holding that a female prisoner who suffered sexual assault was entitled to compensation for attorney’s fees, paralegal fees, and relevant costs, in addition to a jury award of compensatory and punitive damages).
206 Outside of the prison context, damage awards for sexual assault are typically much higher. A recent survey of civil actions for sexual assault resolved in state appellate courts between 2001 and 2004 found that damage awards in sexual assault cases outside prison can range from nothing to well over one million dollars. But in cases involving institutional liability, “a significant number of cases award compensatory damages of $100,000 to $200,000.” Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. Rev. 55, 96–97 & n.267 (2006) (listing cases).
207 "[Inadequate damage awards may be a particular issue when the victim and the assailant are acquaintances or partners," as they are by definition in cases of custodial sexual abuse. *Id.* at 95 (citing *Louviere v. Louviere*, 839 So. 2d 57, 76 (La. Ct. App. 2002) (awarding assailant’s estranged wife less than twenty-five percent of damages awarded to unrelated victim who suffered similar sexual assaults); *A.R.B. v. Elkin*, 98 S.W.3d 99, 104–05 (Mo. Ct. App. 2003) (reversing trial award of $100 nominal damages to son abused by father, setting aside award of no damages to daughter abused by father, and remanding with instruction to consider compensatory and punitive damages for both children); *Beaver v. Mont. Dep’t of Natural Res. & Conservation*, 78 P.3d 857, 874–75 (Mont. 2003) (holding that $9095 award for sexual assault by co-worker was not inadequate)).
208 *Morris*, 343 F. Supp. 2d at 248.
209 In the rare instances in which a man is incarcerated for raping a black woman, “the
1. The Prison Litigation Reform Act

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

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

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

The PLRA is a status-based law that excludes almost all prisoner claims from the courts.\(^{216}\) Like historical doctrines designed to deter rape
complainants, black witnesses, and married women from bringing white men to court, the PLRA establishes unique hurdles that are nearly impossible for prisoner plaintiffs to overcome.

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

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

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217 See id. at 1650; Adlerstein, supra note 149, at 1694–95.
218 Siegel, Rule of Love, supra note 16, at 2150 (quoting State v. Rhodes, 61 N.C. (Phil.) 453, 457 (1868)).
219 42 U.S.C. § 1997e(a) (2000); see also Booth v. Churner, 532 U.S. 731, 739 (2001); Schlanger, supra note 138, at 1649–54. Previously, the Civil Rights of Institutionalized Persons Act provided that a lawsuit could be “continue[d]” for ninety days for a prisoner (or other litigant subject to the Act) to exhaust “such plain, speedy and effective administrative remedies as are available,” if the Attorney General certified that the available administrative remedies were in “substantial compliance with . . . minimum acceptable standards.” Pub. L. No. 96-247, 94 Stat. 349, 352 (1980) (codified as amended at 42 U.S.C. § 1997e (2000)). The PLRA removed the requirements of administrative remedies that are “plain, speedy and effective” and of Attorney General certification for prisoners, but not for other institutionalized persons. See Schlanger, supra note 138, at 1695–96.
220 Schlanger, supra note 138, at 1650–53.
221 Boston, supra note 152, at 431.
222 Schlanger, supra note 138, at 1653–54 (citing cases in which prisoner litigation was barred even though the missed grievance deadline resulted from the prisoner’s hospitalization for the injury that gave rise to the lawsuit); Adlerstein, supra note 149, at 1695.
If she misses the grievance deadline, her litigation is dismissed. Furthermore, prison grievance procedures offer no prospective relief to protect the prisoner before she is raped. If a guard has merely threatened to assault the prisoner, offered a quid pro quo for sex, or groped her—or if she did not think to preserve a DNA sample during her rape—the grievance process will do nothing. Even though filing a grievance is futile in such circumstances, the PLRA still requires the prisoner to report the abuse to her abuser’s colleagues through an often-humiliating disciplinary procedure that is likely to result in retaliation.

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

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

\[224\] E-mail from Dori Lewis to author, supra note 6.
\[225\] Amador Statement, supra note 6, ¶ 34(a), 37, 39(d), 39(p), 49(l); Interview with Dori Lewis, supra note 6.
\[226\] See, e.g., Amador Statement, supra note 6, ¶ 49(g) (“During [the] investigation into Officer Gilbert’s misconduct by Albion officials and by staff of the Inspector General’s office, Ms. Rock was subjected to demeaning statements, including comments about her supposed sexual activities prior to her incarceration. She was threatened, including a threat that her parole date would be delayed. She was subjected to an intrusive strip frisk of her entire body and photographs were taken of her in her bra and panties.”).
\[227\] 42 U.S.C. § 1997e(e) (2000); see also 28 U.S.C. § 1346(b)(2) (2000); Royal v. Kautzky, 112 F.3d 191 (5th Cir. 1997) (leading case holding PLRA requires more than de minimis physical harm); infra notes 314–318 and accompanying text; see also Oliver v. Keller, 289 F.3d 623 (9th Cir. 2002); Robertson, Psychological Injury, supra note 138, at 118–19; Schlanger, supra note 143, at 1630–31.
\[228\] See Golden, supra note 3, at 46.
\[230\] See, e.g., Williams v. Prudden, No. 02-1754, 2003 U.S. App. LEXIS 9553, at *4 (8th Cir. May 19, 2003); Liner v. Goord, 196 F.3d 132 (2d Cir. 1999); Boston, supra note 152, at 441, 434–43 (arguing that, in effect, courts “have rewritten a statute that bars the filing of a certain kind of civil action so that it bars the award of certain kinds of damages
the physical injury requirement bars only actions for compensatory damages, and does not apply to actions for declaratory or injunctive relief or for nominal or punitive damages. Furthermore, many appellate courts have found that sexual touching that results in slight or only short-term physical injury may still satisfy the physical injury requirement. At least one district court, however, has suggested that sexual assault short of penetration would not satisfy the physical injury requirement.

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

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

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

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


236 See supra notes 204–207 and accompanying text.

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

238 28 U.S.C. § 1915A(a) (2000). A court must review and may dismiss a claim if it is frivolous or malicious, or fails to state a claim, without providing an opportunity for plaintiff to respond. Id. A defendant need not respond to the prisoner’s claim unless the court determines that the claim has “reasonable opportunity to prevail on the merits” and orders defendant to respond. 42 U.S.C. § 1997e(g)(2) (2000); see also Schlanger, supra note 138, at 1629–30.
...tions “shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs,” and the court must give “substantial weight” to the “adverse impact” any such relief may have on “public safety or the operation of a criminal justice system.” Furthermore, after two years have elapsed, the government may apply for termination of a consent decree, which the court must grant unless the plaintiff establishes an ongoing constitutional violation. This may require repeated litigation if the constitutional violation has not been corrected within two years. Moreover, if the consent decree has been working to ameliorate the constitutional problem, all relief will end.

2. Institutional Immunities

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

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

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242 Dinos, supra note 3, at 294; see also Adlerstein, supra note 149, at 1692.
244 Monell, 436 U.S. at 690–91; see also Scott, 85 F.3d at 233.
246 “[T]he Eleventh Amendment bars [Section 1983 suits against the state] unless the State has waived its immunity, or unless Congress has exercised its undoubted power under Section 5 of the Fourteenth Amendment to override that immunity.” Will v. Mich. Dep’t of State Police, 491 U.S. 58, 66 (1989). “[A] suit against a state official in his or her official capacity . . . is a suit against the official’s office. As such it is no different from a suit
sory liability may not rely on the theory of vicarious liability and is only available if the supervisor was personally involved in the deprivation of the plaintiff’s constitutional rights. This narrow interpretation of “personal involvement” forces plaintiffs to attempt to assign personal responsibility to individual supervisors for systemic failures such as inadequate training, supervision, or investigation or the existence of a climate of tolerance of sexual abuse. Even where a prisoner can establish that an institutional policy or custom facilitated her sexual abuse, a supervisor cannot be held liable unless the plaintiff can prove that the supervisor was personally responsible for it.

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

against the State itself.” Id. at 71.

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

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

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


251 Jeffries, supra note 250, at 50.

252 Interview with Dori Lewis, supra note 6.
Prison guards and institutions also enjoy qualified immunity for conduct that is not clearly unlawful: prison guards and officials cannot be held liable for torts committed in the course of their employment unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known” under the law of that time. Unfortunately, the law does not clearly prohibit all forms of custodial sexual abuse. Although the illegality of forcible rape is sufficiently clear to overcome qualified immunity, it is not firmly established that other forms of sexual abuse, such as sexual harassment and sexual threats, are clearly unlawful. Courts have held that many forms of sexual abuse short of rape, such as sexual harassment without touching and sexual activity to which the guard alleges the prisoner consented, are not clearly unlawful. In states that have not criminalized all sexual contact between guards and prisoners, even sexual touching and quid pro quo sexual exploitation short of rape may not be clearly unlawful. Qualified immunity may particularly impede allegations of institutional failure to investigate sexual abuse, as it is not clear how cursory an investigation must be before it will be found clearly unlawful.

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

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254 Harlow, 457 U.S. at 818.
255 See Schwenk v. Hartford, 204 F.3d 1187, 1205 (9th Cir. 2000) (finding it well established that raping an inmate “constitutes a violation of the Eighth Amendment and no reasonable prison guard could have believed otherwise”).
258 In Vermont, consensual sex between prisoners and guards has not been banned by statute; in Colorado, New Hampshire, and Wyoming, prisoner “consent” mitigates the offense. Abuse of Women in Custody, supra note 3.
259 Current precedent suggests that the standard may not be very exacting. See supra note 248 and accompanying text.
260 Richardson v. McKnight, 521 U.S. 399, 408–09 (1997) (analyzing a section 1983 claim against guards in a private prison, the Court described unwarranted timidity as “the most important special government immunity producing concern”).
261 Levinson, supra note 250, at 351.
A second, related rationale for qualified immunity is that governmental institutions must be spared the burden of litigation.\(^{262}\) The Supreme Court has held that “public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”\(^{263}\) It has cautioned that “broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues . . . can be peculiarly disruptive of government.”\(^{264}\)

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

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


\(^{264}\) Harlow, 457 U.S. at 817.

\(^{265}\) Siegel, Rule of Love, supra note 16, at 2156.

\(^{266}\) “Doubtless many correctional facilities are autonomously managed with due concern for inmates’ rights—and do not foment costly litigation as a result.” Adlerstein, supra note 149, at 1688.

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

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

a. Rational-Basis Scrutiny of Prisoners’ Claims

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

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

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

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268 The Supreme Court observed:

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


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

270 See supra note 5 and accompanying text.

271 Weidman, supra note 83, at 1514.


274 Id.


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

277 Id. (citing Lyon v. Farrier, 727 F.2d 766, 768–69 (8th Cir. 1984)).
Just as nineteenth-century courts invoked the doctrine of marital privacy to justify their noninterference in cases involving violence against women, contemporary courts invoke the principle of judicial deference to insulate institutional authority against judicial review. “Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.”

In the Court’s view, “[r]unning a prison is an inordinately difficult undertaking” that the Court ought not lightly disrupt by imposing constitutional standards. For this reason, the Court emphasizes the importance of deference within the prison context. “According to the Court, correctional staff invariably exercise ‘considered’ judgment, and their backgrounds ensure that they are ‘trained’ in prison administration.” Thus, as in its earlier marital privacy decisions, the Court portrays the defendant institution in an idealized light, invoking an image of a well-ordered, humane place of confinement in the face of allegations of institutionally sponsored violence. Noting the danger of this trend, Justice Thurgood Marshall warned in the 1980s:

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

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

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278 Turner, 482 U.S. at 89.
279 Id. at 84–85.
280 Id. at 84–85, 90.
nineteenth-century courts recognized the illegality of domestic violence while developing doctrinal justifications for continued refusal to intervene, the contemporary Court affirms the existence of prisoners’ rights while adopting a rule of deference that ensures that prisoners’ rights will rarely be enforced.

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

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

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286 Bell, 441 U.S. at 547.
287 Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995); see also Turner v. Sailey, 482 U.S. 78, 90 (1987); Bell, 441 U.S. at 547.
288 See Wacquant, supra note 13, at 96; see also supra notes 52–55 and accompanying text.
289 Johnson, supra note 29, at 31.
290 Weidman, supra note 83, at 1521.
291 Id. at 1550–51.
293 Johnson, 543 U.S. at 510 (quoting Overton v. Bazzeta, 539 U.S. 126, 131 (2003)).
294 Id.
oners on the basis of race, the policy is subject to the same strict scrutiny as would apply to a race-based equal protection claim outside prison.295

Sexual abuse, and institutional policies that confer impunity for it, are as “‘pernicious in the administration of justice’”296 as overt racial segregation. Nonetheless, Johnson offers little hope of raising the standard of review applicable to sexual abuse claims for three reasons. First, the PLRA grievance-exhaustion requirement would pose a substantial barrier to any such challenge.297 Second, unlike the racial segregation policy of the California correctional department, the policies that give rise to custodial sexual abuse—inadequate restrictions on cross-gender surveillance, unresponsive grievance procedures, and indifference to known sexual misconduct—are far from anomalous. In fact, they are the norm in U.S. women’s prisons.298 Third, these policies are at least arguably facially neutral with respect to gender. Prison authorities’ “awareness” that sexual abuse is a likely result of such policies does not establish their discriminatory purpose.299 Unless the plaintiffs can show that such policies were adopted “at least in part ‘because of,’ not merely ‘in spite of,’ [their] adverse effects” on prisoners300—that is, that prison authorities were not only indifferent to sexual abuse but actually wanted it to happen—the prisoner plaintiff will likely continue to be stuck with rational-basis review.

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

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

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295 Id. at 505; see also Lee v. Washington, 390 U.S. 333, 333–34 (applying heightened standard of review when evaluating racial segregation in prison).
296 Id. at 511 (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).
297 See supra notes 217–221 and accompanying text.
298 See supra Part I.B.
300 Id.
302 See, e.g., Turner v. Safley, 482 U.S. 78, 89 (1987) (“When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).
Such jurisprudence contrasts sharply with the treatment of Fourth Amendment claims in prison. Within this context, constitutional privacy has been interpreted in uniquely narrow ways that allow male guards to conduct intrusive physical searches and surveillance of women prisoners that heighten the risk of sexual abuse.\footnote{Such practices include watching the prisoners in their housing units, viewing them in the shower and on the toilet, and performing intrusive body searches. Kim Shayo Buchanan, Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse, 88 Marq. L. Rev. 751, 763–73 (2005).}

The courts have held that prisoners have no constitutional expectation of privacy regarding searches of their cells or property\footnote{Hudson v. Palmer, 468 U.S. 517, 526 (1984).}—even if such searches are malicious or retaliatory.\footnote{See Rodriguez v. McClenning, 399 F. Supp. 2d 228, 239 (S.D.N.Y. 2005).} Furthermore, not all circuits agree that prisoners even retain any vestigial privacy right against guards viewing or touching their genitals. The Courts of Appeal for the First, Second, Sixth, Ninth, and Eleventh Circuits have held that prisoners have a right of privacy that limits the right of opposite-sex guards to view or touch their genitals;\footnote{Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993); Covino v. Patrissi, 967 F.2d 73, 78 (2d Cir. 1993); Cornwell v. Dahlberg, 963 F.2d 912, 916–17 (6th Cir. 1992); Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988); Bonitz v. Fair, 804 F.2d 164, 172–73 (1st Cir. 1986).} dicta in the Court of Appeals for the Seventh Circuit suggests that they do not.\footnote{Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995).} The Supreme Court has left this issue open.\footnote{Weiser, supra note 3, at 32.} According to the Court, if prisoners have any Fourth Amendment rights in this context, these rights exist only to the degree that they can “be reconciled with the concept of incarceration and the needs and objectives of penal institutions.”\footnote{Hudson, 517 U.S. at 526.} Thus, whatever privacy rights prisoners retain, they must “always yield to what must be considered the paramount interest in institutional security.”\footnote{Id. at 528.}

Nonetheless, the Court assured litigants in \textit{Hudson v. Palmer} that its deferential Fourth Amendment jurisprudence does not leave prisoners entirely at the mercy of their keepers: “[t]he Eighth Amendment always stands as protection against ‘cruel and unusual punishments.’”\footnote{Id. at 530.} This protection, however, is illusory.

c. \textit{Deliberate Indifference: The Eighth Amendment}

The Eighth Amendment guarantee against cruel and unusual punishment arguably protects prisoners against abuse while they are in government custody.\footnote{See Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that deliberate indifference to prisoners’ medical needs constitutes cruel and unusual punishment under the Eighth Amendment).} The courts’ constraints on the scope of this protection,
however, reflect the familiar theme that courts must be protected against prisoners who are inclined to waste judicial time with complaints about trivial harm. Accordingly, appellate courts have grafted a somewhat superfluous “de minimis harm” criterion onto the Eighth Amendment requirement that a prisoner prove that the impugned treatment has deprived her of the “minimal civilized measure of life’s necessities.” Courts have found that violent sexual assault is sufficiently serious to satisfy the Eighth Amendment threshold. However, sexual harassment, touching, threats, and coerced “consensual” sex have often been held to fall short of the de minimis threshold.

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

*Amendment*).

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

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

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

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

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

318 *Id.* at 1036–37.

319 *Id.*
A prisoner not only must establish a deprivation of life’s necessities that exceeds a rather high de minimis threshold, but also must prove that the defendant possessed a sufficiently capable state of mind: “‘deliberate indifference’ to inmate health or safety.”

Like the intent requirement for equal protection claims, this standard is akin to malice. Any abuse or oppression of prisoners, no matter how cruel or unusual, is constitutionally permitted unless the prisoner can prove that the prison official engaged in deliberate “unnecessary and wanton infliction of pain,” or “know[ed] of and disregard[ed] an excessive risk to inmate health or safety.” A purely objective showing of deliberate indifference—negligence or gross negligence—is not enough.

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

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

323 Farmer, 511 U.S. at 837.
324 Id. at 838.
325 See id. at 837 (“[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”).
326 Dinos, supra note 3, at 291, 293. But see Farmer, 511 U.S. at 843 n.8 (“While the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him, he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.”); Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999) (holding proof of malice not necessary when clear that sex was forced); Carrigan v. Davis, 70 F. Supp. 2d 448, 454–55 (D. Del. 1999) (finding that criminal law banning guards’ sex with prisoners establishes “deliberate indifference” regardless of whether guard had “consensual” sex with inmate or raped her).
327 See Hovater v. Robinson, 1 F.3d 1063, 1067–68 (10th Cir. 1993).
gations of sexual abuse and for deterring prisoners from reporting their abuse at all. 328 It is no surprise, then, that “departments of corrections often fail to record complaints or even to investigate them in an organized and centralized manner.” 329 Without such records, “it is almost impossible for a prisoner to demonstrate that a particular male guard poses a risk of sexual abuse.” 330 Thus, the retaliation and negligent record keeping that typify prison grievance processes serve to immunize prisons from liability for custodial sexual assault. 331

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

**Conclusion**

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

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

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

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

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

331 *Id.* at 808.


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

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

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

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

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

334 Id. at 2340.

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