
COMMENT

ACCESSING ACCOUNTABILITY: EXPLORING CRIMINAL
PROSECUTION OF MALE GUARDS FOR SEXUALLY
ASSAULTING FEMALE INMATES IN U.S. PRISONS

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INTRODUCTION

Time named the “silence breakers”—women who have bravely spoken out against sexual assault in myriad workplaces and contexts, and launched the #MeToo movement—the “Person of the Year” in 2017.¹ The *Time* cover story quite literally brought the ongoing “reckoning” of women victims standing up to abusers to the forefront: “[Women have] had it with the fear of retaliation, of being blackballed They’ve had it with the code of going along to get along. They’ve had it with men who use their power to take what they want from women.”² This narrative—and the general reckoning of #MeToo—failed to consider, however, the plight of one of America’s most at-risk populations suffering unabated sexual abuse: incarcerated women.³

That incarcerated women experience the traumas of sexual assault and abuse by male guards is not new.⁴ According to the U.S. Department of Justice’s Bureau of Justice Statistics (BJS), allegations of sexual misconduct in prisons are on the rise, and approximately half of reported sexual assaults are allegedly perpetrated by guards against inmates.⁵ According to a January 2014 BJS report, “[F]emales account for a greater proportion of victims of staff-on-inmate victimization than they do in the overall inmate population.”⁶ The prevalence of reported incidents of sexual assault by guards on inmates is certainly troubling, but it fails to illustrate the truly horrifying nature of guard-on-inmate sexual assault.⁷ While underreporting in the general

¹ Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/>.

² *Id.*

³ See Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 68 (1996) (“As a consequence of . . . [a] lack of research, conclusive data on the prevalence of prison assault are unavailable. . . . However, even the most conservative estimates of prisoner sexual assault rates translate into a high number of victims among inmate populations nationwide.” (citation omitted)).

⁴ Samiera Saliba, *Rape by the System: The Existence and Effects of Sexual Abuse of Women in United States Prisons*, 10 HASTINGS RACE & POVERTY L.J. 293, 323 (2013); see also M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 CRIM. L. BULL. 428, 431-32 (2010) (“Historically, the concern about inmate and staff sexual contact was primarily directed at male guards sexually assaulting female inmates. This concern was well-founded.”).

⁵ BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2009–11 1 (2014), <https://www.bjs.gov/content/pub/pdf/svraca0911.pdf> [<https://perma.cc/564M-VSL7>].

⁶ *Id.* at 12.

⁷ See Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 51 (2007) (“Sexual abuse is well known to be severely underreported, both inside and outside prison.”); see also Hannah Brenner, Kathleen Darcy, Gina Fedock & Sheryl Kubiak, *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 555 (2016) (“The reality both inside and outside prison is that sexual violence is a highly underreported crime. National data suggests that only 8% of prisoners report their sexual victimization during incarceration.” (footnote omitted)).

population makes incidents of sexual assault difficult to quantify, this phenomenon is especially acute in the custodial context,

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 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.⁸

Even when female inmates do report the guards who abuse them, their complaints are subject to vigorous scrutiny designed to either deter reporting entirely or to make cases so difficult to sustain that civil claims or criminal charges are only rarely brought successfully.⁹

In 2003, Congress passed the Prison Rape Elimination Act (the “PREA”), which set forth various policies and provisions aimed at ending custodial sexual assault.¹⁰ The PREA “mandated data collection about prison rape as defined by the state,”¹¹ created a “zero tolerance” policy for “all forms of sexual abuse and sexual harassment,” and required the implementation of “PREA coordinator[s]” whose responsibility it would be “to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.”¹² However, the PREA “does not contain any significant new initiatives to end the sexual victimization of incarcerated women In fact, the administrative rules implementing the PREA candidly acknowledge it may have no measurable effect whatsoever.”¹³ The continued prevalence of guard-on-inmate sexual assault demonstrates the PREA’s ineffectiveness.¹⁴ This Comment undertakes to explore

⁸ Buchanan, *supra* note 7, at 66-67.

⁹ See Alysia Santo, *Preying on Prisoners: In Texas, Staffers Rarely Go to Jail for Sexually Abusing Inmates*, THE MARSHALL PROJECT (June 17, 2015), <https://www.themarshallproject.org/2015/06/17/preying-on-prisoners> [<https://perma.cc/7KW8-RVPU>] (“But even where there is enough evidence to prove a staff member had sexual contact with an inmate, criminal sanctions are rare. Fewer than half are referred for prosecution. Accountability dwindles further from there.”); see also Buchanan, *supra* note 7, at 65-66 (describing “corroboration requirement[s]” that make reporting sexual abuse by prison guards extremely dangerous and that create further obstacles to meaningful accountability); BUREAU OF JUSTICE STATISTICS, *supra* note 5, at 5 (“The most common outcome of investigations was a determination that the evidence was insufficient to show whether the alleged incident occurred, i.e., the allegation was unsubstantiated.”).

¹⁰ 28 C.F.R. § 115 (2018); see also NATIONAL PREA RESOURCE CENTER, <https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> [<https://perma.cc/WD7J-H4UU>] (last visited Dec. 5, 2017).

¹¹ Michelle VanNatta, *Conceptualizing and Stopping State Sexual Violence Against Incarcerated Women*, 37 SOC. JUST. 27, 30 (2010).

¹² 28 C.F.R. §§ 115.11(a)–(b).

¹³ David W. Frank, *Abandoned: Abolishing Female Prisons To Prevent Sexual Abuse and Herald an End to Incarceration*, 29 BERKELEY J. GENDER, L. & JUST. 1, 13 (2014)

¹⁴ See Cierra Simpson, Comment, *Inevitable Horrors: Sexual Assault in Prison*, 60 ST. LOUIS U. L.J. 145, 164 (2015) (“PREA has not accomplished its goals because inmate sexual assault is too large of an issue to control without additional help.”). See generally Julie K. Brown, *Bartered Sex, Corruption and Cover-Ups Behind Bars in Nation’s Largest Women’s Prison*, MIAMI HERALD (Dec. 13, 2015), <http://www.miamiherald.com/news/special-reports/florida-prisons/article49175685.html>; Joseph Goldstein, *Brooklyn Prison*

the feasibility of criminal liability for guards who sexually assault women inmates, given the PREA's general failure to slow or stop sexual violence in prisons.¹⁵

Given the Prison Litigation Reform Act (PLRA),¹⁶ which seeks to curb prisoner civil litigation in federal courts, and the PREA's ineffectiveness, criminal redress is a possible, if unlikely, avenue for incarcerated women to seek recourse for the sexual harms they suffer during their terms of imprisonment. While criminal complaints are possible in theory, they prove improbable in practice given the procedural and systemic challenges to prisoners bringing successful legal claims generally, and to incarcerated persons—especially women—making out criminal complaints against guards for sexual violence in particular. The myriad hurdles that combine to make criminal redress difficult to imagine in this context—including the lack of a criminal *pro se* equivalent and prosecutorial discretion that dictates criminal proceedings in the United States, as well as general credibility issues and power dynamics—have not rendered all attempts at imposing criminal liability entirely futile. Mechanisms and procedures could be made more robust in order to make criminal complaints a more effective and promising mode of redress for women who are sexually assaulted while incarcerated. Furthermore, if criminal prosecutions are pursued and terms of incarceration for assailant-guards are actually handed down, criminal punishments against guards who assault female inmates may act as a deterrent of male-guard-on-female-inmate sexual violence.¹⁷

This Comment proceeds as follows: Part I further identifies the problem of male guards sexually assaulting female inmates and discusses some of the underlying power dynamics at issue in the prison context. Part II identifies legal barriers that inmates face to accessing the courts, including the PLRA, and Part III discusses existing remedies and modes of civil recourse. Part IV considers criminal redress as a path to improve the prospect of holding guards accountable

Supervisors Charged with Sexually Assaulting Inmates, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/nyregion/prison-supervisors-sex-abuse-prevention-rape-charges.html?mcubz=1>.

¹⁵ This Comment does not address the PREA in detail, but rather begins with the assumption that it has been largely ineffective. For more comprehensive and helpful reviews of the PREA, see Robert W. Dumond, *Confronting America's Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003*, 31 J. AM. ACAD. PSYCHIATRY L. 354, 358 (2003); Maureen Brocco, Note, *Facing the Facts: The Guarantee Against Cruel and Unusual Punishment in Light of PLRA, Iqbal, and PREA*, 16 J. GENDER, RACE & JUST. 917, 939-43 (2013).

¹⁶ 28 U.S.C. § 1915 (2012); 42 U.S.C. § 1997e (2012).

¹⁷ This Comment is limited in scope to discussing male guards' sexual abuse of female inmates. Male-guard-on-male-inmate and inmate-on-inmate sexual violence are certainly problems, as is, assuredly, female-guard-on-male-inmate violence.

Cases claiming rapes or other serious assaults by female guards against male inmates are exceedingly rare By contrast, there are many cases involving female inmates and male guards replete with confirmed instances of serious rape or forcible sexual assault In addition to heterosexual assaults, inmates are also at risk of sexual abuse by same-sex guards.

McGuire, *supra* note 4, at 432.

for sexually assaulting female inmates. Part V concludes by exploring how feminist legal advocacy might address the issues identified in this Comment.

I. UNDERSTANDING THE PROBLEM

Sexual assaults perpetrated by male prison guards against female inmates are endemic to the American carceral system.¹⁸ Academics and the news media alike consistently report that “[d]espite the fact that all forms of staff and inmate sexual conduct are illegal or at least administratively proscribed and awareness that all prisoners are potential victims of such abuse has begun to dawn, such assaults have not abated.”¹⁹ Indeed, “[w]omen are disproportionately sexually abused by prison staff. Nationwide, they represent 7% of all prisoners, yet they account for 33% of staff-on-inmate victims, according to the latest Justice Department study.”²⁰ Sexual abuse in this context manifests in various forms, ranging from namecalling and “[v]erbal harassment” to forcible rape.²¹ The nature and structure of women’s prisons, where predominantly male guards are given virtually complete control over women who have nowhere to hide from abusers, and the inherent power dynamics in these institutions, helpfully explain the particular problem of guard-on-inmate sexual violence.²² As Lora Bex Lempert argues, incarcerated “[w]omen, under the best of circumstances, are at the mercy of the officers who guard them.”²³

A. Gender and Intersectional Hierarchies

Female prison populations, along with the general mass incarceration problem in the United States, have exploded.²⁴ The Sentencing Project

¹⁸ Saliba, *supra* note 4, at 323 (“Sexual abuse of imprisoned women . . . has become part of the prison sentence on a *de facto* basis.”).

¹⁹ McGuire, *supra* note 4, at 4; *see also* Brown, *supra* note 14 (documenting multiple abuses by guard, but concluding that “perhaps the worst indignity of all, women say, is that the officers—both male and female—use their positions of power to pressure inmates to have sex and to perform indecent acts.”); VanNatta, *supra* note 11, at 30 (“Studies show that the rate of sexual violence against those in women’s prisons is significant, even as forms and rates vary.”).

²⁰ Santo, *supra* note 9.

²¹ For a comprehensive “continuum of staff sexual misconduct,” *see* BARBARA OWEN, JAMES WELLS, & JOCELYN POLLOCK, IN SEARCH OF SAFETY: CONFRONTING INEQUALITY IN WOMEN’S IMPRISONMENT 156-164 (2017).

²² Amy Laderberg, *The “Dirty Little Secret”: Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting To Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 324 (1998).

²³ LORA BEX LEMPERT, WOMEN DOING LIFE: GENDER, PUNISHMENT, AND THE STRUGGLE FOR IDENTITY 170 (2016).

²⁴ *Incarcerated Women and Girls*, THE SENTENCING PROJECT (Nov. 2015), <http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> [<https://perma.cc/HJJ4-9VV3>]; *see also* INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN’S PRISONS 12 (Robin Levi & Ayelet Waldman eds., 2011) (“Today, women are the fastest growing segment of the prison population, and the most vulnerable.”). The Prison Policy Initiative

reports that “[b]etween 1980 and 2014, the number of incarcerated women increased by more than 700%, rising from a total of 26,378 in 1980 to 222,061 in 2014.”²⁵ Despite the increase in female inmates, most prison staff are men.²⁶ Early women’s prisons were staffed solely by female guards.²⁷ Separating men and women inmates in single-gender facilities staffed by guards of the same sex continued until 1972, at which time Title VII “protections against sex-based job discrimination . . . were extended to state employees, including those who were employed by the states’ prison systems. Female correctional officers successfully used the protections contained in Title VII to obtain access to jobs in male prisons”²⁸ However, this also meant that male prison guards could marshal Title VII to obtain employment opportunities in women’s correctional facilities.²⁹

To work in prisons housing inmates of the opposite sex, both male and female corrections officers have argued that gender is not a bona fide occupational qualification (BFOQ).³⁰ Pursuant to Title VII, to establish that gender is a BFOQ, corrections departments “must show a high correlation between sex and ability to perform job functions.”³¹ In *Dothard v. Rawlinson*, the Supreme Court held that Alabama’s “statutory height and weight standards had a discriminatory impact on women applicants” to work as prison guards in male correctional facilities,³² but being male was a BFOQ “for the job of correctional counselor in a ‘contact’ position in an Alabama male maximum-security penitentiary.”³³ Courts since *Dothard* have cited it to note that the

reports that there were 219,000 women incarcerated in the United States as of 2017. See Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Oct. 19, 2017), <https://www.prisonpolicy.org/reports/pie2017women.html> [<https://perma.cc/RC9H-ANKQ>].

²⁵ *Incarcerated Women and Girls*, *supra* note 24.

²⁶ See FED. BUREAU OF PRISONS, STAFF GENDER (2017), https://www.bop.gov/about/statistics/statistics_staff_gender.jsp [<https://perma.cc/2YUY-GYYN>] (reporting that 72.9% of prison staff are men, while 27.1% are women).

²⁷ See Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 198 (2006) (discussing the nineteenth century prison reform movement to separate male and female inmates into single-gender correctional facilities: “One of the major characteristics of the Reform Movement was the establishment of separate prisons for women. These prisons were often directed and managed by all-female staff.”).

²⁸ McGuire, *supra* note 4.

²⁹ See OWEN ET AL., *supra* note 21, at 136 (noting that when women prison staff sued for equal employment in men’s prisons, “men too gained the right to work in women’s facilities”).

³⁰ 42 U.S.C. § 2000e-2 (2012).

³¹ *Breiner v. Nev. Dep’t. of Corr.*, 610 F.3d 1202, 1213 (9th Cir. 2010) (internal quotation marks omitted); see also *Teamsters Local Union No. 117 v. Wash. Dep’t. of Corr.*, 789 F.3d 979, 987 (9th Cir. 2015) (“Although limited gender discrimination may be permissible in the prison employment context, prison administrators do not get a free pass. The Department must have an objective ‘basis in fact’ for its belief that gender discrimination is ‘reasonably necessary . . .’” (citation omitted)).

³² *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977).

³³ *Id.* at 336-37.

particular prison conditions that made gender a BFOQ there were “atypical,” and have required correctional facilities “to identify a concrete, logical basis for concluding that gender restrictions are ‘reasonably necessary.’”³⁴

Male prison guards and their unions have made successful claims that gender could not be the basis for assignments to correctional facilities, because gender in this context could not be a BFOQ. In a 2004 case, the Southern District of New York held that gender-based assignments of guards to prison facilities could not be maintained as a BFOQ.³⁵ The court there noted,

[C]ontrolling precedent does not permit gender-based discrimination in order to prevent hypothetical safety risks posed by a small percentage of male correction officers, even to the extent the likely wrongdoers are undetectable *ex ante*. A valid BFOQ defense requires a factual showing that “all or substantially all” members of the targeted group would be “unable to perform safely and efficiently the duties of the job involved.”³⁶

The court found Westchester County’s justification for gender-segregated staffing unconvincing because the county based its argument on a few “incidents involving four officers” and thus “failed to establish that all or substantially all male correction officers pose a risk of inappropriate sexual conduct with female inmates to justify a complete ban.”³⁷ *Westchester County* was one of many cases where a court so held for male corrections officers.³⁸ As a result of this litigation, “[i]n many states, men now make up the majority of custodial staff.”³⁹

Male guards working in women’s correctional facilities engender a uniquely predatory environment.⁴⁰ Where male guards are responsible for—and have

³⁴ *Breiner*, 610 F.3d at 1212; *see also* *Henry v. Milwaukee Cty.*, 539 F.3d 573, 579 (7th Cir. 2008) (quoting *Dothard* for the proposition that “the [BFOQ] defense is ‘meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.’”).

³⁵ *Westchester Cty. Corr. v. Cty. of Westchester*, 346 F. Supp. 2d 527 (S.D.N.Y. 2004).

³⁶ *Id.* at 534 (citation omitted).

³⁷ *Id.* at 534-35.

³⁸ *See, e.g., Forts v. Ward*, 621 F.2d 1210, 1216-17 (2d Cir. 1980) (vacating the district court’s determination that male guards could not work the evening shift at a women’s prison; women inmates’ complaints of violations of their privacy could not outweigh Title VII concerns where the prison facility was willing “to make necessary changes to eliminate the opportunity for viewing . . . that impair the privacy of the inmates during the nighttime hours.”); *Edwards v. Dep’t. of Corr.*, 615 F. Supp. 804, 809 (M.D. Ala. 1985) (finding a male prison official’s sex not a bona fide occupational qualification that defendants could use to justify not promoting him in a women’s correctional facility). Notably, some circuits do hold that gender can be a BFOQ in women’s prisons in particular. *See, e.g., Teamsters Local Union No. 117 v. Wash. Dep’t. of Corr.*, 789 F.3d 979, 987 (9th Cir. 2015) (collecting cases from the Sixth, Seventh, Eighth, and Ninth Circuits, noting that “we and other circuits similarly have upheld sex-based correctional officer assignments in women’s prisons”).

³⁹ OWEN ET AL., *supra* note 21, at 136.

⁴⁰ Cheryl Bell, Martha Coven, John P. Cronan, Christian A. Garza, Janet Guggemos & Laura Storto, *Rape and Sexual Misconduct in the Prison System: Analyzing America’s Most “Open” Secret*, 18 YALE L. & POL’Y REV. 195, 203 (1999) (noting that because “[t]he prison guards who oversee these female

ostensibly complete control over—populations of incarcerated women, “[c]ross-gender supervision results in a unique set of institutional concerns regarding privacy, sexual harassment, and sexual misconduct.”⁴¹ Incarcerated women “are dependent on staff for almost everything in the total institution, as they control all movement and distribute almost every resource.”⁴² This total dependency of incarcerated women on male guards entrenches a gendered hierarchy whereby inmates barter sex for—or engage in sexual relations out of fear of deprivation of—basic necessities, such as feminine hygiene products, and simple privileges, such as visitation time with family members.⁴³ Indeed, as of 2006, when the was still relatively new law, “it ha[d] become increasingly apparent that women in confinement face a substantial risk of sexual assault, most often by a small number of ruthless male correctional staff who use terror, retaliation, and repeated victimization to coerce and intimidate confined women.”⁴⁴

Given the power inequalities between any given female inmate and prison staff member, no sexual relationship between them could be consensual. In fact, the PREA makes consent unavailable as a defense to sexual relations between guards and inmates.⁴⁵ As Beck argues,

According to federal law and most state laws, all sexual relations between staff and inmates are considered abuse, even if the sexual activity would have been considered consensual had it occurred outside of a prison Staff and

inmates are predominantly male, [this] creat[es] what some consider a highly sexualized and hostile environment that invites disaster.”); *see also* INSIDE THIS PLACE, *supra* note 24, at 17 (“While abuse in male prisons is well documented, women in prison suffer in relative anonymity. This disparity is especially troubling, since women in prison are in many cases more vulnerable to rights violations.”).

⁴¹ LEMPERT, *supra* note 23, at 171.

⁴² OWEN ET AL., *supra* note 21, at 136; *see also* Saliba, *supra* note 4, at 296 (“The power dynamic of cross-gender supervision is visible in the everyday lives of female prisoners. Male prison guards have complete control over the daily activities of the female inmates.”).

⁴³ *See* INSIDE THIS PLACE, *supra* note 24, at 232 (“[W]omen often exchange sex to protect their rights to phone calls, visits, or basic supplies such as food, shampoo, and soap.”); *see also* Buchanan, *supra* note 7, at 57 (noting that “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 a story about a female inmate, “Dorothy,” the ACLU reports: “The imbalance of power between prisoners and guards leads to the use of both direct physical force and indirect force based on the prisoners’ total dependence on guards for basic necessities and the guards’ ability to withhold privileges.” ACLU, *Words from Prison: Sexual Abuse in Prison*, <https://www.aclu.org/other/words-prison-sexual-abuse-prison> [<https://perma.cc/E4XN-EKUW>] (last visited Nov. 2, 2018).

⁴⁴ Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 142, 158 (2006).

⁴⁵ *See* U.S. DEPT. OF JUSTICE, OFFICE OF INSPECTOR GEN., DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 4 (2005), <https://oig.justice.gov/special/0504/final.pdf> [<https://perma.cc/MC8W-77GL>] (“It is important to note that consent is never a legal defense for corrections staff who engage in sexual acts with inmates. According to federal law, all sexual relations between staff and inmates are considered abuse.”).

inmates are in inherently unequal positions, and inmates do not have the same ability as staff members to consent to a sexual relationship.⁴⁶

In sum, “the social authority and control male custodial officers hold over incarcerated women creates a ‘super authority’ and . . . the gaze of male guards . . . creates an atmosphere of threat.”⁴⁷ Consent cannot be meaningfully given in this context.⁴⁸

The gendered power dynamics at work in women’s prisons are only compounded by race. The majority of incarcerated women in the United States are women of color.⁴⁹ In fact, “Black women are the fastest-growing population in prisons.”⁵⁰ Meanwhile, according to the Federal Bureau of Prisons, 62.9% of prison staff are white (non-Hispanic).⁵¹ Therefore, racial hierarchies exacerbate institutional power dynamics from which incarcerated women are already suffering. What results is at least three tiers of systemic oppression of incarcerated women, who are mostly women of color: (1) the inherent guard-inmate hierarchy of any prison; (2) a gendered power hierarchy where female inmates are subject to supervision by male guards; and (3) these power dynamics are further aggravated along racial lines where white men are guarding—and preying upon—incarcerated women of color. There are likely no two other sociocultural groups so disparate; intersections of race and gender within the prison context make these power dynamics particularly problematic and self-perpetuating.⁵² As Buchanan notes: “Women, especially women of

⁴⁶ Allen J. Beck, *Staff Sexual Misconduct: Implications of PREA for Women Working in Corrections*, 16 JUST. RES. & POL’Y 8, 9 (2015).

⁴⁷ VanNatta, *supra* note 11, at 29.

⁴⁸ One may take issue with a law that deprives inmates *prima facie* of autonomy in the form of the ability to consent to sexual relations with a prison staff member. For example, “[c]haracterizing their liaisons as consensual is empowering to women who have little power otherwise.” LEMPERT, *supra* note 23, at 171. Further,

[w]omen prisoners are not a homogenous group of passive victims and can exercise agency within these constrained choices of sexual behavior . . . [I]t may be the case that such relationships are truly consensual, or it may be that such relationships can be understood as the tactics of the oppressed . . .

OWEN ET AL., *supra* note 21, at 154. Ultimately, however, a female inmate’s “claims of consent [in these situations] mask the predatory nature of the sexual liaisons.” LEMPERT, *supra* note 23, at 172.

⁴⁹ See Buchanan, *supra* note 7, at 48 (“[M]ore than two thirds of women in U.S. prisons are African American or Latina.”).

⁵⁰ INSIDE THIS PLACE, *supra* note 24, at 246.

⁵¹ FED. BUREAU OF PRISONS, *Staff Ethnicity/Race*, (2017), https://www.bop.gov/about/statistics/statistics_staff_ethnicity_race.jsp [<https://perma.cc/M2BB-26A5>].

⁵² MAXINE BACA ZINN & BONNIE THORNTON DILL, *WOMEN OF COLOR IN U.S. SOCIETY* 4, 10 (1993) (describing how “[w]omen of color are subordinated . . . because [of] patterns of hierarchy, domination, and oppression based on race, class, gender, and sexual orientation” and that “[w]hite males . . . set the standards by which all social action is measured”).

color, are exposed to institutionalized sexual abuse, while a network of legal rules prevents them from seeking protection or redress in the courts.”⁵³

B. *Reporting Abuse in the Prison Context: Fear and Retaliation*

Beginning from the underlying premise that any prison staff-inmate sexual encounter cannot be consensual, reporting sexual abuse is particularly dangerous and encumbered by various concerns that a nonincarcerated sexual abuse victim may not have to consider. There is a huge disincentive to report abuse by a prison staff member “because [inmates] fear staff reprisal, worry that others will accuse them of lying, or want to avoid being labeled a snitch.”⁵⁴ Incarcerated women abused by prison staff members “have no exit Unlike women on the outside, who can move, change jobs, or simply shop in different neighborhoods, there is no place that imprisoned women can go to escape predatory, unprofessional officers.”⁵⁵ Reporting sexual misconduct by prison staff creates myriad dangers and safety risks for incarcerated women not only because “the same people being paid to protect them” are the ones violating them, but also due to “collateral consequences” that can flow from reporting.⁵⁶ For example, incarcerated women report being “placed in disciplinary housing” and “losing [their] privileges” as a result of making complaints about sexual misconduct by a prison guard.⁵⁷

The threat of retaliation by the officers themselves is perhaps one of the greatest deterrents to women inmates reporting sexual abuse. Indeed, “[r]etaliatiion against prisoners who report sexual abuse is all too common and can sometimes result in prisoners having to serve longer terms.”⁵⁸ In one account, Teri Hancock, a formerly incarcerated woman, describes prolonged, violent sexual abuse by the assistant deputy warden of the facility where she

⁵³ Buchanan, *supra* note 7, at 55.

⁵⁴ Laderberg, *supra* note 22, at 324; *see also* Rachel Culley, “The Judge Didn’t Sentence Me to be Raped”: Tracy Neal v. Michigan Department of Corrections: *A 15-Year Battle Against the Sexual Abuse of Women Inmates in Michigan*, 22 WOMEN & CRIM. JUST. 206, 211 (2012) (“Several factors discouraged women from speaking up, including fear of punishment or confrontation.”).

⁵⁵ LEMPert, *supra* note 23, at 174; *see also* Buchanan, *supra* note 7, at 65 (“Outside prison, women who are raped often find that the experience of reporting their assault . . . 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.” (citation omitted)).

⁵⁶ OWEN ET AL. *supra* note 21, at 164.

⁵⁷ *Id.*

⁵⁸ Bell et al., *supra* note 40, at 210; *see also* INSIDE THIS PLACE, *supra* note 24, at 65 (describing “the first time [a guard] raped [her]” and that “[e]veryone knew that you couldn’t go to the prison officials and give a report, because the prison officials wouldn’t do anything other than retaliate against you. That officer sexually assaulted me for years.”); Saliba, *supra* note 4, at 299 (“[T]he guard will most likely assault the woman who complained. Some inmates have reported that the guards work as a team, one will keep [watch] while the other sexual [sic] assaults the woman inside.”).

served her sentence.⁵⁹ When Teri told a friend about the assaults via mail, the facility intercepted the letter and sent it to internal affairs, and the prison warden and his colleagues repeatedly threatened Teri.⁶⁰ Another formerly imprisoned woman, Emily Madison, tells a similar story. After reporting a guard who had sexually assaulted her and raped other inmates, Emily describes: “The retaliation was horrible. The officers made me submit urine samples on a weekly basis. They would wake me up on the midnight shift . . . They would come and shake my room down.”⁶¹

Central to many claims of sexual assault is a credibility problem.⁶² Here, “[a]ccusers—typically women—do not tend to fare well in these [he said/she said] contests.”⁶³ Credibility problems are particularly acute in the male-guard-on-female-inmate sexual assault context because most—if not all—cases will be “word on word,” and the power differentials inherent to the prison system make one party (the guard) assumedly more trustworthy than the complainant-inmate.⁶⁴ Furthermore, in this context, there is little or no “corroborative evidence” that there might be in a sexual assault that occurs outside prison walls.⁶⁵ Even where there may be a corroborating witness to a prison sexual assault by a guard, that witness is unlikely to come forward: where the witness is another inmate, she could also “face potential retaliation for cooperating,”⁶⁶ and where the witness is another guard, he is either complicit in the abuse or unwilling to report a coworker.⁶⁷

Tuerkheimer describes credibility as comprising two parts: trustworthiness and plausibility.⁶⁸ “A listener engages in credibility discounting when, based upon a faulty preconception, he reduces a speaker’s perceived trustworthiness or diminishes the plausibility of her account.”⁶⁹ Credibility “discounting,” as

⁵⁹ INSIDE THIS PLACE, *supra* note 24, at 96-98.

⁶⁰ *Id.* at 98.

⁶¹ *Id.* at 113.

⁶² Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017).

⁶³ *Id.*

⁶⁴ *Id.* at 9.

⁶⁵ *See id.* at 9-10 (describing various types of “[c]orroborative evidence . . . [that] can include electronic evidence like text messages, voicemails, photographs or social media posts, forensic reports, witnesses to the lead-up or aftermath, and, on rare occasions, eyewitnesses to the incident.”) (citation omitted). Arguably, none of these types of corroboration exist with any regularity in the prison sexual assault context.

⁶⁶ McGuire, *supra* note 4, at 12; *see also* INSIDE THIS PLACE, *supra* note 24, at 65 (in one inmate’s account of sexual assault, her cellmate knew of the abuse but “she didn’t do or say anything at the time because she didn’t want to get involved.”).

⁶⁷ *See* Frank, *supra* note 13, at 4-5 (“Guards not only assaulted the women, but served as ‘look-outs’ during assaults by other staff.”); *see also* VICTORIA LAW, RESISTANCE BEHIND BARS: THE STRUGGLES OF INCARCERATED WOMEN 63-67 (2009) (describing female prisoners suffering from retaliation by their abusers’ fellow guards after reporting sexual assaults).

⁶⁸ Tuerkheimer, *supra* note 62, at 13-14.

⁶⁹ *Id.* at 14.

Tuerkheimer terms it, is a zero-sum game: “[U]nder certain circumstances—notably the word-on-word case—a determination that one party is worthy of belief requires a judgment that the other is not.”⁷⁰ In the custodial sexual assault context, this will almost always operate to the detriment of the inmate-victim whose account is weighed against that of a guard.⁷¹

Thus, not only do incarcerated women have well-founded fears of further abuse and retaliation for reporting, these women have reason to doubt how their own stories will be perceived. Grounded in baseless stereotypes, incarcerated women in particular suffer from a severe lack of credibility when reporting sexual misconduct by prison guards: “Inmates have reported that prison authorities don’t take the reports of sexual abuse seriously. In fact, when they do report the abuse, many are ridiculed and may even be prescribed medication to help with their ‘hallucinations’ as they are often labeled delusional.”⁷² In one study, prosecutors consistently described juries’ refusals to believe inmates’ accounts of abuse.⁷³

Prison grievance procedures further reflect this inherent distrust of inmates’ complaints. Near-impossible hurdles in the form of substantiation and corroboration requirements—as determined and enforced by the state—force a prisoner filing a complaint for sexual abuse to provide, for example, “physical proof or DNA evidence.”⁷⁴ These procedural requirements “stem[] from prison authorities’ and courts’ blanket reluctance to accept a prisoner’s word over a guard’s [P]risoners face an overt ‘presumption of incredibility’”⁷⁵ Indeed, in a seminal multijurisdictional report on women’s prisons, Human Rights Watch concluded: “No state we visited adequately ensures that female prisoners can speedily and effectively complain of such abuse with confidence that it will be impartially investigated and remedied and without fear that they will face retaliation or even punishment.”⁷⁶

As a result, current figures on sexual assaults in prison grossly underestimate the true extent of the problem. Power dynamics disincentivize reporting, and when incarcerated victims do report their abuse, they suffer

⁷⁰ *Id.* at 15.

⁷¹ Brown, *supra* note 14 (“Prosecutors say that without hard evidence, such as DNA or damning video footage, proving officer misconduct can be impossible.”).

⁷² Saliba, *supra* note 4, at 299 (citation omitted).

⁷³ Brenda V. Smith & Jaime M. Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors’ Perceptions*, 3 AM. U. CRIM. L. BR. 19, 21 (2008) (“Both state and federal prosecutors noted that while it was easier for juries to understand the abuse of power issue, juries have problems accepting the credibility of inmates. Juries perceived inmates as liars with a bias against corrections staff.”).

⁷⁴ Buchanan, *supra* note 7, at 65; *see also supra* note 9 and accompanying text (discussing the vigorous scrutiny to which prisoner sexual assault complaints are held).

⁷⁵ Buchanan, *supra* note 7, at 65-66.

⁷⁶ HUMAN RIGHTS WATCH, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996), https://www.hrw.org/legacy/reports/1996/Us1.htm#_1_19 [<https://perma.cc/4XHX-4W5N>].

harsh, retaliatory consequences. The result is a system that deters reporting and facilitates unmitigated sexual abuse of incarcerated women.⁷⁷

II. PROCEDURAL BARRIERS AND ACCESS TO COURTS

When incarcerated women do report sexual abuse by guards, they face extreme procedural hurdles. First, before they can get to court, inmate complainants must satisfy the exhaustion requirement of the PLRA.⁷⁸ The PLRA makes the exhaustion of administrative remedies mandatory.⁷⁹ Under the PLRA as interpreted by the Supreme Court in *Woodford v. Ngo*, any incarcerated person seeking access to the federal courts must “properly exhaust[]” all available administrative remedies—namely, prison grievance procedures.⁸⁰ The PLRA, discussed below, has posed “significant procedural barriers to litigation. Women in prison are . . . forced to rely on what are often inadequate internal prison-grievance systems.”⁸¹ Each of these hurdles will be addressed in turn.

A. Prison Grievance Procedures

First, any prisoner seeking to file a civil claim in federal court must initially lodge a complaint through the grievance process at the facility where she is incarcerated.⁸² Generally, this entails a multistep complaint process.⁸³ As Borchardt details,

First, a prisoner must seek to remedy the complaint through “informal resolution,” as it is usually called. Although ostensibly “informal,” this first stage frequently requires a degree of formality, as the grievance may be dismissed for minor procedural defects: using the wrong form, using the wrong color ink, attaching additional pages to the requisite form, or describing the complaint with insufficient specificity. Second, if the informal resolution attempt does not result in a favorable outcome, the prisoner must file a “formal grievance,” as it is usually called. Formal grievances require multiple procedural technicalities—such as

⁷⁷ Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 119, 125 (2009) (“Despite underreporting, the numbers of reported prison rapes reveal a terrifying reality.”).

⁷⁸ 42 U.S.C. § 1997e(a) (2012).

⁷⁹ *Woodford v. Ngo*, 548 U.S. 81, 85 (2006).

⁸⁰ *Id.* at 92.

⁸¹ INSIDE THIS PLACE, *supra* note 24, at 227.

⁸² Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN’S L. REV. 203, 217 (2004) (“The exhaustion of administrative remedies entails that a prisoner litigant must first process his claims through all of the institutional grievance procedures before bringing a suit in federal court.”).

⁸³ Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 492 (2012).

using the correct form, attaching the right documentation, naming individuals and places involved with sufficient specificity, using the right color ink, and others—for which failure to comply may result in dismissal. Third, if the formal grievance does not result in a favorable outcome, the prisoner must file an appeal. Some grievance systems require a second level of appeal, which is the fourth and usually final stage of the grievance process.⁸⁴

Prison grievance processes are highly variable because states and independent bodies within states, including municipalities and even individual prisons, are responsible for creating and maintaining their own grievance procedures.⁸⁵ These procedures sometimes involve ludicrous deadlines, which, if a prisoner fails to meet, will render her complaint untimely and will preclude successful progression to the federal court system because she failed to exhaust her “available” administrative remedies.⁸⁶ Even the Supreme Court has recognized that “the deadline for filing an administrative grievance is generally not very long—14 to 30 days.”⁸⁷ Indeed, these procedures “invite[] technical mistakes resulting in inadvertent noncompliance with the exhaustion requirement, and barring litigants from court because of their ignorance and uncounselled procedural errors.”⁸⁸

The prison grievance system is riddled not only with procedural trapdoors that make deadline and rule-compliant filing extremely difficult, but also with significant risks to those who do attempt to make use of the system.⁸⁹ First, the nature of the system requires a “prisoner to report the abuse to her abuser’s colleagues through an often-humiliating disciplinary procedure that is likely to result in retaliation.”⁹⁰ In addition, these processes are not

⁸⁴ *Id.* at 492-94 (footnotes omitted).

⁸⁵ *Id.* at 490.

⁸⁶ *Woodford v. Ngo*, 548 U.S. 81, 85 (2006); *see also* Buchanan, *supra* note 7, at 72 (giving the example of the New York Department of Corrections, which “imposes a fourteen-day limit for filing any prisoner grievance, unless the grievance authority determines that ‘mitigating circumstances’ justify the delay.”).

⁸⁷ *Woodford*, 548 U.S. at 95.

⁸⁸ John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 431 (2001); *see also* Borchardt, *supra* note 83, at 494 (“Grievance systems generally have very strict time requirements—usually mere days—that prisoners must satisfy when proceeding through each stage of the grievance process. Prisoners are deemed to have exhausted the grievance procedures only when they have successfully completed all stages, satisfying the requisite time limits and procedural technicalities.” (footnote omitted)).

⁸⁹ HUMAN RIGHTS WATCH, *supra* note 76 (“Grievance or investigatory procedures, where they exist, are often ineffectual, and correctional employees continue to engage in abuse because they believe they will rarely be held accountable, administratively or criminally. Few people outside the prison walls know what is going on or care if they do know. Fewer still do anything to address the problem.”).

⁹⁰ Buchanan, *supra* note 7, at 73 (footnote omitted).

confidential, exposing the victim to further abuse.⁹¹ As a result, prisoners do not make use of the prison grievance system. Lori Girshick concludes,

The grievance process can be difficult for inmates to access. It is a risky step more likely to lead to harassment and retaliation than redress for a wrong done Officers always know when a grievance has been filed and the inmate will still be at the mercy of that officer for further sexual abuse or hassles in daily living. This serves as a serious disincentive for coming forward and making reports. Inmates report that sometimes the grievance is thrown into the trash right in front of them.⁹²

B. *The Prison Litigation Reform Act*

The PLRA was passed with the aim of curbing “frivolous” prisoner litigation.⁹³ As Margo Schlanger, who has extensively studied and written on the PLRA and inmate litigation, notes,

The government officials and legislators who were the driving force behind the PLRA presented the following account of the cases: inmates, they said, were unduly litigious, making federal cases out of the most trivial mishaps; the cases were deluging both executive and judicial officials who were supposed to respond to them⁹⁴

The most significant section of the PLRA is its exhaustion requirement, codified at 42 U.S.C. § 1997e(a). This exhaustion provision mandates: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”⁹⁵

The Supreme Court further elaborated on the exhaustion provision in two cases, decided within months of each other: *Woodford v. Ngo*⁹⁶ and *Jones v. Bock*.⁹⁷ In *Woodford*, the Court held that administrative grievance procedures must be “properly” exhausted, which in the prison context means meeting all

⁹¹ Brocco, *supra* note 15, at 926-27; *see also* Buchanan, *supra* note 7, at 64 (“Prison staff often fail to keep prisoner grievances confidential: thus when a prisoner attempts to file a grievance, she often faces retaliatory harassment, discipline, or even assault by guards.”).

⁹² Lori B. Girshick, *Abused Women and Incarceration*, in *WOMEN IN PRISON: GENDER AND SOCIAL CONTROL* 95, 109 (Barbara H. Zaitzow & Jim Thomas, eds., 2003).

⁹³ Chen, *supra* note 82, at 221; *see also* Brocco, *supra* note 15, at 925 (“To reduce frivolous lawsuits, PLRA imposes restrictions on prisoner litigation. The number of complaints filed before and after PLRA’s passage shows that these restrictions successfully reduced prisoner complaints.”).

⁹⁴ Margo Schlanger, *Inmate Litigation*, 116 *HARV. L. REV.* 1555, 1567 (2003).

⁹⁵ 42 U.S.C. § 1997e(a) (2012).

⁹⁶ 548 U.S. 81 (2006).

⁹⁷ 549 U.S. 199 (2007).

deadlines as required by the correctional institution's grievance system.⁹⁸ There, respondent-prisoner Ngo argued that administrative remedies were no longer "available" to him at the correctional facility where he was incarcerated because time to file had run.⁹⁹ The Court rejected Ngo's argument that "the reason why administrative remedies are no longer available is irrelevant. Bare unavailability suffices even if this results from a prisoner's deliberate strategy of refraining from filing a timely grievance."¹⁰⁰ In turn, the Court held that such an interpretation of the PLRA would nullify the exhaustion requirement.¹⁰¹ Ngo failed to exhaust administrative remedies properly on account of lack of compliance with timely grievance filing that then precluded bringing a civil claim in federal court.¹⁰²

A few months later, in *Jones v. Bock*, the Court reiterated the proper exhaustion requirement of the PLRA.¹⁰³ The *Jones* Court held, however, that exhaustion is not a pleading requirement to be fulfilled by prisoners; failure to exhaust is an affirmative defense.¹⁰⁴ Furthermore, the Court went on to hold that where a prisoner states multiple claims but fails to exhaust only some, failure to exhaust part does not defeat an otherwise procedurally compliant whole.¹⁰⁵

The exhaustion requirement has worked a significant disadvantage to prisoner suits. "Claims have been barred despite the fact that special circumstances—such as illiteracy, physical illness, and mental illness—would have made compliance with standard grievance procedures impossible."¹⁰⁶ Even though the exhaustion requirement may be the most daunting PLRA-imposed hurdle to prisoner litigation,¹⁰⁷ it is by no means the only impediment to prisoners filing civil complaints in federal courts. The PLRA also requires even indigent prisoners filing *pro se* to pay filing fees.¹⁰⁸ This further distinguishes

⁹⁸ *Woodford*, 548 U.S. at 90-91 ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.").

⁹⁹ *Id.* at 87-88.

¹⁰⁰ *Id.* at 88.

¹⁰¹ *Id.* at 95.

¹⁰² *Id.* at 87.

¹⁰³ *Jones v. Bock*, 549 U.S. 199, 218 (2007).

¹⁰⁴ *See id.* at 216 ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.").

¹⁰⁵ *See id.* at 222 ("A typical PLRA suit with multiple claims, on the other hand, may combine a wide variety of discrete complaints, about interactions with guards, prison conditions, generally applicable rules, and so on, seeking different relief on each claim. There is no reason failure to exhaust on one necessarily affects any other.").

¹⁰⁶ INSIDE THIS PLACE, *supra* note 24, at 229; *see also id.* ("In one particularly notorious case, it took a court almost five years to determine that a group of women filing a class action suit alleging sexual assault had not properly exhausted their administrative remedies." (citation omitted)).

¹⁰⁷ *See Buchanan*, *supra* note 7, at 72 ("The most damaging hurdle imposed by the PLRA is its grievance-exhaustion requirement.").

¹⁰⁸ 28 U.S.C. § 1915(b) (2012).

prisoner-filed suits from other civil suits filed *pro se*: “In non-prisoner litigation lawsuits, indigent persons who cannot afford their court costs may file *in forma pauperis*, and disregard the costs. This indigent-friendly costs exception is not available to a prisoner-plaintiff. The only available option is to pay the fees in installments over time.”¹⁰⁹ In addition, the PLRA imposes a three-strikes rule:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.¹¹⁰

Another troubling limitation imposed by the PLRA is the physical injury requirement. This clause mandates that a prisoner make “a prior showing of physical injury or the commission of a sexual act.”¹¹¹ The PLRA does not answer whether custodial sexual assault is itself a physical injury or something more (e.g. bruising, bleeding, broken bones) is required.¹¹² Courts have described physical injuries meeting this requirement as those that are “observable or diagnosable medical condition[s] requiring treatment by a medical care professional.”¹¹³ It is particularly challenging for female inmates to meet the physical injury requirement because “the courts find the rape of a woman to be somehow less of an injury than the rape of a man.”¹¹⁴ Given the frequent lack of corroborating or physical evidence to support a finding of injury or past sexual act in custodial sexual abuse cases,¹¹⁵ “although the case law is far from uniform, some courts have deemed sexual assault not to constitute a ‘physical injury’ within the meaning of the PLRA.”¹¹⁶ Making a

¹⁰⁹ Brocco, *supra* note 15, at 927 (citations to the PLRA omitted).

¹¹⁰ 28 U.S.C. § 1915(g) (2012).

¹¹¹ See 42 U.S.C.A. § 1997e(e) (West 2013) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act.”).

¹¹² 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, 45 (2004).

¹¹³ *Id.* at 47; see also *Luong v. Hatt*, 979 F. Supp. 481, 486 (N.D. Tex. 1997) (supplying this definition of “physical injury”); *Mala v. Pastrana*, No. 08-22629, 2009 WL 3055214, at *2 (S.D. Fla. July 6, 2009) (citing *Luong* for the same definition).

¹¹⁴ Golden, *supra* note 112, at 51.

¹¹⁵ See, e.g., *Dumond*, *supra* note 44, at 158-59 (2006) (describing the case of Hope Hernandez, who was raped by a prison guard: “Later I told a nurse what had happened, and they took me to the hospital to do a rape kit. But the officer had used a condom. The rape kit came back . . . inconclusive.” (citations omitted)).

¹¹⁶ Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 144 (2008); see also *Hancock v. Payne*, No. Civ.A.103CV671JMRJMR, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006) (finding the physical injury requirement unsatisfied where “the plaintiffs do not make any claim of

showing of physical injury first requires reporting the assault, which, as noted above, inmates are unlikely to do for myriad, compound reasons.¹¹⁷ Further, this showing demands a collection of evidence by prison authorities—such as DNA evidence or photographs of marks or bruising—that either may not result from a particular assault or that the prison may be unable or unwilling to gather.¹¹⁸ Several authors note that the physical injury requirement “effectively curtails actions for damages brought by prisoners seeking redress from rape.”¹¹⁹ This may have been an unintended consequence of the PLRA, but it is an effect with which prisoners must now contend.¹²⁰

As a result of these provisions aimed at deterring prisoner suits—and, at the very least, making them procedurally difficult to bring—prisoner civil filings were down in the years immediately following passage of the PLRA.¹²¹ In 1995, there were 24.6 prisoner civil filings per 1000 prisoners; by 1997, the year after the PLRA became law, that figure was down to 15.1, and continued to decrease through 2007, at which point there were only 9.6 civil prisoner-filed claims per 1000 prisoners.¹²² While the Supreme Court’s interpretation of the exhaustion requirement in *Woodford* may not have had a similar effect,¹²³ at least in the context of prisoners filing claims of sexual assault and abuse, the PLRA appears to have operated as intended by curbing not only frivolous claims, but also potentially meritorious ones. The procedural strictures of the PLRA, however, leave the relative merits of many such prisoner-filed suits unknown. The PLRA, in conjunction with prison-specific power dynamics that engender fear of retaliation at every turn, have effectively operated to disincentivize and limit prisoner–victims from utilizing grievance procedures and proceeding with legal redress against guards who assault them.¹²⁴

physical injury beyond the bare allegation of sexual assault.”); Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 162 (2015) (“In particular, prisoners’ cases are thrown out of court for failure to properly complete often-complicated grievance procedures, or because they do not allege physical injury, which some courts read the PLRA to require for recovery even in constitutional cases.” (citation omitted)).

¹¹⁷ See *supra* Part I.

¹¹⁸ David K. Ries, Note, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & POL’Y 915, 938 (2005).

¹¹⁹ Golden, *supra* note 112, at 38; see also Buchanan, *supra* note 7, at 73 (“On its face, however, the physical injury requirement appears to bar prisoner claims for sexual abuse if no physical injury results.”).

¹²⁰ See Golden, *supra* note 112, at 44–45 (“Even those lawmakers who opposed the enactment of the PLRA did not raise the issue of rape cases.”).

¹²¹ See Schlanger, *supra* note 116, at 155–56 (2015) (“In 1996, the PLRA immediately transformed the litigation landscape. After a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade. Since 2007, filing rates, prison population, and filings have all plateaued.”).

¹²² *Id.* at 157.

¹²³ Elana M. Stern, Comment, *Completely Exhausted: Evaluating the Impact of Woodford v. Ngo on Prisoner Litigation in Federal Courts*, 166 U. PA. L. REV. 1511, 1512–13 (2018).

¹²⁴ Golden, *supra* note 112, at 60.

C. Pleading Requirements

A final point to consider here is that when prisoners do file a claim, most do so *pro se*.¹²⁵ Unlike in “criminal and administrative [proceedings that] are largely ‘out of the victim’s hands’ in that prosecutors or prison administrators must initiate and pursue the cases against the assailants,”¹²⁶ here a prisoner-claimant remains the master of her own case, but she does so at her peril. Under federal pleading requirements, an inmate must state her claim with sufficient facts to meet a standard of plausibility.¹²⁷ This heightened pleading standard is especially arduous for inmates, who represent themselves and are without access to resources for or assistance with conducting formalities of litigation, such as legal research and fact discovery.¹²⁸ As a result, meeting the pleading requirements is yet another procedural hurdle that makes sustaining prisoners’ *pro se* civil claims nearly impossible.¹²⁹

III. EXISTING REMEDIES AND LITIGATION

While male-guard-on-female-inmate sexual abuse is rarely the subject of civil litigation or criminal prosecution,¹³⁰ not all prisoner-brought litigation is fruitless.¹³¹ The Supreme Court has recognized that “rape or other violence . . . serves absolutely no penological purpose.”¹³² In *Farmer v. Brennan*, the Court held that prison officials’ displays of “deliberate indifference” toward “a substantial risk of serious harm to an inmate” constitute an Eighth Amendment violation.¹³³ *Farmer* concerned a transgender inmate’s complaints that guards displayed deliberate indifference to her safety by placing her in the general prison population at a male correctional facility despite her appearance that “project[ed]

¹²⁵ Brocco, *supra* note 15, at 928-29; see also Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996) (“Prisoner lawsuits challenging prison conditions share two characteristics. Nearly all of these lawsuits are filed *pro se*, and the vast majority are dismissed as frivolous.”).

¹²⁶ McGuire, *supra* note 4.

¹²⁷ See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹²⁸ Brocco, *supra* note 15, at 929; see also *id.* at 930-36 (detailing the pleading requirements for federal complaints); Chen, *supra* note 82, at 215 (“A great deal of prisoners do not have adequate schooling, have learning disabilities, and are ‘functionally illiterate.’ It is not easy for a prisoner to simply draft up a complaint that would communicate the extent of his injuries so that they represent a cognizable legal claim.” (internal citation omitted)).

¹²⁹ Brocco, *supra* note 15, at 930-36.

¹³⁰ INSIDE THIS PLACE, *supra* note 24, at 227.

¹³¹ For a comprehensive sampling of federal civil suits by circuit, see generally Brenda V. Smith & Melissa C. Loomis, *Sexual Abuse in Custody: A Case Law Study*, NATIONAL PREA RESOURCE CENTER (Feb. 1, 2013), <https://www.prearesourcecenter.org/sites/default/files/library/sexualabusecasescaselawsurvey.pdf> [<https://perma.cc/WNC7-WUSV>].

¹³² *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring).

¹³³ *Id.* at 828 (majority opinion).

feminine characteristics.”¹³⁴ The *Farmer* Court defined “deliberate indifference” on the part of a prison guard as a subjective standard, where “the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”¹³⁵ Female inmates have been able to bring cognizable and successful federal and state civil claims to seek redress for sexual harm suffered while incarcerated. Most of these cases are brought in federal court,¹³⁶ most commonly under 42 U.S.C. § 1983.¹³⁷ Section 1983 claims, however, also create multiple challenges for prisoner-litigants, which will be discussed in the latter part of this section.

A. *Some Success Stories*

Where female inmates have successfully brought federal civil actions, they have generally done so as a class.¹³⁸ For example, in *Women Prisoners v. District of Columbia*,¹³⁹ a class of female inmates succeeded at the district court level.¹⁴⁰ In addition to detailing “countless incidents of sexual misconduct between prison employees and female prisoners[,]”¹⁴¹ the plaintiff class also mounted an extensive, expert-laden case, “address[ing] the flaws in the Inmate Grievance Procedure, the lack of specific staff training, the absence of confidentiality of complaints, the inadequacy of the investigations, and the prison’s repeated failures to take remedial action.”¹⁴² In the aftermath of *Women Prisoners*, the Court of Appeals for the District of Columbia upheld a jury verdict finding deliberate indifference where a single inmate alleged that she was forced to perform a striptease for prison guards.¹⁴³ In a Massachusetts federal case, *Kane v. Winn*, the court noted: “In other litigation, the federal government has . . . reached substantial settlements with the states of Arizona and Michigan

¹³⁴ *Id.* at 830-31 (internal quotation marks omitted).

¹³⁵ *Id.* at 837.

¹³⁶ Bell et al., *supra* note 40, at 214.

¹³⁷ Ashley E. Day, *Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. § 1983*, 38 SANTA CLARA L. REV. 555, 557 (1998) (“The main legal channel for female prisoners who file a cause of action alleging abuse by male prison guards is under 42 U.S.C. § 1983, which addresses violations of constitutional rights under the Eighth Amendment.”).

¹³⁸ See Laderberg, *supra* note 22, at 326 (“[C]lass action suits under the Eighth Amendment have emerged as the best option for prisoners wishing to obtain injunctive relief from custodial abuse in American prisons.”); *see also id.* at 341 (“The prison administration often has ignored or dismissed individual incidents of sexual abuse . . .”).

¹³⁹ 877 F. Supp. 634 (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995), *remanded by* 95 F.3d 910 (D.C. Cir. 1996).

¹⁴⁰ Bell, et al., *supra* note 40, at 217.

¹⁴¹ *Id.* at 216.

¹⁴² Laderberg, *supra* note 22, at 354.

¹⁴³ *Daskalea v. District of Columbia*, 227 F.3d 433, 441 (D.C. Cir. 2000).

regarding sexual misconduct and privacy violations that female inmates have suffered at the hands of prison guards.”¹⁴⁴ More recently, in a § 1983 class action suit in the Southern District of New York, currently-incarcerated women alleged multiple incidents of abuse by prison guards, including retaliation for reporting abuse.¹⁴⁵ Plaintiffs in this suit sought redress under the Eighth Amendment.¹⁴⁶

On the state level, *Tracy Neal v. Michigan Department of Corrections* serves as another example of successful prisoner class action litigation to address sexual abuse.¹⁴⁷ In *Neal*, “[t]he allegations involved sexual abuse spanning more than two decades and several administrations.”¹⁴⁸ Despite a protracted history, the case resulted in a jury verdict for the plaintiffs, who were inmates, along with a monetary damages award of over \$15 million.¹⁴⁹

B. No Guarantees: Stumbling Blocks and Cases Lost

Filing under 42 U.S.C. § 1983 remains a challenge for prisoners—especially those filing *pro se*—and formerly incarcerated individuals trying to state a claim about what occurred during their confinement. In order to sustain a § 1983 claim for Eighth Amendment violations, a complaint must “allege a deprivation of a civil right.”¹⁵⁰ Furthermore, “the plaintiff must prove that the party acted under color of law.”¹⁵¹ It is difficult for abused inmates to meet the requirements of 42 U.S.C. § 1983 because the person acting “under color of state law”¹⁵² must do so with “‘deliberate indifference’ to inmate health or

¹⁴⁴ 319 F. Supp. 2d 162, 187 (D. Mass. 2004).

¹⁴⁵ Complaint at 5-45, *Jane Jones et al. v. Annucci*, <https://www.clearinghouse.net/detail.php?id=15190> [<https://perma.cc/UU5P-KWE5>].

¹⁴⁶ *Id.* at 2. The suit was voluntarily dismissed by the parties in December 2016. Civil Rights Litigation Clearinghouse, *Case Profile: Jane Jones v. Annucci*, <https://www.clearinghouse.net/detail.php?id=15190> [<https://perma.cc/7HQA-FCFQ>] (last visited Oct. 26, 2018).

¹⁴⁷ Culley, *supra* note 54, at 207.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Day, *supra* note 137, at 557.

¹⁵¹ *Id.*

¹⁵² *Id.* The statute mandates that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added).

safety.”¹⁵³ Making a sufficient showing of subjective deliberate indifference under *Farmer* is a burden that many prisoners filing *pro se* cannot meet.¹⁵⁴

Furthermore, as government authorities, prison personnel enjoy qualified immunity.¹⁵⁵ The Supreme Court has held that “an official is entitled to immunity unless his conduct violates a ‘clearly established’ constitutional right.”¹⁵⁶ Additionally, “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.”¹⁵⁷ In some instances, courts have held that “[w]here guards themselves are responsible for the rape and sexual abuse of inmates, qualified immunity offers *no* shield.”¹⁵⁸ But courts do not so uniformly hold.¹⁵⁹ Indeed, “as interpreted by the circuit courts, *Farmer* has significantly limited the circumstances in which judges can hold prison officials accountable.”¹⁶⁰ Thus, it is almost impossible for an inmate filing a Section 1983 action *pro se* to do so successfully.¹⁶¹

In addition to pleading and immunity problems, prisoners are up against statutes of limitations. Section 1983 does not have an independent statute of limitations, but rather, federal courts apply the relevant state statute of limitations, which ranges from one to three years.¹⁶² Not only may prisoners be unaware of the statutes of limitations applicable to their claims, but an otherwise meritorious claim “may be precluded altogether if the statute of limitations for the Section 1983 claim expires before the prisoner has exhausted all administrative

¹⁵³ *Farmer v. Brennan*, 511 U.S. 825, 825 (1994); see also Buchanan, *supra* note 7, at 85 (“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 . . .’”).

¹⁵⁴ Buchanan, *supra* note 7, at 85 (“A purely objective showing of deliberate indifference—negligence or gross negligence—is not enough.”).

¹⁵⁵ Buchanan, *supra* note 7, at 75.

¹⁵⁶ Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126 (1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

¹⁵⁷ Buchanan, *supra* note 7, at 75.

¹⁵⁸ *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (emphasis in original) (citing *Mathie v. Fries*, 935 F. Supp. 1284, 1301 (E.D.N.Y. 1996) (finding defendant liable under section 1983 where “[t]he sexual abuse and sodomy perpetrated . . . against the powerless inmate was applied maliciously and sadistically in order to afford personal gratification to [defendant]. These malicious acts violated all contemporary standards of decency.”)); see also *Ware v. Jackson Cty.*, 150 F.3d 873, 876-87 (8th Cir. 1998) (upholding finding of section 1983 liability where inmate successfully alleged “rampant sexual misconduct of employees at the [correctional facility] toward female inmates.”).

¹⁵⁹ See Bell, et al., *supra* note 40, at 213 (“In *Carrigan v. Delaware*, even when an official was aware of incidents of sexual harassment within his prison, that awareness was not sufficient to constitute ‘deliberate indifference to a substantial risk of serious harm.’”).

¹⁶⁰ *Id.*

¹⁶¹ Buchanan, *supra* note 7, at 75.

¹⁶² Chen, *supra* note 82, at 224-25.

remedies.”¹⁶³ As a result, statutes of limitations further compound exhaustion requirements to keep inmates’ claims out of court on procedural grounds.¹⁶⁴

More often than not, inmates’ complaints of sexual abuse result in little or no action by the prison, and guards suffer few, if any, consequences. Guards against whom grievances are lodged will sometimes get transferred to other facilities or lose their jobs as “punishment.”¹⁶⁵ Indeed, “correctional staff are allowed to resign, an administrative sanction, in lieu of being criminally prosecuted for sexual abuse with persons in custody.”¹⁶⁶ Even where legal action ensues, accused guards have not necessarily even faced those repercussions: in an Ohio case settled during the course of litigation, the accused guard “was fired and then reinstated with the stipulation that he not work with female inmates, according to court documents.”¹⁶⁷ The lack of severe sanctions—criminal or otherwise—for guards who sexually assault inmates is not merely anecdotal: in a report based on data from 2009-2011, BJS concluded that “[t]he most commonly imposed sanctions for staff sexual misconduct were loss of job (in 85% of incidents)”¹⁶⁸

A case example illustrates the shortcomings and challenges of inmate civil litigation. In a Section 1983 case brought in the Southern District of New York and appealed to the Second Circuit, the courts found that a group of currently and formerly incarcerated women could not proceed with their claims of sexual abuse and harassment by prison officials at several correctional facilities for failure to exhaust administrative remedies, and further concluded that no “special circumstances” existed to “excuse

¹⁶³ Antonieta Pimienta, Note, *Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the “Object Intelligibly” Standard*, 114 COLUM. L. REV. 1209, 1219 (2014).

¹⁶⁴ See *supra* Part II.

¹⁶⁵ See Brown, *supra* note 14 (“The so-called punishment for an officer who rapes an inmate is to get transferred to another facility.”) (internal quotation marks omitted).

¹⁶⁶ Smith & Yarussi, *supra* note 73, at 21.

¹⁶⁷ Eric Heisig, *Ohio Will Pay \$525,000 to Cleveland Woman Who Accused Prison Guard of Sexual Assault*, CLEVELAND.COM (Oct. 25, 2017), http://www.cleveland.com/court-justice/index.ssf/2017/10/ohio_will_pay_525000_to_clevel.html [<https://perma.cc/6G62-W3M8>]; see also John Rudolf, *Alabama Women’s Prison Inmates Sexually Abused by Guards, Report Says*, HUFFINGTON POST (May 5, 2012, 7:27 PM), https://www.huffingtonpost.com/2012/05/22/alabama-womens-prison-sexual-abuse_n_1537623.html [<https://perma.cc/MP4V-ECXL>] (reporting on an Alabama women’s prison where sexual abuse is rampant: “All of the charges [against prison guards] were settled with plea bargains, and only one prison employee served more than six days in jail.”).

¹⁶⁸ BUREAU OF JUSTICE STATISTICS, *supra* note 5, at 2; see also Simon McCormack, *Prison Staff Not Held Accountable for Sexual Abuse of Inmates: Report*, HUFFINGTON POST (Jan. 24, 2014, 4:54 PM, updated Jan. 27, 2014), https://www.huffingtonpost.com/2014/01/24/prison-staff-sex-abuse-report_n_4661485.html [<https://perma.cc/FXU6-DRJH>] (referencing the 2014 BJS report: “The report also said that just 27 percent of staff who were referred for prosecution were arrested, and only 1 percent were convicted.”); Goldstein, *supra* note 14 (“New York City agreed to pay \$1.2 million to settle a lawsuit brought by two female inmates who accused a guard at Rikers Island of repeatedly sexually abusing them. That guard was never criminally charged and remains employed by the city Correction Department.”).

. . . failure to exhaust.”¹⁶⁹ The district court held administrative exhaustion procedurally defective here despite the plaintiffs’ allegation “that administrative remedies were rendered ‘unavailable’ by virtue of threats made against them.”¹⁷⁰ The district court reasoned that because a few of the plaintiffs did file some form of grievance, this “directly cuts against [their] argument that the process is unavailable to victims of sexual abuse” and further that the “evidence does not demonstrate that Plaintiffs’ efforts at grieving properly were thwarted, but rather shows that they merely selected to pursue informal avenues instead of the formal grievance procedure.”¹⁷¹

Such cases demonstrate the inherent flaws in the PLRA and prison grievance procedures,¹⁷² and further illustrate the ultimate conclusion that current forms of legal redress for custodial sexual assault are, at best, inadequate.¹⁷³ Given the shortcomings of civil claims and their obvious failure to mitigate staff sexual abuse of inmates, the following section will explore the possibility and utility of criminal liability.

IV. CRIMINAL LIABILITY

Criminal prosecutions may be the preferable mode of redress for custodial sexual assault, rather than civil litigation grounded in federal law that is relatively difficult to bring successfully given the myriad hurdles just described.¹⁷⁴ Indeed, “the majority of people in the U.S. prison population fall under the jurisdiction of the states, . . . [thus] state criminal laws are arguably the most important mechanisms for addressing sexual misconduct in prisons.”¹⁷⁵ Criminal cases have rarely been brought against prison staff for sexual abuse of female inmates;¹⁷⁶ a few recent cases have involved criminal

¹⁶⁹ *Amador v. Andrews*, 655 F.3d 89, 102-03 (2d Cir. 2011).

¹⁷⁰ *Amador v. Superintendents Dep’t. Corr. Servs.*, No. 03 Civ. 0650 (KTD)(GWG), 2007 WL 4326747, at *8 (S.D.N.Y. Dec. 4, 2007), *vacated in part, dismissed in part by Amador v. Andrews*, 655 F.3d 89 (2d Cir. 2011).

¹⁷¹ *Id.*

¹⁷² See *supra* notes 93-124 and accompanying text (discussing the PLRA and barriers to prisoner-initiated civil litigation in federal courts).

¹⁷³ See OWEN ET AL., *supra* note 21, at 167 (“Sexual misconduct complaints are routinely dismissed on dubious grounds. Investigations are often superficial and incomplete. And guards who sexually assault prisoners are rarely punished.”) (internal quotation marks and citation omitted).

¹⁷⁴ See *supra* Part III.

¹⁷⁵ INSIDE THIS PLACE, *supra* note 24, at 234.

¹⁷⁶ That inmates often delay reporting makes the cases against guards more difficult to prove:

Bringing criminal sex crime charges against corrections officers is rare and difficult. Inmates, fearful of retaliation, often wait weeks, months or longer to make an allegation, if they do so at all. When an inmate delays reporting, physical evidence has often disappeared, making the allegation a matter of the inmate’s word against the guard’s.”

Goldstein, *supra* note 14; see also Human Rights Watch, *supra* note 76 (describing Georgia’s handling of criminal prosecutions of guards for sexually assaulting inmates: “In October and November 1992,

charges against prison guards and administrative personnel for sexual misconduct.¹⁷⁷ While these cases can—and sometimes do—end in plea deals,¹⁷⁸ bringing criminal charges may be a more effective deterrent of custodial sexual abuse than civil claims,¹⁷⁹ many of which are dismissed for procedural defects before the merits can be assessed, and which may only result in liability for the prison employer or supervisor, as opposed to the individual guard.¹⁸⁰ However, criminal cases also suffer from their own deficiencies in addressing guard-on-inmate sexual assault: prosecutorial discretion in bringing criminal charges and a hesitation to proceed with cases against prison personnel make criminal cases an unlikely and seldom-pursued form of recourse, even when procedurally possible.¹⁸¹

While criminal claims are by no means a substitute for civil claims—indeed, pursuing both forms of relief may be preferable—criminal liability holds at least two advantages over civil claims. First, criminal charges are not governed by the PLRA, and therefore are not limited by the PLRA's exhaustion, filing fee, physical injury, or three-strikes provisions.¹⁸² Second, statutes of limitations for criminal sexual assault claims are generally longer; in some states, there is no statute of limitations for felony sexual assault.¹⁸³

Criminal cases against prison guards for sexually assaulting female inmates have been brought successfully and resulted in prison sentences. For

indictments were handed down against fourteen former GWCI or Colony Farm employees on state criminal law charges ranging from sodomy and sexual assault against a person in custody to rape. A fifteenth defendant was later indicted after DNA testing showed him to be the father of a prisoner's baby Only two defendants were actually brought to trial on these charges, although two others pled guilty and were sentenced to terms of probation.”)

¹⁷⁷ Goldstein, *supra* note 14; *see also* Mike Deak, *Fifth Edna Mahan Guard Charged with Sexual Assault*, MYCENTRALJERSEY.COM (Aug. 17, 2017, 5:28 PM), <http://www.mycentraljersey.com/story/news/crime/2017/08/17/fifth-edna-mahan-guard-charged-sexual-assault/577992001/> [<https://perma.cc/6S44-JLDH>]; Elliott C. McLaughlin, *Lawsuit Alleges Georgia Prison Supervisor Raped Women Inmates*, CNN (Feb. 15, 2016, 9:42 PM), <http://www.cnn.com/2016/02/15/us/georgia-prison-rapes-lawsuit/index.html> [<https://perma.cc/R83M-4MH5>].

¹⁷⁸ *See* Jerry Iannelli, *Miami Federal Prison Guard Gets Eight Months in Jail for Raping Inmate*, MIAMI NEW TIMES (Nov. 15, 2017, 8:00 AM), <http://www.miaminewtimes.com/news/miami-prison-guard-caught-raping-inmate-sentenced-to-eight-months-in-jail-9831049> [<https://perma.cc/28TN-PB87>] (discussing a federal prison officer who pled guilty to raping an inmate and received an eight-month sentence).

¹⁷⁹ The relative magnitude of civil claims compared to criminal prosecutions likely results, at least in part, from the ability of prisoner-litigants to bring civil claims *pro se*.

¹⁸⁰ *See supra* Parts II–III, (discussing barriers to inmate-brought civil litigation and immunities from civil liability).

¹⁸¹ Smith & Yarussi, *supra* note 73, at 20.

¹⁸² *See supra* notes 93–124 and accompanying text (describing the PLRA and its effects on prisoner-filed civil litigation).

¹⁸³ *See generally* Brittany Ericksen & Ilse Knecht, *Statutes of Limitations for Sexual Assault: A State-by-State Comparison*, VICTIMS OF CRIME (Aug. 21, 2013), <https://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf?sfvrsn=2> [<https://perma.cc/Z6ZK-CTC8>].

example, in *Commonwealth v. Black*,¹⁸⁴ appellant, a guard at Lackawanna County Prison, faced several sexual misconduct charges.¹⁸⁵ Black pled guilty and was sentenced to up to eight years' imprisonment and up to ten years' "special probation."¹⁸⁶ On appeal, Black unsuccessfully challenged his sentence as unreasonable because it was beyond the sentencing guidelines' recommendation.¹⁸⁷ The Superior Court rejected Black's arguments and upheld his prison sentence given the sentencing court's consideration of

the duration and length of time in which the crimes occurred; the number of victims; the need to deter similarly situated authority figures; the harm Appellant had done to the criminal justice system as a whole; and that Appellant had taken advantage of helpless women. These reasons are sufficient to sentence outside of the guidelines and in the aggravated range.¹⁸⁸

In a New Mexico case, former female inmates successfully brought criminal charges against prison guard Anthony Townes for multiple instances of sexual assault.¹⁸⁹ In the underlying criminal case, Townes pled guilty to multiple counts of criminal sexual abuse and false imprisonment.¹⁹⁰ Townes conceded that the factual allegations against him were true, "including that he had unlawfully restrained or confined Plaintiffs and caused them to engage in sexual intercourse while they were inmates and while he was in a position of authority over them and that he was able to use his authority to coerce Plaintiffs to submit to the acts."¹⁹¹ Here, the New Mexico Supreme Court also found Townes' employer—the private correctional facility where he worked—and the prison warden vicariously civilly liable and responsible for the payment of all civil damage awards.¹⁹²

Similarly, the Texas case of Marilyn Shirley resulted in both a criminal conviction and a civil damages award.¹⁹³ Shirley was serving a four-year prison sentence for a drug offense when guard Mike Miller raped her.¹⁹⁴ She reported the assault to a prison official and produced the sweatpants she had been wearing that night, which had Miller's DNA on them. In her civil case, Shirley won a four million dollar damages award against Miller, and he was sentenced

¹⁸⁴ No. 700 MDA 2016, 2016 WL 6876487 (Pa. Super. Ct. Nov. 22, 2016).

¹⁸⁵ *Id.* at *1.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *2.

¹⁸⁸ *Id.* at *3.

¹⁸⁹ *Spurlock v. Townes*, 368 P.3d 1213, 1214 (N.M. 2016).

¹⁹⁰ *Id.* at 1215.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1218-19.

¹⁹³ See Tony Cox, *One Woman's Story of Prison Rape, and Recovery*, NPR (Mar. 21, 2007, 9:00 AM), <https://www.npr.org/templates/story/story.php?storyId=9032287> [<https://perma.cc/PM58-QJQB>] (describing how the FBI participated in the prison investigation, retrieving DNA evidence that assisted in the case).

¹⁹⁴ *Id.*

to over twelve years in prison on several counts of sexual misconduct.¹⁹⁵

Yet another example of successful criminal prosecution of a prison guard for custodial sexual assault comes from the Sixth Circuit. In *United States v. Smith*, the Court of Appeals upheld a federal jury verdict convicting prison guard Eddie Smith of several sexual offenses against inmates at the Federal Medical Center in Kentucky.¹⁹⁶ At his trial, victims testified about multiple instances of rape and forced sexual encounters.¹⁹⁷ The jury convicted Smith on almost all counts, and he was sentenced to over twenty years' imprisonment.¹⁹⁸

These cases demonstrate the potential for pursuing criminal prosecutions against male guards who sexually assault female inmates. While criminal liability is possible, it is by no means a complete or reliable cure for the defects of civil litigation. Criminal prosecutions have several shortcomings in the context of custodial sexual assault. First, accessing the criminal justice system is particularly hard for incarcerated persons. Unlike an assault victim outside of prison who can make a police report at any time, incarcerated women—like all inmates—are at the mercy of prison grievance processes, which have been documented to be ineffective and are only rarely pursued to the fullest extent possible.¹⁹⁹ Furthermore, inmates have limited access to means of communication with those outside prison walls, which negatively impacts inmates' abilities to report and bring attention to the abuses they suffer while incarcerated.²⁰⁰ In conjunction “with the extreme difficulty of litigating abuses in prison, this leaves prison officials free to . . . act largely with impunity.”²⁰¹

Second, prosecutorial discretion leaves many potential cases untried.²⁰² In the sexual assault context, prosecutors hesitate to pursue cases due to a lack of evidence and conflicting accounts; these factors make sexual assault cases “high[-]risk” prosecutions.²⁰³ Prosecutorial discretion limits custodial sexual assault cases in particular, due not only to lack of corroborating evidence, but also to biases against complaining witnesses who are or were incarcerated at the time of

¹⁹⁵ *Id.*

¹⁹⁶ *United States v. Smith*, No. 96-5385, 1998 WL 136564, at *1 (6th Cir. Mar. 19, 1998) (per curiam), *aff'd*, 348 F.3d 545, 548 (6th Cir. 2003).

¹⁹⁷ *Smith*, 1998 WL 136564, at *1.

¹⁹⁸ *Smith*, 348 F.3d at 549.

¹⁹⁹ See *supra* notes 82–92 and accompanying text (discussing prison grievance processes); see also HUMAN RIGHTS WATCH, *supra* note 76 and accompanying text (noting the ineffectiveness of prison grievances).

²⁰⁰ INSIDE THIS PLACE, *supra* note 24, at 255.

²⁰¹ *Id.*

²⁰² See Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1, 29 (2016) (“Prosecutors have the discretion to decide which cases will be charged and which will not.”); see also Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape As Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 179 (2011) (“Prosecutors are reluctant to pursue criminal charges in cases that are viewed as highly contested, controversial, and ambiguous.”).

²⁰³ *Smith & Yarussi*, *supra* note 73, at 20.

their assault.²⁰⁴ Cases by female inmates against prison guards are especially challenging and thus unattractive to prosecute because of not only the inherent uphill battle of sexual assault cases generally, but also the problems of “unsympathetic victims, delayed reports of the assault, lack of physical evidence, poor investigations, and conflicting testimony” in the prison context in particular.²⁰⁵ Here, inmates are far from “ideal victims” of sexual assault;²⁰⁶ while “[t]he general public would not condone rape, . . . instead [the public] may typically accept it as part of prison life.”²⁰⁷ Juries may find inmates inherently untrustworthy due to their status as offenders.²⁰⁸ Furthermore, from a strategic perspective, prosecutors may be reluctant to bring charges against corrections personnel on whom “prosecutors must rely . . . to testify in . . . other criminal cases.”²⁰⁹ These challenges compound and make criminal prosecutions fewer and further between in the custodial sexual assault context.²¹⁰ Because there is no *pro se* analog in the criminal justice system, the progression of an inmate’s criminal case against a guard depends not only on the pursuit of prison grievances, but also on a prosecutor’s willingness to take the case to court.²¹¹

The burden of proof in criminal prosecutions also makes these cases tougher to bring successfully. A criminal case against a guard must meet the beyond-a-reasonable-doubt standard, which is especially difficult where prosecutors have limited, if any, evidence other than a complaining victim’s testimony.²¹² Additionally, “timing often creates a problem for criminal prosecutions”²¹³ when a prison grievance procedure has already taken place and the administrative investigation yielded findings in favor of the guard²¹⁴ or no further investigation at all due to lack of substantiation.²¹⁵

²⁰⁴ *Id.*

²⁰⁵ *Id.*; *see also id.* at 23 (noting that the prison context, corroborating and physical evidence is often completely absent).

²⁰⁶ Brenner et al., *supra* note 7, at 540 (“Prisoners face a societal brand of deviance that carries with it assumptions about their behavior because they committed a crime for which they are serving time. These assumptions are powerful enough to bar them from attaining the characteristics of ‘ideal victimhood.’”).

²⁰⁷ Thompson, *supra* note 77, at 135; *see also supra* notes 62–70 and accompanying text (discussing credibility problems generally and their applicability to the prison context in particular).

²⁰⁸ Smith & Yarussi, *supra* note 73, at 21.

²⁰⁹ *Id.* at 20.

²¹⁰ *See* Santo, *supra* note 9 (noting that in forty-six percent of Texas cases involving inmates’ complaints of staff sexual abuse, prosecution was declined, and in nineteen percent of these cases, there was no indictment or the case was dismissed).

²¹¹ *Id.*

²¹² Smith & Yarussi, *supra* note 73, at 20–21.

²¹³ *Id.* at 21.

²¹⁴ *Id.*

²¹⁵ *See* McGuire, *supra* note 4 (“In the vast majority of cases that are not substantiated, prison officials conclude that there is not enough evidence to establish that the offense occurred.”); *see also supra* notes 74–77 and accompanying text (describing corroboration requirements).

Finally, there is the argument that given the ongoing and unmitigated nature of staff sexual abuse in women's prisons,²¹⁶ perhaps criminal cases are not powerful deterrents. Criminal charges have been brought against prison guards and resulted in sentences of imprisonment,²¹⁷ but violence against incarcerated women has not abated.²¹⁸ Indeed, without a shift in advocacy regarding—and attention to—the plight of incarcerated women at the hands of predatory guards, it might be that the wave of condemning sexual assault perpetrated by powerful men, and its potential deterrent effects, “cannot[] reverberate through prison walls.”²¹⁹

V. AN OPPORTUNITY FOR FEMINIST LEGAL ADVOCACY

Given the failures of legislative reform and shortcomings of redress in the courts, what should be done about guards' sexual assaults of incarcerated women? This problem is recognized, documented, and increasingly prevalent; existing legislation and legal remedies clearly have not fully addressed it.²²⁰ While criminal prosecution may be a more promising avenue than civil litigation, it remains a rarely pursued and still imperfect remedy.²²¹ Feminist legal advocacy—in courts and in coalitions more broadly—may be able to contribute to filling this void. Feminist legal advocacy does not provide a singular answer to the problem of custodial sexual assault,²²² but three key proposals—statutory reform,²²³ prison abolition,²²⁴ and decriminalization of certain behaviors—will be addressed in turn.

A. *Statutory Reform: Politically Possible, Practically Ineffectual*

Prison reform agendas have historically focused on statutory and legislative change. In the nineteenth and early twentieth centuries, most

²¹⁶ *Supra* notes 4–9 and accompanying text.

²¹⁷ *See supra* notes 189–198 and accompanying text (describing criminal cases against prison guards for sexually assaulting female inmates).

²¹⁸ *See* INSIDE THIS PLACE, *supra* note 24, at 232 (noting that BJS reports in response to PREA requirements “confirm the . . . finding of highly variable but persistent prevalence [of custodial sexual assault]”).

²¹⁹ Natasha Lennard, *Will The Prison Rape Epidemic Ever Have Its Weinstein Moment?*, THE INTERCEPT (Nov. 21, 2017, 4:08 PM), <https://theintercept.com/2017/11/21/prison-rape-sexual-assault-violence/> [<https://perma.cc/U27W-J7TE>]; *see also supra* notes 1–3 and accompanying text (describing current sexual assault cases receiving media attention).

²²⁰ *Supra* notes 3–11 and accompanying text.

²²¹ *See supra* Part IV.

²²² Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 972 (1998) (“There is no general feminist theory for responding to violence; indeed, there apparently is no general feminist response to criminal justice, international law, or even domestic violence issues.”).

²²³ Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L.J. 71, 121–29 (2015).

²²⁴ Frank, *supra* note 13, at 23.

prison reformers were religiously and politically conservative, upper- and middle-class white women concerned with opening separate prisons for women.²²⁵ These “[e]arly reformers believed that sex was at the root of the problems that brought women into conflict with the law.”²²⁶

More recent statute-based prison reform has maintained the conservative base of earlier movements. The PREA was itself “spearheaded by human rights, faith-based, and prison rape victims’ advocacy groups” and “largely . . . attributed to growing conservative concerns about homosexuality and the spread of AIDS”²²⁷ Couching an end to prison sexual abuse as a way to eliminate sexual relations—and consequences of those relations—that conservatives in particular found undesirable effectively made the PREA “politically salient for the Republican-dominated Congress” in power in the early 2000s.²²⁸

Despite the effectiveness of coalitions and political support in passing the PREA, the law itself has clearly failed to result in any measurable decline in—let alone an end to—custodial sexual abuse.²²⁹ The PREA’s ineffectiveness stems not only from its lack of “teeth” to combat custodial sexual assault meaningfully, but in its failure to consult those most familiar with prison conditions and administration.²³⁰ To the extent that passing the PREA involved coalition building, the resulting coalition was not representative of the key

²²⁵ Smith, *supra* note 27, at 198.

²²⁶ *Id.*; see also McGuire, *supra* note 4 (“Progressive-era reformers, who were mostly white, upper class women, advocated changes designed to protect female inmates from predatory and abusive male correctional officers.”).

²²⁷ Lisa Pasko, *Damaged Daughters: The History of Girls’ Sexuality and the Juvenile Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1099, 1125 (2010); see also Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 CRIM. L. BR. 10, 10 (2008) (“There were also significant concerns about homosexual sex—a key issue for conservative constituencies—and the spread of AIDS to ‘innocent’ defendants. In particular, Prison Fellowship Ministries, The Hudson Institute, and other Christian organizations were visible proponents of PREA and testified about these issues.”). However, some authors characterize this coalition as more politically diverse. See Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1737 (2006) (noting that the PREA “was the result of a remarkable coalition of advocacy groups ranging from conservative organizations, like Focus on the Family, the Christian Coalition, and the Hudson Institute, to civil and human rights groups”).

²²⁸ Smith, *supra* note 227, at 11; see also INSIDE THIS PLACE, *supra* note 24, at 234 (noting “[t]he advocacy movement that spurred the passage of state laws criminalizing all sexual conduct between custodial officials and prisoners.”).

²²⁹ See Frank, *supra* note 13, at 13 (“PREA is not simply a law without teeth, but one without stakes. It acknowledges that it cannot mandate compliance, and even, if it could, compliance would have an immeasurable effect.”).

²³⁰ *Id.*; see also Smith, *supra* note 227, at 11 (noting that “correctional actors . . . were caught unaware by the passage of PREA” and that “PREA’s initial proponents did not involve established advocates and litigators who had primarily litigated and worked on issues of sexual abuse of women in custody.”).

stakeholders in this arena; ultimately, there was a fundamental disconnect between the words of the legislation and the realities on the ground.²³¹

Suggestions sounding in legislative reform include introducing a statutory scheme that works to prevent sexual assault and offer redress when it does occur. This plan would aim to prevent custodial sexual assault by, for example, suspending terms of incarceration “if the person sentenced is highly likely to be unlawfully sexually assaulted in detention or has actually been unlawfully sexually assaulted in detention,” and creating a presumption that all incarcerated women are at an increased risk of sexual assault.²³² Other parts of the proposed statutory scheme would include measures to mitigate sexual assault by ending solitary confinement, cracking down on retaliation for reporting sexual assault, and compensate victims of custodial sexual violence with monetary damages.²³³

The problem with this approach, however, is operationalizing it. Statutory schemes like the PREA have already proven to be ineffective. It is not clear what further regulation would achieve or that state governments would comply with monetary damage awards absent civil litigation demanding such judgments.²³⁴ While the PREA and PLRA were politically popular,²³⁵ statutory enforcement has been lacking,²³⁶ and efforts at reform have been empty.²³⁷ Furthermore, it is unclear if future statute-based reform would be more inclusive of those who are familiar with prison sexual violence, let alone anyone who has experienced sexual assault while incarcerated. This approach would likely replicate the problems and pitfalls of the PREA.

B. Ending the Carceral State?

Another possibility is to make mass incarceration central to the feminist legal-advocacy agenda and to end women’s prisons in particular.²³⁸ As Victoria

²³¹ *Supra* notes 109–118 and accompanying text (noting the failure of the PLRA to define “physical injury,” which has had unintended consequences for victims of custodial sexual assault).

²³² Arkles, *supra* note 221, at 122.

²³³ *Id.* at 123–25.

²³⁴ Thompson, *supra* note 77, at 175 (“In thinking about the campaign to eliminate rape in prison, it remains clear that more than a legislative mandate will be required.”).

²³⁵ See EQUAL JUSTICE INITIATIVE, *Federal Government Increases Pressure on States to Stop Prison Rape*, (Feb. 17, 2014), <https://eji.org/news/federal-government-increases-pressure-to-stop-prison-rape> [<https://perma.cc/LD3F-GDM4>] (noting that PREA passed with unanimous, bipartisan support).

²³⁶ Frank, *supra* note 13, at 13.

²³⁷ INSIDE THIS PLACE, *supra* note 24, at 230 (“While numerous efforts have been made to reform the PLRA, as of today none have been successful.”).

²³⁸ Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1450 (2012) (“Among the most robust connections between earlier contestations around violence against women and the contemporary rhetorics surrounding mass incarceration are the discursive elisions that have characterized antiracist and feminist approaches to both of these social problems.”).

Law posits, the “carceral variant of feminism continues to be the predominant form. While its adherents would likely reject the descriptor, carceral feminism describes an approach that sees increased policing, prosecution, and imprisonment as the primary solution to violence against women.”²³⁹ The approach of carceral feminism has been criticized for excluding the voices of women most likely to be affected by incarceration: women of color.²⁴⁰ Commentators also point out the inherent tension between ending violence against women through “increasing policing, prosecution, and incarceration” rates and ending incarceration of women more generally.²⁴¹

An extreme approach advanced by some advocates is to end women’s prisons entirely. The crux of the argument is that without any such facilities, there would be no opportunity for custodial sexual assault of incarcerated women.²⁴² Advocates in favor of this approach note the “extreme violence, dehumanization, racialized degradation and indignity” to which inmates are subject.²⁴³ Because prisons “cannot reasonably guarantee incarcerated women will be free from sexual victimization” and such “substantial danger of sexual victimization is unconscionable,” the argument goes, no female correctional facility should remain.²⁴⁴ Prison abolition advocates see the closure of all-female correctional facilities as a precursor to ending most, if not all, modes of incarceration more generally.²⁴⁵

While this approach would eliminate the opportunity for custodial sexual assault of female inmates, it does not seem to be a realistic solution. Prison abolition would be a radical departure from prevailing modes of social order and criminal justice; it would require, in sum, “a very different social landscape.”²⁴⁶ Indeed, the call for prison abolition “is an aspirational ethical, institutional, and political framework that aims to fundamentally reconceptualize security and collective social life, rather than simply a plan to tear down prison walls.”²⁴⁷ It is difficult to imagine a time where arguing for the end of prisons would be a

²³⁹ Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 17, 2014), <https://www.jacobinmag.com/2014/10/against-carceral-feminism/> [<https://perma.cc/52UM-DYCH>].

²⁴⁰ Krishna de la Cruz, Comment, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, 19 SCHOLAR: ST. MARY’S L. REV. RACE & SOC. JUST. 79, 81 (2016).

²⁴¹ *Id.*; see also Gottschalk, *supra* note 227, at 1721 (“[F]ew feminists considered that by enlisting the state to combat violence against women, women’s groups might be contributing to the construction of the carceral state.”).

²⁴² Frank, *supra* note 13, at 20.

²⁴³ Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015).

²⁴⁴ Frank, *supra* note 13, at 21.

²⁴⁵ *Id.* at 20; see also Michele C. Nielsen, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons*, 64 UCLA L. REV. 230, 276 (2017) (describing McLeod’s prison abolition argument that all prisons should cease operating “save for perhaps the terrible few inmates who are beyond redemption and too much of a threat to society to ever be released”).

²⁴⁶ Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 215 (2000).

²⁴⁷ McLeod, *supra* note 243, at 1167-68.

politically expedient or popular agenda; the carceral system is “deeply entrenched” in the fabric of American social and political life.²⁴⁸

C. *Noncriminal Alternatives and Decriminalization*

The third and final approach addressed here is the middle ground between statutory reform on the one hand, and wholesale institutional and sociocultural reconceptualization on the other. Noncriminal alternatives reject using the state or criminal justice system, but instead focus on decriminalizing certain behaviors, addressing underlying sociocultural and economic disparities, and utilizing restorative justice in lieu of criminal sanctions to address interpersonal and domestic violence.²⁴⁹ The objective of this strategy is to reduce the number of women in prison. This advocacy is not directed at ending or reforming prisons, but the effect of decriminalizing drug-related and nonviolent offenses for which most incarcerated women are serving time, along with ending mandatory-arrest and no-drop domestic violence policies,²⁵⁰ may be to reduce the number of women who are incarcerated, and in turn, reduce incidents of custodial sexual violence.²⁵¹

Noncriminal alternatives that could address custodial sexual violence are those that keep women out of prisons *ex ante*. These reforms aim to answer the shortcomings and criticisms of carceral feminism by disrupting cycles of violence that are largely responsible for landing women in prison. People who are incarcerated are more likely than the general population to have faced sexual abuse or violence during childhood or their adult lives before prison.²⁵² This is especially true for women who are incarcerated. As the editors of *Inside This Place, Not of It* note,

One of the most striking things about our experience in collecting these narratives has been the overwhelming prevalence of histories of sexual abuse. According to the U.S. Department of Justice, two-thirds of women in prison

²⁴⁸ Gottschalk, *supra* note 227, at 1748; *see id.* (“Political leaders, whatever their intentions and strategic preferences, are highly constrained by the institutional landscape.”).

²⁴⁹ *See* Arkles, *supra* note 223, at 121 (“Traditional law reform cannot end carceral sexual violence.”).

²⁵⁰ *Infra* note 255 and accompanying text.

²⁵¹ *See infra* (discussing the makeup of women’s prison populations, the offenses for which women most commonly receive prison sentences, and linkages between past interpersonal violence and incarceration).

²⁵² Nancy Wolff, Jing Shi, & Jane A. Siegel, *Patterns of Victimization Among Male and Female Inmates: Evidence of an Enduring Legacy*, 24 VIOLENCE VICT. 469 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3793850/pdf/nihms168246.pdf> [<https://perma.cc/2HKR-CX25>].

have experienced sexual and physical abuse in their lives, a statistic that was reflected in our interviews.”²⁵³

Studies have found linkages between past sexual trauma, interpersonal violence, and incarceration.²⁵⁴ Perhaps addressing the ongoing problems of sexual and interpersonal violence will reduce alcohol and drug problems in women, which are among the most common causes for the surging female inmate population.²⁵⁵

More intersectional, diverse coalitions taking aim at sexual and domestic violence in its myriad forms might also break cycles of violence that result in victims of abuse being imprisoned. Criminalizing domestic and interpersonal violence has resulted in negative consequences and sometimes criminal punishments for women victims.²⁵⁶ At present, the response to domestic and interpersonal violence is “arrest, prosecution, and punishment” in the form of no-drop prosecution policies and mandatory arrests when reports are made to police.²⁵⁷ This approach has been sharply criticized by feminist legal advocates who note that women of color are both reluctant to involve police and are more likely to face consequences as a result of mandatory-arrest policies.²⁵⁸ Feminist legal advocates have argued that victims should, at the very least, retain more autonomy after domestic-violence-related arrest is made; removing the victim’s agency in this process can be revictimizing.²⁵⁹ Instead, “experimenting with

²⁵³ INSIDE THIS PLACE, *supra* note 24, at 18; *see also* Wolff et al., *supra* note 252, at 477 (reporting that 54% of female inmates in study “experienced sexual abuse as children . . . 47% of female inmates[] reported childhood sexual victimization”).

²⁵⁴ *See* Angela Browne, Brenda Miller, & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT’L J. L. & PSYCHIATRY 301, 312 (1999) (“[R]esults show that a substantial majority of the sample of women in the general corrections population reported having experienced sexual molestation or severe violence prior to the current incarceration.”).

²⁵⁵ *Id.* at 302-03.

²⁵⁶ *See* de la Cruz, *supra* note 240, at 89 (“[I]t is irrational to support laws that criminalize and imprison victims.”); Law, *supra* note 239 (noting that mandatory arrest policies in relation to domestic violence complaints “have also led to dual arrests, in which police handcuff both parties because they perceive each as assailants”).

²⁵⁷ Beth E. Richie, *How Anti-Violence Activism Taught Me to Become a Prison Abolitionist*, THE FEMINIST WIRE (Jan. 21, 2014), <http://www.thefeministwire.com/2014/01/how-anti-violence-activism-taught-me-to-become-a-prison-abolitionist/> [<https://perma.cc/86SX-424X>]; *see also* ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 181 (2000) (discussing “[t]he development of mandatory arrest litigation, which made domestic violence a crime” and how police “frequently arrest both battering men and the women they batter. Many women who are battered are reluctant to charge their batterers with a crime, and many prosecutor’s offices have developed controversial ‘no-drop’ policies, which can force women to face criminal charges if they refuse to testify against their assailant.”).

²⁵⁸ Law, *supra* note 239.

²⁵⁹ Minow, *supra* note 222, at 977. As one author posits,

As domestic violence policies have endeavored to remove discretion from the various institutional actors, the victim’s control over the process has been removed. There are several compelling reasons for shifting the control from the victim to the criminal

alternative approaches for dealing with violence against women and other crimes, such as restorative justice programs,²⁶⁰ and community-based peer-mentorship initiatives, may be more successful than mandatory, state-sanctioned penal responses that can have negative consequences for female victims.²⁶¹

Reducing the female prison population would require the decriminalization of drug offenses and other nonviolent crimes for which most women are serving time.²⁶² Drug-related offenses, along with “immigration violations and nonviolent . . . offenses,” are the largest contributors to female inmate population growth.²⁶³ Many female offenders are “the unwitting or reluctant accomplices to abusive partners,”²⁶⁴ or develop drug habits in response to past abuse or sexual victimization, committing drug or property-related crimes to feed their addictions.²⁶⁵ Therefore, decriminalizing minor drug and property-related offenses—along with more autonomous forms of redress for interpersonal violence—could interrupt destructive cycles that lead women to prison and reduce the number of incarcerated women on the whole.

The first step to decreasing female inmate populations is decriminalization of minor drug offenses. Several states have already decriminalized marijuana possession.²⁶⁶ By contrast, wholesale decriminalization of domestic violence is

justice system The effect of mandatory policies, however, may be to strip the victim of any sense of control and to foster a sense of disempowerment.

Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 80 B.C. L. REV. 937, 961 (1999)

²⁶⁰ Gottschalk, *supra* note 227, at 1724.

²⁶¹ Nielsen, *supra* note 245, at 277; *see also* Law, *supra* note 239 (describing various community-based initiatives and programs aimed at curbing domestic and interpersonal violence, outside the realm of state-sanctioned criminalization).

²⁶² Buchanan notes,

Since the advent of the war on drugs, imprisonment of women has increased even faster than the imprisonment of men. 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% 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.

Buchanan, *supra* note 7, at 52-53 (internal citations omitted); *see also* Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 284 (2011) (“The gendered effects of the War on Drugs persist: In 2003, 29% of women in state prisons were incarcerated for drug offenses, compared to only 19% of male inmates.”).

²⁶³ Kim White, *Women in Federal Prison: Pathways In, Programs Out*, 14 WM. & MARY J. WOMEN & L. 305, 308 (2008).

²⁶⁴ Gottschalk, *supra* note 227, at 1723.

²⁶⁵ White, *supra* note 263, at 309-10.

²⁶⁶ *States That Have Decriminalized*, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS (2017), <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> [<https://perma.cc/7MH9-QB6D>]; Sophie Quinton, *In These States, Past Marijuana Crimes Can Go Away*, HUFFINGTON POST

not feasible: criminal responses are an entrenched mode of dealing with violent offenses generally, and domestic violence in the United States in particular.²⁶⁷ Perhaps instead of the total decriminalization of domestic violence, shifting the mode of criminalization by giving victims more agency over their cases and doing away with mandatory arrest and prosecution policies could be a politically salient and practicable middle ground.²⁶⁸ As Aya Gruber succinctly concludes, “the trend towards addressing the problem of domestic violence through criminal law will likely continue, and feminists in the legal arena will not be able simply to ignore the criminal system.”²⁶⁹

In conjunction with combatting sexual and interpersonal violence in all its forms through noncriminal means, and decriminalization of nonviolent offenses, is an advocacy opportunity—or perhaps, a necessary precondition—to demand better and fairer access to resources for communities of color and women in particular that would help to break cycles of abuse and incarceration.²⁷⁰ Creating access to more equal education, fair housing, higher-wage jobs and professional career opportunities is yet another solution that will require addressing systemic inequalities.²⁷¹ Because most incarcerated women are women of color,²⁷² and communities of color “continue to have the worst schools, the fewest job opportunities, and the least affordable housing[,]”²⁷³ addressing these inequalities over time would go a long way to reducing crime rates, and in turn, the female prison population.

(Nov. 20, 2017, 10:09 AM), https://www.huffingtonpost.com/entry/in-these-states-past-marijuana-crimes-can-go-away_us_5a12e8e8e4b023121e0e94e3 [<https://perma.cc/LT4B-HW6W>].

²⁶⁷ Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 161-62 (2003); see also Gottschalk, *supra* note 227, at 1720-21 (discussing feminists’ decades-long advocacy to bring attention to violence against women generally, and to criminalization of domestic violence offenses in particular).

²⁶⁸ See Han, *supra* note 267, at 185-89 (discussing more victim-centric alternatives to mandatory arrest and no-drop prosecution policies); see also Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 820-21 (2007) (discussing various alternatives to and reforms of domestic violence criminalization).

²⁶⁹ Gruber, *supra* note 268, at 826.

²⁷⁰ See Law, *supra* note 239 (“[Carceral feminism] fails to address factors that exacerbate abuse, such as male entitlement, economic inequality, the lack of safe and affordable housing, and the absence of other resources.”).

²⁷¹ Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, 139 DAEDALUS 8, 8-9 (2010); see also Nicholas Freudenberg, *Adverse Effects of US Jail and Prison Policies on the Health and Well-Being of Women of Color*, 92 AM. J. PUB. HEALTH 1895, 1895-96 (2002) (“Women in the correctional system are typically young, poor, and of limited formal educational attainment Studies conducted in urban jails have shown that rates of recent homelessness among incarcerated women are as high as 40%.”).

²⁷² See *supra* notes 49-52 and accompanying text (discussing the racial makeup of female inmate populations).

²⁷³ Freudenberg, *supra* note 271, at 1896.

D. *A Way Forward?*

The most promising of these solutions is a hybridized version: shifting the focus of criminalization to decriminalize nonviolent offenses and in turn, end mass incarceration as it currently exists, while meaningfully and consistently punishing perpetrators of custodial sexual violence. At first glance, it may appear inconsistent to argue for decriminalization on one hand while considering criminal sanctions for guards who sexually assault female inmates on the other. What is required is a shift in which behaviors are criminalized and who is imprisoned. Ending mass incarceration in its current form—by advocating for the decriminalization of minor nonviolent offenses and supporting bottom-up, community-based initiatives and access to resources to break cycles of violence, including the end of no-drop and mandatory-prosecution policies—is a worthwhile pursuit of feminist legal advocates, but it does not necessarily mean ending *all* incarceration or incarceration for every offense. Furthermore, to the extent that sexual and interpersonal violence outside of prison remains criminalized, ending no-drop and mandatory-arrest policies but retaining criminal liability in a less coercive form limits the involvement of the state while still allowing a victim to pursue criminal charges; this can be analogized to the custodial context insofar as an inmate-victim must first report sexual abuse and undertake grievance procedures in order for a criminal case to even potentially ensue. Decriminalizing offenses that disproportionately target poor communities and communities of color while holding male guards—who are generally non-minorities—responsible for committing sexual abuse is a reasonable way forward, and would accomplish dual goals of decreasing female prison populations while still holding accountable those who sexually violate incarcerated women.

As noted, most women are incarcerated for nonviolent, drug-related offenses.²⁷⁴ Decriminalizing these violations—and rethinking the so-called “war on drugs” and the enforcement of its policies—would go a long way to reduce the number of women in prison.²⁷⁵ This would also likely change the racial makeup of prisons, since “blacks are nearly four times as likely as whites to be arrested for drug offenses and 2.5 times as likely to be arrested for drug possession.”²⁷⁶ While prisons may not ever be wholly abolished in the United

²⁷⁴ *Supra* notes 262–265 and accompanying text.

²⁷⁵ See Marylee Reynolds, *The War on Drugs, Prison Building, and Globalization: Catalysts for the Global Incarceration of Women*, NWSA J., Summer 2008, at 72, 72–73 (“A primary catalyst behind America’s imprisonment binge is the war on drugs This domestic war has expanded across the globe and its primary victims have been poor women of color.”).

²⁷⁶ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons> [<https://perma.cc/2GQH-ESQ3>].

States, decreasing prison populations is a worthwhile goal that would, at the very least, shrink the number of victims of custodial sexual abuse.²⁷⁷ Furthermore, making criminal sanctions for reports of domestic violence optional, as opposed to a process of mandatory arrest and no-drop prosecution that denies victims meaningful agency, may also decrease prison populations.²⁷⁸

Reorienting what and who is criminalized can be consistent with feminist legal advocacy agendas; disfavoring mass incarceration and advocating for goals that would effectively spell its end do not equate to decriminalizing all forms of violence.²⁷⁹ Some feminist legal advocates continue to urge for the criminal punishment of those who sexually assault or physically violate women.²⁸⁰ Male guards who sexually abuse female inmates arguably fall into the narrow “terrible few” for whom carceral punishment is required.²⁸¹ Ending mass incarceration does not necessarily mean ending *all* incarceration, unless the end of mass incarceration is equated with complete prison abolition, which, as discussed, is an unlikely outcome.²⁸² However, ending mass incarceration can mean *decreasing* prison populations, which decriminalizing the underlying offenses for which most women are incarcerated in the first place would achieve.²⁸³

One could argue that there is tension in advocating for decriminalization of the behaviors that land many women in prison while still criminalizing sexual assault committed by guards upon female inmates. There are a few responses to this criticism. First, as demonstrated here, the prison context is fundamentally different; the power dynamics at play, compounded by racial and gender hierarchies, as well as the particular inability of incarcerated women to seek redress for the harms they suffer in prison, makes criminal liability for guards who sexually assault inmates one of the limited ways to address this problem. Indeed, as one author has noted, the “location of this violence and the identity of the victim” sets the custodial sexual assault context apart from other forms of violence against women and the movements dedicated to addressing those iterations of violence.²⁸⁴ Approaches to curbing and eventually ending guards’ sexual abuse of incarcerated women, therefore,

²⁷⁷ See *supra* notes 218–273 and accompanying text (assessing potential approaches to ending custodial sexual assault).

²⁷⁸ *Supra* notes 269–271 and accompanying text.

²⁷⁹ See Gruber, *supra* note 268, at 824 (concluding that while “feminists [should] stop supporting incarceration” this does not necessarily translate to “argu[ing] for decriminalizing domestic violence.”).

²⁸⁰ Gottschalk, *supra* note 227, at 1724; see also Thompson, *supra* note 77, at 172 (“[I]t will be incumbent upon those individuals who are seeking to raise awareness about rape in custody to paint a picture of victimization that reflects the reality of rape in an environment where the victim is powerless.”).

²⁸¹ Nielsen, *supra* note 245, at 276.

²⁸² *Supra* notes 244–246 and accompanying text.

²⁸³ See Gottschalk, *supra* note 227, at 1696 (describing ideal penal reform as “slashing the US incarceration rate to a level comparable to other advanced industrialized countries”).

²⁸⁴ Thompson, *supra* note 77, at 163.

cannot neatly borrow from other forms of antiviolenace advocacy that wholly condemn or encourage criminal sanctions as a mode of redress.²⁸⁵

Second, there is a distinction to be made between 1) decriminalizing minor, nonviolent offenses and rethinking mandatory arrests and prosecution for domestic violence disputes and 2) prosecuting guard-on-inmate sexual assault: criminalizing the former has been a form of “support[ing] social hierarchies related to race and gender,” in that those offenses disproportionately affect the lives of people of color,²⁸⁶ while underlying the criminalization of the latter is a reluctance to recognize violence committed by white men against women of color.²⁸⁷ This hybrid approach thus avoids the pitfalls of relatively extreme advocacy—that for total prison abolition and ends to all forms of criminalization, which seem unlikely at best—while retaining the practicality of approaches that have already taken root, such as decriminalizing minor drug offenses.²⁸⁸ Similarly, reframing mandatory-arrest and no-drop prosecution policies as options, rather than obligations, maintains criminalization of violence when sought by victims, rather than when coerced by the state.²⁸⁹

It is not inconsistent to advocate for the decriminalization of what results in women’s incarceration *ex ante* while arguing for accountability for the harms they suffer while in prison *ex post*. Feminist legal advocates should focus on reducing women’s prison populations to the extent feasible. But assuming that women’s prisons will continue to exist, given the unlikelihood of total prison abolition in the United States, custodial sexual assault will also persist.²⁹⁰ Therefore, feminist legal advocates can argue for an end to *mass* incarceration while still favoring *some* incarceration, namely that of guards who sexually abuse and violate female inmates. The fundamental difference is *who* is incarcerated and for what offense; taking seriously incarcerated women’s accounts of sexual abuse in prison and consistently holding their abusers criminally accountable would be a marked departure from the status quo.²⁹¹

Feminist legal advocacy in this arena need not be zero sum. Advocacy agendas that aim to decrease prison populations in the long run implicitly seek to end custodial sexual assault, but advocates concerned with the prevalence of sexual violence in women’s prisons must also contend with the current realities of the problem. Criminalizing guards’ sexual assaults of female inmates may provide an imperfect-yet-possible short-term advocacy opportunity for those who both want to end this form of sexual violence and who, taking the long view,

²⁸⁵ *Id.*

²⁸⁶ See *supra* notes 254–267 and accompanying text.

²⁸⁷ Arkles, *supra* note 223, at 76–77.

²⁸⁸ See *supra* notes 244–246, 268–271 and accompanying text.

²⁸⁹ See *supra* notes 268–271.

²⁹⁰ See *supra* notes 240–246 and accompanying text.

²⁹¹ See *supra* Part IV.

seek to decrease prison populations on the whole. To the degree that custodial sexual assault is criminalized, a more concrete avenue for feminist legal advocacy to explore in the immediate future is better training of prosecutors handling inmates' criminal sexual assault complaints against guards. In their report, Smith and Yarussi note that "prosecutors are not sufficiently knowledgeable about prisons, prison culture or correctional practices. Federal investigators also felt that prosecutors did not have sufficient knowledge of issues such as the coercive influence of contraband on sex and security in the institution."²⁹² A straightforward solution would be to require state and federal prosecutors—or representatives of any prosecutor's office who would be handling prisoner complaints—to attend trainings on how to respond to the particular sensitivities and procedural hurdles of these cases. This would inherently require addressing and breaking down stereotypically held notions of inmates as unreliable victims whose complaints against guards cannot be trusted.²⁹³

Feminist legal advocacy as it pertains to custodial sexual assault can avoid the pitfalls of earlier prison reform movements by including the voices of communities most affected by incarceration—communities of color generally and those who are or were incarcerated in particular.²⁹⁴ Multiple advocacy groups are already engaged in combating mass incarceration in general and the challenges faced by incarcerated women in particular.²⁹⁵ Some of these projects not only cater to incarcerated women, but are created by them.²⁹⁶ Thus, the challenge will be for "mainstream" feminist legal advocacy—and the law more generally—to adopt these attitudes and take seriously incarcerated women's narratives, lived experiences, and complaints of sexual violence perpetrated by those tasked with protecting them. Sexual violence in prison does not have to be an "inevitable" reality;²⁹⁷ in particular, male guards committing acts of sexual violence against female inmates does not have to be

²⁹² Smith & Yarussi, *supra* note 73, at 23.

²⁹³ *Id.* at 23-24.

²⁹⁴ See *supra* notes 223-226 (describing the political and religious leanings of statute-based prison reform movements); notes 260-623; 272-274 (discussing communities most impacted by incarceration and the criminalization of drug offenses).

²⁹⁵ Though by no means an exhaustive list, some of these groups include: ALLIANCE FOR SAFETY AND JUSTICE, <https://www.allianceforsafetyandjustice.org/who-we-are/>; JUST LEADERSHIP USA, <https://www.justleadershipusa.org/advocacy/>; PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/>.

²⁹⁶ See, e.g., WOMEN AND PRISON, <http://www.womenandprison.org/>; WOMEN IN PRISON PROJECT, <http://www.correctionalassociation.org/pp/about-women-in-prison-project>; COALITION FOR WOMEN PRISONERS, <http://www.correctionalassociation.org/coalition/coalition-for-women-prisoners>; YOUNG WOMEN'S FREEDOM CENTER, <http://www.youngwomenfree.org/>; WORTH, <http://www.womenontherise-worth.org/>; WOMEN'S PRISON ASSOCIATION, <http://www.wpaonline.org/about/what-we-do>; WOMEN'S PRISON BOOK PROJECT, <https://wpbp.org/>.

²⁹⁷ Nick Malinowski, *NYC Official Says Rape Is Inevitable at Rikers Island: If True, We Cannot Send Anyone There*, HUFFINGTON POST BLOG (June 26, 2016, 7:41 PM), https://www.huffingtonpost.com/nick-malinowski/nyc-official-says-rape-is_b_10600320.html [<https://perma.cc/3zT5-7Y6Y>].

a defining feature of U.S. correctional facilities. But making accountability an accessible avenue for inmate-victims—thus ending the impunity that marks this specific type of sexual abuse—remains an open challenge.²⁹⁸

²⁹⁸ See generally Buchanan, *supra* note 7 (describing the prevalence of sexual assault of female inmates by prison guards in the framework of a status regime).

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