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## **CUSTODIAL SEXUAL ABUSE: ENFORCING LONG-AWAITED POLICIES DESIGNED TO PROTECT FEMALE PRISONERS**

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## CUSTODIAL SEXUAL ABUSE: ENFORCING LONG-AWAITED POLICIES DESIGNED TO PROTECT FEMALE PRISONERS

When I went to prison, I was supposed to give up my liberty—but not my soul.<sup>1</sup>

### I. INTRODUCTION

This note addresses the prevalence of custodial sexual abuse in women's prisons and the inadequate remedies that are available to female prisoners. Custodial sexual abuse includes rape, sexual assault, the use of authority to coerce sexual relations, unwanted touching, and verbal harassment.<sup>2</sup>

A common legal channel for women seeking civil redress for their victimization is under the Eighth Amendment.<sup>3</sup> An Eighth Amendment violation occurs when two requirements are met.<sup>4</sup> First, the alleged injury must be objectively serious.<sup>5</sup> Second, the prison guard must have had a subjective mindset of deliberate indifference at the time of the alleged injury.<sup>6</sup> Due to the demanding nature of the subjective prong of an Eighth Amendment violation,<sup>7</sup> it is difficult for women to obtain positive results within the legal system.<sup>8</sup> Accordingly, this note advocates that an independent agency should be established to monitor the prison guards' behavior and that a prison should be held vicariously liable for a guard's abuse of authority.

Part I of this note explores the history of custodial sexual abuse. It also describes the types of women that are incarcerated and the nature of the guards' duties. Moreover, this section introduces the various

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1. *Not Part of My Sentence: Violations of the Human Rights of Women in Custody* at <http://www.amnestyusa.org/rightsforall/women/stories/robin.html> (1999).

2. *See All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* at <http://www.hrw.org/hrw/summaries/s.us96d.html> (Dec. 1996).

3. *See, e.g.,* *Farmer v. Brennan*, 511 U.S. 825 (1994); *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996); *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995).

4. *See Farmer*, 511 U.S. at 834.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See Adkins*, 59 F.3d 1034.

forms of sexual abuse and the methods the United Nations has used to address the problem.

Part II of this note describes the problems female prisoners face when bringing their cause of action under the Eighth Amendment. This section discusses the two part test for Eighth Amendment liability, with a focus on the second prong of deliberate indifference, and what actions rise to the level of a constitutional violation.

Part III of this note analyzes the deliberate indifference prong required for Eighth Amendment liability. It also introduces new policies which various states have adopted, and presents Congress' effort to recognize the problem of custodial sexual abuse. The focus, however, is on enforcement of these policies.

Finally, Part IV of this note concludes with proposals for new legal causes of action and policy suggestions for effective enforcement of the new prison guidelines promulgated by Congress.

## II. THE HISTORY AND DEVELOPMENT OF CUSTODIAL SEXUAL ABUSE

Sexual abuse has historically been a part of incarceration for women.<sup>9</sup> In 1869, two women campaigned for the end of sexual abuse in Indiana's prisons, and in 1874, the first separate women's prison was established in Indiana.<sup>10</sup> By 1940, separate women's prisons existed in almost half of the United States.<sup>11</sup> Once women's prisons were created, women were guarded by women.<sup>12</sup> However, after the 1972 amendment to the Civil Rights Act of 1964, women began guarding men and men began guarding women again.<sup>13</sup> Today, seventy percent of guards in U.S. federal women's prisons are men.<sup>14</sup>

Guards have virtually absolute authority within prisons.<sup>15</sup> Male guards can observe female prisoners dressing, undressing, receiving intimate medical care, or performing basic hygiene and bodily func-

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9. See Nancy Kurshan, *Women and Imprisonment in the U.S.*, at <http://www.prisonactivist.org/women/women-and-imprisonment.html> (last visited Nov. 12, 1999).

10. See *id.*

11. See *id.*

12. See Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER SOC. POL'Y & L. 1, 20 (1999).

13. See *id.*

14. See *Not Part of My Sentence: Violation of the Human Rights of Women in Custody*, at <http://www.amnestyusa.org/rightsforall/women/overview.html> (1999).

15. See Kurshan, *supra* note 9.

tions.<sup>16</sup> This imbalance of power between guards and inmates allows guards to take advantage of a prisoner's dependency on them for basic necessities by giving guards the opportunity to withhold privileges.<sup>17</sup>

In addition to the level of power and authority given to guards, the characteristics and backgrounds of many female prisoners make them susceptible and more vulnerable to abuse.<sup>18</sup> Moreover, the non-violent offenses many of these prisoners committed, combined with their financial background, reinforces how unfortunate and misplaced some of these women are.<sup>19</sup> In the United States, the average female inmate is a young, single mother who dropped out of high school and has few job skills.<sup>20</sup> Seventy-five percent of women in prison have been arrested for non-violent offenses.<sup>21</sup> "The major crimes that women here are charged with are prostitution, pick-pocketing, shoplifting, robbery and drugs."<sup>22</sup> Between forty-eight and eighty percent of female prisoners have suffered from sexual abuse or abusive relationships prior to incarceration.<sup>23</sup> Ninety percent have a history of drug and/or alcohol abuse.<sup>24</sup> The characteristics of most female prisoners demonstrate that some of these women have been unnecessarily victimized because they should not have been imprisoned in the first place. Also, the prior abuse many women inmates encountered increases their susceptibility to subsequent victimization.<sup>25</sup>

Many male correctional employees create a hostile environment for female inmates through their abuse of authority. First, male guards vaginally, anally and orally rape female prisoners.<sup>26</sup> These women have also been sexually assaulted and abused at the hands of the

16. *See id.*

17. *See Not Part of My Sentence: Violation of the Human Rights of Women in Custody at* <http://www.amnestyusa.org/rightsforall/women/factsheets/assault.html> (1999).

18. *See generally infra* notes 27-28, 32-34 (implying that characteristics such as former victimization, drug/alcohol abuse, and youth make some women more vulnerable to abuse).

19. *See generally infra* notes 27, 29-31, 35 (demonstrating that many female prisoners are non-violent and not in need of long-term incarceration).

20. *See Kurshan, supra* note 9. Seventy-five percent of women in prison are between the ages of twenty-five and thirty-four. Fifty percent lived below the poverty line and were unemployed upon arrest. Seventy-eight percent are mothers of dependent children.

21. *See Not Part of My Sentence, supra* note 17.

22. *See Kurshan, supra* note 9.

23. *See Not Part of My Sentence, supra* note 17.

24. *See id.*

25. *See Kurshan, supra* note 9.

26. *See All Too Familiar, supra* note 2.

guards.<sup>27</sup> In order to commit these acts, guards threaten, intimidate, and force inmates into submission.<sup>28</sup> Guards also use their power within the prison to provide goods and privileges as a method of compelling sexual relations or withholding goods and privileges as punishment for not engaging in sexual contact.<sup>29</sup> Second, correctional officers use mandatory frisks or cell searches as opportunities to touch women's breasts, buttocks, and vaginal area.<sup>30</sup> Finally, male guards verbally degrade and harass women based on their gender.<sup>31</sup> This type of abuse by an authority figure will continue within the correctional system until a strict system of punishment is in place.

One of the leading factors contributing to custodial sexual abuse in the United States is that male guards are given authority positions that involve contact with women.<sup>32</sup> Furthermore, employing male guards often results in abuse that is contrary to international policy.<sup>33</sup> The International Covenant on Civil and Political Rights and the International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment require states to prohibit torture, which includes sexual abuse, and to investigate and punish any abuse.<sup>34</sup> In addition, the United Nations Standard Minimum Rules for the Treatment of Prisoners (UN Rules) require that governments prohibit sexual abuse within prisons, provide methods for prisoners to report such abuse, and punish abusive conduct.<sup>35</sup> Moreover, the Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment.<sup>36</sup> The aforementioned treaties and laws imply that female prisoners should be protected from sexual abuse.

Female prisoners are usually reluctant to report incidents of sexual assault or abuse that they suffer at the hands of correctional officers for several reasons.<sup>37</sup> First, it is difficult to prove an allegation when the evidence is based on the prisoner's account of the events.<sup>38</sup>

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27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See All Too Familiar, supra* note 2.

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

37. *See Nowhere to Hide: Retaliation Against Women in Michigan State Prisons, at* <http://www.amnestyusa.org/rightsforall/women/report/women-24.html>.

38. *See id.*

Due to a prisoner's lack of credibility, the guard's account is usually accepted as true.<sup>39</sup> Second, inmates often feel punished because they are put in protective segregation while their report is investigated.<sup>40</sup> Protective segregation separates these women from the general prison population.<sup>41</sup> Third, once a woman reports the event, she might be subjected to retaliation by the guard.<sup>42</sup> Retaliation might include threats, violence, and suspension of privileges or infraction tickets designed to prolong jail-time.<sup>43</sup> Finally, once an inmate reports an incident that actually goes to trial, the results are often not in her favor.<sup>44</sup> Due to these reasons, many of the assaults committed by male guards go unreported and unpunished.

### III. LEGAL BACKGROUND: CASES AND RULES

The Eighth Amendment to the United States Constitution provides that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>45</sup> A cause of action under the Eighth Amendment can arise when a prison guard uses excessive force against an inmate,<sup>46</sup> or when a guard does not provide adequate food, clothing, and medical care.<sup>47</sup> Additionally, prison officers must "take reasonable measures to guarantee the safety of the inmates."<sup>48</sup>

However, not every injury received in prison is protected by the Eighth Amendment. In order for a prison guard to be held liable for an Eighth Amendment violation, two requirements must be fulfilled.<sup>49</sup> First, the alleged injury, based on an objective standard, must be "sufficiently serious."<sup>50</sup> Specifically, the guard's act must deprive the prisoner of the "the minimal civilized measure of life's necessities."<sup>51</sup> Second, the prison official must have had a "sufficiently culpable state

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39. *See id.*

40. *See id.*

41. *See id.*

42. *See Not Part of My Sentence, supra* note 17.

43. *See id.*

44. *See* Ashley E. Day, Comment, *Cruel and Unusual Punishment of Female Inmates: The Need For Redress Under 42 U.S.C. § 1983*, 38 SANTA CLARA L. REV. 555, 557 (1998).

45. U.S. CONST. amend. VIII (emphasis added).

46. *See* Hudson v. McMillian, 503 U.S. 1 (1992).

47. *See* Hudson v. Palmer, 468 U.S. 517 (1984).

48. *Id.* at 526-527.

49. *See* Farmer v. Brennan, 511 U.S. 825 (1994).

50. *Id.* at 834.

51. *Id.*

of mind" at the time of the act.<sup>52</sup> This subjective standard is based on "deliberate indifference" to the inmate's health and safety.<sup>53</sup> Deliberate indifference has been defined as, "a state of mind more blameworthy than negligence."<sup>54</sup> If a cause of action succeeds under the Eighth Amendment, injunctive relief, such as moving the prisoner or relocating the guard, will be granted.<sup>55</sup>

The case of *Farmer v. Brennan*<sup>56</sup> defines the deliberate indifference standard of the two part test for Eighth Amendment liability. Dee Farmer was a transsexual who was serving a federal sentence for credit card fraud.<sup>57</sup> The general practice of federal prison authorities was to segregate transsexuals from the general male population.<sup>58</sup> After a transfer for disciplinary reasons, Farmer was placed in the general population.<sup>59</sup> Within two weeks of his transfer, Farmer was beaten and raped in his cell by a fellow inmate.<sup>60</sup> Farmer then filed a complaint against prison officials alleging an Eighth Amendment violation.<sup>61</sup>

In determining whether a violation occurred, the Court introduced the deliberate indifference test.<sup>62</sup> The Court stated that correctional officers fulfill the deliberate indifference standard if they know of "an excessive risk to inmate health or safety," and disregard that risk.<sup>63</sup> "The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harms exists, and he must also draw the inference."<sup>64</sup> The test is defined as "subjective recklessness."<sup>65</sup>

The difficulty of overcoming this stringent two part test is apparent in *Barney v. Pulsipher*.<sup>66</sup> There, two women were sexually assaulted by their jailer, Gerald Pulsipher, on separate occasions.<sup>67</sup> Each woman

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52. *Id.*

53. *Id.*

54. *Id.* at 835 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)).

55. *See Farmer*, 511 U.S. at 846.

56. *See id.* at 825.

57. *See id.*

58. *See id.*

59. *See id.* at 830.

60. *See id.*

61. *See Farmer*, 511 U.S. at 830.

62. *See id.* at 837.

63. *Id.*

64. *See id.*

65. *Id.* at 839-40.

66. 143 F.3d 1299 (10th Cir. 1998).

67. *See id.* at 1303.

was serving a 48-hour sentence for a minor offense.<sup>68</sup> The jail had a policy which specifically instructed jailers to announce themselves to the jail dispatcher prior to entering the cell blocks of the opposite sex. The dispatcher was then to monitor the cell block. Another policy existed which prohibited male jailers from "remov[ing] female inmates from their cell without another officer being physically present."<sup>69</sup> In each woman's case, Pulsipher, against jail policy, removed her from her cell without informing the dispatcher and escorted her to a private area where no other officer was present.<sup>70</sup>

When applying the two-part Eighth Amendment standard, the court ruled that the first requirement was fulfilled, because sexual assaults are "sufficiently serious to constitute a violation under the Eighth Amendment."<sup>71</sup> However, the court also ruled that the second prong, the deliberate indifference standard, was not met.<sup>72</sup> Although the jail had an official policy which was violated, the existence of the policy was not enough to establish that a risk existed in which male guards were likely to assault female prisoners.<sup>73</sup> The court disregarded the argument that the policy was implemented due to the risk of male jailer/female prisoner contact and the potential abuse of authority that could arise from that contact.<sup>74</sup> Additionally, there was no previous sexual abuse in Pulsipher's background or evidence of previous incidents of abuse.<sup>75</sup> Since the deliberate indifference element was not satisfied, Pulsipher's actions did not amount to a constitutional violation.<sup>76</sup>

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68. *See id.*

69. *Id.*

70. *See id.* at 1304-05.

71. *Id.* at 1310.

72. *See id.*

73. *See Barney v. Pulsipher*, 143 F.3d at 1311 (relying on *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993), which held that policies alone do not establish obvious risks to female prisoners. To hold such a risk exists would mean that every male guard is a threat to female prisoners when the two are alone and no evidence would support this conclusion).

74. *See id.*

75. *See id.* at 1311. This final conclusion that there was no previous sexual abuse in Pulsipher's background was ironic because both plaintiffs were incarcerated at separate times and both were assaulted. Therefore, when the second plaintiff was attacked, technically, Pulsipher had a history of sexual misconduct. However, both allegations arose at the same time, thereby voiding this argument.

76. *See id.*

Likewise, in *Adkins v. Rodriguez*,<sup>77</sup> prison Deputy Kenneth Rodriguez was not found liable for sexual harassment under the deliberate indifference requirement of an Eighth Amendment violation.<sup>78</sup> While Shelly Ann Adkins was incarcerated for a felony conviction, Deputy Rodriguez made sexual comments to her regarding her body, "his own sexual prowess," and his previous sexual encounters.<sup>79</sup> Adkins complained to the female dispatcher at the jail, and Deputy Rodriguez was told that he, and other male guards, should only speak to female prisoners through the intercom system.<sup>80</sup> He was also told to stay away from Adkins' cell.<sup>81</sup> However, Deputy Rodriguez continued with his sexually explicit remarks.<sup>82</sup>

Finally, one night, while working the overnight shift, Deputy Rodriguez removed the keys to the female cellblock from a sleeping Sergeant's pocket, and entered Adkins' cell.<sup>83</sup> He stood over her bed, watching her.<sup>84</sup> Adkins woke up and questioned Deputy Rodriguez's presence.<sup>85</sup> He told her that he was checking on her, commented on her breasts, and left her cell.<sup>86</sup> Deputy Rodriguez explained to the Captain that he heard Adkins groaning in pain and went into her cell to give her toothache medicine.<sup>87</sup> He was suspended for one week.<sup>88</sup>

The court found that sexual harassment, without any traces of violence, did not fall within the context of the Eighth Amendment.<sup>89</sup> Additionally, the single invasion into Adkins' cell did not fulfill the deliberate indifference requirement.<sup>90</sup>

The difficulty of overcoming the deliberate indifference requirement is once again apparent in *Scott v. Moore*.<sup>91</sup> There, Artelia Scott

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77. 59 F.3d 1034 (10th Cir. 1995).

78. *See id.*

79. *Id.* at 1035.

80. *See id.*

81. *See id.* at 1035-36.

82. *See id.* at 1036.

83. *See id.*

84. *See id.*

85. *See Adkins v. Rodriguez*, 59 F.3d at 1036.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.* at 1037.

90. *See id.* at 1038.

91. 114 F.3d 51 (5th Cir. 1997). Although this case is based on municipal liability within 42 U.S.C. § 1983, an issue which this note does not discuss, the Eighth Amendment analysis is relevant.

was arrested, taken to jail, processed by the female jailer who was on duty when she arrived, and placed in a holding cell.<sup>92</sup> George Moore replaced the female jailer for an eight-hour shift.<sup>93</sup> Throughout his shift, Moore repeatedly entered Scott's cell and raped her.<sup>94</sup> To meet the deliberate indifference standard, Scott offered various pieces of evidence.<sup>95</sup> First, she introduced an affidavit by an expert in jail policy who stated that male guards should be supervised when they have contact with female prisoners.<sup>96</sup> Second, Scott offered the affidavit of a transvestite who admitted that he performed oral sex on Moore on various occasions when he was incarcerated under Moore's shift.<sup>97</sup> Finally, she presented a statement Moore made to the investigating officers informing them that he "had oral sex with more than a dozen other inmates on separate occasions."<sup>98</sup>

The court found that the evidence did not show that the city "knew or should have known" of risks involving the jail's staffing policy.<sup>99</sup> The court reasoned that since the holding cell was located on the first floor of the police department and since over 100 officers had unlimited access to the jail, sexual assaults and rape would be extremely difficult to commit.<sup>100</sup> The court found that this case demonstrated that the jail "could have been managed better."<sup>101</sup> Thus, the deliberate indifference requirement was not met and a constitutional violation had, therefore, not occurred.

On the other hand, *Women Prisoners v. District of Columbia*<sup>102</sup> is one of the first cases to meet the rigorous deliberate indifference standard and establish an Eighth Amendment violation.<sup>103</sup> In this landmark class action suit involving three women's facilities in Washington, D.C., approximately six women testified at trial that they were sexually assaulted by prison guards while serving their sentences.<sup>104</sup> The district court found, and the court of appeals affirmed, that there were numer-

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92. *See id.* at 52.

93. *See id.*

94. *See id.*

95. *See id.* at 54-55.

96. *See id.* at 55.

97. *Id.* at 55.

98. *See Scott v. Moore*, 114 F.3d at 55.

99. *Id.* at 55.

100. *See id.*

101. *Id.*

102. 93 F.3d 910 (D.C. Cir. 1996).

103. *See id.*

104. *See id.* at 914.

ous incidents of sexual misconduct—ranging from sexual remarks and harassment to assault and rape—between the male prison employees and female prisoners.<sup>105</sup> Although the D.C. prisons had introduced policies focusing on sexual abuse, the court held that the policies were ineffective because of a lack of “specific staff training, inconsistent reporting practices, cursory investigations and timid sanctions.”<sup>106</sup> The repeated sexual assaults, coupled with the sexual harassment, were sufficient to satisfy the deliberate indifference prong.<sup>107</sup> Therefore, injunctive relief was granted to the women prisoners for a constitutional violation.<sup>108</sup> The Order for Injunctive Relief included the following: implementation of a policy prohibiting sexual harassment, the obligation for D.C. prisons to take appropriate steps to prevent sexual harassment, the implementation of an inmate grievance procedure to report incidents of abuse, establishment of a confidential hot-line for reporting abuse, and training for employees.<sup>109</sup> The deliberate indifference standard was most likely overcome due to the severity of the multiple accounts of victimization in the class action suit.<sup>110</sup>

#### IV. ANALYSIS

This section focuses on three main areas. First, the deliberate indifference prong required for Eighth Amendment liability is analyzed. Second, new policies implemented both by state and federal governments are introduced. Finally, an emphasis is placed on the enforcement of these policies. This note suggests that an outside agency

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105. *See id.*

106. *Id.*

107. *See Women Prisoners*, 93 F.3d. at 929.

108. *See id.* at 932-33.

109. *See id.* at 933-35.

110. *See generally* Amy Laderberg, Note, *The “Dirty Little Secret”: Why Class Actions Have Emerged As The Only Viable Option For Women Inmates Attempting To Satisfy The Subjective Prong Of The Eighth Amendment In Suits For Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 363 (1998) (discussing that class action suits against prison guards and prisons have a higher success rate than individual suits because they allow the plaintiffs to rely on multiple incidents of abuse and victimization to demonstrate the severity of the abuse which would then fulfill the deliberate indifference standard). *See also* *Nunn v. Michigan Department of Corrections*, 592 N.W. 2d 370 (Mich. Ct. App. 1998). This recent class action suit involves women who are charging that the prison management failed to prevent rape and sexual abuse by male guards and prison staff. Although the case has been brought under the Civil Rights Act, not the Eighth Amendment, the decision could increase awareness of the problem and encourage female inmates to file lawsuits when they are sexually abused in prison.

should monitor enforcement and that prisons should be held vicariously liable for their employees' sexual misconduct. Both recommendations would ensure enforcement and protect women in prison.

The deliberate indifference standard under the Eighth Amendment is too stringent to allow any reasonable opportunity to obtain relief. A prison guard fulfills the deliberate indifference standard if he has a "sufficiently culpable state of mind."<sup>111</sup> The guard must know of the excessive risk to the inmate's health and/or safety and must disregard that risk.<sup>112</sup> Rape would seem to fit within this standard since a correctional officer knows that rape is a violent crime against both health and safety, yet disregards the risk. However, the standard is nearly impossible to defeat because it is based on the officer's subjective mindset, not an objective "reasonable person" standard.<sup>113</sup>

Courts are hesitant to find liability for prison guards for many reasons. First, sexual harassment alone, as opposed to assault and rape, is not violent enough to impose liability.<sup>114</sup> Second, a risk does not exist if no previous incidents were reported.<sup>115</sup> Third, if the alleged assault occurs in a crowded area, the chance of its recurrence is negligible, and thus does not create an excessive risk.<sup>116</sup> Finally, in some cases, the risk of sexual abuse is not excessive if the prison has instituted policies against abuse.<sup>117</sup> Therefore, sexual abuse in prisons becomes a vicious circle. If the crime goes unreported, the future crimes will not impose liability. However, if the assault is reported, additional factors may also preclude liability. Sexual abuse by male guards therefore becomes a lose-lose situation for most female prisoners.

As a result of the increased attention on sexual abuse by male guards<sup>118</sup> and the landmark victory in *Women Prisoners*,<sup>119</sup> many new policies have been adopted within prisons across the United States. For example, the District of Columbia provides a Department of Justice hot-line for female prisoners to report abuse, medical and psychological care to inmates who report abuse, a training program for prison

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111. *Farmer v. Brennan*, 511 U.S. 825 (1994).

112. *See id.* at 838.

113. *See id.* at 825.

114. *See Adkins v. Rodriguez*, 59 F.3d 1034, 1037 (10th Cir. 1995).

115. *See Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998).

116. *See Scott v. Moore*, 114 F.3d. 51, 55 (5th Cir. 1997).

117. *See id.*

118. *See Not Part of My Sentence*, *supra* note 17.

119. 93 F.3d 910 (D.C. Cir. 1996).

staff, and background checks on new guards.<sup>120</sup> In addition, every state, except Illinois, expressly criminalizes sexual misconduct by prison guards.<sup>121</sup> Moreover, Georgia gives a prisoner's testimony credibility in courts, instead of solely relying on the guard's account of the events.<sup>122</sup> Michigan has an outside governmental official who has limited authority to oversee prison conditions.<sup>123</sup> The Federal Bureau of Prisons has also introduced new policies to encourage the reporting of abuse, such as a telephone link to an external investigation unit.<sup>124</sup> Lastly, California has adopted similar reforms such as confidential reporting systems and specialized training for guards.<sup>125</sup>

In addition to new prison policies, The Child Protection and Sexual Predator Punishment Act of 1998<sup>126</sup> includes custodial sexual assault.<sup>127</sup> Additionally, Congress has found that sexual abuse by male prison guards is a serious problem and established a prevention program.<sup>128</sup> This program requires that prisons are prohibited from hiring corrections officers who have been convicted or found liable of custodial sexual assault and that national and state databases be maintained, listing guards who have been convicted or found liable of custodial sexual assault.<sup>129</sup> Guards are only given immunity under this Act for good faith conduct.<sup>130</sup> However, good faith conduct is not defined. If any state fails to comply with these requirements, they will be deprived of ten percent of the funds that they would otherwise have received under 42 U.S.C. § 13701.<sup>131</sup>

Although the problem of custodial sexual abuse seems to be addressed in various reform policies, these policies alone are not enough. Since the prisons have adopted policies, cases have shown that the mere existence of a policy does not satisfy the deliberate indifference prong of the Eighth Amendment test for constitutional violations.<sup>132</sup>

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120. *See id.*

121. *See All Too Familiar, supra* note 2.

122. *See id.*

123. *See id.*

124. *See Not Part of My Sentence: Violation of the Human Rights of Women in Custody, at* <http://www.amnestyusa.org/rightforall/women/report/wome11.html>.

125. *See Lucas v. White*, 63 F.Supp.2d 1046 (N.D. Cal. 1999).

126. *See H.R. REP. No. 576*, 105th Cong. (2nd Sess. 1998).

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See Scott v. Moore*, 114 F.3d 51, 55 (5th Cir. 1997).

Additionally, The Child Protection and Sexual Predator Punishment Act of 1998 provides a loophole of good faith conduct for prison guards to slip through.<sup>133</sup> Therefore, as long as male guards testify that the sexual encounter was consensual, they will not be held liable. This good faith conduct requirement also defies state laws that have, for the most part, criminalized sexual relations between guards and inmates.<sup>134</sup>

Moreover, prisons are prohibited from hiring guards who have been convicted. However, due to the severe underreporting of custodial sexual abuse, a guard might pose a high assault risk yet still not have a record. One way to combat this would be to interview fellow employees and inmates at the guard's former employment. Thus, as long as policies prohibiting custodial sexual abuse are not enforced, the abuse is likely to continue.

The new policies prisons have adopted will not make a substantial difference in the treatment of female prisoners unless they are enforced. Due to the threat of retaliation by guards, women are fearful to report incidents of sexual abuse.<sup>135</sup> Retaliation is defined as an act by a correctional officer aimed at an inmate to punish her for reporting abuse or to keep her from reporting abuse.<sup>136</sup> Retaliation ranges from guards limiting the inmate's phone and visitation privileges to placing the prisoner in punitive segregation.<sup>137</sup> Additionally, many guards ask their colleagues to assist in issuing tickets.<sup>138</sup> Tickets are issued whenever a prison policy is violated.<sup>139</sup>

In Michigan, when a woman reports sexual abuse, the report is written and kept in the open in the guard's office so that any officer can read it.<sup>140</sup> Furthermore, no precautions are taken to protect the victim's identity.<sup>141</sup> The investigation is then conducted by a member of the corrections department and rarely requires more than the

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133. See H.R. REP. No. 576, 105th Cong. (2nd Sess. 1998).

134. See *All Too Familiar*, *supra* note 2.

135. See *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, at <http://www.hrw.org/reports98/women/Mich.htm> (last visited Nov. 12, 1999).

136. See *id.*

137. See *id.*

138. See *id.*

139. See *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, at <http://www.hrw.org/reports98/women/Mich.htm> (last visited Nov. 12, 1999).

140. See *id.*

141. See *id.*

guard's version of the events.<sup>142</sup> Thus, retaliation not only prevents inmates from reporting abuse, but it also hampers effective enforcement of prison policies.

An outside, non-governmental agency should be created in each state to monitor the enforcement of prison procedures. This agency could help prevent retaliation against inmates and help encourage the reporting of guard misconduct. This agency could also oversee the numerous new policies, such as background checks, required training, grievance procedures, and hot-lines that prisons have adopted. The agency must consist of individuals who are not involved with correctional officers. These individuals can randomly visit the prison to speak with inmates, observe office records and watch guards. Since correctional officers currently have virtually unlimited discretion in how prison rules are enforced,<sup>143</sup> this independent agency would serve to limit the guard's discretion and remind them that they are under scrutiny.

Prisons would have a greater stake in enforcing prison policies if they were held liable for the actions of correctional officers. According to the Supreme Court of California, three policy objectives are at the root of vicarious liability.<sup>144</sup> First, it prevents recurrence of the same tortuous activities.<sup>145</sup> Second, it provides compensation for the victim.<sup>146</sup> Third, vicarious liability ensures that "the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury."<sup>147</sup>

Currently a prison is held vicariously liable for a prison guard's sexual misconduct if the guard was acting within the scope of employment at the time of the assault. However, the scope of employment is often difficult to determine. In *Primeaux v. United States*,<sup>148</sup> a uniformed police officer offered Primeaux a ride.<sup>149</sup> Because Primeaux's car was trapped in a snow bank, she accepted.<sup>150</sup> After driving away, Officer Scott pulled over, ordered Primeaux out of the car and raped

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142. See *Nowhere to Hide*, *Supra* note 136.

143. See *id.*

144. See *Mary M. v. City of Los Angeles*, 285 Cal. Rptr. 99, 101 (1991).

145. See *id.*

146. See *id.*

147. *Id.*

148. 102 F.3d 1458 (8th Cir. 1996).

149. See *id.* at 1460.

150. See *id.*

her.<sup>151</sup> The court found that it was reasonably foreseeable that a police officer would use his authority to “cause a person to rely on or fear that authority and succumb to sexual advances.”<sup>152</sup> In this case, the rape was committed within Officer Scott’s scope of employment. In *Mary M. v. City of Los Angeles*,<sup>153</sup> the court concluded that “when a police officer on duty misused his official authority by raping a woman whom he [had] detained, the public entity that employs him can be held vicariously liable.”<sup>154</sup> Analogously, in *Barney v. Pulsipher*,<sup>155</sup> it was reasonably foreseeable that Pulsipher, the only jailer on duty, relied on and misused his authority by raping Christensen and Barney.<sup>156</sup> However, because there is no vicarious liability in prisons, Pulsipher and the jail that employed him were freed from any liability.

Sexual abuse also tends to fall within the scope of employment when it occurs at a location where law enforcement work is conducted and while the officer is on-duty.<sup>157</sup> Therefore, Pulsipher’s acts of sexual abuse that occurred inside the holding cell during his eight-hour shift would be classified as within the scope of employment.<sup>158</sup> On the other hand, an officer who forced a female suspect into an abandoned building before sexually assaulting her was not acting within the scope of his employment.<sup>159</sup> Although the officer was on-duty, the assault did not occur where the law enforcement work was conducted.<sup>160</sup>

Based on these criteria, female prisoners who are sexually assaulted by on-duty guards should usually meet the scope of employment criteria since they do not have the luxury of leaving the prison property. Therefore, prisons should frequently be held vicariously liable for the sexual misconduct of their guards. This liability or threat of liability would force prison authorities to implement and supervise the conduct of the prison guards through effective enforcement of prison policies.

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151. *See id.*

152. *Id.* at 1463.

153. *See Mary M.*, 285 Cal. Rptr. at 110.

154. *Id.*

155. 143 F.3d 1299.

156. *See id.* at 1298.

157. *See Mary M.*, 285 Cal. Rptr. at 102.

158. *See Barney*, 143 F.3d 1299.

159. *See Jarvis v. Government of the Virgin Islands*, 919 F.Supp. 177 (Virgin Is. App. Div. 1996).

160. *See id.*

## V. CONCLUSION

"The sexual abuse of women in prison is one of the most heinous state-sanctioned human rights violations within the United States today."<sup>161</sup> Male guards use their authority to frighten, intimidate and abuse female prisoners. For the most part, this has been an invisible crime and a losing battle for female inmates. The strict, subjective deliberate indifference standard is one of the main reasons that female prisoners have not found relief under the Eighth Amendment.<sup>162</sup> However, due to recent media attention<sup>163</sup> and a recent victorious civil lawsuit,<sup>164</sup> the prisons and the legislature, at least to some extent, have responded.<sup>165</sup>

As this note has demonstrated, mere unenforced prison policies are not enough to combat the sexual abuse. "Women prisoners represent one of the most disfranchised and invisible adult populations in our society."<sup>166</sup> In order to recognize the value of the health and safety of these women, prison policies must be enforced. An outside agency, which is not affiliated with the prison, should routinely monitor the prison, interview female inmates, observe the guards, and bring actions against the prisons and their guards on the prisoners' behalf. Additionally, prisons should be held vicariously liable for the sexual misconduct of their guards. Not only would this provide compensation for the victim, but also ensure that the prison policies are enforced. The women in prison are paying their debt to society through incarceration. They should not be subjected to additional punishment, fear, and humiliation at the hands of prison guards.

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161. Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 357 (1998).

162. See *Farmer v. Brennan*, 511 U.S. 825 (1994).

163. See Kurshan, *supra* note 9.

164. See *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996).

165. See *Not Part of My Sentence*, *supra* note 14.

166. Davis, *supra* note 161, at 351.