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Comment

*555 CRUEL AND UNUSUAL PUNISHMENT OF FEMALE INMATES: THE NEED FOR REDRESS UNDER 42 U.S.C. § 1983 [FN1]

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"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [FN2]

I. Introduction

This comment addresses the inadequate statutory and constitutional remedies for female inmates who have been subjected to abuse by male prison guards. [FN3] Historically, women have been subjected to "sexual abuse and oppression" by the males who controlled the prisons for women. [FN4] In the United States, the women's prison reformers were particularly concerned "with the sexual abuse of incarcerated women by male officials in institutions housing both sexes." [FN5] Today, while there is still a problem with female inmates being sexually abused by male guards; current research rarely discusses the extent of this problem. [FN6]

According to one theorist, since women only comprise approximately 7.5% of all incarcerated persons, the special problems affecting women are often overlooked. [FN7] In the 1970s, research documented the high risk of women in U.S. jails being sexually assaulted by male officials. [FN8] This study acknowledged reports of outright rape, as well as the requirement of sexual "favors" in exchange for women's basic *556 needs. [FN9] For example, in 1974, the North Carolina prison system could no longer overlook the sexual assault of female inmates by guards after one female inmate fought off an attempted oral rape by her male guard. [FN10] Since then, female inmates have filed suit against male prison officials for such violations and allegations of sexual misconduct. [FN11] As recently as 1996, three female inmates brought suit against federal prison authorities, alleging that some of the male guards were "selling" female inmates to male inmates who, in turn, proceeded to sexually assault and beat them. [FN12]

Today, in the United States, the average female inmate is thirty-six years old, Caucasian, has dependent children, [FN13] and is incarcerated for a drug related offense. [FN14] Typically, female inmates have a history of physical and/or sexual abuse before they are incarcerated, which makes them even more susceptible to abuse by male guards or officials. [FN15]

In the past, female inmates have been reluctant to report incidents of sexual assault and harassment that they suffer in prison. However, as with the increased reports of spousal rapes, [FN16] more women are coming forward to report instances of sexual harassment and abuse from male prison guards or officials. [FN17] These types of lawsuits have become much more prevalent in the last five to ten years. [FN18] Unfortunately, despite *557 this increase, the abuse of women prisoners is still rather common, and it is believed that many abuses remain unreported. [FN19] One explanation for this stems from the inability of these women to obtain positive results through the legal process.

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. [FN20] 42 U.S.C. § 1983 is a means of "vindicating federal rights elsewhere conferred." [FN21] Therefore, to state a claim under 42 U.S.C. § 1983, the female inmate must allege a deprivation of a civil right. [FN22]

Additionally, to hold a party legally responsible for the deprivation of a right under the Constitution, the plaintiff must prove that the party acted under color of law. [FN23] 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 must act with "deliberate indifference" [FN24] to inmate health or safety. [FN25]

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In addition, another obstacle confronting plaintiffs bringing a claim under 42 U.S.C. § 1983 is the "qualified immunity" defense available to the defendant state actor. [FN26] Qualified immunity protects government officials from liability for constitutional violations, except in the "most egregious cases." [FN27] The courts are reluctant to characterize government *558 conduct as "egregious." [FN28] Many of the 42 U.S.C. § 1983 cases are dismissed or found in favor of the government on the basis of the qualified immunity defense. Accordingly, this comment advocates a change in the interpretation of 42 U.S.C. § 1983 which would enable injured female inmates a means to obtain legal redress.

First, the background section of this comment discusses the most common cause of action for sexual harassment and/or sexual abuse of female inmates by male guards. [FN29] This section explores under what circumstances a plaintiff may file a suit under 42 U.S.C. § 1983, what type(s) of violation(s) the plaintiff must allege, and who must commit the violation(s). [FN30] This section also distinguishes between suits against individuals and those against municipalities. [FN31] Moreover, it defines when a defendant has acted under color of state law in order to meet the 42 U.S.C. § 1983 requirements. [FN32] The background section then discusses the alleged violations of the Eighth Amendment and the "deliberate indifference" test. [FN33] It concludes with a discussion of the immunity often given to prison officials and the available remedies for successful plaintiffs bringing 42 U.S.C. § 1983 claims. [FN34]

Second, the analysis section demonstrates that while the 42 U.S.C. § 1983 standard appears reasonable, it is inadequate to address the claims of abused female inmates. [FN35] Qualified immunity is often given to prison officials, leaving abused female inmates with no means of recourse. [FN36] Additionally, the analysis section demonstrates that the current test for finding a Constitutional violation under the Eighth Amendment is ambiguous and inappropriate. [FN37]

*559 Finally, this comment proposes that, although the standards of 42 U.S.C. § 1983 and the Eighth Amendment seem reasonable and necessary on their face, a close examination reveals that these standards are inadequate and far too rigid. They contain numerous loop holes for prison guards, and leave too much interpretation to the courts. The interpretation of 42 U.S.C. § 1983 should be based upon a strict adherence to its actual language. As it is interpreted now, qualified immunity is granted in far too many situations. Thus, some form of respondeat superior liability [FN38] should attach to the guards who are acting in their official capacity.

II. Background

A. 42 U.S.C. § 1983

Congress enacted 42 U.S.C. § 1983 [FN39] as part of the Civil Rights Act of 1871. [FN40] 42 U.S.C. § 1983 does not confer substantive rights; it is solely a method for "vindicating federal rights elsewhere conferred," [FN41] merely providing a procedure for redress. [FN42] As a remedial statute, this federal statute is not a basis for jurisdiction. [FN43] It is intended to supplement state remedies and vindicate constitutional rights violations. [FN44] However, to state a claim under 42 U.S.C. § 1983, the plaintiff must allege a deprivation of a civil right. [FN45] The most *560 common constitutional violations alleged abused female prisoners are violations of the Eighth Amendment. [FN46]

1. The Meaning of "Person" Under 42 U.S.C. § 1983

Only "persons" may be sued under 42 U.S.C. § 1983. [FN47] In some instances, an individual is exempt from the definition or interpretation of "person" [FN48] and, in others, the interpretation of persons may exceed mere individuals. Corporations, school boards, athletic associations, and state universities have all been found to be "persons" within the meaning of the statute. [FN49] Municipalities often fall under the interpretation of "person" as well. [FN50] Yet, there is a different test applied when a suit is against a municipality. [FN51]

If the action or inaction taken by a municipality extends beyond mere negligence, then it may be held liable under 42 U.S.C. § 1983. [FN52] A municipality can be held liable under 42 U.S.C. § 1983 if the harm suffered is a result of an official policy, custom, or pattern. [FN53] However, the municipality's official policy, custom, or pattern must also be linked to a constitutional violation in order for the municipality to be held liable. [FN54]

In the context of abused female inmates, *Scott v. Moore* [FN55] exemplifies when municipalities may be considered "persons" for purposes of liability under 42 U.S.C. § 1983. [FN56] In this case, Artelia Scott was arrested for public intoxication and resisting arrest. [FN57] She was placed in a holding cell while awaiting arraignment. [FN58] At the time of her holding, a male *561 correctional officer, Moore, was the only officer on duty. [FN59] During this time, he repeatedly

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entered Scott's cell and sexually assaulted her. [FN60] Scott reported the incident when she was released from custody. [FN61] This led to Moore's resignation and guilty plea to criminal charges. [FN62] Subsequently, Scott filed suit against Moore, the City, and the Chief of Police alleging various state and federal constitutional claims. [FN63]

In examining Scott's complaint, the court considered when municipalities are liable under 42 U.S.C. § 1983. [FN64] Although municipalities are considered persons within the meaning of 42 U.S.C. § 1983, [FN65] they are only held liable when the "harm suffered [i]s the result of an 'official policy, custom, or pattern.'" [FN66] Prison officials may not be held liable under 42 U.S.C. § 1983 for "mere negligence in oversight[; n] onethless, [they] may not ignore obvious dangers to inmates." [FN67] In addition, they may not be held liable under respondeat superior principles. [FN68]

In Scott, the court established a three-part test plaintiffs must meet in order to hold a municipality liable. [FN69] First, the City must have "promulgated 'an official policy, practice, or custom,'" leaving it subject to 42 U.S.C. § 1983 liability. [FN70] Second, a plaintiff must establish that the policy can be linked to a constitutional violation. [FN71] Third, a plaintiff must prove that the municipality's action, or inaction, "extended beyond mere negligent oversight of [her] constitutional rights." [FN72] In Scott, the court held that a jury could find that the plaintiff met all three requirements, it then vacated the *562 district court's grant of summary judgment on plaintiff's 42 U.S.C. § 1983 inadequate staffing claim and remanded the case for further proceedings. [FN73]

Unlike a municipality, a state cannot qualify as a "person" within the meaning of 42 U.S.C. § 1983. [FN74] Along this same line, a suit against a state official in his or her official capacity is "no different from a suit against the state." [FN75] Thus, individuals, such as state prison guards, are exempt from the definition of "person." [FN76] Further, the Eleventh Amendment bars bringing a suit in federal court against a nonconsenting state. [FN77] This occurs when relief is sought against the state and not the individual state official. [FN78]

2. Acting Under Color of State Law

The most common cause of action for sexual harassment and/or sexual abuse inflicted upon female inmates by male guards is under 42 U.S.C. § 1983, alleging a violation of constitutional rights under the Eighth Amendment. [FN79] To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a constitutional violation and show the alleged deprivation was committed by a person acting under color of state law. [FN80] A defendant acts under color of state law when he has the authority of state law and exercises power under it. [FN81]

*563 In West v. Atkins, [FN82] the Supreme Court promulgated the 42 U.S.C. § 1983 acting under "color of state law" analysis. [FN83] The facts surrounding West are as follows. While Quincy West was incarcerated at Odom Correction Center, in Jackson, North Carolina, he injured his Achilles tendon while playing volleyball. [FN84] Over a period of several months, West saw Dr. Samuel Atkins, who was under a contract to provide orthopedic services to inmates. [FN85] Dr. Atkins placed West's leg in a series of casts and advised him that surgery was necessary. [FN86] Dr. Atkins, however, failed to schedule the surgery, leaving West with a very swollen and painful ankle. [FN87] Moreover, West was not free to see a physician of his own choosing, since he was "a prisoner in 'close custody.'" [FN88] Thereafter, when West did not receive the necessary medical treatment, he filed a cause of action against Atkins for violation of his civil rights. [FN89]

The main issue in West was whether Atkins acted "'under color of state law' within the meaning of 42 U.S.C. § 1983, when he treat[ed] . . . inmate[s]." [FN90] The court proceeded with the following analysis. For a plaintiff to state a cause of action under 42 U.S.C. § 1983, he or she must allege "a violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." [FN91] The traditional definition of "acting under color of state law" provides that the defendant "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" [FN92] The alleged deprivation "must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible." [FN93] The person who *564 allegedly caused the deprivation must be a state actor. [FN94] Generally, state employment is enough to qualify a defendant as a state actor. [FN95] Since Dr. Atkins had a contract to provide medical care to inmates, the court held that Dr. Atkins' medical treatment to West qualified as state action, and that Dr. Atkins acted under color of state law. [FN96]

The Court in West created a two-prong test to determine whether a private individual acted under color of state law. [FN97] Under the first prong, the alleged deprivation must result from the exercise of a right or privilege having its source in state authority. [FN98] The court gives three examples of what qualifies under this first prong. [FN99] The first example,

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articulated in *U.S. v. Classic*, [FN100] states that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.'" [FN101] In the second example, from *Adickes v. H.H. Kress & Co.*, [FN102] the Court held that a defendant does not have to be an officer of the state to act under state law; "it is sufficient that she 'is a willful participant in joint activity with the State or its agents.'" [FN103] In *West*, [FN104] the third example, the Court held that private persons who are authorized to exercise state authority are deemed to be "acting under color of state law." [FN105]

The second prong of the test, to determine whether one acted under color of state law, provides "that if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under [*56542 U.S.C.] § 1983.'" [FN106] If the state action requirement is met, then the "alleged infringement of the plaintiff's federal rights is fairly attributable to the state." [FN107]

3. Constitutional Rights; Violations of the Eighth Amendment

To state a cause of action under the Eighth Amendment of the United States Constitution for a deprivation of a constitutional right, the alleged deprivation must be "objectively sufficiently serious," and the prison official must have a "sufficiently culpable state of mind." [FN108] The state of mind is determined by whether the prison official had a deliberate indifference to the inmate's health or safety. [FN109] Only if a prison official knows that an inmate "face[s] a substantial risk of serious harm and disregards that risk [of harm] by failing to take reasonable measures to abate it," will the prison official be held liable. [FN110]

The case of *Adkins v. Rodriguez* [FN111] illustrates that even "outrageous and unacceptable conduct" by a prison guard may not necessarily constitute an Eighth Amendment violation. [FN112] In this case, Shelly Adkins was serving a sentence for a felony conviction at Huerfano County Jail. [FN113] Deputy Rodriguez was a trainee at the Sheriff's Department in Huerfano County. [FN114] From January 6, 1990 through March 22, 1990, Deputy Rodriguez commented to Adkins about her body, his sexual prowess, and his sexual conquests. [FN115] Adkins complained to Sergeant Garcia, who advised Rodriguez that male guards were only to use the intercom to speak with female inmates. [FN116] Sergeant Garcia also required that conversations be limited to business matters. [FN117] This, however, did *566 not stop Deputy Rodriguez. [FN118]

On March 22, 1990, Rodriguez, on the graveyard shift, took the keys to the female inmates' cells and entered Adkins' cell. [FN119] Adkins awoke with Rodriguez standing over her bed. [FN120] According to Adkins, Rodriguez told her that he was checking up on her. [FN121] As he left, he said, "[b]y the way, you have nice breasts." [FN122] Adkins complained about the incident but, when questioned, Rodriguez claimed that he heard Adkins "moaning in pain and entered her cell to bring her medication for a toothache." [FN123] As a result of Adkins' complaint, Rodriguez was suspended for a week. [FN124] Thereafter, he resigned during the suspension week. [FN125] Adkins then filed a lawsuit alleging a violation of the Eighth Amendment of the Constitution. [FN126]

The district court had to determine whether Adkins "was denied the minimal civilized measure of life's necessities." [FN127] The court reasoned that since allegations of sexual harassment in the employment context are not covered by 42 U.S.C. § 1983, Adkins did not have a "clearly established right to be free of sexual harassment in a prison setting." [FN128] Therefore, the district court dismissed Adkins' complaint, "finding no clearly established right under the Eighth Amendment [of the Constitution] for a prisoner to be free [from] verbal sexual harassment." [FN129]

On appeal, Adkins had the burden of establishing that when the harassment occurred she "had a clearly established right to be free from verbal sexual harassment." [FN130] While the appellate court acknowledged that the acts by Rodriguez were "outrageous and unacceptable conduct by a jailer," it *567 found no constitutional violation. [FN131] Therefore, the court of appeals supported the district court's ruling, affirming the defendant's summary judgment motion based on the affirmative defense of qualified immunity. [FN132]

a. Test for Determining Eighth Amendment Liability

The United States Supreme Court decision in *Farmer v. Brennan* [FN133] illustrates conditions under which a prison official may be held liable for the actions of a prisoner in violation of another prisoner's Eighth Amendment rights. Dee Farmer, a male inmate, was a preoperative transsexual placed in the general population of a male prison. [FN134] It was uncontested that Farmer "project[ed] feminine characteristics." [FN135] Farmer had undergone estrogen therapy, surgically received breast implants, and "submitted to unsuccessful 'black market' testicle-removal surgery." [FN136]

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On at least one occasion, Farmer was required to be segregated for his own safety. [FN137] However, Farmer was later transferred to the United States Penitentiary in Terre Haute, Indiana, where he was placed in the general population. [FN138] Within two weeks, Farmer was beaten and raped by another inmate in his own cell. [FN139] Farmer filed suit alleging a violation of the Eighth Amendment. [FN140]

The court opined, "[i]t is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." [FN141] It also held that "[p]rison officials have a duty . . . to *568 protect prisoners from violence at the hands of other prisoners." [FN142] The officials must "take reasonable measures to guarantee the safety of the inmates." [FN143]

In Farmer, the court held that a prison official violates the Eighth Amendment only if two requirements are met. [FN144] First, the "deprivation alleged must be 'objectively sufficiently serious,'" meaning that the official's "act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" [FN145] When the claim is against an official for the failure to prevent harm, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." [FN146]

Second, the "state of mind [must be] one of 'deliberate indifference' to inmate health or safety." [FN147] The principle upheld in this requirement is that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." [FN148] The issue in this case, however, was what qualifies as "deliberate indifference." [FN149]

b. Deliberate Indifference

In Farmer, the Court defined deliberate indifference as a state of mind which is "more blameworthy than negligence." [FN150] When there is a cause of action under the Eighth Amendment for excessive physical force, the claimant must do more than prove "'indifference' . . . [; t]he claimant must show that officials applied force 'maliciously and sadistically for the very purpose of causing harm.'" [FN151]

The test for determining deliberate indifference is whether 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 *569 draw the inference." [FN152] Therefore, officials who knew of the risk to inmate health or safety may be "free from liability if they responded reasonably to the risk." [FN153]

The deliberate indifference test was also at issue in Long v. McGinnis. [FN154] In this case, Long was an inmate at the Huron Valley Women's Facility. [FN155] She was transferred to the Men's Facility for temporary medical treatment in its infirmary. [FN156] While she was in the infirmary, a male inmate, Stroman, gained access to the cell's locking mechanism and proceeded to hold a knife to Long's throat and rape her. [FN157] Long alleged that the guard who was on duty, Weiss, knew that a female was in the infirmary and that Stroman had potential access to those cells. [FN158] Long claimed that Weiss spent his time on duty watching television rather than patrolling the area. [FN159]

Plaintiff filed a cause of action against the Michigan Department of Corrections, its director, Weiss, and Stroman for monetary damages under 42 U.S.C. § 1983. [FN160] However, the district court granted the defendant's motion for summary judgment as to the claims against Weiss, finding that there was no "genuine issue of material fact as to whether Weiss was 'deliberately indifferent.'" [FN161] The court of appeals affirmed this decision, articulating the standard that under the Eighth Amendment, the victim must prove that the guard showed "deliberate indifference to a substantial risk of harm" to hold the prison guard liable for the rape of one inmate by another. [FN162] The court concluded that Long did not show Weiss had a deliberate indifference to the risk of harm, nor did *570 Long offer evidence that Weiss had a culpable state of mind. [FN163]

Another case applying the Eighth Amendment and the deliberate indifference test is Hovater v. Robinson. [FN164] The Hovater court applied this test to a situation involving a detention officer personally accused of sexually assaulting a female inmate. [FN165] Jerrie Hovater claimed that she was sexually assaulted by Tommie Robinson, a detention officer, while incarcerated at the Sedwick County Jail. [FN166]

On June 7, 1988, Robinson called Hovater to the jail's third floor library to straighten the books. [FN167] Hovater claims that during this time Robinson sexually propositioned her, made a sexual advance, and said he would call her again the next day. [FN168] The next day she was, in fact, called to the third floor. Hovater alleged that Robinson forcibly sodomized her in the

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library. [FN169] When Robinson again called her to the third floor later that same day, she told the elevator operator about Robinson's sexual advances towards her. [FN170] The elevator operator contacted a supervisor after bringing Hovater to the third floor. [FN171]

On June 9, 1988, Robinson was placed on probation. [FN172] Thereafter, he resigned. [FN173] Hovater filed suit against Robinson, Sedgwick County, and Sheriff Hill, alleging violations of her constitutional rights under the Eighth and Fourteenth Amendments. [FN174] Hovater claimed her rights were violated since she was not protected from the jail guards. [FN175] She alleged that the defendants were responsible because of a policy and custom of allowing the defendant "to have unsupervised access to and custody of female inmates over an extended period of time with deliberate indifference to the *571 consequences, for failure to train the detention officers to prevent the policy and custom from occurring in the first place, and for failure to supervise and protect." [FN176]

Defendant Sheriff Hill and Sedgwick County moved for summary judgment. [FN177] Sheriff Hill asserted the defense of qualified immunity. [FN178] The district court denied the motion, holding that Sheriff Hill had "constructive notice that Robinson, a single male officer, had unsupervised care and custody of female inmates." [FN179] Thus, the court found that Sheriff Hill and Sedgwick County were aware that Hovater's alleged injury was "likely to result when a single male officer had unsupervised care and custody of a single female inmate." [FN180] The court of appeals, however, reversed, finding that Sheriff Hill had no knowledge that Robinson was a threat to female inmates [FN181] and, thus, was entitled to qualified immunity. [FN182]

B. Qualified Immunity

A common defense to a 42 U.S.C. § 1983 claim is qualified immunity. [FN183] It has no "textual basis in either the Constitution or statute"-- it is entirely court created. [FN184] There are three competing goals which qualified immunity attempts to serve. [FN185] The first is to "provide . . . effective redress to persons whose constitutional rights have been violated by government officials." [FN186] The second goal is to "deter . . . officials from abusing their power in derogation of the Constitution." [FN187] The third goal is to "protect . . . officials from being unduly burdened by the threat of potential liability in the *572 discharge of their discretionary duties." [FN188]

Qualified immunity protects government officials from liability for constitutional violations except in the "most egregious cases." [FN189] Such immunity is granted when government officials are performing discretionary functions. [FN190] They are "generally . . . shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [FN191] Therefore, the first step in determining whether qualified immunity applies is dependent upon whether the plaintiff has alleged a violation of a constitutional right. [FN192] If the plaintiff has, then the next step "is to decide if [the] right was clearly established at [the] time [[the] conduct occurred and whether [the] defendant's conduct was objectively reasonable." [FN193] If the plaintiff is successful in establishing this, the issue becomes the "objective legal reasonableness of defendant's conduct under [the] circumstances." [FN194] In other words, the issue is "whether [[a] reasonable official would have known that alleged acts violated that right." [FN195]

Finally, a plaintiff may only overcome a qualified immunity defense by showing that his or her rights were clearly established under the Constitution of the United States at the time of the violation. [FN196]

C. Remedies

1. Conventional Remedies

If a plaintiff prevails on his or her 42 U.S.C. § 1983 claim, monetary relief is granted by way of nominal, compensatory, *573 and/or punitive damages. [FN197] However, monetary liability is only imposed on "persons" responsible for the deprivation of the constitutional or federal rights. [FN198] Since a state does not qualify as a person within the meaning of 42 U.S.C. § 1983, state officials acting in their official capacity also do not qualify under the meaning of "person." [FN199] Thus, if the violator qualifies for official immunity, then the "prisoner may be barred from obtaining damages under [42 U.S.C.] § 1983, despite the fact that [42 U.S.C.] § 1983 does not on its face provide for any sort of official immunity." [FN200]

42 U.S.C. § 1983 exempts the individual acting in his official state capacity from the definition of "person," unless the action involves a prayer for injunctive relief. [FN201] Injunctive relief may be granted if an "inmate continues to be deprived of her

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rights," and there is a "real and immediate threat that the prisoner will be the victim of an unconstitutional action." [FN202] Attorneys fees may also be granted to the prevailing party under 42 U.S.C. § 1988. [FN203]

2. Remedies Exceeding the Court's Authority

a. The Women Prisoners Case

In *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, [FN204] the district court found a number of violations of statutory and constitutional provisions committed by the District of Columbia Department of Corrections ("DCDC"). [FN205] The judgment of the district court ordered improvement of a number of conditions at the various DCDC facilities. [FN206] This judgment order was *574 then contested on appeal. Ultimately, the court of appeals found the district's order to be beyond the scope of the court's authority. [FN207]

(1) Background and Factual Findings of Women Prisoners

In *Women Prisoners*, the district court found that there had been numerous incidents of sexual misconduct between the male prison employees and the female inmates in all three of the DCDC facilities. [FN208] Approximately a half dozen female inmates testified they had been sexually assaulted by prison guards. [FN209] The misconduct included inappropriate remarks, invasions of privacy, and violent sexual assaults. [FN210] One of the "most disturbing" aspects of these violations was "the inadequacy of the Defendant's response to these attacks." [FN211] Defendant had adopted procedures and policies to deal with sexual misconduct; [FN212] however, there were no training procedures, consistent reporting practices, investigations, or severe sanctions implemented. [FN213] Therefore, the procedures and policies were of little use. [FN214]

(2) Conclusions of Law

The court held that the sexual harassment at the three DCDC facilities at issue [FN215] were violations of the Eighth Amendment's guarantee against cruel and unusual punishment and 42 U.S.C. § 1983. [FN216]

*575 (3) District Court's Order

To remedy the violations, the district court ordered that the DCDC enact and comply with a number of regulations. The Order required the DCDC to implement a regulation which prohibited sexual harassment and invasions of female inmates' privacy. [FN217] The regulation was to provide that female inmates who made complaints would not be subject to disciplinary action, irrespective of the merits of the complaint. [FN218] The Order also authorized the Special Officer of the district court to investigate any allegations of sexual misconduct and to participate in the penalties for the violation. [FN219]

Lastly, the Order required that the DCDC comply with its own Inmate Grievance Procedure. [FN220] The Inmate Grievance Procedure is the device by which inmates are able to report misconduct by prison guards. [FN221] The court further provided that the DCDC must also employ "trainers" to instruct inmates and jailers about the [DCDC]'s policies and regulations regarding sexual harassment, to heighten their awareness of the problem." [FN222]

(4) Defendants' Challenges

Defendants challenged the District Court's Order that the sexual harassment the women endured was a violation of their Eighth Amendment right against cruel and unusual punishment. [FN223] Specifically, they challenged the authorization allowing the Special Officer's staff to monitor sexual harassment complaints, the requirement that the DCDC comply with its own Inmate Grievance Procedure, and the prohibitions against taking any retaliatory action against inmates who file complaints. [FN224]

(5) The D.C. Circuit Court's Ruling

The Court of Appeals for the District of Columbia upheld *576 the Order pertaining to the Inmate Grievance Procedure and the provision covering retaliation against inmates for reporting complaints. [FN225] The court did, however, agree with the defendants' argument that the district court judge overstepped the court's role by ordering a special officer to monitor and oversee the implementation of the district court's Order. [FN226] Therefore, that part of the decision was overturned. [FN227] The implementation of the Inmate Grievance Procedure and the retaliation provision were left to the prison facility's

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own personnel, despite the fact that they were found to be in violation of the women's constitutional rights. [FN228]

III. Identification of the Problem

As the background section describes, many of the sexual harassment and/or sexual assault complaints brought by female inmates do not result in the inmates' favor. More realistic standards for valid causes of action and resulting liability must be created. As the standards now exist, many injured women have no appropriate legal redress against their male violators. The difficulty in attaching liability to states and municipalities under 42 U.S.C. § 1983 and in overcoming the qualified immunity defense prohibits plaintiffs from obtaining judgments in their favor. Frequently overlooked complaints and improper procedures are not considered "official" policies and, therefore, do not result in municipality liability. Finally, the "deliberate indifference" standard, applied to alleged Eighth Amendment violations, is an extremely rigid one, foreclosing a large portion of female inmates from successfully bringing their claims of alleged abuses.

IV. Analysis

A. The "Official" Policy Standard for Municipality Liability Is Inadequate

The standard for holding municipalities liable, as discussed above, requires that the "harm suffered was the result *577 of an 'official policy, custom, or pattern.'" [FN229] The action, or inaction, by the municipality must extend beyond mere negligence. [FN230] This standard does not, therefore, encompass unofficial, but frequently followed, customs or patterns, such as allowing male guards to be alone with female inmates. Moreover, this standard does not encompass situations where complaints are merely overlooked, and not investigated. [FN231]

Under the current standard, allegations of sexual misconduct which are reported but not investigated would not be actionable, unless there was an "official" policy not to investigate. [FN232] Therefore, even if some further sexual abuse occurred similar to that previously complained of, there would still be no municipal liability. Only when there is a long and documented history of uninvestigated allegations will the failure to investigate qualify as an official custom or pattern. While it is easy to find that a municipality's employees acted with authority, it is difficult to prove whether their action or inaction is official.

B. The Eighth Amendment

A strict standard must be met to find a violation of the Eighth Amendment. The standard for finding such a violation provides that the harm suffered must be "objectively sufficiently serious" and the prison official must have a culpable state of mind. [FN233] To be "objectively sufficiently serious," there must be a "denial of the minimal civilized measure of life's necessities." [FN234] For the prison official to be found to have a culpable state of mind, the official must also show a deliberate indifference to inmate health and/or safety. [FN235]

1. The Denial of the "Minimal Civilized Measure of Life's Necessities"

The first aspect of this test, "objectively sufficiently serious," has been defined by courts to mean that the action of the official resulted in the denial of "the minimal civilized *578 measure of life's necessities." [FN236] A very conservative interpretation would be that only what is necessary to survive meets this test. For example, food, water, clothing, shelter, and basic medical care would qualify. Under this interpretation, even acts of rape might not qualify as being a denial of "the minimal civilized measure of life's necessities." [FN237] An argument could be made that the United States is a civilized society, yet rape is quite prevalent; therefore, the absence of rape is not a requirement of the "minimal civilized measure of life's necessities." [FN238] Women are able to survive rape, hence the term "Rape Survivor." Yet, it is certainly arguable that being subjected to rape is a denial of a civilized aspect of one of life's necessities or basic right to be free from unwanted bodily intrusion.

However, since being subjected to rape may not be a deprivation of "the minimal civilized measure of life's necessities," it is even less probable that sexual assault, improper touching, or verbal forcible oral copulation would meet the above standard. The word "civilized" brings with it much debate. It is subject to different interpretations by different courts. While some liberal judges may be of the opinion that rape, sexual assault, and improper touching are deprivations of the minimum civilized measure of life's necessities, other, more conservative, judges may not. For instance, in *Adkins*, the court found that verbal sexual harassment, "threats of violence and sexual assault and/or sexual intimidation" did not constitute a denial of the

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"minimal civilized measure of life's necessities." [FN239] The emphasis on "civilized measures of life's necessities" does not carry with it any concrete interpretations. To some, this may mean food and water, while to others clothing and shelter. Yet, to even others, it may mean being free from sexual intimidation, assault and harassment of any kind.

This standard of the minimum measure of life's necessities is much too rigorous to realistically address the violations female inmates face by male guards. Frequently, male *579 guards verbally and physically abuse female inmates. [FN240] By applying this interpretation, these improper practices are allowed to continue unabated.

Therefore, when an alleged harm is sexual harassment with no physical touching involved, it will most likely not be seen as a denial of "the minimal civilized measure of life's necessities." [FN241] As *Adkins v. Rodriguez* demonstrates, without physical contact, there is not a deprivation of the minimal measure of life's necessities. [FN242]

2. Deliberate Indifference of Inmate Health or Safety Is Too Rigorous a Standard to Meet

The second part of the two-part test requires that the official must have a culpable state of mind, meaning the official must show "'deliberate indifference' to inmate health or safety." [FN243] This has been interpreted to mean that the official must know of and disregard an excessive risk of harm to inmate health or safety. [FN244] Once again, it is often too difficult for plaintiffs to meet this standard.

For instance, in *Hovater*, the district court found that the sheriff and county were aware that harm could result when a male officer was with a female prisoner alone, yet the court of appeals held that the sheriff had no knowledge that Robinson was a threat to the female inmates. [FN245] Therefore, the sheriff was given qualified immunity. [FN246] The district court found the sheriff was aware of a disregard for the safety of the inmates. [FN247] Nevertheless, the court concluded that this knowledge must not have been specific enough or excessive enough for the court to find that the sheriff had a "deliberate indifference." [FN248]

Yet knowing the danger inherent in leaving a female prisoner alone with a male guard, and doing nothing to prevent that harm, certainly suggests that a prison facility "know[s] of and disregards the threat to inmate health or *580 safety." *Hovater* appears to meet this interpretation. Since these suits fall under the Eighth Amendment, thereby implicating constitutional issues, the courts appear to require a showing of heightened severity of physical abuse before they will find a violation under the Eighth Amendment.

When abused female inmates cannot meet the standards for a prima facie case, there is no recourse against the violators under the Eighth Amendment. [FN249] Unless there is a different interpretation, female inmates will continue to fail to state a cause of action for a violation of the Eighth Amendment. [FN250] Consequently, the practice will continue unabated and more and more female inmates will continue to be harmed. [FN251]

C. 42 U.S.C. § 1983 and Qualified Immunity

42 U.S.C. § 1983 clearly provides that a person must be acting under color of state law to be held liable. [FN252] What cannot be found anywhere in the actual text of 42 U.S.C. § 1983 is an exemption creating qualified immunity. [FN253] This is because qualified immunity is not in the statute nor in the Constitution, [FN254] rather, it is completely court created. [FN255] Yet, there are many cases which grant qualified immunity to either the actual wrongdoer, the employer, or personnel manager. [FN256]

The second problem created by the qualified immunity standard is that it provides that one cannot obtain qualified immunity if the actions violate a "clearly established constitutional or statutory right." [FN257] On its face, this appears reasonable. However, when dealing with sexual harassment of *581 female inmates, a problem still exists. While sexual harassment has occurred for numerous years, it has just recently begun to be reported. [FN258] There are few precedents upon which the courts can rely; therefore, denying qualified immunity only for violations of "a clearly established statutory or constitutional right" results in a Catch-22 situation. The lack of precedent means that the rights of female inmates are not clearly established. So long as this right is not clearly established, female inmates cannot successfully defeat a qualified immunity defense.

This is the case in many sexual harassment situations. [FN259] The current standard provides that if there has been no actual

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physical touching or assault, then there has been no right violated against the female inmate. [FN260] Yet, in the employment setting such conduct is clearly a violation of a right and, therefore, has legal ramifications. [FN261]

Title VII protects employees from verbal and physical sexual harassment in the work place. [FN262] This stems from the rationale that working is one's livelihood and, accordingly, the workplace must be free from harassment and intimidation. [FN263] While in a work setting, the victim may resign and acquire a new job, the victim in a prison setting has no options of leaving, moving to a new prison, or transferring. Yet, there is no violation of an inmate's rights if there has been no physical touching or assault. [FN264] This is because the violation is not seen as a deprivation of the "minimal civilized measure of life's necessity." [FN265]

Adkins recognized that 42 U.S.C. § 1983 is not a valid cause of action for sexual harassment in the workplace and, as a result, cannot provide prisoners with the right to be free from such harassment and intimidation in the prison setting. [FN266] What the court did not recognize, however, is that *582 people in the workplace have other options, remedies, or recourse available to them. They are able to file suit under Title VII of the 1964 Civil Rights Act. [FN267] Or, if they wish, they can transfer to a different office, or terminate their employment. Obviously, none of these options are available to female inmates who cannot flee from prison officials.

Inmates "do not forfeit all constitutional protections by reason of their conviction and confinement in prison." [FN268] The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment. [FN269] However, the court in Adkins did not find constant verbal harassment of a female inmate to be cruel and unusual punishment. [FN270] It appears that the court did not take into consideration the prisoner's actual situation, where her protection and fate is entirely in the hands of the guards. The mere appearance of authority of the guards can create an enormous amount of intimidation and fear in an inmate. Inmates realize that issues such as visitation rights, parole, and other privileges may depend on their record of good behavior. In turn, their record of good behavior can certainly be influenced by their guards. Thus, when guards abuse their authority, female inmates often fear there is nothing they can do without facing repercussions. [FN271]

In Adkins, Defendant Rodriguez was attempting to show Adkins his authority and power when he obtained the key to her cell in the middle of the night and entered it. [FN272] Although he did not physically assault or rape her, he did frighten and intimidate her. [FN273] Thus, it should be considered cruel and unusual punishment for a female inmate to have to anticipate when the guard will again enter her cell and not know what the guard will do the next time--whether it be rape her, assault her, or do nothing. This should be considered a violation of Adkins' right to preserve her bodily integrity and to be free from bodily harm to which she is entitled. Not all rights *583 are lost once a woman is incarcerated. [FN274]

In Adkins, the finding of Rodriguez' qualified immunity sent a strong message to all female inmates: unless you are raped or physically assaulted, it is legally acceptable for a guard to verbally sexually harass and intimidate you as he sees fit. [FN275] Guards will often use threats of taking away privileges or credit towards work time or even threaten solitary confinement if women report the abuses. [FN276] Exempting a guard or prison official from qualified immunity only when a clearly established constitutional or statutory right has been violated allows prison officials excessive leeway, without providing the prisoners appropriate protection.

D. Remedies

1. Traditional Remedies

At first glance, it appears that female inmates who have been sexually assaulted have appropriate remedies available to them. However, this is not the case. The remedies available to female inmates for violations of the Eighth Amendment are inadequate. Monetary liability is only imposed on "persons." [FN277] It would seem logical that if a state official is acting in his official capacity and committing various violations he would be held liable. However, as discussed earlier, states and state officials acting in their official capacity are exempt from the definition of "persons." [FN278]

While the word "person" includes an individual or a human being, but not various entities, such as states, it does, however, include a municipality. [FN279] Therefore, it would logically follow that a state would also be included in the definition. However, it is not. States do not face monetary liability. [FN280]

As discussed above, qualified immunity is a bar to civil damages for those that qualify. Government officials performing *584 discretionary functions generally enjoy qualified immunity. [FN281] This immunity applies to official and particularly

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executive functions, which include the commonly performed functions of police officers or prison personnel. [FN282] Therefore, the actual person who has violated the rights of the female inmate may enjoy qualified immunity and be barred from any civil damages.

2. Women Prisoners: Overstepping the Judicial Scope

Women Prisoners is one of the more extreme cases in which many constitutional violations were found against the individual guards and the DCDC facilities in general. [FN283] The district court ordered implementation of various new policies and procedures. [FN284] The court of appeals, however, reversed some of the Orders, holding that the district court judge had overstepped her bounds. [FN285] The decision of the court of appeals left everything to be done internally within the DCDC. [FN286] The district court required the monitoring of the DCDC's actions to ensure that the DCDC was complying; however, it was determined that this was not within the judge's discretion to order. [FN287]

The district judge's Order was a step in the right direction. There were numerous violations found against the DCDC, and the judge ordered appropriate measures to ensure that such violations would not happen again. [FN288] Yet these actions were found to be outside the scope of her judicial authority. [FN289] Therefore, the court of appeals left it up to the DCDC to solve the problems internally. [FN290] Common sense tells one that asking the problem-maker to solve the problems will probably not result in the most positive and productive solutions.

***585** Injunctive relief is often what the female inmates desire. [FN291] It would assist in alleviating the risk of harm they face while incarcerated. However, the current injunctive relief standard is too difficult for many female inmates to meet because, to obtain the requisite injunctive relief, one must still meet the standards for an Eighth Amendment violation. [FN292]

V. Proposal

The following proposal refers to each section discussed in this comment: the 42 U.S.C. § 1983 standard for individuals and municipalities, the Eighth Amendment standard, and the available remedies. Under 42 U.S.C. § 1983, there is no mention of qualified immunity, yet it is implemented in numerous cases such as the ones previously discussed.

The current standard for imposing municipality liability is excessive and difficult to meet. There are two ways to remedy this dilemma. One option would be to exclude the word "official" from the interpretation of municipality liability. However, even if this were done, some manipulation still might occur in deciding what is actually the proper policy, custom, or pattern.

The other, and much more realistic, option would be to allow respondeat superior liability. [FN293] By imposing liability under the doctrine of respondeat superior, there would be a much greater incentive on the part of the correctional facilities to properly train, supervise, and evaluate their guards and other personnel. Opponents of imposing respondeat superior liability against municipalities argue that taxpayers' money would be used to build, maintain, and defend against lawsuits. [FN294] Additionally, they argue that it would be the taxpayers' money which ultimately would pay for any adverse judgments against the facilities. [FN295] However, this argument provides all the more incentive for the correctional facilities to properly run and maintain its organization and monitor the actions of its personnel. If taxpayers are responsible for ***586** the misconduct and mismanagement of correctional facilities, there will be enormous public, as well as political, pressure to run and maintain these facilities properly.

The standard should still remain "more than mere negligence in oversight," but it should be less than in compliance with an "official policy, custom, or practice." As discussed above, without respondeat superior liability, municipalities are often not held responsible for their own employees' actions.

The standard for finding an Eighth Amendment violation should be interpreted at a much lower level. A necessary finding of "the minimum civilized measure of life's necessity" is far too rigid and stringent a requirement for adequate protection of female inmates. A more appropriate interpretation would be to require knowledge of the existing harm and failure to take measures to alleviate the risk of harm. This requirement would enable a plaintiff to plead a prima facie case.

The requirement that qualified immunity is not granted when there is a "clearly established" violation of rights should be interpreted differently. A proper interpretation would provide protection when there has been a violation of the "rights, privileges, or immunities secured by the Constitution and laws" as the words of the statute state. The "clearly established"

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standard grants immunity in far too many situations where there has been a violation of a right, yet not a clearly established right, such as in the case of sexual harassment and sexual intimidation.

Lastly, in terms of the remedies imposed under 42 U.S.C. § 1983, the definition of "person" should be extended or broadened to include state officials and/or the state. Since "person" already encompasses municipalities, the statute has not been interpreted literally. Therefore, to expand its meaning to include states would not alter any existing rigid interpretation and would allow the female inmates to feel some sense of justice being served.

VI. Conclusion

The numerous newspaper articles and lawsuits confirm that mistreatment of female inmates is not just an isolated problem within one prison system. The abuses by guards and other prison officials is a nationwide problem throughout *587 numerous correctional facilities--local, statewide and federal. When an abused female inmate who is a victim of blatant sexual abuse cannot establish a prima facie under the required standards of 42 U.S.C. § 1983, rather than on the merits of her case, it will prevent other similarly situated female inmates from speaking out. This sends a message that it is acceptable for male guards to abuse their power by making sexual advances, suggestions, propositions, and/or attacks upon female inmates.

As this comment has demonstrated, abused female inmates do not have adequate means for redress under 42 U.S.C. § 1983. Without redefining the standards currently used to establish a prima facie case under this statute, it will be difficult, if not impossible, to protect victims of sexual assault from the power of authority figures and provide them with appropriate redress and remedies. These women are paying for their crime by their incarceration. However, their punishment should not entail a sentence of verbal and physical sexual harassment, intimidation, and coercion--clear violations of their constitutional rights.

[FN1]. 42 U.S.C. § 1983 (1994).

[FN2]. U.S. Const. amend. VIII (emphasis added).

[FN3]. See discussion *infra* Part III.

[FN4]. Alida V. Merlo & Joycelyn M. Pollock, *Women, Law, & Social Control* (1995).

[FN5]. Joanne Belknap, *The Invisible Woman: Gender, Crime, and Justice* 93 (1996). This was also the same with regards to the reformers' concerns in England. *Id.*

[FN6]. *Id.* at 100.

[FN7]. *Id.* at 101; U.S. Dept't of Justice, *The June 7, 1991 Forum on Issues in "Female Offenders"* (1991). In the early 1980s, women were 5% of the offenders in prisons; in June of 1991 that number had increased to 7.5%. *Id.* Belknap, *supra* note 5, at 100. The number of women in U.S. prisons tripled during the 1980s, while the number of men only doubled. *Id.* at 100-01. In the 1990s women constituted approximately 6% of incarcerated persons. *Id.* at 101.

[FN8]. *Id.* at 100.

[FN9]. *Id.* at 100. These basic needs include items such as food and family contact. *Id.*

[FN10]. *Id.* The inmate's fight to protect herself resulted in the accidental death of the guard. *Id.* This case also received more attention since the inmate was African American, while the deceased guard was Caucasian. *Id.*

[FN11]. Merlo & Pollock, *supra* note 4, at 166. A recent Texas case alleged that women inmates were coerced to have sex with male officers and then forced to have abortions when they became pregnant. *Id.* Additionally, in Hawaii's Prison for Women, it has been estimated that approximately half of the guards were involved in a coercive "sex ring" involving as many as 25% of the inmates. *Id.* See discussion *infra* Parts II.A.1-3, II.A.3.b, II.C.2.

[FN12]. Dennis J. Opatrny, *3 Women Sue, Allege Sex Slavery in Prison; Warden, Guards at East Bay Facility Among the Accused*, S.F. Examiner, Sept. 29, 1996, at C1. The three women sued federal prison authorities, alleging the officials knew of the sex slavery ring, but ignored their repeated pleas for help. *Id.* The lawsuit was filed August 13, 1996. *Id.*

[FN13]. U.S. Dep't of Justice, *supra* note 7, at 2. Eighty-eight percent of female inmates have dependent children. *Id.*

[FN14]. *Id.* Sixty-two percent of female offenders are incarcerated for a drug related offense. *Id.*

[FN15]. *Id.*

[FN16]. Dennis J. Opatrny, *supra* note 12, at C1.

[FN17]. *Id.*

[FN18]. *Id.*

[FN19]. *Id.*

[FN20]. See discussion *infra* Parts II.A.3, II.A.3.a-b. Usually women in these situations also file suit under the Fourteenth Amendment since oftentimes there are extant equal protection issues. *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), cert. denied, 416 U.S. 940 (1997); *West v. Atkins*, 487 U.S. 42 (1988); *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992). This comment, however, will only deal with the Eighth Amendment issues which arise when male guards abuse female inmates.

[FN21]. Stephanie E. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 *Yale L.J.* 126 n.6 (1985) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). See discussion *infra* Part II.A.

[FN22]. See discussion *infra* Part II.A.2.

[FN23]. See discussion *infra* Part II.A.2.

[FN24]. See discussion *infra* Part II.A.3.b.

[FN25]. See discussion *infra* Part II.A.3.b.

[FN26]. See discussion *infra* Part II.B.

[FN27]. See discussion *infra* Part II.B.

[FN28]. *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), cert. denied, 416 U.S. 940 (1997); *West v. Atkins*, 487 U.S. 42 (1988); *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992).

[FN29]. See discussion *infra* Parts II.A, II.B, II.C.

[FN30]. See discussion *infra* Parts II.A.1-2.

[FN31]. See discussion *infra* Part II.A.1.

[FN32]. See discussion *infra* Part II.A.2.

[FN33]. See discussion *infra* Parts II.A.3.a-b.

[FN34]. See discussion *infra* Parts II.B, II.C.1, II.C.2.a.(1)-(4).

[FN35]. See discussion *infra* Part IV.

[FN36]. See discussion *infra* Part IV.C.

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[FN37]. See discussion *infra* Part IV.B.

[FN38]. "Respondeat superior" is a latin term meaning "let the master answer." Black's Law Dictionary 1311 (6th ed. 1990). "Under this doctrine an employer is liable in certain cases for injury to person...proximately resulting from acts of employee done within the scope of his employment in the employer's service." *Id.* at 1312

[FN39]. 42 U.S.C. § 1983 (1994). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *Id.*

[FN40]. Brian Richard Henry, Title VII As a Remedy for Alleged Employment Discrimination by State and Local Government Employers: Is It Exclusive or Only Supplementary to 42 U.S.C. § 1983?, 36 Case W. Res. L. Rev. 519, 520 (1986).

[FN41]. Balcerzak, *supra* note 21, at 126 n.6 (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

[FN42]. Matthew P. Previn, Procedural Means of Enforcement Under 42 U.S.C. 1983, 83 Geo. L.J. 1498 (1995).

[FN43]. Balcerzak, *supra* note 21, at 128.

[FN44]. Previn, *supra* note 42, at 1498-99.

[FN45]. 42 U.S.C. § 1983 (1994) (historical and statutory n.191).

[FN46]. See discussion *infra* Part II.A.3.

[FN47]. *Martin v. Davison*, 322 F. Supp. 318 (D.C. Pa. 1971).

[FN48]. Previn, *supra* note 42, at 1508.

[FN49]. 42 U.S.C. § 1983 (1994) (historical and statutory n.191-94).

[FN50]. *Scott v. Moore*, 85 F.3d 230, 233 (3d Cir. 1996) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978)).

[FN51]. *Id.* at 231 (quoting *Hare v. City of Corinth, MS*, 74 F.3d 633 (5th Cir. 1996)).

[FN52]. *Id.* (quoting *Hare v. City of Cornith, MS*, 74 F.3d 633 (5th Cir. 1996)).

[FN53]. *Id.* at 233 (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978)).

[FN54]. *Id.*

[FN55]. *Id.* at 230.

[FN56]. *Scott v. Moore*, 85 F.3d 230 (3d Cir. 1996) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978)).

[FN57]. *Id.* at 232.

[FN58]. *Id.* at 231. Scott was arrested for public intoxication, assault, and resisting arrest on December 31, 1988. *Id.* When she was taken to Killeen City Jail, she was processed by the female jailer who was on duty. *Id.* After the female jailer's shift ended, defendant George Moore's shift began. *Id.*

[FN59]. *Scott v. Moore*, 85 F.3d 230, 231 (3d Cir. 1996).

[FN60]. Id.

[FN61]. Id. She was unable to report the incident earlier since Moore followed her and stood next to her during her three phone calls. Id.

[FN62]. Id. at 230-31.

[FN63]. Id.

[FN64]. *Scott v. Moore*, 85 F.3d 230, 232 (3d Cir. 1996). Moore declared bankruptcy after the suit was filed. The bankruptcy proceeding discharged Scott's claim against him. Id. at 231.

[FN65]. Id. at 233.

[FN66]. Id.

[FN67]. Id.

[FN68]. Id. See also supra note 38 (defining "respondeat superior").

[FN69]. *Scott v. Moore*, 85 F.3d 230, 233 (3d Cir. 1996).

[FN70]. Id.

[FN71]. Id. at 233.

[FN72]. Id.

[FN73]. Id. at 236.

[FN74]. Previn, supra note 42, at 1508.

[FN75]. Id.

[FN76]. Id. This is so unless the prayer is for injunctive relief. Id. at 1509; but see id. at 1509 n.3090 (comparing *Hafer v. Melo*, 502 U.S. 21 (1991) (individual capacity suit against state official in her individual capacity upheld even when official's actions were cloaked with state authority and could not have been effectuated had she been only acting in her personal capacity); and *White v. Gregory*, 1 F.3d 267, 270 (4th Cir. 1993) (state prison officials sued in their individual capacities are not absolutely immune from personal liability), cert. denied, 510 U.S. 1096 (1994)).

[FN77]. Previn, supra note 42, at 1508 n.3089 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[FN78]. Previn, supra note 42, at 1508 n.3089 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)).

[FN79]. See supra note 20.

[FN80]. Previn, supra note 42, at 1498-99. If a plaintiff cannot allege a constitutional violation, she may allege a deprivation of rights guaranteed by federal laws. Id. at 1499.

[FN81]. *West v. Atkins*, 487 U.S. 42, 49 (1988).

[FN82]. Id. at 42.

[FN83]. Id.

[FN84]. *Id.* at 43.

[FN85]. *Id.* at 44.

[FN86]. *Id.*

[FN87]. *West v. Atkins*, 487 U.S. 42, 44 (1988).

[FN88]. *Id.* North Carolina does not allow prisoners, except minimum security prisoners, to obtain their own medical care at their own expense. *Id.* at 44 n.2.

[FN89]. *Id.* at 45.

[FN90]. *Id.*

[FN91]. *Id.* at 47.

[FN92]. *West v. Atkins*, 487 U.S. 42, 49 (1988).

[FN93]. *Id.* at 47.

[FN94]. *Id.*

[FN95]. *Id.*

[FN96]. *Id.* at 54.

[FN97]. Previn, *supra* note 42, at 1498 n.3059.

[FN98]. *Id.* at 1498 n.3059 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)).

[FN99]. *Id.*

[FN100]. 313 U.S. 299 (1941).

[FN101]. Previn, *supra* note 42, 1498 n.3059 (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)).

[FN102]. 398 U.S. 144 (1970).

[FN103]. Previn, *supra* note 42, at 1498 n.3059 (citing *Adickes v. H.H. Kress & Co.*, 398 U.S. 144, 152 (1970)).

[FN104]. 487 U.S. 42, 54-55 (1988).

[FN105]. Previn, *supra* note 42, at 1498 n.3059 (1995) (citing *West v. Atkins*, 487 U.S. 42, 54-55 (1988)).

[FN106]. *West v. Atkins*, 487 U.S. 42, 49 (1988) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982)).

[FN107]. *Id.*

[FN108]. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

[FN109]. *Id.* at 834.

[FN110]. *Id.* at 825.

[FN111]. 59 F.3d 1034 (10th Cir. 1995).

[FN112]. *Id.* at 1037.

[FN113]. *Id.* at 1035.

[FN114]. *Id.*

[FN115]. *Id.*

[FN116]. *Id.* at 1035.

[FN117]. *Adkins v. Rodriguez*, 59 F.3d 1034-35 (10th Cir. 1995).

[FN118]. *Id.* at 1036.

[FN119]. *Id.*

[FN120]. *Id.*

[FN121]. *Id.*

[FN122]. *Id.* at 1035.

[FN123]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995).

[FN124]. *Id.* at 1036.

[FN125]. *Id.*

[FN126]. *Id.* at 1035. *Adkins* also filed suit under the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.* As stated above, only the alleged violation of the Eighth Amendment will be discussed in this comment.

[FN127]. *Id.*

[FN128]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995).

[FN129]. *Id.* at 1036.

[FN130]. *Id.* *Rodriguez* claimed qualified immunity as an affirmative defense. *Id.* This left *Adkins* with the burden she now bears. *Id.*

[FN131]. *Id.* at 1037.

[FN132]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1038 (10th Cir. 1995); see discussion *infra* Part II.B regarding qualified immunity.

[FN133]. 511 U.S. 825 (1994).

[FN134]. *Id.* at 829.

[FN135]. *Id.* For example, *Farmer* continued his hormone treatment in prison through smuggled drugs. *Id.* *Farmer* also wore his clothing in a feminine manner. *Id.*

[FN136]. *Id.*

[FN137]. *Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

[FN138]. *Id.*

[FN139]. *Id.* Apparently, petitioner had no objection, or voiced no objection, to being placed in general population. *Id.*

However, Farmer was segregated several days later while awaiting information regarding his HIV positive status. *Id.* Farmer reported the incident several days after its occurrence. *Id.*

[FN140]. *Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

[FN141]. *Id.* at 832.

[FN142]. *Id.* at 833 (citing *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)).

[FN143]. *Id.* at 832 (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).

[FN144]. *Id.* at 834.

[FN145]. *Id.*

[FN146]. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

[FN147]. *Id.*

[FN148]. *Id.*

[FN149]. *Id.*

[FN150]. *Id.* at 835.

[FN151]. *Id.*

[FN152]. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

[FN153]. *Id.* at 844. The case was remanded to determine whether the prison officials would have liability for not preventing the harm to Farmer under the deliberate indifference standard. *Id.* at 851.

[FN154]. *Long v. McGinnis*, No. 95-1227, 1996 U.S. App. LEXIS 25356, at * 1 (6th Cir. Sept. 17, 1996).

[FN155]. *Id.* at *2.

[FN156]. *Id.*

[FN157]. *Id.* The male inmate, James Stroman, gained access to the locking mechanism when he was cleaning the nurses' station. *Id.* He claims that the "encounter was consensual." *Id.*

[FN158]. *Long v. McGinnis*, No. 95-1227, 1996 U.S. App. LEXIS 25356, at * 2 (6th Cir. Sept. 17, 1996).

[FN159]. *Id.*

[FN160]. *Id.*

[FN161]. *Id.* at *3.

[FN162]. *Id.* at *5.

[FN163]. *Id.* at *5-*6.

[FN164]. 1 F.3d 1063 (10th Cir. 1993).

[FN165]. *Id.* at 1064.

[FN166]. *Id.*

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[FN167]. *Id.* at 1063-64. Mr. Robinson's duties included escorting inmates from the elevator to appropriate rooms on the third floor. *Id.* at 1063.

[FN168]. *Id.* at 1063-64.

[FN169]. *Hovater v. Robinson*, 1 F.3d 1064 (10th Cir. 1993).

[FN170]. *Id.* at 1065.

[FN171]. *Id.*

[FN172]. *Id.*

[FN173]. *Id.*

[FN174]. *Id.*

[FN175]. *Hovater v. Robinson*, 1 F.3d 1063, 1065 (10th Cir. 1993).

[FN176]. *Id.* at 1065. There was a policy that a female officer, if available, was to escort female inmates to various places within the jail. If a female detention officer was not available, then two male detention officers were to escort the female inmate. This is one of the policies which Hovater claims was violated. *Id.* at 1065.

[FN177]. *Id.*

[FN178]. *Id.* at 1066.

[FN179]. *Id.* at 1065.

[FN180]. *Hovater v. Robinson*, 1 F.3d 1063, 1066 (1993).

[FN181]. *Id.* at 1068.

[FN182]. *Id.*

[FN183]. Balcerzak, *supra* note 21, at 126. Other defenses are *res judicata*, collateral estoppel, and absolute immunity. Previn, *supra* note 42, at 1507.

[FN184]. Balcerzak, *supra* note 21, at 129.

[FN185]. *Id.* at 126.

[FN186]. *Id.*

[FN187]. *Id.*

[FN188]. *Id.*

[FN189]. *Id.* at 128.

[FN190]. Previn, *supra* note 42, at 1511-12. Discretionary functions appear to be judgment calls required by one's job position. 42 U.S.C. §1983 (1994) (historical and statutory n.3293). A correctional officer performs a discretionary function when he exercises his authority to use reasonable force for a permissible purpose. *Foster v. McGrail*, 844 F. Supp. 16, 24 (D.C. Mass. 1994).

[FN191]. Previn, *supra* note 42, at 1506.

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[FN192]. 42 U.S.C. § 1983 (1994) (historical and statutory n.3288).

[FN193]. Id. (citing *Hale v. Townley*, 45 F.3d 914 (1995)).

[FN194]. 42 U.S.C. § 1983 (1994) (historical and statutory n.3288 (citing *Baker v. Putnal*, 75 F.3d 190 (1996))).

[FN195]. 42 U.S.C. § 1983 (1994) (citing *Foulks v. Cole County*, 991 F.2d 454 (1993)).

[FN196]. Previn, supra note 42, at 1516 n.3100.

[FN197]. Id. at 1514.

[FN198]. Id. at 1508.

[FN199]. See discussion supra Part II.A.1.

[FN200]. Previn, supra note 42, at 1510.

[FN201]. Id. at 1508-09. Injunctive relief entails, "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." Black's Law Dictionary 784 (6th ed. 1990).

[FN202]. Previn, supra note 42, at 1506.

[FN203]. 42 U.S.C. § 1988 (1994); see also Previn, supra note 42, at 1506.

[FN204]. 93 F.3d 910 (1996).

[FN205]. Id. As mentioned earlier, the constitutional violation of the Eighth Amendment is the only one to be discussed. The other alleged violations were of D.C. Code § 24-442, Title IX, Education Amendments of 1972, 20 U.S.C. § 1681, and the equal protection guarantee of the Fourteenth Amendment. Id.

[FN206]. Id.

[FN207]. Id. at 932.

[FN208]. Id. at 914. The District houses women serving sentences over one year in three facilities: the Lorton Minimum Security Annex, the Correctional Treatment Facility, and the Central Detention Facility. *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 913 (D.C. Cir. 1996), cert. denied, 416 U.S. 940 (1997).

[FN209]. Id. at 914.

[FN210]. Id.

[FN211]. Id.

[FN212]. Id.

[FN213]. Id.

[FN214]. *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 914 (D.C. Cir. 1996).

[FN215]. The three facilities at issue were the Lorton Minimum Security Annex, the Correctional Treatment Facility, and the Central Detention Facility. *Women Prisoners*, 93 F.3d at 913.

[FN216]. Id. at 916.

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[FN217]. *Id.* at 917.

[FN218]. *Id.*

[FN219]. *Id.*

[FN220]. *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 917 (D.C. Cir. 1996).

[FN221]. *Id.*

[FN222]. *Id.*

[FN223]. *Id.* at 913. The defendants challenged more than just the orders relating to the sexual harassment. *Id.*

[FN224]. *Id.* at 918.

[FN225]. *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 932 (D.C. Cir. 1996).

[FN226]. *Id.*

[FN227]. *Id.*

[FN228]. *Id.*

[FN229]. *Scott v. Moore*, 85 F.3d 230, 232 (5th Cir. 1996).

[FN230]. *Id.*

[FN231]. Carol Ness, *Suit Accuses Jailer of Assault; 6 Women on Road Crew Say He Made Threats, Forced Sex*, S.F. Examiner, Apr. 26, 1995, at A2.

[FN232]. See *supra* Part II.A.1.

[FN233]. U.S. Const. amend. VIII.

[FN234]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995).

[FN235]. *Farmer v. Brennan*, 511 U.S. 825, 831 (1994).

[FN236]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995).

[FN237]. *Id.* at 1036.

[FN238]. *Id.*

[FN239]. *Id.* at 1036-38. However, a court hearing a Title VII suit would be more inclined to find that verbal sexual harassment was not "civilized." *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986).

[FN240]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1036-38 (10th Cir. 1995).

[FN241]. *Id.* at 1036-38.

[FN242]. *Id.*

[FN243]. *Farmer v. Brennan*, 511 U.S. 825, 831 (1994).

[FN244]. *Id.* at 831.

[FN245]. *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993).

[FN246]. *Id.* at 1068.

[FN247]. *Id.* at 1067.

[FN248]. *Id.*

[FN249]. *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995); *Long v. McGinnis*, No. 95-1227, 1996 U.S. App. LEXIS 25356, at *1 (6th Cir. Sept. 17, 1996); *West v. Adkins*, 487 U.S. 42 (1988).

[FN250]. See discussion *infra* Part V.

[FN251]. This is exemplified through the continual newspaper articles and books on the subject. See, e.g., Merlo & Pollock, *supra* note 4, at 166; Belknap, *supra* note 5, at 100; Ness, *supra* note 231, at A2.

[FN252]. 42 U.S.C. § 1983 (1994). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory of the District of Columbia...causes...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...." *Id.*

[FN253]. *Id.*

[FN254]. Balcerzak, *supra* note 21, at 126.

[FN255]. *Id.*

[FN256]. See discussion *infra* Parts II.A.3, II.A.3.b.

[FN257]. Previn, *supra* note 42, at 1512.

[FN258]. Dennis J. Opatrny, 3 Women Sue, Allege Sex Slavery in Prison; Warden, Guards at East Bay Facility Among the Accused, S.F. Examiner, Sept. 29, 1996, at C1.

[FN259]. *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995).

[FN260]. *Id.*

[FN261]. 42 U.S.C. § 703 (1964). In the employment context, Title VII protects employees from sexual harassment, both physical and verbal. *Id.*

[FN262]. *Id.*

[FN263]. *Id.*

[FN264]. *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995).

[FN265]. *Id.*

[FN266]. *Id.* at 1036.

[FN267]. 42 U.S.C. § 703 (1964).

[FN268]. *Cumbey v. Meachum*, 684 F.2d 712-13 (10th Cir. 1982).

[FN269]. U.S. Const. amend. VIII.

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[FN270]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1037 (10th Cir. 1995).

[FN271]. *Belknap*, supra note 5, at 100; *Merlo & Pollock*, supra note 4, at 166.

[FN272]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995).

[FN273]. *Id.*

[FN274]. *Balcerzak*, supra note 21, at 126.

[FN275]. *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995).

[FN276]. *Ness*, supra note 231, at A2.

[FN277]. *Previn*, supra note 42, at 1506.

[FN278]. *Id.*

[FN279]. *Id.* at 1516. For a municipality to be found liable, the policy or custom must have been adopted or implemented by the governing body's officials. *Id.* at 1516 n.3091.

[FN280]. *Id.* at 1516.

[FN281]. *Previn*, supra note 42, at 1510.

[FN282]. *Id.* at 1512.

[FN283]. *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 932 (D.C. Cir. 1996).

[FN284]. *Id.* at 932.

[FN285]. *Id.*

[FN286]. *Id.*

[FN287]. *Id.*

[FN288]. *Id.*

[FN289]. *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 932 (D.C. Cir. 1996), cert. denied, 416 U.S. 940 (1997).

[FN290]. *Id.*

[FN291]. *Farmer v. Brennan*, 511 U.S. 825, 845 (1994).

[FN292]. *Farmer* requested injunctive relief. *Id.* at 845-46. However, his request was denied as he was unable to meet the deliberate indifference test. *Id.*

[FN293]. *Id.*; see supra note 68.

[FN294]. *Balcerzak*, supra note 21, at 126.

[FN295]. *Id.*

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