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Note

**\*323 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**

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Women [prisoners] complain of male corrections officers refusing to leave their cells so they can dress, caressing their breasts and other parts of their bodies, pulling down their pants in front of them, touching themselves, making lewd and offensive comments, following them around the facility, assigning them to their offices as clerks, watching them use the bathroom and shower, coming on to the unit without warning of their presence, and frequently promising them favors and presents for sexual activity. [FN1]

Despite a growing concern for the vast number of frivolous claims filed on behalf of prisoners, sexual abuse of women inmates by their male guards is a pervasive and legitimate problem in both state and federal prisons of the United States. The media and the legal profession have devoted increased attention to sexual abuse in prisons for several reasons, including the rapid increase in the number of incarcerated women guarded by men, [FN2] the unique perceptions of women inmates who often \*324 have a prior history of sexual abuse, [FN3] the disturbing lack of prosecutions for custodial sexual misconduct, and the ultimate failure of the lawsuits actually filed by women prisoners. [FN4]

The power dynamics inherent in the inmate/guard relationship and in the nature of confinement itself contribute to the problem of seeking a remedy for sexual abuse. "An inmate's word alone will not suffice as grounds for disciplining a staff member . . . ." [FN5] Sexually abused female inmates are often reluctant to come forward to report incidents of abuse because they fear staff reprisal, worry that others will accuse them of lying, or want to avoid being labeled a snitch. [FN6] As a result, "prison officials, critics and inmates conclude that more sexual misconduct goes on than is reported." [FN7] The problems in calculating and remedying the frequency of sexual abuse in prisons mirror those in other areas of the law. As with sexual abuse of children and sexual harassment in both the workplace and the military, the physical environment and established power structures foster opportunities for sexual abuse in prisons:

[M]ost sexual harassment takes place without witnesses between people of unequal power in a highly structured, hierarchical \*325 organization. If there are no witnesses, the tendency of most people in that organization, and in our society, will be to believe the more highly-ranked and credentialed person in any contest between the two as to what happened. [FN8]

The prison setting greatly magnifies this power disparity, and women prisoners have no ability to escape from the abuse.

Prisoners face yet another problem in attempting to remedy sexual abuse: custodial sexual abuse is a virtually invisible phenomenon. [FN9] Witnesses rarely observe the incidents, victims are hesitant to make complaints, and the departments of corrections often fail to record complaints or investigate them in an organized and centralized manner. [FN10] At the state and national level, the prevalent misconduct by male guards is not apparent outside of the prison system itself, and therefore is difficult to eradicate. [FN11] While suits under the Eighth Amendment against \*326 guards in their individual capacities [FN12] for monetary damages have occasionally prevailed, these types of lawsuits have neither acknowledged the problem of sexual abuse in America's prisons nor offered solutions. Eighth Amendment suits for injunctive relief against members of the prison administration in their official capacities [FN13] or against the penal institution itself would attract desperately needed visibility to custodial sexual abuse, but these suits rarely have been successful. Instead, class action suits under the Eighth Amendment have emerged as the best option for prisoners wishing to obtain injunctive relief from custodial abuse in American prisons.

Class action suits have many unique features that contribute to the plaintiffs' success in achieving relief from sexual abuse while incarcerated. For example, media coverage of such suits attracts significant publicity. [FN14] Wide-spread national

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exposure \*327 in turn creates pressure for internal investigations within the prison system and fosters external public awareness of the problem. [FN15] Under the weight of this intense scrutiny, the departments of correction have allowed the involved officers to resign or "retire" in order to end criticism of the prison and avoid public embarrassment. [FN16] In fact, female inmates may consider the removal or relocation of the "offending" officers as an additional aspect of "relief." [FN17] Defining the class bringing the suit as "all women prisoners who are [[ currently] incarcerated in the . . . correctional system . . . and all women prisoners who will hereafter be incarcerated in the . . . correctional system" [FN18] enhances the inmate's credibility and reduces the chance that the officer's version will prevail over the inmate's version of events. [FN19] The vast number of inmates coming forward with comparable stories of sexual abuse makes it more difficult for the officers to claim that the plaintiffs fabricated the allegations [FN20] or consented to the sexual encounters. [FN21]

\*328 Another beneficial aspect of a class action suit is that the combined consideration of each female prisoner's complaint allows courts to characterize the abuses as occurring in a "sexualized environment" [FN22] within the prison system instead of simply isolated incidents happening on an individualized basis. [FN23] "[A] focus on 'the combined acts or omissions' of the state's agents, rather than the search for a particular bad actor whose individual culpability could support liability" [FN24] also could lead to a greater perception of harm by the courts and the public. This Note suggests that the characterization of the harm as occurring in a "sexualized environment" makes it easier for a class of female prisoner plaintiffs to satisfy the subjective prong of the Eighth Amendment. [FN25]

The nature of the Eighth Amendment standard is the primary reason for the seemingly insurmountable challenge facing the inmate-plaintiff. The subjective prong of the Supreme Court's Eighth \*329 Amendment analysis requires an inquiry into the state of mind of the defendant-prison official, and the requisite state of mind differs depending on the type of challenged act. [FN26] Plaintiffs' claims of patterns of custodial sexual abuse constitute "conditions of confinement" [FN27] under the Court's Eighth Amendment analysis. [FN28] In "conditions of confinement" cases, acting with "deliberate indifference" satisfies the definition of "wanton" [FN29] and therefore embodies "cruel and unusual punishment in violation of the Eighth Amendment." [FN30] In a class action, once the plaintiffs establish a pattern of abuse, courts then may determine that the defendants acted with "deliberate indifference" to the women prisoners' endurance of the condition of sexual abuse. As this Note suggests, however, inmate-plaintiffs proceeding individually actually have little opportunity to gain injunctive relief under the Eighth Amendment.

This Note explores the implications of using the subjective prong of the Eighth Amendment to bring claims to remedy custodial sexual abuse. The first section analyzes the Eighth Amendment framework established in *Farmer v. Brennan*, [FN31] the Supreme Court decision resolving the dispute over the test for "deliberate indifference," and notes the harshness of this standard. The second section describes the pervasiveness of sexual abuse in U.S. prisons and offers first-hand perspectives on its nature and effects. The third section discusses several suits by individual women inmates and offers explanations for the failure of these actions. The fourth section explores *Women Prisoners v. District of Columbia* [FN32] and suggests why this particular class action suit was successful. The fifth section questions whether the existing Eighth Amendment standard poses an insurmountable obstacle to all inmate-plaintiffs except those involved in class action suits alleging custodial sexual abuse, and also offers possible solutions. This Note concludes that the level of proof required to satisfy the subjective "deliberate indifference" prong of the Eighth Amendment is too demanding for individual prisoners to meet when they are suing for injunctive relief against \*330 prison administrators in their official capacities or against the prison itself. This analysis ultimately determines that the present standard has deterred women from coming forward with allegations of abuse, and has created enormous obstacles for those who have pursued their claims on an individual basis.

#### Farmer v. Brennan and the Eighth Amendment Framework

The Eighth Amendment standard established by the Supreme Court in *Farmer v. Brennan* has left inmate-plaintiffs in general, and individual inmate-plaintiffs in particular, with little hope of obtaining relief from custodial sexual abuse. *Farmer* provided minimal support for future inmate-plaintiff cases because it involved the claim of a single inmate and was ambiguous in its exploration of the plaintiff's demand for injunctive relief. [FN33] *Farmer* did, however, establish the current definition of "deliberate indifference" as applied to "conditions of confinement" cases. [FN34] While the Supreme Court has upheld the view that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society,'" [FN35] *Farmer* and the preceding line of cases actually demonstrated a shift away from concern for prisoners' safety.

The Supreme Court's decision in *Estelle v. Gamble* [FN36] marked the first major departure from the "hands-off" approach to prison administration abuse issues arising from practices of incarceration. [FN37] The Court concluded that "deliberate

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indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" [FN38] Mere negligence was not enough to make a valid claim under the Eighth Amendment, [FN39] as "only \*331 such [deliberate] indifference that can offend 'evolving standards of decency'" was sufficient. [FN40]

In *Rhodes v. Chapman* [FN41] the Court solidified the judicial role in prison oversight by unequivocally declaring that "[c]onfinement in a prison . . . is a form of punishment subject to [judicial] scrutiny under the Eighth Amendment standards." [FN42] The Court also recognized that the consideration of prison conditions alone or in combination "may deprive inmates of the minimal civilized measure of life's necessities." [FN43] This realization was a necessary step in favor of prisoners' rights, as the *Rhodes* Court observed that despite the "magnitude" and "complexity" of the problems of prison administration, "[c]ourts certainly have a responsibility to scrutinize claims of cruel and unusual confinement." [FN44]

In *Wilson v. Seiter*, [FN45] the Court elaborated on several doctrines established in earlier cases, and then departed from precedent by establishing an intent requirement. [FN46] The Court refused to accept the inmate's suggestion that it "should draw a distinction between 'short-term' or 'one-time' conditions (in which a state-of-mind requirement would apply) and 'continuing' or 'systemic' conditions (where official state of mind would be irrelevant)." [FN47] The Supreme Court instead held that all "conditions of confinement" cases require an inquiry into the state of mind of the official in order to determine whether the official \*332 acted with "deliberate indifference." [FN48] In its refusal to recognize the difference between "one-time" and "systemic" conditions, the Court opined that there was no basis for drawing such a distinction [FN49] and that such a distinction "defie[d] rational implementation." [FN50]

The Court's elaboration on the consideration of conditions "in combination" [FN51] was the only aspect of *Wilson* of any consolation to the inmate- plaintiff.

Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need . . . . Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists. [FN52]

The opportunity to combine individual complaints is of great value to inmate- plaintiffs, especially in the context of class action suits. [FN53]

Justice White's concurrence in *Wilson* classified the majority opinion as overreaching in its application of the "deliberate indifference" analysis to cases with systemic violations. [FN54] He noted that the majority's intent requirement departed from precedent, [FN55] and made it virtually impossible to apply in certain cases:

Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and \*333 outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. [FN56]

As Justice White asserted, such a muddled inquiry into a subjective intent standard is not very meaningful in practice when a plaintiff challenges an entire prison system or staff. [FN57]

In *Farmer v. Brennan*, [FN58] the Supreme Court defined "deliberate indifference" as applied to "conditions of confinement" cases, and left future inmate-plaintiffs with a seemingly insurmountable challenge in satisfying the subjective prong of the Eighth Amendment. The plaintiff in *Farmer* was an inmate diagnosed by the medical personnel of the Federal Bureau of Prisons (BOP) as a transsexual. [FN59] She [FN60] was serving a twenty-year federal sentence for credit card fraud. In accordance with the Federal Bureau of Prisons' policy, *Farmer* was incarcerated in all-male prisons, [FN61] despite having noticeably feminine attributes after undergoing estrogen therapy, silicone breast implants, and an unsuccessful surgery attempt to have her testicles removed. [FN62] On April 1, 1989, a prisoner approached *Farmer*, demanding that she have sexual intercourse with him, and upon her refusal, he forcibly raped her at knife point. [FN63] "As a result of the rape, *Farmer* suffered 'mental anguish, psychological damage, humili[ation], a swollen face, cuts and bruises to her mouth and lips and a cut on her back, as well as some bleeding.'" [FN64] *Farmer* filed a Bivens action, [FN65] seeking damages and an injunction from \*334 future confinement in any penitentiary. [FN66] *Farmer* alleged that the prison officials had acted with "deliberate indifference" in violation of the Eighth Amendment by placing her in the general prison population despite knowledge that "the penitentiary had a violent environment and a history of inmate assaults, and . . . [Farmer] would be particularly vulnerable to sexual attack." [FN67]

In *Farmer*, the Supreme Court narrowed the relevant issue to a choice between a civil or a criminal recklessness standard.

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[FN68] Farmer urged the Court to adopt the more lenient civil law standard that defined recklessness as acting, or failing to act, [FN69] in response to a high risk of harm that was either known, or so obvious that it should have been known. [FN70] As a general principle, the harsher criminal law standard only permitted a finding of recklessness if a person disregarded a risk of which he was personally aware. [FN71] In defining the standard for "deliberate indifference," the Court in Farmer rejected the civil law standard of recklessness and adopted the criminal law standard. [FN72] The Court held that it could not find a prison official liable under the Eighth Amendment for denying a prisoner humane confinement conditions unless the official actually knew of, and then disregarded, an "excessive" risk to the prisoner's health or safety. [FN73] As the Court wrote: "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." [FN74]

\*335 In essence, the only flexibility that remained for prisoners after Farmer was that an official's knowledge of a risk could be inferred from the existence of an "obvious risk to inmate health or safety." [FN75] As one scholar noted, "by allowing circumstantial evidence of knowledge and not requiring prisoner notification . . . [m]ore failure-to-protect cases are likely to reach the jury." [FN76] Inmates who allege that an obvious risk of harm existed within the prison may succeed in at least raising a reasonable inference that the prison official had knowledge of the potential risk of abuse. To prove obviousness, however, prisoners need to produce concrete evidence of the harm. [FN77] Otherwise, a one-sided inquiry that weighs the prisoner's word against the guard's will govern the determination of obviousness. [FN78] If an inmate-plaintiff is able to combine her account of abuses with the complaints of her fellow inmates, the obviousness of the harm will be more difficult for a guard to challenge.

Justice Blackmun recognized the burden that the harsh criminal recklessness standard would place on prisoner-plaintiffs. [FN79] In his concurrence, Blackmun challenged the "deliberate indifference" state of mind requirement in the context of systemic abuses:

[B]arbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably. Wilson failed to recognize that "state-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level." The responsibility for subminimal conditions in any prison inevitably is diffuse, and often borne, at least in part, by the legislature. [FN80]

Farmer did not specifically address the issue of institutional liability, but the Court did recognize "considerable conceptual difficulty" \*336 in trying to ascertain the subjective state of mind of an entire government entity, as distinguished from a single government official. [FN81]

In suits for injunctive relief, however, courts have traditionally held upper-level officials accountable for violations committed by the lower-level staff, and have ultimately treated an "official capacity suit . . . in all respects other than name . . . as a suit against the entity." [FN82] The Court in Farmer, however, did not adopt the section 1983 [FN83] standard for "deliberate indifference" put forth in *City of Canton v. Harris*. [FN84] Some commentators believe that the Court in Farmer recognized that "Canton's definition of deliberate indifference was an interpretation of 42 U.S.C. § 1983, a statute containing no independent state of mind requirement. Canton itself had noted that the standard it announced for municipal liability did not turn on the standard governing the underlying constitutional claim." [FN85] The test also served a different purpose in Canton by "identifying the threshold" for municipal liability. [FN86] The Court in Farmer therefore held that Canton did not govern the requirements of the subjective prong of the Eighth Amendment. Some may applaud the decision to apply the strictest definition of "deliberate indifference" for "send[ing] a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of inmates is not to be taken lightly." [FN87] Prisoner-plaintiffs, however, \*337 will be unlikely to share this positive outlook as this new standard simply requires more proof and more tangible evidence, resources that victims of sexual abuse often lack, especially when only one inmate's grievances are heard.

Justice Blackmun further criticized the majority opinion in his concurrence in Farmer, recognizing that the holding was "fundamentally misguided; indeed it defies common sense." [FN88] He also argued that "punishment does not necessarily always imply a culpable state of mind on the part of an identifiable punisher." [FN89] "[S]evere, rough, or disastrous treatment" [FN90] may constitute punishment of a prisoner regardless of whether the punisher, such as a prison official, subjectively intended the treatment to be cruel. [FN91] Blackmun advocated overruling *Wilson v. Seiter*, [FN92] and argued that a violation of the Constitution "should turn on the character of the punishment rather than the motivation of the individual who inflicted it." [FN93] In his *Wilson* concurrence, Justice White predicted what would become the aftermath of Farmer: "serious deprivations of basic human needs" . . . will go unredressed due to an unnecessary and meaningless search for "deliberate indifference." [FN94] Justice White's prediction has held true in many ways. The next section will focus on these "deprivations" and their effects in greater detail by considering the reality of sexual abuse of women inmates.

## Sexual Abuse in the Prison Environment: A View from the Inside

Sex in general, sex in particular, is the primary subject of interest in here [in prison], for the [correctional officers] as well as the inmates. I know a [correctional officer] who impregnated \*338 both an inmate and another [correctional officer] in a short space of time, while he was married to yet another. He was found out, suspended for six months, and told he was a naughty boy. [FN95]

For female inmates, several aspects of incarceration make the problem of custodial sexual abuse a unique threat in desperate need of a remedy. As argued earlier, custodial sexual abuse is "invisible" to outsiders. [FN96] The view from the other side of the bars, however, provides a very different perspective.

A surprising percentage of women in prison share a history of sexual abuse prior to incarceration. Statistics indicate that anywhere from forty to eighty- eight percent of these women have been the victims of domestic violence and sexual or physical abuse even before their arrival in prison. [FN97] The American Correctional Association published a profile in 1990 indicating that the typical female prisoner was sexually abused between the ages of five and fourteen, usually by a male in her immediate family. [FN98] As a result of past abuse, many female prisoners fear their male guards:

More than half the women in here have been sexually abused at one time in their lives, some as small children by father, uncle, granddad, mother's lover. They fear men, even despise men. There are hookers who hate men. There are some very young girls in here who are afraid to function in prison without a "protector." [FN99]

As prior victims, incarcerated women become hypersensitized to sexual abuse and often are more vulnerable to attacks in prison. "[S]exual abuse is an important consideration when you look \*339 at incarcerated women." [FN100] A history of sexual abuse has an enormous impact on how these women respond to incarceration. Through their relationships with male guards, women who have experienced sexual abuse often re-live the trauma and suffer flashbacks of prior abuse, particularly when the male guards search them and perform pat-frisks. [FN101] Incarcerated women respond to abusive male authority in prison in the same manner as they did before their confinement in prison. "The women are so needy and in need of love, they are set up for oppression. The only way they know is to exchange their bodies [to meet this need]." [FN102] From her observations while incarcerated in a District of Columbia prison, Elizabeth Morgan shares the view that a prior history of abuse affects the behavior and perceptions of female inmates. [FN103] Arguing that "the [f]ear of male violence and the need to be safe are central to women's experiences," [FN104] Morgan suggests that the prison environment serves to exacerbate these perspectives. She notes that "[b]eliefs about life and about oneself are profoundly affected by survival of traumatic events." [FN105] Women inmates share largely negative outlooks. Morgan suggests that these women simply have no experiences that enable them to envision "any positive outcome for themselves in any [type of] situation involving men." [FN106] Clinical studies have suggested that battered women should be provided with safe experiences in order to take the first step in changing their beliefs about their own lack of power. [FN107] Not only do prisons fail in their attempt to change these women's beliefs, but the women inmates become entrapped in a different, and seemingly \*340 inescapable cycle of abuse. [FN108] "The jail . . . provide[ s] yet more proof that they [a]re powerless to change." [FN109]

In *Jordan v. Gardner*, [FN110] the Ninth Circuit finally acknowledged and documented the fact that many women inmates have a history of sexual abuse. [FN111] The court noted that the psychological impact of clothed body searches by male prison guards of women inmates with a history of sexual abuse amounted to an "infliction of pain." [FN112] The Court in *Jordan* recognized that women are disproportionately victims of rape and sexual assault, and therefore have a stronger incentive to be concerned with and sensitive to sexual behavior. "Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive." [FN113]

When combined with the abusive pasts of women inmates, the retention of powerful positions by male guards fosters an opportunity for continued abuse. [FN114] Simply put, "[p]olice officers have relatively frequent opportunities for sexual harassment and sexual contact with offenders. Offenders are not only aware of the authority of the officer but are also in a position where their complaints may be disregarded or played down." [FN115] The fact \*341 that the guards literally control the lives of the inmates, including ultimately how long the actual period of confinement will be, adds to the power the guards have over the inmates. [FN116] The only "bargaining power" women have is their bodies. [FN117]

Women inmates have come to accept the reality that there is no way to avoid sexual abuse. They also fear that somehow they ultimately will receive punishment for reporting the abuse, instead of the guard receiving punishment for inflicting it. In the words of one inmate:

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"There's not much I can do about it . . . If I write it up, first thing they are going to do is not believe me, then it's PCU [Protective Custody Unit] and then a transfer. That's how it goes with sexual misconduct. . . . There are so many females back there that this happens to and they don't tell. They do not want to speak . . . It's the fear . . . they're scared . . . I'm tired of being scared. I'm tired of things not being done." [FN118]

Women inmates' fears of retribution and endurance of accusations that they are lying when they report abuse only have contributed to the external invisibility of custodial sexual abuse.

The prison administration often has ignored or dismissed individual incidents of sexual abuse, [FN119] but when viewed in combination with other incidents, these occurrences reveal a "sexualized environment" inside the prison walls. The prison emerges as a psychologically destructive setting in which abuse continually plagues hypersensitized inmates: "Each example of harassment is petty. Piled one on top of another they can become what nervous breakdowns are made of, an obsession, the last miserable \*342 straw." [FN120] The lack of privacy inherent in a prison environment necessarily means that women are exposed and vulnerable on a twenty-four-hour basis. While in prison, women inmates "are in a position where sexual harassment behaviors can take place with relative impunity." [FN121] Jails are not constructed with the privacy of inmates as a major concern. Male guards may observe prisoners undressed in their cells, showers, toilets, or during searches by jail matrons. "Some officers apparently seek out opportunities to observe females in various degrees of undress." [FN122] After a while, the constant exposure of women's bodies and the sexual relations between inmates and staff become accepted occurrences. [FN123] "You get the impression from the [[prison] staff . . . that it was a sexual smorgasbord and they could pick and choose whom they wanted." [FN124]

After experiencing incarceration in the District of Columbia, Elizabeth Morgan noted some of the effects of the sexualized environment existing in women's prisons. She first characterized the prison administration as functioning as a "'mind control' sexual abuser." [FN125] Aside from making the prisoners relive their past histories of sexual abuse, this sexualized environment forces the inmates to acquire defensive tactics to protect themselves: "Entries [in Morgan's diary] described female inmates who refused to shower because it required exposing themselves to men a few feet away who were screaming sexual obscenities, insults, and threats. Women inmates also tried to use poor personal hygiene to diminish the risk of rape." [FN126] Although women prisoners were able to develop certain defensive tactics, none of these responses successfully directed the administration's attention to the sexual abuse, so patterns of abuse continued unnoticed.

Sexual abuse of women prisoners by their male guards unfortunately has become an accepted reality. Prison administrators \*343 "allowed this whole culture of abuse (to develop). Abuse was OK. It didn't matter . . . . Everybody became sort of inoculated to the abuse that was ongoing." [FN127] The victims of sexual abuse in prison are silent for several reasons. They fear that no one will believe them, [FN128] that prison officials will punish them, [FN129] or they simply blame themselves for somehow provoking the abuse. [FN130] The few inmates who have recently come forward with individual allegations of abuse have lost in court and have been subject to retaliation by prison staff, [FN131] thereby deterring other victims of sexual abuse from breaking their silence. An inquiry into the circumstances and the reasons for the failures of recent custodial sexual abuse claims under the Eighth Amendment by individual inmates demonstrates why other victims perceive such a grim chance for relief.

#### The Unsuccessful Cases and the Dangers Inherent in Bringing an Individual Claim

This section focuses on key cases brought in the federal courts since 1995 where the individual inmate-plaintiff unsuccessfully attempted to obtain relief against prison supervisors in their official capacities by instituting claims for sexual abuse under the Eighth Amendment. In each of these cases, the plaintiff was unable to satisfy the subjective prong of her Eighth Amendment claim because of her inability to show that the prison supervisors acted with "deliberate indifference." The myriad of failed cases suggests that the "deliberate indifference" standard is too demanding for an individual plaintiff to overcome in actions against prison officers in their official capacities.

In *Downey v. Denton County*, [FN132] an employee of the county sheriff's department sexually assaulted an inmate when they were left alone for nearly two hours, unmonitored and unsupervised, in a room with a disconnected voice-activated security \*344 device. [FN133] Downey gave birth to a child as a result of the incident. [FN134] Downey filed suit against Denton County, the offending officer, and several supervisory officers. [FN135] With respect to the plaintiff's section 1983 claims, the district court granted the county and supervisory officers' motion for judgment on partial findings, yet denied the offending officer's motion for the same. [FN136]

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On appeal, the Fifth Circuit determined that the trial court did not err in granting the county and supervisory officers' motion for judgment on partial findings. [FN137] It upheld the trial court's decision that there was no evidence in the record to support a finding of "deliberate indifference" as outlined in Farmer v. Brennan. [FN138] The court further held that the trial judge did not clearly err in his findings of fact to the effect that the plaintiff failed to show sufficient direct evidence that Sheriff Robinson, one of the supervisory officers, actually was aware of a substantial risk of harm to Downey, or that he disregarded this risk. [FN139] The court concluded that "[a]lthough requisite knowledge of a substantial risk of serious harm can be demonstrated by inference from circumstantial evidence, a survey of the trial record convinces us that there is no evidence of such knowledge on the part of Sheriff Robinson." [FN140]

In Carrigan v. Delaware, [FN141] plaintiff Dorothy Carrigan filed suit against the State of Delaware, the offending officer, [FN142] the \*345 Delaware Department of Corrections, and several administrative officials in both their individual and official capacities. [FN143] Carrigan claimed that Peter Davis, the offending officer, entered her room while she was taking a nap, woke her, told her to be quiet, and then raped her. [FN144] Carrigan reported the incident, and claimed that during the investigation, officers threatened her with additional jail time and prosecution under a law prohibiting sex in prison. [FN145] She also claimed that the prison transferred her from a minimum security unit to a maximum security unit in retaliation for reporting the incident. [FN146] Carrigan subsequently attempted suicide as a result of the intense pressure she experienced after reporting the rape. [FN147] Defendant Davis eventually "admitted to having oral sex with [Carrigan], but claimed that [she] seduced him and the act was consensual." [FN148] Carrigan remarked that the retaliation against her by other guards continued even after Davis admitted to engaging in oral sex. [FN149]

In analyzing "deliberate indifference" as defined in Farmer, the court concluded that unlike the plaintiff in Farmer, the plaintiff in Carrigan failed to establish additional facts sufficient for a reasonable jury to conclude that the conditions of her confinement posed a "substantial risk of serious harm" and that the Administrative Defendants [FN150] acted with "deliberate indifference" to her health and safety. The court in Carrigan noted that

[p]laintiff's brief is replete with rumors and innuendos of sexual impropriety between inmates and prison guards designed \*346 to illustrate that the Administrative Defendants were aware of a risk of sexual assault to Plaintiff; however, these allegations are insufficient to establish that the Administrative Defendants were aware of a risk of harm to Plaintiff. [FN151]

The court further distinguished Carrigan from the plaintiff in Farmer, by asserting that Carrigan had failed to give the Administrative Defendants advance notice of the risk of harm, and did not present other sufficient evidence to support her claim. [FN152] The court, however, based its finding on the fact that Carrigan's allegation of rape was the first rape claim brought to the Administrative Defendants' attention. [FN153] The court erroneously assumed that inmates actually report most rape or sexual abuse incidents, while in reality the exact opposite is true. [FN154] The court's refusal to rely on a correctional officer's affidavits describing rumors about additional incidents of sexual misconduct [FN155] also ignored the reality that only a small percentage of women, on both sides of the prison wall, report such occurrences.

In addition, the court pointed to the Department of Corrections Code of Conduct that strictly forbids "[a]ny sexual contact with offenders," [FN156] as well as the additional training guards receive, \*347 to suggest that the prison maintained a practice of "careful attention, rather than deliberate indifference to correctional officer training." [FN157] The court ultimately granted the Administrative Defendants' motion for summary judgment, concluding that simply because the "[p]laintiff may have suffered [as a result of sexual contact] does not indicate that the Administrative Defendants demonstrated deliberate indifference toward her mental and physical health." [FN158]

In Adkins v. Rodriguez, [FN159] the plaintiff, Shelly Adkins, brought an Eighth Amendment claim against Deputy Rodriguez, the offending officer, and other county officials in their official capacities. [FN160] The trial court dismissed her complaint, finding no right under the Eighth Amendment for a prisoner to be free from verbal sexual harassment. [FN161] Adkins claimed that Rodriguez verbally harassed her and appeared in her cell without authorization. [FN162] Rodriguez allegedly "made verbal comments to Ms. Adkins about her body, his own sexual prowess, and his sexual conquests," and continued to make such comments even after being warned by prison officials to stop his inappropriate behavior. [FN163] On one occasion, Rodriguez entered Adkins's cell in the middle of the night, and when she awoke to find him standing beside her bed, he said, "[b]y the way, you have nice breasts." [FN164] After being threatened with termination, Rodriguez ultimately resigned. [FN165] Adkins argued that Rodriguez's acts violated her rights "to be free from threats of violence and sexual assault and/or sexual intimidation, to be free from cruel and unusual punishment, [and] to be free from unjustified harassment." [FN166]

\*348 On appeal, the Tenth Circuit affirmed the district court's grant of summary judgment for the defendant. Focusing on the

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fact that Rodriguez did not actually touch Adkins, the court concluded that, "we cannot infuse defendant's words of sexual harassment with the sort of violence or threats of violence cognizable in the conditions of confinement cases the [Supreme] Court has addressed." [FN167] The court, however, seemed to suggest that because the plaintiff's complaint only concerned an isolated incident, Adkins could not establish a constitutional violation. [FN168] The court implied that an individual incident of sexual harassment or sexual abuse, regardless of the nature or severity of the attack, would not constitute deliberate indifference. [FN169]

A recent, well-documented, and highly-publicized case, *Fisher v. Goord*, [FN170] popularly known as the "Amy Fisher" case, followed the pattern of inmate-plaintiffs' inability to satisfy the "deliberate indifference" standard in suits against prison supervisors in their official capacities. Fisher alleged that while incarcerated in a New York prison, several corrections officers raped and sexually abused her. [FN171] She also claimed that prison authorities failed to act on her complaints, and that they retaliated against her as a result of her charges. [FN172] Fisher named as defendants seven present or former corrections officers at the prison, [FN173] several high ranking officials in the Department of Correctional Services, and a number of supervisory officers at the prison. [FN174] Fisher filed a motion for a preliminary injunction, \*349 seeking an order requiring her transfer to Danbury prison during the pendency of the action and an order requiring one of the defendant-officers to provide a blood sample. [FN175] A party seeking a preliminary injunction must show that she will suffer irreparable harm in the absence of an injunction and demonstrate either: "(1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." [FN176]

On the likelihood of succeeding on the merits, the district court held that Fisher had failed to establish a clear or substantial likelihood of success on her Eighth Amendment sexual abuse claims. [FN177] After the court considered the testimony during trial and the other evidence in the record, it found that Fisher's claims of rape and sexual abuse were not worthy of belief. [FN178] "Neither Fisher nor her mother was a credible witness and their testimony was contradicted both by other witnesses . . . and other evidence in the record." [FN179] The court attacked Fisher's credibility and suggested that it "appears that [Fisher] and her mother are trying to manipulate the system by capitalizing on this sensitive and important issue." [FN180] The court further criticized Fisher's case because she failed to present any witnesses to the rapes or sexual abuse. [FN181] Judge Arcara also remarked that Fisher did not come across in court as the type of individual who had been the victim of multiple rapes. [FN182]

The fact that New York had not yet established a law mandating that sexual relations of any kind between a corrections officer and an inmate constitutes statutory rape presented a difficult challenge to Fisher's claim. [FN183] Although New York now \*350 has such a law, it was not in effect at the time of the alleged misconduct in Fisher. [FN184] As a result, the court found that Fisher's sexual relationships with the defendants "can only reasonably be interpreted as . . . consensual in nature." [FN185] According to the court, even if her testimony was true, Fisher was unable to affirmatively demonstrate a lack of consent. [FN186]

The court supported the consent defense by applying a recent Eighth Circuit decision to the facts of Fisher's case. In *Freitas v. Ault*, [FN187] an inmate brought a section 1983 action against a warden and prison employee, alleging sexual harassment in violation of the Eighth Amendment. [FN188] The Eighth Circuit in *Freitas* affirmed the district court's determination that the relationship between the inmate and the prison employee was consensual, and noted that "[t]he record contained no evidence, other than [[the inmate's] unsubstantiated assertions, supporting his claim that he succumbed to [the employee's] advances because she was his boss and he feared the possible negative consequences of reporting her actions." [FN189] Fisher argued, in response to *Freitas*, that there was a "power discrepancy" between guard and inmate, "making it impossible for an inmate to ever truly consent to having sexual relations with a correction officer," [FN190] but the court did not find this argument persuasive.

\*351 Even though the court in *Fisher* did not accept that the "power discrepancy" demonstrated a lack of consent, it still labeled these types of sexual relations as inappropriate:

Sexual interactions between correction officers and inmates, no matter how voluntary, are totally incompatible with the order and discipline required in a prison setting. Further, the court is disturbed by the notion that an inmate might feel compelled to perform sexual favors for correction officers in order to be on the officer's "good side." Such quid pro quo behavior is inappropriate, despicable and serves no legitimate penological purpose. [FN191]

Judge Arcara seemed to recognize that sexual relations between inmates and guards constitutes bad prison policy, but failed to consider the inmate's perspective on such relationships. [FN192] Within the walls of a prison, the inmate becomes

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comparable to a victim of child sexual abuse. In both situations, two key factors of sexual abuse are present: "a bigger and more powerful person used his/her strength or authority over a smaller, weaker and more vulnerable individual," and the victim was unable "to resist, and therefore . . . there was no real or true choice in the matter." [FN193]

Recognizing the implications of his ruling that a prisoner may consent to sex with a guard, Judge Arcara concluded with a disclaimer: "The Court['s] . . . decision here should not be viewed as a ringing endorsement of the situation at Albion. Despite the Court's determination that Fisher's claims of rape and sexual abuse are not credible, there are indications that all is not right at Albion." [FN194] Amy Fisher did not necessarily lose her case because of her reputation or her lack of credibility; rather, her failure likely is attributable to the reality that as an individual plaintiff, she could not offer enough proof of sexual abuse in Albion to prevail.

Fisher's tabloid notoriety created a great deal of media attention and several commentators noted the implications of the decision. \*352 Fisher's lawyer, Glenn Murray, reacted to Judge Arcara's ruling by stating, "I'm afraid that with this decision . . . the (Department of Correctional Services) won't take rape accusations more seriously, but rather, less seriously, if such a thing is imaginable." [FN195] Supporters of Judge Arcara's verdict accused Fisher of tarnishing the name of Albion by questioning the integrity of its officers. [FN196] Others viewed the whole suit as entirely fabricated by Fisher in order to obtain a transfer to Bedford Hills prison. [FN197] A union official representing Albion's guards claimed "[s]he dragged down a whole lot of people who worked at Albion who had absolutely nothing to do with this . . . . The only reason for this lawsuit . . . is a book or a movie deal that will come out afterward." [FN198]

Regardless of their interpretation of Judge Arcara's ruling, commentators agreed that the decision would impact the prison system. As Roger Gangi, executive director of the Correctional Association of New York observed: "It's definitely no joke . . . I'm not making any judgments about [[Fisher's] accusations, but \*353 things like this do happen in the state prisons." [FN199] Despite her notoriety, however, even Fisher was unable to generate enough media scrutiny to actually remedy the problems of sexual abuse in New York prisons.

#### Women Prisoners and the Success of Class Action Suits

The ruling in *Women Prisoners v. District of Columbia* [FN200] had two major effects on Eighth Amendment litigation for claims of custodial sexual abuse. First, it attracted necessary recognition of the pervasiveness of the problem. Second, the plaintiffs' success suggested at least one possible method through which inmate-plaintiffs might satisfy the subjective prong of the Eighth Amendment. In *Women Prisoners*, women inmates in the District of Columbia (D.C.) prisons brought a class action suit against the District of Columbia, its Department of Corrections (DCDC), the District of Columbia General Hospital Commission, and numerous District officials, all in their official capacities. [FN201] Among their claims for declaratory and injunctive relief, the plaintiffs alleged that women prisoners in the D.C. prisons were subjected to sexual harassment in violation of the Eighth Amendment. [FN202]

One noticeable benefit of using a class action suit was the plaintiffs' ability to mount a more "exhaustively-prepared case." [FN203] The trial itself lasted three weeks and included the submission of close to nine hundred exhibits and hundreds of pages of transcript and deposition testimony. [FN204] Prisoner testimony revealed allegations of sexual assault, sexual harassment, the inadequacy of the corrections officers' responses, and retaliation by the guards after complaints were filed. [FN205] Women took the stand and told of rapes, forced sodomy, sexual touching, and \*354 fondling. [FN206] In addition to this physical abuse, the women inmates complained of a lack of privacy stemming from the ability of male guards and fellow inmates to view the women in various states of undress. [FN207] The women inmates also described how they were subjected to sexually explicit comments and verbal sexual harassment. [FN208]

As a class, the inmate-plaintiffs benefitted from being able to present expert testimony on the effects of sexual abuse on women inmates, especially those with prior histories of sexual abuse. [FN209] Dr. Susan Fiester testified that among the population of women in prison, "between 70 to 80 percent have been sexually abused at some point in their lives." [FN210] In addition to the harmful physical and psychological effects of sexual abuse and sexual harassment on women prisoners, [FN211] Dr. Fiester explained that those with backgrounds of abuse suffered even further. [FN212] For these women, the recent episodes of sexual abuse or sexual harassment brought flashbacks of prior abuse, which could lead to severe depression, reinforcement of a 'victim' self-image and a belief that, as in childhood, they have no control over their lives." [FN213]

Witnesses for the plaintiffs also addressed the flaws in the Inmate Grievance Procedure, the lack of specific staff training, the

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absence of confidentiality of complaints, the inadequacy of the investigations, and the prisons' repeated failures to take remedial action. [FN214] Officers regarded inmates' complaints as a "joke" or "gossip." [FN215] One of the plaintiffs' expert witnesses testified that "in approximately 90 percent of all sexual harassment \*355 cases [that] she has confronted, the Defendants often fail to reach any conclusions in their investigations." [FN216] One inmate concluded that the grievance system "was like a game to everybody there. They didn't care about anybody's feelings." [FN217] Despite these allegations, the DCDC maintained that it did "everything an institution can do to prevent sexual misconduct." [FN218]

In light of the extent of the accounts of sexual abuse and sexual harassment, Judge Green could not dismiss the plaintiffs' claims as isolated or fabricated. In her findings of fact, she noted:

Within the [DCDC] there is a general acceptance of sexual relationships between staff and inmates which creates a "sexualized environment" where "boundaries and expectations of behavior are not clear." . . . [One former correctional administrator has noted] "[Y]ou just get this sense that [sexual misconduct] has always happened and it is always going to happen." . . . The most disturbing evidence of sexual harassment involves sexual assaults on women prisoners and the inadequacy of the Defendants' response to these attacks. [FN219]

Unlike Judge Arcara in *Fisher*, Judge Green adopted the inmate's perspective and recognized the harmful and pervasive effects of this "sexualized environment." [FN220] She viewed sexual abuse of prisoners not merely as an administrative problem, but also as a physical and mental threat to the women inmates. [FN221]

\*356 Judge Green ruled in favor of the inmate-plaintiffs because, as a class, they were able to satisfy the subjective prong of the Eighth Amendment claim. [FN222] She found that the defendants had acted with "deliberate indifference" to the women prisoners' endurance of the condition of sexual harassment. [FN223] The evidence demonstrated that the defendants both knew of and disregarded an excessive risk of sexual assaults and sexual harassment of the women prisoners. [FN224] Judge Green inferred the presence of deliberate indifference from the obviousness of the sexual harassment. "Indeed, assaults are widely known by DCDC staff, vulgar comments are made openly and women are fondled publicly." [FN225] She concluded that the plaintiffs had proven violations of the Eighth Amendment "by demonstrating a level of sexual harassment that is objectively cruel and to which the Defendants are deliberately indifferent." [FN226]

This "victory" for the plaintiffs was the result of several factors that can be attributed to the fact that the case was a class action suit. The inmates had the ability to combine the individual incidents of sexual harassment to create the "sexualized environment" recognized by Judge Green:

In combination, vulgar sexual remarks of prison officers, the lack of privacy within CTF [Correctional Treatment Facility] cells and the refusal of some male guards to announce their presence in the living areas of women prisoners constitute a violation of the Eighth Amendment since they mutually heighten the psychological injury of women prisoners. [FN227]

\*357 Judge Green focused on the effect of these abuses in combination, and noted that the prison setting heightens psychological impact of abuse further because "the women are tightly confined, making their escape from harassment as unlikely as escape from the jail itself." [FN228] Unlike an isolated occurrence, this "sexualized environment" surrounds and literally consumes the inmates. The combination of sexual abuse, harassment, and the continual unannounced presence of male guards in the women's cells provided a constant "reminder to women prisoners that their exposure to abuse is almost endless." [FN229]

The publicity generated by *Women Prisoners* was useful in drawing attention to the problem of sexual abuse within the D.C. prison system, breaking the tradition of invisibility and giving the inmates hope that they could obtain a remedy. Brenda Smith of the National Women's Law Center told Human Rights Watch that in working on the case since 1990, she had received numerous reports of sexual assaults within the prisons and assisted women on an individual basis. [FN230] She noted, however, that the sheer magnitude and pattern of sexual abuse was \*358 exposed only after the class action suit was filed. [FN231] She told Human Rights Watch that "[i]t is really like this dirty little secret that everyone in corrections knows about and doesn't want to talk about. It is a huge problem." [FN232]

The Washington Post coverage of the case also informed the public of the existence of sexual abuse in prison and appealed to the public's sentiments. [FN233] The exposure of the problem contributed to its remedy, and responses to sexual misconduct have improved since the decision in *Women Prisoners*. In August 1995, for example, prison officials in the District of Columbia suspended seven corrections officers following allegations that they attended a party held within the prison at which two female inmates were asked to perform a striptease. [FN234]

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The most telling example of the acknowledgement of the problem of custodial sexual abuse occurred shortly after Judge Green rendered her decision in *Women Prisoners*. In December 1994, the D.C. City Council modified its rape law as it applied to individuals in police or correctional custody. [FN235] Now, any type of sexual intercourse or sexual contact involving an incarcerated individual is a felony. [FN236] Legislators, at least, are finally beginning to recognize the uniquely vulnerable position of women prisoners and the greatly magnified power disparity between inmate and guard that increases the risk of custodial sexual abuse in prison.

#### Recognition of the Problem and Possible Solutions

As Justice Blackmun noted, concurring in *Farmer v. Brennan*, "regardless of what state actor or institution caused the harm and with what intent, the experience of the inmate is the same. A punishment is simply no less cruel or unusual because its harm is unintended." [FN237] Unfortunately, since *Farmer*, the focus \*359 on the intent of the guard or supervisor has become the deciding factor, notably in cases involving claims seeking injunctive relief for custodial sexual abuse against officers in their official capacities. [FN238]

After *Farmer*, plaintiffs face a dilemma in determining how to go about establishing that the prison had knowledge of harm. In *Farmer*, the Court's reference to the requirement that the inmate prove the prison officials' state of mind "in the usual ways" [FN239] indicated that "statistics, institutional and municipal reporting of assaults, and the existence of systemic predictive factors, among other indicia of 'institutional knowledge' of prison violence," are acceptable forms of "circumstantial evidence that plaintiffs may introduce to establish knowledge of the risk of harm." [FN240] If the plaintiff proves that this risk is longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk. [FN241]

The documentary proof required by this circumstantial evidence standard places a great deal of confidence in the internal investigative systems of prisons, which, in cases of sexual abuse, are frequently less effective than usual.

Victims of sexual abuse and harassment often are very cautious in their reliance on any sort of internal grievance system. [FN242] Inmates share this lack of faith in the formal complaint resolution mechanisms. They feel that "the grievance procedure \*360 is 'just for show,' unanimously agreeing that only those inmates with particularly egregious complaints can prevail in the [grievance] process." [FN243] The *Farmer* Court placed special emphasis on these prison grievances, noting that, "even when [grievance procedures] do not bring constitutionally required changes, the inmate's task in court will obviously be much easier." [FN244] The necessity of these prisoner grievances is problematic: Violence in prison is often substantially underreported, as a result either of prisoner intimidation or of staff indifference or discouragement, and some prison records-especially those dealing with staff use of force-have been found to be too self-serving to meet the reliability requirements of the publicrecords and reports rule. [FN245]

Cases of sexual abuse magnify the problem of underreporting. In her findings of fact in *Women Prisoners*, Judge Green recognized some of the problems of established internal grievance procedures and investigations in addressing sexual harassment. [FN246] Judge Green found that not only did prison officials often fail to reach any conclusions in their investigations of prison sexual harassment claims, [FN247] but the prison administration's typical response to an inmate's internal grievance was to conclude that the allegations "could not be validated." [FN248] In some instances, the offending officers often were not even reassigned after an incident was reported, [FN249] making the inmate hesitant to reveal incidents of abuse for fear of retaliation. In examining prisons in the District of Columbia, Judge Green concluded that the failures of the DCDC Internal Grievance Policy itself constituted "deliberate indifference." She recognized that within the D.C. prisons, "there is no clear understanding \*361 of what constitutes sexual harassment and how it should be reported." [FN250] In addition, the noticeable lack of confidentiality caused women prisoners to suffer the trauma of having the small prison community know the details of a personally degrading assault. [FN251]

Women prisoners also are the targets of retaliation. Prison officials often leak confidential information, coercing women prisoners and the staff into silence while simultaneously insulating their own actions from scrutiny. [FN252] "The invariable result is that cases 'cannot be resolved' and officers who commit the assaults are often reassigned to another facility or allowed to remain in the same facility." [FN253] The very procedures that the Court in *Farmer* found to be virtually indispensable in bringing a successful claim against prison officials [FN254] were recognized by the court in *Women*

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Prisoners as being a source of "deliberate indifference" itself. [FN255]

The plaintiffs in *Women Prisoners* took on the responsibility of exposing to the court the inherent flaws in the process through which inmates obtain proof of the officers' knowledge of harm. The class action form of the suit gave the plaintiffs access to resources and strategies that an individual plaintiff would lack:

In class action litigation, where counsel and expert witnesses are involved on an ongoing basis, additional opportunities exist for proving knowledge. For example, testimony or a declaration from an expert that a risk was obvious may suffice to prove that prison officials had knowledge of it. A letter \*362 from plaintiffs' counsel apprising prison officials or their counsel of a risk of harm should serve the same function. [FN256]

Individual plaintiffs do not have these resources, and they face intimidation from the same internal grievance procedures that must filter requisite proof of knowledge on the part of the officials. Courts should not require plaintiffs to become a class in order to succeed in bringing Eighth Amendment claims for custodial sexual abuse.

### Conclusion

[B]eing a woman prisoner in U.S. state prisons can be a terrifying experience. If you are sexually abused, you cannot escape from your abuser. Grievance or investigatory procedures, where they exist, are often ineffectual, and correctional employees continue to engage in abuse because they believe they will rarely be held accountable, administratively or criminally. Few people outside the prison walls know what is going on or care if they do know. Fewer still do anything to address the problem. [FN257]

The "deliberate indifference" standard outlined by the Supreme Court in *Farmer v. Brennan* has left inmates who are victims of sexual harassment with few alternatives. To succeed in a systemic violations case against prison officers in their official capacities, inmates need the resources that only a class action can afford. Proceeding on an individual basis forces a plaintiff to rely on ineffective, intimidating, and retaliatory internal grievance procedures to obtain proof of the prison officer's knowledge of harm. [FN258]

\*363 Experts have recommended class actions as an "appropriate vehicle" for sexual harassment suits in the employment setting, [FN259] and the rationale for this preference extends to women inmates' suits for custodial sexual abuse. "Inherent disincentives for bringing an individual . . . claim, such as embarrassment and fear of retaliation, could be overcome through the use of class actions." [FN260] Class actions allow plaintiffs to rely on multiple incidents and accounts of sexual assault in order to demonstrate the obviousness of the abuse, allowing for an inference of "deliberate indifference." In light of the "deliberate indifference" standard articulated in *Farmer*, a class action lawsuit remains not merely a good option for inmate-plaintiffs, but the only option.

In the future, as Justice White suggested in *Wilson v. Seiter*, courts must make a distinction between cases involving an individual claim against the offending officer and claims for systemic violations against officers in their official capacities. [FN261] For the latter category of cases, the "deliberate indifference" standard should not apply. As the numerous unsuccessful cases brought by female inmates have shown, if courts do not make this distinction, custodial sexual abuse will remain a "dirty little secret" within the prisons, kept quiet by self-serving internal grievance procedures.

[FN1]. Human Rights Watch Women's Rights Project, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 290 (1996) [hereinafter *All Too Familiar*] (quoting testimony of Ruth Cassell before the New York Governor's Task Force on Sexual Harassment, Sept. 24, 1992). Despite these accounts of abuse, corrections officers and members of the legal profession fear the potential repercussions of responding to an inmate's false claims. An attorney representing the former deputy warden at the Georgia Women's Correctional Institution expressed this fear in the wake of the events surrounding the Georgia prison sex scandal: "They've let loose a witch hunt in the prison system. The government's looking for scapegoats, and the prisoners have figured out how to run the prisons by accusing everyone in authority of sexual misconduct." Lauran Neergaard, *14 Are Indicted in Georgia Prison Sexual Abuse Case*, *Boston Globe*, Nov. 14, 1992, at 3, available in 1992 WL 4201362.

[FN2]. See *All Too Familiar*, supra note 1, at 20-22; see also Steven A. Holmes, *Rape of Women Prisoners Increasing, Groups Say They Try to Help Win Some Cases, but Prisons Often Say Sex Was Consensual*, *Dallas Morning News*, Jan. 19, 1997, at 12A, available in 1997 WL 2640195 (stating that "some prison officials and human rights groups say that a source of the problem is the large number of men guarding female prisoners"); Nancy Kurshan, *Women and Imprisonment in the U.S.:*

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History and Current Reality (visited June 7, 1998) < <http://www.igc.apc.org/justice/prisons/women/women-and-imprisonment.html>> (noting that the rate of incarceration of women has increased faster than that of men each year since 1981).

[FN3]. See *infra* notes 103-07, 109, and accompanying text (discussing Dr. Elizabeth Morgan's observations and analysis of abused women's perceptions of men and of themselves).

[FN4]. See *All Too Familiar*, *supra* note 1, at 26-27; see also Terry Burns, *Group Urges Law Protection for Inmates[;] Calls Sexual Abuse by Guards, Officials Potential Problem*, *State J. Reg.*, Dec. 6, 1996, at 17, available in 1996 WL 13475540 (quoting prison rights advocate Michael Mahoney, who stated that "[t]he Department of Corrections, to their credit, has referred several of these cases to local prosecutors, but they don't seem to be prosecuted").

[FN5]. Dan Morain, *Sex in Prison - Too Often a Guard Plays a Role in Affair*, *L.A. Times*, Feb. 8, 1988, at 3, available in 1988 WL 229743 (quoting Jerry Williford, Western Regional Director of the federal prison system).

[FN6]. See *id.*; see also Burns, *supra* note 4, at 17 (attributing the lack of documented abuse cases "to the reluctance of inmates to come forward with charges because they fear retaliation").

[FN7]. Morain, *supra* note 5, at 3.

[FN8]. Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, *65 S. Cal. L. Rev.* 1451, 1451 (1992). Abuse of women prisoners also is comparable to child sexual abuse, as both may be described as "form[s] of furtive violence committed against vulnerable individuals." Lynne Henderson, *Without Narrative: Child Sexual Abuse*, *4 Va. J. Soc. Pol'y & L.* 479, 480 (1997). Both types of abuse also occur in a relationship based on trust and authority. In child sexual abuse cases, this power disparity allows the abuser to coerce the victim into silence by threats of harm if the victim refuses to submit or discloses "the secret" of abuse. See Maria L. Imperial & Jeanne B. Mullgrav, *The Convergence Between Illusion and Reality: Lifting the Veil of Secrecy Around Childhood Sexual Abuse*, *8 St. John's J. Legal Comment.* 135, 137-38 (1992). The same types of threats are likely to arise in the prisoner-guard relationship when a guard sexually abuses a female inmate.

[FN9]. See Laurie A. Hanson, *Comment, Women Prisoners: Freedom from Sexual Harassment - A Constitutional Analysis*, *13 Golden Gate U. L. Rev.* 667, 667 (1983) (arguing that sexual harassment of female prisoners is so pervasive that it is invisible).

[FN10]. See *All Too Familiar*, *supra* note 1, at 261-64.

[FN11]. See *id.* at 5.

In the Georgia and District of Columbia correctional systems, for example, it took class action suits in 1992 and 1994, respectively, to make the problem of sexual misconduct visible outside the confines of the correctional system itself. Only after being sued did the departments of corrections admit that the problem of custodial sexual misconduct existed in their facilities for women and that reforms were needed. Sexual misconduct is often so entrenched that, in those correctional systems where class actions suits have not yet occurred or have only recently been initiated, such abuse is still largely an invisible problem or one that the respective correctional systems flatly deny.

*Id.* Corrections officers themselves are unaware of the severity and frequency of the sexual abuse problems in prisons, as few incidents have been documented. See Holmes, *supra* note 2, at 12. A. Harold Clarke, director of the Nebraska Department of Corrections and president of the Association of State Corrections Administrators, commented with concern on the situation: "In my home state, we haven't had one complaint, and I'm certain that other agencies can say the same thing. I'm not sure how extensive the problem is, but it is a problem that should be studied." *Id.*

[FN12]. A prisoner's suit against a guard in his individual capacity for a violation of her Eighth Amendment rights may arise from the plaintiff's allegations that the guard raped or otherwise sexually abused her. See, e.g., *Carrigan v. Delaware*, *957 F. Supp.* 1376, 1390 (D. Del. 1997) (upholding an inmate's claim of gross negligence against a guard despite the qualified immunity typically given to guards); *Fisher v. Goord*, *981 F. Supp.* 140, 174- 75 (W.D.N.Y. 1997) (holding that a guard's unwanted sexual advances, while inappropriate and unacceptable, did not state a claim under the Eighth Amendment).

[FN13]. "State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them. By contrast, officers sued in their personal capacity come to the

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court as individuals." H.E. Barrineau III, *Civil Liability in Criminal Justice* 65 (2d ed. 1994) (citation omitted) (citing [Hafer v. Melo](#), 502 U.S. 21, 27 (1991)). A suit against a guard or prison administrator in his official capacity for a violation of a prisoner's Eighth Amendment rights might address, for example, the prison's responsibility for implementing a policy allowing male guards to have unsupervised access and custody of female inmates with deliberate indifference to the consequences, failing to train the officers, or failing to supervise and protect. See, e.g., [Hovater v. Robinson](#), 1 F.3d 1063, 1065 (10th Cir. 1993) (extending qualified immunity to a situation in which an officer was unaware that specific detention officers posed a threat to prisoners).

[FN14]. See D. Alan Rudlin, *Packaging Toxic Tort Cases for Trial: Use of Test Cases, Bifurcation and Class Actions*, in *Preparing a Toxic Tort Case for Trial* 1991, at 185, 279 (PLI Litig. & Admin. Practice Course Handbook Series No. 406, 1991) ("A class action with vast damage claims and/or particularly sympathetic plaintiffs attracts media interest."); see also *All Too Familiar*, supra note 1, at 135-37, 158 (attributing the reforms in Georgia's policies regarding sexual abuse of prisoners to the complaint filed in the class action suit *Cason v. Seckinger*, Civil Action File No. 84-313-1-MAC (M.D. Ga. Mar. 4, 1994) (granting permanent injunction), and the media attention that followed).

[FN15]. See *All Too Familiar*, supra note 1, at 146.

[FN16]. See *id.* at 156-57; Neergaard, supra note 1, at 3 (noting that since the beginning of Georgia's investigation of female inmates' accusations of sexual abuse, "eight employees have been fired, seven others have resigned, four were transferred and five were suspended in connection with the allegations").

[FN17]. The pattern of abuse is likely to continue if the offending officer remains in contact with the female inmate he previously abused. See *All Too Familiar*, supra note 1, at 157-58, 188-90.

[FN18]. *Women Prisoners v. District of Columbia*, 877 F. Supp. 634, 638- 39 (D.D.C. 1994), vacated in part, modified in part, 899 F. Supp. 659 (D.D.C. 1995), remanded by 93 F.3d 910 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997). While Judge Green's original order for declaratory and injunctive relief in *Women Prisoners* has been modified subsequent to her 1994 decision, "[a]ppellants have not challenged the district court's findings that the sexual harassment . . . rise[s] to the level of violations of the Eighth Amendment." *Women Prisoners*, 93 F.3d at 928.

[FN19]. See *Women Prisoners*, 877 F. Supp. at 642 ("When the evidence is reduced to a dispute between an inmate's allegation and an employee's version of events, the Defendants generally side with the employee.").

[FN20]. See *All Too Familiar*, supra note 1, at 5 (discussing prison investigations in the District of Columbia and five other states and noting that "in almost every case of custodial sexual misconduct, correctional officials assumed that the prisoner lied and thus refused, absent medical reports or witnesses who were not prisoners, to credit prisoner testimony").

[FN21]. See *Holmes*, supra note 2, at 12A.

[FN22]. *Women Prisoners*, 877 F. Supp. at 639.

[FN23]. See *id.*

[FN24]. *John Boston et al., Farmer v. Brennan: Defining Deliberate Indifference under the Eighth Amendment*, 14 *St. Louis U. Pub. L. Rev.* 83, 99 (1994) (quoting *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988)); see also John Boston, *Wilson v. Seiter: A Preliminary Analysis*, in 8 *Civil Rights Litigation and Attorney Fees Annual Handbook* 41, 47-48 (Nat'l Lawyers Guild ed., 1992) (categorizing prisoners' suits for injunctive relief as suits against the whole prison system for its "systemic deficiencies" and not against officials in their individual capacities).

[FN25]. *U.S. Const. amend. VIII*. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.* (emphasis added). For a good discussion on the barrier faced by women inmates in suits for custodial sexual abuse because of prison officials' claims of qualified immunity, see [Ashley E. Day, Note, Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. § 1983](#), 38 *Santa Clara L. Rev.* 555, 558 (1998). Day's proposed solution to the obstacles facing inmate plaintiffs is "a change in the interpretation of 42 U.S.C. § 1983 which would enable injured female inmates a means to obtain legal redress." *Id.*

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[FN26]. See, e.g., [Boddie v. Schnieder](#) 105 F.3d 857, 861 (2d Cir. 1997) (finding that a prison official's sexual abuse of a prisoner violated the Eighth Amendment when the officer had a "sufficiently culpable state of mind").

[FN27]. See [Women Prisoners](#), 877 F. Supp. at 663 (discussing [Wilson v. Seiter](#), 501 U.S. 294 (1991)).

[FN28]. See, e.g., [Fisher v. Goord](#), 981 F. Supp. 140, 171-72 (W.D.N.Y. 1997); [Women Prisoners](#), 877 F. Supp. at 663-67.

[FN29]. [Estelle v. Gamble](#), 429 U.S. 97, 105-06 (1976).

[FN30]. [Fisher](#), 981 F. Supp. at 172.

[FN31]. 511 U.S. 825 (1994).

[FN32]. 877 F. Supp. 634 (D.D.C. 1994), vacated in part, modified in part, 899 F. Supp. 659 (D.D.C. 1995), remanded by 93 F.3d 910 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997).

[FN33]. See [Boston et al.](#), supra note 24, at 96.

[FN34]. See [Farmer](#), 511 U.S. at 825 (holding that prison officials are acting with "deliberate indifference" only when they know an inmate has a "substantial risk of harm" and the official fails to act reasonably to minimize that risk).

[FN35]. *Id.* at 834 (quoting [Rhodes v. Chapman](#), 452 U.S. 337, 347 (1981)).

[FN36]. 429 U.S. 97 (1976). The respondent-inmate in [Estelle](#) claimed that the prison violated his Eighth Amendment rights by inadequately treating a back injury he sustained while working in the prison. See *id.* at 100-01.

[FN37]. See [David M. Siegal](#), [Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter](#), 44 *Stan. L. Rev.* 1541, 1553-54 (1992).

[FN38]. [Estelle](#), 429 U.S. at 104 (quoting [Gregg v. Georgia](#), 428 U.S. 153, 173 (1976)).

[FN39]. See *id.* at 106.

[FN40]. *Id.*

[FN41]. 452 U.S. 337 (1981). In [Rhodes](#), inmates brought a class action suit on behalf of themselves and other similarly situated inmates, alleging that "double celling" of confined inmates violated the Constitution. See *id.* at 339-41.

[FN42]. [Siegal](#), supra note 37, at 1554 (quoting [Rhodes](#), 452 U.S. at 345).

[FN43]. [Rhodes](#), 452 U.S. at 347.

[FN44]. *Id.* at 352.

[FN45]. 501 U.S. 294 (1991). In [Wilson](#), an inmate alleged Eighth Amendment violations based on poor conditions of confinement including "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." *Id.* at 296. The inmate sought declaratory and injunctive relief, as well as compensatory and punitive damages. See *id.*

[FN46]. See *id.* at 310 (White, J., concurring).

[FN47]. *Id.* at 300.

[FN48]. See *id.* at 302-04.

[FN49]. See *id.* at 300.

[FN50]. *Id.* at 301.

[FN51]. *Id.* at 304 (citing [Rhodes v. Chapman](#), 452 U.S. 337, 347 (1981)).

[FN52]. *Id.*

[FN53]. When multiple plaintiffs are united in a single class action suit, they have access to a greater pool of resources, and they may be able to obtain more talented and devoted attorneys. See Rudlin, *supra* note 14, at 279 ("Increased financial support and more capable plaintiffs' counsel make the task of defense more challenging than in smaller, individual actions.").

[FN54]. See [Wilson](#), 501 U.S. at 306-11 (White, J., concurring).

[FN55]. See *id.* at 306 (White, J., concurring) ("[The majority's] reasoning disregards our prior decisions that have involved challenges to conditions of confinement . . .").

[FN56]. *Id.* at 310 (White, J., concurring).

[FN57]. See *id.* (White, J., concurring).

[FN58]. 511 U.S. 825 (1994).

[FN59]. See *id.* at 829.

[FN60]. Although the majority opinion avoided applying any personal pronouns to Farmer, "she prefer[red] to be referred to with feminine pronouns." Boston et al., *supra* note 24, at 84 & n.5.

[FN61]. See [Farmer](#), 511 U.S. at 825.

[FN62]. See *id.* at 829.

[FN63]. See *id.* at 830.

[FN64]. Marjorie Rifkin, [Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World](#), 26 Colum. Hum. Rts. L. Rev. 273, 273-74 (1995) (quoting Petitioner's Opening Brief at 5 & n.15, [Farmer v. Brennan](#), 511 U.S. 825 (1994) (No. 92-7247)).

[FN65]. See generally [Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics](#), 403 U.S. 388, 396-97 (1971) (providing a remedy for individuals deprived of their constitutional rights by federal employees). Claimants must first demonstrate a deprivation of a right secured by the Constitution and laws of the United States, and then must prove that the official acted under color of federal law in depriving the claimant of that right. See [John E. Nordin, II, The Constitutional Liability of Federal Employees: Bivens Claims](#), 41 Fed. B. News & J. 342, 342 (1994) (explaining that a Bivens claim may only be brought against federal employees in their individual capacities).

[FN66]. See [Farmer](#), 511 U.S. at 831.

[FN67]. *Id.*

[FN68]. See *id.* at 835-37.

[FN69]. A failure to act is relevant only where the person has a duty to act. See *id.*

[FN70]. See *id.* at 836-37.

[FN71]. See *id.*

[FN72]. See *id.* at 837.

[FN73]. See *id.*

[FN74]. *Id.*

[FN75]. *Id.* at 844.

[FN76]. Rifkin, *supra* note 64, at 293-94.

[FN77]. See *id.* at 293.

[FN78]. See *infra* notes 148, 153, and accompanying text (noting that guards challenging prisoners' claims often argue that the sexual acts were consensual).

[FN79]. See *Farmer*, 511 U.S. at 851-58 (Blackmun, J., concurring).

[FN80]. *Id.* at 855 (Blackmun, J., concurring) (citations omitted) (quoting *The Supreme Court, 1990 Term-Leading Cases*, 105 Harv. L. Rev. 177, 243 (1991)).

[FN81]. *Id.* at 841.

[FN82]. Rifkin, *supra* note 64, at 300 (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

[FN83]. 42 U.S.C. § 1983 (1994).

[FN84]. 489 U.S. 378, 390 (1989) (establishing that "deliberate indifference" is sufficient to hold a municipality liable for a failure to train when the inadequacy "is so obvious, and the inadequacy so likely to result in violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need").

[FN85]. *Boston et al.*, *supra* note 24, at 88 (citations omitted). After *Farmer*, there are now two standards for "deliberate indifference." This dichotomy is likely to create confusion in the lower courts. See *id.* at 89. Cases addressing issues of supervisory liability for sexual abuse of women inmates by their male guards will utilize both the *Farmer* and *Canton* standards. This Note, however, focuses on the "deliberate indifference" standard required for the underlying Eighth Amendment claim.

[FN86]. *Farmer*, 511 U.S. at 841 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 124 (1992)).

[FN87]. *Id.* at 852 (Blackmun, J., concurring).

[FN88]. *Id.* at 854 (Blackmun, J., concurring).

[FN89]. *Id.* (Blackmun, J., concurring).

[FN90]. *Id.* (Blackmun, J., concurring).

[FN91]. See *id.* at 854-55 (Blackmun, J., concurring) (citing *Webster's Third New International Dictionary* 1843 (1961)).

[FN92]. 501 U.S. 294 (1991).

[FN93]. *Farmer*, 511 U.S. at 851 (Blackmun, J., concurring) (quoting *Estelle v. Gamble*, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting)).

[FN94]. *Wilson*, 501 U.S. at 311 (White, J., concurring) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

[FN95]. Jean Harris, "They Always Call Us Ladies": Stories from Prison 115- 16 (1988).

[FN96]. See *supra* text accompanying notes 9-10.

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[FN97]. See *All Too Familiar*, supra note 1, at 19; see also Lynn Smith, Majority of State's Women Inmates Abused as Children, Warden Says, L.A. Times, Mar. 19, 1992, at 5, available in 1992 WL 2937221 (stating that "the average female offender reports a typical pattern of violence or sexual abuse in their original homes").

[FN98]. See Lisa Krim, A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners, 6 *UCLA Women's L.J.* 85, 112-13 (1995).

[FN99]. Harris, supra note 95, at 116.

[FN100]. *All Too Familiar*, supra note 1, at 19 (quoting clinical psychologist Christine Kampfner).

[FN101]. See *id.*; see also Krim, supra note 98, at 113-14 (noting that past sexual abuse may influence how body searches performed by male guards affect women inmates).

[FN102]. *All Too Familiar*, supra note 1, at 19-20 (quoting psychologist Christine Kampfner).

[FN103]. See Elizabeth Morgan, The Psychology of a Failing Jail: Jail as an Abusive and Sexually Abusive Foster "Family" for "Children" with Multiple Trauma-Implications for Rehabilitation 163-79 (1995) (unpublished Ph.D. thesis, University of Canterbury (New Zealand)) (on file with author).

[FN104]. *Id.* at 175.

[FN105]. *Id.* at 177.

[FN106]. *Id.*

[FN107]. See *id.*

[FN108]. Murphy Davis, the Georgia state director of Southern Prison Ministries, has attributed a major part of the problem of sexual abuse to the fact that the prisons are run almost exclusively by white men:

Men are the women's keepers and completely control their present and their futures. That is an invitation to abuse. . . . This is as exaggerated, as distorted, a power relationship as you can get. You literally have people who have keys and power who have control over women who have absolutely no power.

Eric Harrison, Nearly 200 Women Have Told of Being Raped, Abused in a Georgia Prison Scandal So Broad Even Officials Say It's . . . a 13-Year Nightmare, L.A. Times, Dec. 30, 1992, at 1, available in 1992 WL 2821314.

[FN109]. Morgan, supra note 103, at 177.

[FN110]. 986 F.2d 1521 (9th Cir. 1993).

[FN111]. See *id.* at 1525 ("Eighty-five percent of the inmates report a history of serious abuse to . . . counselors, including rapes, molestations, beatings, and slavery.").

[FN112]. *Id.* at 1526.

[FN113]. *Id.* at 1526 n.5 (quoting *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)).

[FN114]. One woman prisoner identified this abusive use of power in describing the guard who allegedly raped her: "I hate him. He used his power against many women in that prison. He used us like we were whores." Harrison, supra note 108, at 1.

[FN115]. Thomas Barker & David L. Carter, *Police Deviance* 144 (2d ed. 1991).

[FN116]. See Morain, supra note 5, at 3 ("There's an awful lot that a woman can lose. If they don't cooperate or if a situation becomes unfriendly, they can lose their (release) dates." (quoting Ellen M. Barry, a San Francisco prison rights lawyer)).

[FN117]. See, e.g., 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, available in 1996 WL 3718387 (quoting a former inmate as

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saying "about one-third of women in prison trade sex with guards for favors, some as small as packages of gum or small vials of perfume. The other two-thirds live with constant harassment to do the same.").

[FN118]. All Too Familiar, *supra* note 1, at 195 (quoting an interview with a female inmate).

[FN119]. See Morgan, *supra* note 103, at 177-78 (noting that the administration failed to control sexually aggressive male guards).

[FN120]. Harris, *supra* note 95, at 234.

[FN121]. Barker & Carter, *supra* note 115, at 145.

[FN122]. *Id.*

[FN123]. See All Too Familiar, *supra* note 1, at 138.

[FN124]. *Id.* (quoting Bob Cullen, a legal services attorney representing inmates in a class action lawsuit).

[FN125]. Morgan, *supra* note 103, at 178.

[FN126]. *Id.* at 96.

[FN127]. Harrison, *supra* note 108, at 1 (quoting attorney Bob Cullen).

[FN128]. See *id.*

[FN129]. See All Too Familiar, *supra* note 1, at 210-11, 259-63, 313-15.

[FN130]. See Judith I. Avner, Sexual Harassment: Building a Consensus for Change, 3 *Kan. J.L. & Pub. Pol'y* 57, 58 (1994).

[FN131]. See *supra* notes 4, 6, and accompanying text.

[FN132]. 119 F.3d 381 (5th Cir. 1997).

[FN133]. See *id.* at 384.

[FN134]. See *id.*

[FN135]. See *id.*

[FN136]. See *id.*

[FN137]. See *id.* at 389.

[FN138]. See *id.* at 386.

[FN139]. See *id.*

[FN140]. *Id.* In prior cases, courts had framed the actual risk in such general terms that the obvious or substantial nature of the risk would be difficult for an individual inmate-plaintiff to prove through factual evidence. See, e.g., *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993). In *Hovater*, the court refused to frame the risk in terms of whether the supervisory officials had prior notice of sexual misconduct between the offending officer and female inmates. See *id.* at 1066. The court instead held that in order to find that an obvious and substantial risk was present, "it must conclude that a male guard having sole custody of a female inmate creates such a risk to her safety that it constitutes a violation of the Eighth Amendment's cruel and unusual punishment clause." *Id.* The court in *Hovater* was unable to make that finding. See *id.*

[FN141]. 957 F. Supp. 1376 (D. Del. 1997).

[FN142]. Following the officer's arrest on charges of "engaging in sex in a detention facility," he resigned. [Id. at 1380.](#)

[FN143]. See [id. at 1379.](#)

[FN144]. See [id. at 1380.](#)

[FN145]. See [id.](#)

[FN146]. See [id.](#)

[FN147]. See [id.](#)

[FN148]. [Id.](#)

[FN149]. See Holmes, *supra* note 2, at 12A ("I got beat up the other day,' [[[Carrigan] said. 'I don't care what anybody tells me, because I wasn't doing nothing. I got beat up behind this case.'").

[FN150]. The term "Administrative Defendants" collectively referred to Stanley Taylor, former Chief of the Bureau of Prisons and present Commissioner of Correction for the State of Delaware; Grace Martin, Deputy Warden; Tom Baylor, Internal Affairs Officer for the Department of Corrections; and Jack Sines, Internal Affairs Officer for the Department of Corrections. See [Carrigan, 957 F. Supp. at 1379.](#)

[FN151]. [Id. at 1382.](#)

[FN152]. See [id.](#)

[FN153]. See [id.](#) Interestingly, another inmate in the same prison reported being raped by a different male guard on the day after Carrigan was attacked. See Holmes, *supra* note 2, at 12A. State officials in that case also argued that the sex was consensual. See [id.](#) The inmate, Valerie Daniels, gave birth to a child as a result of the rape, and also claimed that she was subjected to retaliation by prison officials after reporting the incident. See [id.](#)

[FN154]. See Hanson, *supra* note 9, at 670; see also Avner, *supra* note 130, at 58 (noting that 95% of all victims of sexual harassment do not make formal complaints).

[FN155]. See [Carrigan, 957 F. Supp. at 1382.](#)

[FN156]. [Id. at 1383](#) (emphasis added) (quoting Delaware Department of Corrections Officer Code of Conduct A-169). The mere existence of such a policy does not, however, establish an obvious risk of sexual contact between male guards and female inmates. The court in [Hovater v. Robinson, 1 F.3d 1063 \(10th Cir. 1993\)](#), held that the jail's manual setting forth procedures to keep male guards from having unsupervised care of female inmates did not establish an obvious risk that male guards are likely to assault female inmates when they are left alone with them. See [id. at 1068](#). The court in [Hovater](#) instead preferred the defendants' argument that the policy was adopted to "protect male guards from false complaints." [Id.](#) But see Greg A. Naylor, *A Supervisor's Guide to Preventing Sexual Harassment* 57 (1996) (noting that "anti-dating" or "anti-fraternization" policies are designed to avoid "the potential for [any] sex harassment charges").

[FN157]. [Carrigan, 957 F. Supp. at 1383.](#)

[FN158]. [Id. at 1385.](#)

[FN159]. [59 F.3d 1034 \(10th Cir. 1995\).](#)

[FN160]. See [id. at 1035.](#)

[FN161]. See [id. at 1036.](#)

[FN162]. See [id.](#)

[FN163]. *Id.* at 1035-36.

[FN164]. *Id.* at 1036.

[FN165]. See *id.*

[FN166]. *Id.* at 1037.

[FN167]. *Id.*

[FN168]. See *id.* at 1038 (stating that Adkins "did not establish the single invasion of her cell constituted the deliberate indifference required for a violation of her Eighth Amendment rights" (emphasis added)).

[FN169]. See *id.*

[FN170]. 981 F. Supp. 140 (W.D.N.Y. 1997).

[FN171]. See *id.* at 145-51.

[FN172]. See *id.* at 143.

[FN173]. Three of the corrections officers who allegedly raped and sexually abused Fisher had either resigned or been reassigned to other prisons prior to the trial. See *id.* The only prison official actually linked to the alleged rape through physical evidence "suddenly quit his job at Albion three days after her lawsuit was filed in July and left town after 18 years on the job." Michael Beebe & Dan Herbeck, Amy Fisher Stirrs Concern with Testimony, Buffalo News, Sept. 25, 1996, at B1, available in 1996 WL 5868979.

[FN174]. See Fisher, 981 F. Supp. at 143.

[FN175]. See *id.*

[FN176]. Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996).

[FN177]. See Fisher, 981 F. Supp. at 172.

[FN178]. See *id.*

[FN179]. *Id.* at 172.

[FN180]. *Id.* at 176.

[FN181]. See *id.* at 150.

[FN182]. See *id.* The court referred to Fisher's "matter of fact" and general description of the incidents as contributing to this conclusion. See *id.* Therapists, however, have recognized that it is common for victims of sexual abuse to reveal as little as possible about the incident because it makes them "re-live" the experience. See William E. Prendergast, The Merry-Go-Round of Sexual Abuse: Identifying and Treating Survivors 94 (1993).

[FN183]. See N.Y. Penal Law § 130.05(3)(e) (Consol. 1996). Likewise, in the District of Columbia, sexual intercourse and sexual contact with a person in custody were not explicitly made felony offenses until just after the court rendered its decision in Women Prisoners. See D.C. Code Ann. §§ 22-4113(1), 22-4114(1) (1996); see also *infra* text accompanying notes 235-36 (discussing the District of Columbia's response to Women Prisoners).

[FN184]. N.Y. Penal Law § 130.05(3)(e) did not go into effect until 1996- after the sexual encounters between the prison guard and Fisher, which occurred between 1992 and 1995.

[FN185]. Fisher, 981 F. Supp. at 174.

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[FN186]. See *id.*

[FN187]. 109 F.3d 1335 (8th Cir. 1997).

[FN188]. See *id.* at 1336.

[FN189]. Freitas, 109 F.3d at 1339; see also Fisher, 981 F. Supp. at 174 (using identical language in describing plaintiff's failure to prove her case).

[FN190]. Fisher, 981 F. Supp. at 174-75. This argument acknowledges the dynamics of the prison setting and the amplified power and control a guard has over an inmate. See All Too Familiar, *supra* note 1, at 284 n.13 ("Where you have power over a person, it cannot be consensual . . ."); Hanson, *supra* note 9, at 685 ("Sexual relationships between inmates and guards are the product of sexual exploitation and cannot be defined as voluntary.").

[FN191]. Fisher, 981 F. Supp. at 175.

[FN192]. See *id.*

[FN193]. Prendergast, *supra* note 182, at 4.

[FN194]. Fisher, 981 F. Supp. at 176.

[FN195]. Michael Beebe & Dan Herbeck, Fisher's Lawyer Says Arcara's Ruling Will Discourage Inmate Reports of Jail Rape, Buffalo News, July 17, 1997, at E2, available in 1997 WL 6448922.

[FN196]. See Michael Beebe, Union President Says Fisher Ruling Restores Reputation of Albion Prison, Buffalo News, July 18, 1997, at C4, available in 1997 WL 6449129.

[FN197]. See *id.* (quoting a spokesman for the New York State Department of Correctional Services who felt that Fisher filed her lawsuit only after first attempting to threaten legal action if prison officials did not transfer her to Bedford Hills).

[FN198]. *Id.* As a result of Fisher's notoriety and spotlight in the media, she was able to attract public scrutiny to the conditions in Albion much in the same way other prisoners have in the wake of class action suits. In December 1997, the Women in Correctional Facilities Committee of the New York Bar Association urged Governor Pataki's administration to bolster efforts to prevent future sexual abuse of women in the state's penitentiaries. See Joel Stashenko, Panel Says Prison Guards Abuse Power Over Female Inmates, Buffalo News, Dec. 26, 1997, at A12, available in 1997 WL 6482765. The Committee recognized that sexual abuse of women inmates "was and is a real problem" and that "an ongoing abuse of power by the guards, coupled with sexual relations between guards and inmates is a sure recipe for disaster." *Id.* Caitlin Barghmann, the Committee's chairwoman, further noted that "[b]ecause the guards are in a position of authority, they are the ones who need to learn to address the relationship and handle it properly." *Id.* The Committee's statements, offered just a few months after Judge Arcara rendered his decision in the Amy Fisher case, demonstrate how celebrity status, like class action suits, attracts public attention to the problem of sexual abuse inside the prison walls. Widespread awareness is the first step toward finding a solution.

[FN199]. Beebe & Herbeck, *supra* note 173, at B1.

[FN200]. 877 F. Supp. 634 (D.D.C. 1994), vacated in part, modified in part, 899 F. Supp. 659 (D.D.C. 1995), remanded by 93 F.3d 910 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997).

[FN201]. See *id.* at 639.

[FN202]. See *id.*

[FN203]. Rudlin, *supra* note 14, at 278.

[FN204]. See Women Prisoners, 877 F. Supp. at 638.

[FN205]. See *id.* at 639-40.

[FN206]. See *id.* at 640.

[FN207]. See *id.*

[FN208]. See *id.* (including such comments as, "Well, you go ahead and do that and I'll be in there to stick my rod up in you.").

[FN209]. See *id.* at 643.

[FN210]. *Id.* at 643 n.8.

[FN211]. These effects include low self-esteem, self-doubt, irritability, anxiety, nervousness, depression, nausea, headaches, insomnia, fatigue, and increased stress. See *id.* at 642-43.

[FN212]. See *id.* at 645.

[FN213]. *Id.*

[FN214]. See *id.* at 640-41.

[FN215]. *Id.* at 641.

[FN216]. *Id.* at 642 (emphasis added).

[FN217]. Brooke A. Masters, Women Tell of Sex Abuse at D.C. Jails; Trial Begins in Suit Brought by Inmates, Wash. Post, June 14, 1994, at B1, available in 1994 WL 2292331.

[FN218]. *Id.* Women Prisoners was not the first time the DCDC faced a challenge to the conditions of confinement in its prisons. Overcrowding in prisons also has been a long-standing concern. "The District of Columbia has the highest rate of incarceration in the United States, locking up 1651 citizens per every 100,000." Katya Lezin, Life at Lorton: An Examination of Prisoners' Rights at the District of Columbia Correctional Facilities, 5 *B.U. Pub. Int. L.J.* 165, 170 (1996). "The vast majority of inmates . . . describe their incarceration as intolerable, and many believe that the conditions of detainment at Lorton are particularly unpleasant." *Id.* at 172.

[FN219]. *Women Prisoners*, 877 F. Supp. at 639.

[FN220]. See *id.* at 665 (recognizing that "[t]here is a substantial risk of injury when officers make sexual remarks in an environment where sexual assaults of women prisoners by officers are well known and inadequately addressed").

[FN221]. See *id.*

[FN222]. See *id.*

[FN223]. See *id.*

[FN224]. See *id.* at 665-66.

[FN225]. *Id.* at 666.

[FN226]. *Id.*

[FN227]. *Id.* at 665 (emphasis added). Congress enacted the Prison Litigation Reform Act (PLRA) on April 26, 1996 as part of an effort "to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners." 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995). Two sections of the PLRA adopt physical injury requirements. Section 803(d) provides that: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility,

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for mental or emotional injury suffered while in custody without a prior showing of physical injury." PLRA § 803(d), 42 U.S.C.A. § 1997(e) (West Supp. 1997). Section 806 provides that: "No person convicted of a felony who is incarcerated . . . may bring a civil action against the United States or an agency, officer, or employee of the Government for mental or emotional injury suffered while in custody without a prior showing of physical injury." Id. § 806, 28 U.S.C.A. § 1346(b)(2) (West Supp. 1997). See generally Stacey Heather O'Bryan, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 Va. L. Rev. 1189 (1997) (discussing the purpose of PLRA and its effect on the "constitutional claims by state prisoners"). On appeal, the court considered the PLRA in the context of the Women Prisoners decision. The appellate court did not even address the district court's reliance on the psychological harm resulting from sexual harassment. See *Women Prisoners v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996) (neglecting to raise the issue of the psychological harm that results from sexual harassment), cert. denied, 117 S. Ct. 1552 (1997).

[FN228]. *Women Prisoners*, 877 F. Supp. at 665. Judge Green distinguished the prisoners' environment from circumstances on the other side of the prison wall:

In free society, a woman who experiences harassment may seek the protection of police officers, friends, coworkers or relevant social service agencies. She may also have the option of moving to locations where the harassment would no longer occur. In sharp contrast, the safety of women prisoners is entrusted to prison officials, some of whom harass women prisoners and many of whom tolerate the harassment.

Id.

[FN229]. Id.

[FN230]. See *All Too Familiar*, supra note 1, at 113.

[FN231]. See id.

[FN232]. Id.

[FN233]. See, e.g., *Masters*, supra note 217, at B1.

[FN234]. See Toni Locy, *7 D.C. Jail Guards Suspended in Cellblock Striptease*, Wash. Post, Aug. 4, 1995, at C1, available in 1995 WL 9255460.

[FN235]. See D.C. Code Ann. §§ 22-4113(1), 22-4114(1) (1996).

[FN236]. See id.

[FN237]. *Farmer v. Brennan*, 511 U.S. 825, 855-56 (1994) (Blackmun, J., concurring).

[FN238]. See, e.g., supra notes 140, 151-52, and accompanying text.

[FN239]. *Farmer*, 511 U.S. at 842.

[FN240]. Rifkin, supra note 64, at 301.

[FN241]. Id. (quoting *Farmer*, 511 U.S. at 842-43).

[FN242]. See, e.g., Sarah H. Perry, *Comment, Enough is Enough: Per Se Constructive Discharge for Victims of Sexually Hostile Work Environments Under Title VII*, 70 Wash. L. Rev. 541, 559 (1995) (noting that "[m]any victims of sexual harassment perceive that filing a formal complaint will be ineffective. Studies reveal that most female victims of sexual harassment are unwilling to use internal grievance procedures because they believe that nothing will be done").

[FN243]. Lezin, supra note 218, at 204 (citing a February 1994 interview with inmates at Lorton prison).

[FN244]. *Farmer*, 511 U.S. at 847.

[FN245]. Boston et al., supra note 24, at 101 (citation omitted).

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[FN246]. See [Women Prisoners v. District of Columbia](#), 877 F. Supp. 634, 639-43 (D.D.C. 1994), vacated in part, modified in part, 899 F. Supp. 659 (D.D.C. 1995), remanded by 93 F.3d 910 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997).

[FN247]. See id. at 642.

[FN248]. Id.

[FN249]. See id.

[FN250]. Id. at 666.

[FN251]. See id. This is in sharp contrast to the recommended investigation procedure in an employment setting. "Whoever is designated as investigator [of an incident of sexual harassment] should be able to act quickly, remain objective, conduct a thorough investigation, maintain confidentiality, and be authorized to take or effectively recommend prompt remedial measures." Alan M. Koral, *Critical Decisions in the Investigation of a Sex Harassment Claim - Practice Pointers and Case Law Update*, in *Avoiding and Litigating Sexual Harassment Claims 1997*, at 153, 188 (PLI Litig. & Admin. Practice Series No. H- 567, 1997).

[FN252]. See [Women Prisoners](#), 877 F. Supp. at 666.

[FN253]. Id.

[FN254]. See [Farmer v. Brennan](#), 511 U.S. 825, 847 (1994).

[FN255]. See [Women Prisoners](#), 877 F. Supp. at 666.

[FN256]. Boston et al., supra note 24, at 102 (citation omitted).

[FN257]. All Too Familiar, supra note 1, at 1.

[FN258]. Similar problems have been noted with sexual harassment claims in the employment context. See, e.g., [Marcy O'Brien, Comment, Jenson v. Eveleth Taconite Co.: A Legal Standard for Class Action Sexual Harassment](#), 19 J. Corp. L. 417, 434 n.206 (1994) (citing several problems associated with individual claims for sexual harassment in the workplace-"difficult to prove, not worth amount of money needed to litigate, competent counsel is hard to attract because of less chance of settlement, and it is doubtful that injunctive relief would cover anyone but the plaintiff").

[FN259]. Id. at 421.

[FN260]. Id. at 434.

[FN261]. See supra note 54 and accompanying text.

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