

# RAPE, RESIGN, REPEAT: HOW THE DELIBERATE INDIFFERENCE STANDARD DENIES REDRESS TO DETAINEES RAPED BY CORRECTIONS OFFICIALS

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## INTRODUCTION

A civil rights lawsuit based on 42 U.S.C. § 1983 (hereinafter “section 1983”) is the primary legal tool for current or former detainees seeking recourse

after suffering abuse, including sexual assault, at the hands of state corrections officials.<sup>3</sup>

Typically, plaintiffs seek redress for the abusive employee's unconstitutional conduct and for the employee's supervisors' "deliberate indifference" to such conduct.<sup>4</sup> Given that "49% of the [reported]<sup>5</sup> unwanted sexual misconduct or harassment in prisons involve[s] prison staff as perpetrators,"<sup>6</sup> a functional and effective legal standard in section 1983 lawsuits is essential to uphold our nation's notions of fairness and justice.

When individuals allege civil rights violations under section 1983, state government actors and their supervisors typically assert the defense of qualified immunity. Courts originally developed qualified immunity to protect government officials from excessive lawsuits, accusations, and punishment for their reasonable mistakes while acting under color of law.<sup>7</sup> Qualified immunity alone is a high bar for plaintiffs to meet. Courts have raised the bar even higher for supervisory liability claims, wherein plaintiffs allege the supervisors' conduct contributed to the wrongdoing, even though they did not directly commit the alleged act. To establish liability, plaintiffs must prove that the supervisors acted with deliberate indifference to the accused employee's allegedly unconstitutional conduct.<sup>8</sup> Formerly or currently detained plaintiffs often attempt to meet the

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† Note from the Editor: This version differs from the print version due to miscommunication which resulted in an earlier version of the article being published. There are no substantive differences between the drafts of the article, this version should be used as the true and accurate draft. The only notable changes will be seen in formatting and footnote numbering. We apologize for the inconvenience to you and Ms. Stein.

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3. See RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 987 (7th ed. 2017).

4. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) ("[T]he inadequacy of police training may serve as the basis for [section] 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.").

5. Hannah Brenner, Kathleen Darcy & Sheryl Kubiak, *Sexual Violence as an Occupational Hazard & Condition of Confinement in the Closed Institutional Systems of the Military and Detention*, 44 PEPP. L. REV. 881, 902 (2017) ("[R]esearchers estimate that the number of sexual assaults is much higher than the numbers suggest because inmates may not report, even to researchers, for myriad reasons.").

6. Liz Fields, *Half of Sexual Abuse Claims in American Prisons Involve Guards*, *Study Says*, ABC NEWS (Jan. 26, 2014), <http://abcnews.go.com/US/half-sexual-abuse-claims-american-prisons-involve-guards/story?id=21892170> [<https://perma.cc/G5G9-MJHY>] (citing Allen J. Beck & Ramona R. Rantala, *Sexual Victimization Reported by Adult Correctional Authorities*, 2009-11, DEP'T OF JUST. (Jan. 2014), <https://www.bjs.gov/content/pub/pdf/svraca0911.pdf> [<https://perma.cc/4RJ7-FGEH>] (emphasis added)).

7. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (Qualified immunity protects state actors from civil liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

8. *Harris*, 489 U.S. at 388 n.7.

deliberate indifference standard by proving that the supervisor's failure to "train, supervise, or correct wrongdoing" caused the subordinate's violation.<sup>9</sup>

Despite the known prevalence of officer-perpetrated sexual assault in confinement, courts have nevertheless created and reinforced a broad qualified immunity defense for supervisors. Consequently, our justice system leaves sexual assault survivors with virtually no opportunity for redress and only minimally incentivizes institutions to reform detainment policies in ways that may prevent future harm. This comment addresses this issue in four parts. Part I discusses the qualified immunity doctrine's historical background to illustrate courts' expansion of it since its inception. Part II analyzes *Rivera v. Bonner*,<sup>10</sup> a 2017 Fifth Circuit case, to demonstrate the injustice that results from applying the deliberate indifference standard to supervisory liability in certain circumstances. Part III details the ongoing problem of sexual assault by corrections officials against detainees to illustrate how the deliberate indifference standard consistently fails plaintiffs, and it suggests courts abandon deliberate indifference for section 1983 sexual assault actions against corrections officials. Finally, Part IV proposes an alternative standard that better aligns with current legal discourse.

## I. BACKGROUND

Section 1983 provides a cause of action for individuals whose rights have been violated by a state government official acting under color of law.<sup>11</sup> To succeed in a section 1983 action, plaintiffs must demonstrate that a state official "caus[ed]" a violation of his or her constitutional rights.<sup>12</sup> "Anyone whose conduct is 'fairly attributable to the state' can be sued as a state actor under [section] 1983."<sup>13</sup> Before the Supreme Court decided *Monroe v. Pape* in 1961,

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9. Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 HARV. C.R.-C.L. L. REV. 273, 275 (2012).

10. *Rivera v. Bonner*, 691 F. App'x 234 (5th Cir. 2017).

11. Section 1983 states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.A. § 1983 (Westlaw through Pub. L. No. 116-5) (emphasis added). See also *Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled on other grounds*, ("Congress, in enacting [section 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of power."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (Acknowledging municipalities' section 1983 liability in certain circumstances, but noting that only government officials, not municipalities themselves, are subject to punitive damages.); *Harris*, 489 U.S. at 380.

12. Levinson, *supra* note 7, at 277 (emphasis added).

13. *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (explaining

the relevant jurisprudence lacked clarity regarding the key phrase, “under color of law.” In *Monroe*, the Court rejected the accused police officer’s argument that his conduct did not fall “under color of law” because it violated state law.<sup>14</sup> Instead, the Court held, the phrase, “under color of law,” encompasses lawful and unlawful conduct committed by officials acting under the state’s authority.<sup>15</sup>

The qualified immunity doctrine is a formidable defense against section 1983 and other civil rights claims brought against government officials. If a court grants qualified immunity to a defendant, it terminates the plaintiff’s claim, precluding a jury or bench trial.<sup>16</sup> The wholly court-made doctrine<sup>17</sup> developed to protect eligible executive branch officers from liability when they make reasonable mistakes while acting under color of law.<sup>18</sup> Such protection intends to encourage officials to vigorously exercise their discretionary duties without fear of facing a lawsuit if their well-intended decisions go awry.<sup>19</sup> The Supreme Court has specified, “[qualified immunity] is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.”<sup>20</sup> The qualified immunity doctrine seeks to balance several competing interests: individuals’ interest in redress when asserting their constitutional rights; government officials’ interest in avoiding liability when they make reasonable mistakes while acting under color of law; and finally, the justice system’s interest in ensuring that constitutional claims against government officials are reasonable and cost-effective.<sup>21</sup>

*A. The qualified immunity doctrine may shield supervisors from liability for a subordinate’s allegedly unconstitutional conduct.*

Two types of government actors may assert a qualified immunity defense: the government actor accused of committing the section 1983 violation and that

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that executive branch officers are entitled to qualified immunity of varying degrees based on the scope of their discretion, responsibilities of the office, and the current circumstances), *abrogated on other grounds* by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

14. *Monroe*, 365 U.S. at 184-87.

15. *Id.* at 184 (“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.” (citing *United States v. Classic*, 313 U.S. 299, 326 (1941))); *id.* at 187.

16. *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982).

17. See David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36 (1989) (quoting *Imbler v. Patchman*, 424 U.S. 409, 417 (1976)).

18. *Scheuer*, 416 U.S. at 242.

19. See *Harlow*, 457 U.S. at 819; *Richardson v. McKnight*, 521 U.S. 399, 407-08, 411 (1997).

20. *Scheuer*, 416 U.S. at 242 (quoting *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959)) (internal quotations omitted).

21. *Harlow*, 457 U.S. at 806 (1982); see also *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (“The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated.”); see also *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989).

government actor's supervisors.<sup>22</sup> To evaluate a qualified immunity defense, courts conduct a two-pronged analysis.<sup>23</sup> Courts consider whether, in the light most favorable to the party claiming injury, the accused violated a constitutional right and whether the violated right was "clearly established" given the specific circumstances of the situation.<sup>24</sup> Courts may decide to address either prong first in their analyses.<sup>25</sup>

Because the supervisor did not directly commit the constitutional violation, supervisory liability requires plaintiffs to overcome a particularly unyielding hurdle. To hold supervisors liable, a plaintiff must demonstrate that the supervisor *caused* the constitutional violation.<sup>26</sup> To prove causation, the plaintiff must establish that the supervisor was deliberately indifferent to the subordinate's unconstitutional conduct.<sup>27</sup> Under the deliberate indifference standard, a plaintiff fails if he or she merely shows that the constitutional violation "would not have occurred if the superior had done more than he or she did."<sup>28</sup> Rather, "[the plaintiff's] evidence must demonstrate a *close causal relationship* between the [defendant's] conduct and [the plaintiff's] injuries."<sup>29</sup>

A plaintiff may overcome a qualified immunity defense by arguing that a supervisor's "failure to train, supervise, or discipline" demonstrates deliberate indifference to the subordinate's wrongful conduct.<sup>30</sup> In the aforementioned "failure to act claim,"<sup>31</sup> the supervisor's prior inaction becomes the "moving force of the constitutional violation."<sup>32</sup> The plaintiff must prove the supervisor-defendant "disregarded a *known or obvious* consequence of his action [or

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22. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); see also, e.g., Levinson, *supra* note 7, at 273-74.

23. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

24. *Id.*

25. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

26. See 42 U.S.C.A. § 1983 (Westlaw through Pub. L. No. 116-5); Levinson, *supra* note 7, at 277; *Harris*, 489 U.S. at 393 (O'Connor, J., concurring in part and dissenting in part) (agreeing with majority that section 1983's cause requirement "entails more than simply showing 'but for' causation.>").

27. *Harris*, 489 U.S. at 397 (O'Connor, J., concurring in part and dissenting in part).

28. *Heggenmiller v. Edna Mahan Corr. Inst. for Women*, 128 F. App'x 240, 248 (3d Cir. 2005) (quoting *Sample v. Diecks*, 885 F.2d 1099, 1117 (3d Cir. 1989)) (emphasis added).

29. *Heggenmiller*, 128 F. App'x at 248 (emphasis added).

30. Levinson, *supra* note 7, at 277; *Harris*, 489 U.S. at 388 ("[T]he inadequacy of police training may serve as the basis for [section] 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."); *id.* at 390 ("[T]he focus must be on [the] adequacy of the training program in relation to the tasks the particular officers must perform.>").

31. See Levinson, *supra* note 7, at 280.

32. Levinson, *supra* note 7, at 280 (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

inaction].”<sup>33</sup> A “stringent standard of fault,”<sup>34</sup> it nearly always requires the plaintiff to establish that the supervisor had notice of the wrongdoing,<sup>35</sup> typically demonstrated by a “pattern of similar constitutional violations by untrained employees.”<sup>36</sup> The Supreme Court underlined the crucial role of notice in establishing deliberate indifference:

Policymakers’ “continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the ‘deliberate indifference’—necessary to trigger municipal liability.” Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.<sup>37</sup>

However, the qualified immunity defense is not impenetrable. Even when qualified immunity is available to corrections officials, the defense fails “if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right and if they knew or should have known that their conduct violated the constitutional norm.”<sup>38</sup>

As government actors, state and federal corrections officials may assert qualified immunity defenses to inmates’ civil rights actions against them.<sup>39</sup> In contrast, private prison officials may not assert qualified immunity.<sup>40</sup> The private sector incentivizes private firms to ensure their employees, corrections officials, are neither excessively hesitant nor aggressive in carrying out their duties.<sup>41</sup> Private firms are also likely to indemnify accused employees due to insurance

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33. *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (quoting *Bd. of Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997)) (emphasis added); *see id.*

34. *Connick*, 563 U.S. at 61 (citing *Bd. of Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997)).

35. [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is *so obvious*, and the inadequacy *so likely to result in the violation of constitutional rights*, that the policymakers of the city can reasonably said to have been deliberately indifferent to the need.

*City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (emphasis added).

36. *Connick*, 563 U.S. at 62 (citing *Bryan Cty.*, 520 U.S. at 409).

37. *Connick*, 563 U.S. at 62.

38. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

39. *Procunier*, 434 U.S. at 561.

40. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

41. *Id.* at 409 (“[A] firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, [and whose] guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job.”).

requirements; thus, the threat of a section 1983 lawsuit is not likely to deter employees from vigorously pursuing their job responsibilities.<sup>42</sup>

The accused corrections official's supervisors may also assert a qualified immunity defense if they face a section 1983 action; like other government employee supervisors, the plaintiff must meet the deliberate indifference standard to hold them accountable.<sup>43</sup> Yet, unlike other government supervisors, corrections supervisors carry the weight of a special public policy concern: a significant and unique responsibility to ensure detainees do not suffer from unconstitutional conditions of confinement.<sup>44</sup> Detained populations' vulnerability, stemming from a complete reliance on corrections officials, should oblige courts to lower the deliberate indifference standard in certain instances, such as sexual assault.<sup>45</sup>

*B. Originally intended to be defined narrowly, courts have expanded the qualified immunity doctrine over the last forty years.*<sup>46</sup>

The legal system's gradual expansion of a now far-reaching qualified immunity defense has eroded civil rights protections. Bearing in mind that civil litigants have no right to counsel, the lofty barriers to overcoming a qualified immunity defense are exceptionally effective in diluting section 1983 claims.<sup>47</sup> In particular, the United States Supreme Court delivered a sharp blow to section 1983 plaintiffs in *Ashcroft v. Iqbal*<sup>48</sup> and *Connick v. Thompson*.<sup>49</sup>

Several scholars and lawyers view the five-justice opinion in *Ashcroft v. Iqbal* as a chilling rejection of supervisory liability in section 1983 claims.<sup>50</sup> The Court explained, "the term 'supervisory liability' is a misnomer,"<sup>51</sup> and it emphasized civil rights suits' limitations: "[a]bsent vicarious liability, each

42. *Id.* at 411.

43. Levinson, *supra* note 7, at 275-76.

44. *See* DeShaney v. Cty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general wellbeing.").

45. *Id.*

46. *Compare* Wyatt v. Cole, 504 U.S. 158, 159 (1992) (holding that private citizen accused of wrongdoing in collaboration with Sheriff's Office under section 1983 could not assert qualified immunity), *with* Filarsky v. Delia, 566 U.S. 377, 393-94 (2012) (holding that private attorney retained by City to assist with section 1983 litigation could assert the qualified immunity defense). *See also* Karen Blum, et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 641 (2013) (explaining scholars view *Filarsky* as a significant case indicating the Supreme Court's shift towards broadly applying the qualified immunity doctrine.).

47. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 390-91 (1989).

48. 556 U.S. 662 (2009).

49. 563 U.S. 51 (2011).

50. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) ("[Supervisors] may not be held accountable for the misdeeds of their agents."); *see also* Levinson, *supra* note 7, at 274 (2012).

51. *Iqbal*, 556 U.S. at 677.

Government official . . . is *only liable for his or her own* misconduct.”<sup>52</sup> The Court clarified, “[b]ecause vicarious liability is inapplicable to *Bivens* and [section] 1983 suits, a plaintiff must plead that *each* Government-official defendant, *through the official’s own individual actions*, has violated the Constitution.”<sup>53</sup> The four-justice dissent, led by Justice Souter, rebuked the majority for overreaching, finding it answered a question that the parties did not present.<sup>54</sup> The dissent argued, rather than narrow the scope of supervisory liability, the majority in fact “eliminate[s] *Bivens* supervisory liability entirely.”<sup>55</sup>

Scholars have further criticized the *Iqbal* Court for incorrectly equating a supervisory liability claim in a *Bivens* action<sup>56</sup> with that in a section 1983 action.<sup>57</sup> The Court’s decision to mirror the supervisory liability standards in two different types of actions against government officials surprised many because *Bivens* claims derive from common law while section 1983 claims are statutory. By treating the two types of civil rights actions as if they were synonymous, the *Iqbal* Court disregarded section 1983’s deep-rooted statutory foundation. Unlike a *Bivens* claim, section 1983 “expressly creates a statutory right to relief against those who ‘cause’ constitutional violations.”<sup>58</sup> As courts traditionally view statutory rights more favorably than those grounded in federal common law, the *Iqbal* decision strayed from long-established practice.<sup>59</sup>

Two years later, the Court seized an opportunity to further curb supervisory liability claims. In *Connick v. Thompson*, the Court rejected a supervisory liability claim brought against a District Attorney’s Office for its attorneys’ *Brady* violations.<sup>60</sup> Even the District Attorney’s “effective” concession that his office’s training procedures were inadequate was insufficient to hold the Office liable for its employees’ misconduct.<sup>61</sup> In *Connick*, a private investigator discovered that the District Attorney’s Office failed to disclose exculpatory evidence regarding Defendant John Thompson, instigating eighteen years of wrongful incarceration, including fourteen years on death row.<sup>62</sup> Following the investigation, the Office disclosed the previously withheld evidence and the lower court vacated Defendant Thompson’s convictions.<sup>63</sup> In addition to his *Brady* claim, Defendant Thompson sued the District Attorney under section 1983

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52. *Id.* (emphasis added).

53. *Id.* at 676 (emphasis added).

54. *Id.* at 692 (Souter, J., dissenting).

55. *Id.* at 693.

56. *Iqbal*, 556 U.S. at 668 (explaining that the *Iqbal* plaintiff brought a *Bivens* action, not a section 1983 action); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (clarifying that a *Bivens* action provides damages when a federal, rather than a state, official violates an individual’s constitutional rights while acting under color of law).

57. *See, e.g.*, Levinson, *supra* note 7, at 274.

58. *Id.*

59. *Id.*; *see also id.* at 274 n.10.

60. *Connick v. Thompson*, 563 U.S. 51, 71-72 (2011).

61. *Id.* at 96 (Ginsburg, J., dissenting).

62. *Id.* at 54.

63. *Id.*; *see also id.* at 88 (Ginsburg, J., dissenting).



on supervisory liability grounds, arguing that the District Attorney's failure to train his Office's prosecutors amounted to deliberate indifference.<sup>64</sup>

Rejecting the jury verdict, the Supreme Court held that the District Attorney was not liable for his employees' conduct.<sup>65</sup> Reluctant to "micromanage"<sup>66</sup> a local government office, the Court concluded, while "no prosecutor remembered any specific trainings regarding *Brady*," it remained "undisputed . . . that the prosecutors were familiar with the general *Brady* requirement."<sup>67</sup> Moreover, prior cases holding that the Office had violated *Brady* did not constitute adequate notice that this training was insufficient because the prior cases did not involve the failure to disclose a blood sample, the specific type of evidence at issue in *Connick*.<sup>68</sup> Justice Scalia concurred, determining that the subordinate prosecutors' "bad faith, knowing [constitutional] violation . . . could not possibly be attributed to a lack of training."<sup>69</sup>

Four justices dissented against the controversial majority decision, finding the District Attorney liable for his subordinates' actions.<sup>70</sup> According to Justice Ginsburg, the District Attorney's conduct fell within the special exceptions set forth in *City of Canton v. Harris*: certain section 1983 violations are so egregious that notice is unnecessary to establish deliberate indifference based on a failure to train.<sup>71</sup> "[A] municipality that empowers prosecutors to press for death sentences without ensuring that those prosecutors know and honor *Brady* rights" are equally "deliberately indifferent" as the *Canton* municipality, which failed to train its police officers in the legal use of deadly force.<sup>72</sup> While Justice Scalia framed this *Brady* violation as an isolated event, Justice Ginsburg explained that the incident reflected a "routine practice" of lackadaisical attention to *Brady*'s requirements.<sup>73</sup> The absence of *Brady* training, Justice Ginsburg argued, rendered misunderstandings of *Brady* "inevitable."<sup>74</sup>

Expanding qualified immunity so broadly that it effectively eliminates supervisory liability has proved almost fatal for section 1983 claims; a recent example is Ms. Rivera's loss in *Rivera v. Bonner*.<sup>75</sup>

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64. *Id.* at 57.

65. *Id.* at 71-72.

66. *Id.* at 68 ("The statute does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States.").

67. *Id.* at 57.

68. *Id.* at 62-63.

69. *Id.* at 78 (Scalia, J., concurring). *See also* Levinson, *supra* note 7, at 275 ("Justice Stevens challenged this statement later in a public address, opining that it ignores the fact that in the real world, bad-faith, knowing violations of constitutional rights may sometimes be attributed to the failure of supervisors to do their jobs.").

70. *Connick*, 563 U.S. at 79 (Ginsburg, J., dissenting).

71. *Id.* at 91-92 (Ginsburg, J., dissenting) (finding "[a]bundant evidence" supporting the jury's decision that "additional training was obviously necessary.").

72. *Id.* at 105.

73. *Id.* at 79.

74. *Id.* at 98.

75. *Rivera v. Bonner*, 91 F. App'x 234 (5th Cir. 2017).

II. *RIVERA V. BONNER* DEMONSTRATES THE DELIBERATE INDIFFERENCE STANDARD'S SHORTCOMINGS IN CERTAIN SECTION 1983 ACTIONS.

A recent Fifth Circuit case, *Rivera v. Bonner*, illustrates how the deliberate indifference standard often leaves deserving plaintiffs remedy-less in their fights for justice via section 1983. The case analysis below shows how the standard tilts too far in corrections supervisors' favor at the expense of impeding necessary change in confinement policies and practices. When courts apply the deliberate indifference standard to section 1983 claims for officer-perpetrated sexual assault, they turn a blind eye to Congress's intent: that section 1983 *balance* competing interests. Section 1983 should protect government officials who make reasonable mistakes within the scope of their employment *and* provide redress to private citizens whose constitutional rights have been violated by state employees.<sup>76</sup>

*Rivera v. Bonner*<sup>77</sup> depicts a sexual assault survivor's almost impossible feat of securing redress through section 1983, even when the accused officer admits he committed the rape and is criminally charged for his conduct. While "[c]ourts of appeals ha[ve] adopted inconsistent tests for 'deliberate indifference,'"<sup>78</sup> the *Rivera* opinion is particularly conducive to analysis because the Court bifurcated Ms. Rivera's claims against the official who committed the assault and his supervisors. The July 2017 opinion focuses on whether the jail supervisors were deliberately indifferent and thus liable for the officer's actions.<sup>79</sup> Because of its transparent reasoning and shocking result, the *Rivera* case drew media attention to a topic often ignored by mainstream society, officer-perpetrated rape in corrections institutions.<sup>80</sup>

In December 2014, Ezmerelda Rivera was arrested for "public intoxication in connection with her husband's arrest for driving while intoxicated."<sup>81</sup> Ms. Rivera's arresting officers brought her to Hale County Jail in Lubbock, Texas.<sup>82</sup> After she changed into jail scrubs, Officer Manuel Fierros took over the booking process, escorting Ms. Rivera into the jail's "multipurpose" room.<sup>83</sup> Fierros instructed the two female officers to leave him and Ms. Rivera alone in the room, which was not monitored by video surveillance.<sup>84</sup> "Fierros then groped Rivera's breasts and forced her to perform oral sex on him."<sup>85</sup> Jail staff left Officer Fierros and Ms. Rivera alone in the unmonitored room for fifty-five minutes while

76. *Harlow v. Fitzgerald*, 477 U.S. 800, 806 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989).

77. *Rivera*, 691 F. App'x 234.

78. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

79. *Rivera*, 691 F. App'x 234.

80. See Andrew Cohen, *Who Pays for Jail Rape?*, MARSHALL PROJECT, (2017) <https://www.themarshallproject.org/2017/07/17/who-pays-for-jail-rape> [<https://perma.cc/3VHJ-EW2V>].

81. *Rivera*, 691 F. App'x at 236.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

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Fierros “left and reentered the room at various times.”<sup>86</sup> Hale County Jail released Ms. Rivera the next day.<sup>87</sup>

Ms. Rivera filed a complaint with state law enforcement; subsequently, Officer Fierros confessed to sexually assaulting her.<sup>88</sup> In March 2015, Ms. Rivera brought a section 1983 claim against Fierros and his supervisors, Hale County Sheriff David Mull and Jail Administrator A.J. Bonner, for their deliberate indifference to the “risks associated with hiring Fierros and [their inadequate training and supervision] of jail employees.”<sup>89</sup> Alleging supervisory liability based on the failure to train, Ms. Rivera argued that the Sheriff and Jail Administrator’s limited background investigation during the hiring process and inadequate response to a prior similar incident established liability for their subordinate’s constitutional violation.<sup>90</sup>

The *Rivera* Court upheld the Hale County Jail supervisors’ qualified immunity defenses, dismissing Ms. Rivera’s supervisory liability claim.<sup>91</sup> The Court found the supervisors were not deliberately indifferent when Hale County Jail Officer Fierros raped Ms. Rivera while she was in their custody because Ms. Rivera failed to demonstrate that her rape was a “plainly obvious consequence” of the Sheriff and Jail Administrator’s actions.<sup>92</sup> The Court determined that the supervisors were not deliberately indifferent in their hiring practices, even when they failed to thoroughly investigate incidents of sexual assault in the offending officer’s past.<sup>93</sup> Moreover, the supervisors were not on notice that an officer-perpetrated sexual assault could occur in their jail even when a similar incident had occurred six months earlier and the supervisors failed to make substantial changes to the Jail’s policies or practices following that incident.<sup>94</sup> Significantly, the case’s summary judgment posture was insufficient to sway the outcome in Ms. Rivera’s favor, as she was the nonmoving party.<sup>95</sup>

*A. An in-depth analysis of the Rivera Court’s reasoning demonstrates that the deliberate indifference standard is fundamentally unfair to*

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86. *Rivera*, 691 F. App’x at 236.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 235-36, 242.

91. *Id.* at 239-40, 243.

92. *Id.* at 240.

93. *Id.* at 240, 243.

94. *Id.* at 242.

95. *Id.* at 242-43.

*survivors of sexual assault by corrections officials.*

Ms. Rivera's failed supervisory liability claim represents grim chances for section 1983 plaintiffs asserting supervisory liability for sexual assault. In describing the deliberate indifference standard, the *Rivera* Court emphasized Ms. Rivera's onerous task:

When a plaintiff alleges that a supervisor inadequately considered an applicant's background, "deliberate indifference" exists where adequate scrutiny . . . would lead a reasonable supervisor to conclude that the *plainly obvious consequences* of the decision to hire would be the deprivation of a third party's constitutional rights."<sup>96</sup>[A]ccordingly, a plaintiff must show that there was "a strong connection between the background of the particular applicant and the specific violation alleged" such that "the hired officer was highly likely to inflict the particular type of injury suffered."<sup>97</sup> "A showing of simple or even heightened negligence will not suffice."<sup>98</sup>

The Court based its decision on three key findings regarding the supervisors' hiring practices, response to a prior similar incident, and their lack of notice regarding their constitutional obligations.

- i. The *Rivera* supervisors were not deliberately indifferent in their hiring practices when they failed to consider a sexual misconduct allegation in the offending officer's past.

Even though the summary judgment posture required the Court to interpret arguments in the light most favorable to Ms. Rivera, it nevertheless seemed to indulge the defendant-supervisors in close calls. The Court's significant deference to the supervisors influenced its determination that their hiring decisions were reasonable. Its approach contradicted the section 1983 Supreme Court case, *Scheuer v. Rhodes*,<sup>99</sup> which held that the Court of Appeals erred when it "erroneously accepted as fact the good faith of the Governor" and took judicial notice of the Governor's claims absent supporting evidence.<sup>100</sup>

When the supervisors hired Fierros, they failed to conduct a thorough background investigation, even when the Sheriff knew Fierros had been arrested for "indecent with a child by sexual misconduct."<sup>101</sup> The background report indicated that Fierros had committed sexual assault on two separate occasions as

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96. *Id.* at 237-38 (quoting *Gros v. City of Grand Prairie*, 209 F.3d 431, 433-34 (5th Cir. 2000)) (emphasis added).

97. *Id.* at 237-38 (quoting *Gros*, 209 F.3d at 434 (5th Cir. 2000)).

98. *Id.* at 238 (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 407 (1997)).

99. *Scheuer v. Rhodes*, 416 U.S. 232, 249 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

100. *Scheuer*, 416 U.S. at 249-50.

101. *Rivera*, 691 F. App'x at 239.

a teenager.<sup>102</sup> Because his record showed no convictions,<sup>103</sup> the Court reasoned, it was “entirely possible” that Fierros’s documented sexual assaults resulted from a Texas law prohibiting minors from engaging in sexual activity with another minor under the age of consent.<sup>104</sup> Therefore, the Court concluded, Fierros’s record may not have called for further investigation by the hiring committee.<sup>105</sup> Yet, the Court ignored an equally possible alternative: that Fierros’s prior conduct should have raised a red flag and undoubtedly related to his new position as a jail officer in charge of female detainees. Even in the summary judgment phase, even when the supervisors’ assumptions, if wrong, posed a grave risk, and even when Supreme Court precedent suggests an alternative approach, the Fifth Circuit gave the supervisors the benefit of the doubt.

The Court’s conclusion that the supervisors’ hiring practices were reasonable inappropriately relied on prior Fifth Circuit cases that are too factually dissimilar from *Rivera* to warrant a reasonable comparison.<sup>106</sup> In one instance, the Court compared the *Rivera* supervisors’ conduct with that of supervisors in a Fifth Circuit police brutality case, in which the plaintiff alleged faulty hiring practices under section 1983.<sup>107</sup> The Court also relied on a Fifth Circuit decision finding that a corrections officer’s rape of a female inmate was not a “plainly obvious consequence” of his work history, which included termination by a school district due to inappropriate advances toward high school girls.<sup>108</sup>

While police brutality and harassing underage girls are horrific, Ms. Rivera’s unique position as Officer Fierros’s detainee demands greater scrutiny of any connection between potentially relevant prior behavior and one’s role as a jail official. Corrections officials’ enormous amount of control over detainees should trigger a heightened concern regarding a job applicant’s personal background of sexual assault. Even the *Rivera* Court recognized that detainees require an especially high level of protection, explaining, “detainees in jails and prisons are ‘restricted in their ability to fend for themselves’ and are therefore far more vulnerable than the general population.”<sup>109</sup>

- ii. The *Rivera* supervisors were not deliberately indifferent even when their response to a prior similar incident was minimal.

Despite calling the supervisors’ reaction to a previous officer-perpetrated sexual assault “limited,” the Court decided that the minimal reaction six months prior failed to establish deliberate indifference for this rape.<sup>110</sup> Thus, the Court

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102. *Id.* at 235.

103. *Id.* at 239.

104. *Id.*

105. *Rivera*, 691 F. App’x at 239.

106. *Id.* at 238-39.

107. *Id.* at 238.

108. *Id.* at 238-39.

109. *Id.* at 239 (citing *Hare v. City of Corinth*, 74 F.3d 633, 639 (5th Cir. 1996)).

110. *Rivera*, 691 F. App’x at 242.

rejected Ms. Rivera's argument that the supervisors were "on notice"<sup>111</sup> of Fierros's misconduct.<sup>112</sup>

Six months before Fierros sexually assaulted Ms. Rivera, the same supervisors were notified that a different jail officer had sexually assaulted a female detainee in the same jail.<sup>113</sup> In response, they permitted the offending officer to resign instead of facing discharge<sup>114</sup> and hung a poster reminding guards that sexually assaulting a detainee constituted a felony.<sup>115</sup> The supervisors took no further action.<sup>116</sup>

According to the *Rivera* Court, the supervisors' conduct would have been inadequate if they had failed to take a *single* preventative measure after the prior incident of sexual assault.<sup>117</sup> But here, they took some preventative measures by offering resignation and hanging a poster, satisfactory responses to their employee sexually assaulting a detainee in their jail.<sup>118</sup> While Hale County Jail officers previously received some state-sponsored training on sexual assault prevention,<sup>119</sup> they received no additional training after the prior sexual assault and before Fierros raped Ms. Rivera.<sup>120</sup> The Fifth Circuit drew a thin line between no action and nearly no action, again weighing the evidence in favor of the supervisors in its deliberate indifference analysis.

The supervisors' failure to install a camera in the Jail's unmonitored multipurpose room after the prior incident of sexual assault also failed to meet the deliberate indifference standard.<sup>121</sup> The supervisors argued that video

111. *See* *Connick v. Thompson*, 563 U.S. 51, 62 (2011).

112. *Rivera*, 691 F. App'x at 242.

113. *Id.* at 236.

114. *Cf.* *Heggenmiller v. Edna Mahan Correctional Institution for Women*, 128 F. App'x 240, 250 (3d Cir. 1993) (Fuentes, J., dissenting) ("The majority gives defendants much credit for firing any guard reported for engaging in sexual relations with inmates. *While a failure to discharge sexual assailants would be truly shocking*, the converse is insufficient, standing alone, to immunize defendants from §1983 liability.") (emphasis added).

115. *Rivera*, 691 F. App'x at 236.

116. *Id.*

117. *Id.* at 242.

118. *Id.* at 236; *see also id.* ("[T]his Court has previously held that jail officials who provide 'no training' on sexual abuse and leave their employees 'virtually unsupervised' are deliberately indifferent to the substantial risk that jailers might abuse detainees." (citing *Drake v. City of Haltom City*, 106 F. App'x 897, 900 (5th Cir. 2004) (per curiam)); *cf.* *Heggenmiller*, 128 F. App'x at 247 (Supervisors took "reasonable steps to prevent the harm from occurring[g]" when they had policies in place to prevent officer-inmate sexual contact and fired officers who sexually assaulted inmates (quoting *Beers-Capitol v. Whetzel*, 256 F.3d 120, 133 (3d Cir. 2001))).

119. *Rivera*, 691 F. App'x at 242.

120. *Id.* at 236, 242; *Cf.* *Hovater v. Robinson*, 1 F.3d 1063, 1065 (10th Cir. 1993) (finding the County Sheriff was not deliberately indifferent to corrections officers' unconstitutional conduct when he drafted the jail's sexual assault policy based on information gathered from various jails across the country); *see also id.* at 1068 (explaining "the jail's manual included procedures to keep a male guard from having unsupervised care of a female inmate.").

121. *Rivera*, 691 F. App'x at 243.

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surveillance was unnecessary for two reasons.<sup>122</sup> First, they did not install a camera because the multipurpose room was often occupied by lawyers or mental health professionals meeting with detainees.<sup>123</sup> The supervisors' privacy concerns in a room often used for confidential interactions trumped their concerns for detainees' Eighth and Fifth Amendment rights.<sup>124</sup> Second, the supervisors insisted, the prior sexual assault took place in an area monitored by a camera, so installing another camera did not seem like a suitable preventative response.<sup>125</sup>

Again, the Court accepted the supervisors' arguments with minimal speculation. It failed to consider alternatives that might have satisfied the supervisors' confidentiality concerns and adequately protected detainees from sexual assault. For example, the Jail could require that only female jail officers accompany female detainees in the unmonitored multipurpose room; it could also mandate that at least one female officer is present in the unmonitored multipurpose room when a male officer is in the room with a female detainee.<sup>126</sup> Alternatively, the Court could have viewed prevention of a second sexual assault in a short period of time in more general terms, expecting supervisors to contemplate how to avoid such great harm from twice occurring on their watch. The fact that the Jail had installed a camera which was not beneficial to preventing the prior assault does not logically lead to the conclusion that another camera in a different, unmonitored area of the Jail would be useless.

iii. The *Rivera* supervisors were not deliberately indifferent because Fifth Circuit precedent did not provide them with notice that their conduct was unconstitutional.

The Court found that the defendant supervisors were not on notice that their acts were unlawful because similar cases in the Fifth Circuit rejected plaintiffs' supervisory liability claims.<sup>127</sup> The supervisors contended that they were not on notice, emphasizing the stringent notice requirement set forth in *Connick v. Thompson*. "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights."<sup>128</sup> Because previous Fifth Circuit cases were factually dissimilar from this situation, the Court could not reasonably expect the supervisors to know whether their background

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122. *Id.* at 240.

123. *Id.*

124. *Id.*

125. *Id.*

126. "Males are the perpetrators in 98 percent of staff-on-inmate sexual assault of female inmates." Christina Piccora, *Female Inmates and Sexual Assault*, NAT'L JURIST (Sept. 15, 2014), <https://www.jurist.org/commentary/2014/09/christina-piccora-female-inmates/> [<https://perma.cc/EYR5-DESY>].

127. *Rivera*, 691 F. App'x at 238-40.

128. *Connick v. Thompson*, 563 U.S. 51, 61 (2011); *see also White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) ("[T]he clearly established law must be 'particularized' to the facts of the case." (quoting *Anderson v. Creighton*, 483 U.S. 685, 640 (1987))).

investigation was adequate or if they sufficiently responded to the prior sexual assault in their jail.<sup>129</sup> The *Rivera* Court agreed, reasoning that if it had previously granted qualified immunity to other supervisors in similar previous cases, then it could not reasonably expect these supervisors to know they risked liability for their employee's sexual assault of Ms. Rivera.<sup>130</sup>

In reaching this conclusion, the Court first analyzed a Supreme Court case, *Board of County Commissioners v. Brown*.<sup>131</sup> Plaintiff Brown brought a section 1983 claim against the County for a police officer's excessive force, alleging the County Sheriff failed to adequately review the officer's criminal background when the department hired him.<sup>132</sup> The *Brown* Court held that the county police department was not deliberately indifferent.<sup>133</sup> While the officer had previously pleaded guilty to multiple misdemeanors, including assault and battery, the Court found that the connection between his criminal background and his use of excessive force was "too tenuous" to demonstrate the Sheriff "disregarded a known or obvious risk of injury."<sup>134</sup>

The *Rivera* Court also focused on a slightly more factually similar case in its own circuit, *Gros v. City of Grand Prairie*.<sup>135</sup> In *Gros*, the plaintiffs filed a section 1983 lawsuit against the City because its police officer "sexually, physically, and verbally abused them during routine traffic stops."<sup>136</sup> The *Gros* Court evaluated weaker evidence of prior misconduct than that in *Brown*, concluding that "scattered comments" in the officer's personnel file from his prior employment, which characterized him as "overly aggressive," were too disconnected from the plaintiffs' allegations of sexual harassment, false arrest, improper searches and seizures, and excessive force to state a deliberate indifference claim.<sup>137</sup>

Additionally, the *Rivera* Court evaluated *Hardeman v. Kerr County*, in which a jail detainee filed a section 1983 claim against Kerr County after a jail officer raped her in custody.<sup>138</sup> According to the officer's employment history, a school district previously terminated him from his police officer position for making "improper advances towards high school (female) students."<sup>139</sup> The Court found no evidence that Kerr County, the guard's supervisor, had discovered this fact in its employment background investigation.<sup>140</sup> However, even if the County knew of the officer's questionable background, "it would have

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129. *Rivera*, 691 F. App'x at 242-43.

130. *Id.*

131. *Id.* at 238; *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397 (1997).

132. *Rivera*, 691 F. App'x at 238 (citing *Brown*, 520 U.S. at 399-401).

133. *Id.* (citing *Brown*, 520 U.S. at 415-16).

134. *Id.* (citing *Brown*, 520 U.S. at 412-14).

135. *Id.* (citing *Gros v. City of Grand Prairie*, 209 F.3d 431, 434 (5th Cir. 2000)).

136. *Id.* (citing *Gros*, 209 F.3d at 436).

137. *Rivera*, 691 F. App'x at 238 (citing *Gros*, 209 F.3d at 435-36).

138. *Id.* (citing *Hardeman v. Kerr Cty.*, 244 F. App'x 593, 595 (5th Cir. 2007) (per curium)).

139. *Hardeman*, 244 F. App'x at 594-95.

140. *Id.* at 594.



required ‘an *enormous leap* to connect “improper advances” towards female students to the sexual assault.’”<sup>141</sup>

In considering these cases, the *Rivera* Court overlooked modern social norms and politics, which critically outdate the decades-old cases on which it relied, and the possibility that the case law’s failure to find supervisory liability may have been incorrect.

The *Rivera* Court’s decision to depend on cases ten to twenty years old weakened its reasoning. While *Rivera* demonstrates our system’s gross deficiencies regarding sexual assault in confinement, the United States has advanced significantly since even the most recent of the three cases, *Hardeman v. Kerr County*, which was decided ten years before *Rivera v. Bonner*.<sup>142</sup>

From 2007 to 2017, the United States has made important strides in broadening its understanding of the harm caused by sexual assault and unconstitutional conditions of confinement. For example, Congress passed the Violence Against Women Act in 2013 to specifically reform the criminal justice system’s response to sexual assault so that it better fulfills survivors’ needs.<sup>143</sup> *Stop Street Harassment* and *HollaBack!*, well-recognized activist campaigns opposing sexual assault, emerged in 2016.<sup>144</sup> The *Rivera* Court’s dependence on decades-old cases reflecting outdated attitudes regarding sexual assault unfairly disregards societal changes directly applicable to *Rivera v. Bonner*.

Moreover, the Fifth Circuit relied on precedent which reveals the unreasonableness of many deliberate indifference cases. While some may argue that *stare decisis* compels strict adherence to precedent, social progress may require a slight departure.<sup>145</sup> For example, today, the *Hardeman* Court’s conclusion that the accused jail officer’s alleged sexual assault was an “enormous leap”<sup>146</sup> from his past employment record of “improper advances”<sup>147</sup> sounds woefully ignorant or perhaps cruel. Knowledge that someone inappropriately harassed minors whom he was hired to protect in the role of police officer should constitute an adequate warning sign that he was more likely than others to exhibit

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141. *Rivera*, 691 F. App’x at 239 (quoting *Hardeman*, 244 F. App’x at 596) (emphasis added).

142. The Fifth Circuit decided *Gros v. City of Grand Prairie* in 2000. *Gros*, 209 F.3d 431, 436 (5th Cir. 2000). The Supreme Court decided *Board of County Commissioners v. Brown* in 1997. *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 399-401 (1997).

143. *Ending sexual violence in one generation: a progress report for the United States*, RELIANCE 12 (Sept. 1, 2016), [http://www.calcasa.org/wp-content/uploads/2016/08/Raliancereport\\_508final.pdf](http://www.calcasa.org/wp-content/uploads/2016/08/Raliancereport_508final.pdf) [<https://perma.cc/HDB3-CGTW>].

144. *Id.* at 10.

145. *See, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“*Stare decisis* is not an ‘inexorable command.’”); *Payne v. Tenn.*, 501 U.S. 808, 827 (1991) (“[W]hen governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’” (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1994))).

146. *Rivera v. Bonner*, 691 F. App’x 234, 239 (quoting *Hardeman v. Kerr Cty.*, 244 F. App’x 593, 596 (5th Cir. 2007) (per curium)).

147. *Id.*

sexually inappropriate behavior towards females in his custody.<sup>148</sup> Similarly, the *Brown* Court found a tenuous connection between past and present conduct, but a layperson would likely find a nexus: a police officer with a history of misdemeanors for battery and assault ultimately used excessive force against the plaintiff, prompting a section 1983 lawsuit against himself and his supervisors for their inadequate hiring practices.<sup>149</sup>

### III. THE STATUS OF INCARCERATED WOMEN TODAY MANDATES AN ALTERNATIVE SOLUTION TO THE DELIBERATE INDIFFERENCE STANDARD.

As more women enter United States detention institutions, the legal system's failure to adequately address officer-perpetrated sexual assault can no longer be tolerated. News reports from Milwaukee to Alabama describe incidents of male officers raping female detainees. One report details male correctional officers openly watching female inmates shower, as well as raping, sodomizing, and fondling them.<sup>150</sup> One survivor described the officer who repeatedly raped her, "he used his keys, his power, his authority to get in [various areas of the jail] and rape me."<sup>151</sup> Yet, today, decisions like *Rivera v. Bonner*<sup>152</sup> are not unusual, and action combatting this issue, by politicians, activists, or the media, is scarce.<sup>153</sup> Individuals deserve the right to utilize section 1983 claims for harms caused by government officials; surely the courts may not deny this right to those sexually assaulted by government officials while incarcerated.

This section first suggests that an alternative to the deliberate indifference standard is necessary to preserve section 1983's utility. It then discusses the prevalence of sexual assault by corrections officials in our jails and prisons, its impact on incarcerated women, and how section 1983 has failed to meaningfully deter officer-perpetrated sexual assaults.

#### A. *The deliberate indifference standard effectively denies the right of redress to certain sexual assault survivors because the assault*

148. *Id.* (quoting *Hardeman*, 244 F. App'x at 596) (emphasis added).

149. *Id.* at 238 (citing *Gros*, 209 F.3d at 435-36).

150. Jack Cloherty, Mike Levine, & Pierre Thomas, *Alabama Prison Was House of Horrors for Female Inmates, Feds Say*, ABC NEWS (Jan. 22, 2014), <https://abcnews.go.com/US/women-universally-fear-safety-alabama-prison-feds/story?id=21627510> [<https://perma.cc/6ZWY-W95E>].

151. John Diedrich, *Woman Describes Rapes by Milwaukee County Jail Guard and Giving Birth While Shackled*, MILWAUKEE J. SENTINEL (June 5, 2017, 4:58 PM), <http://www.jsonline.com/story/news/local/milwaukee/2017/06/05/woman-describes-rapes-milwaukee-county-jail-guard-and-giving-birth-while-shackled/372014001/> [<https://perma.cc/2HEB-Q6HY>].

152. *Rivera v. Bonner*, 691 F. App'x 234 (5th Cir. 2017).

153. For example, former President Barack Obama was the first president to visit a prison in the history of the United States. Scott Horsley, *Obama Visits Federal Prison, A First For A Sitting President*, NAT'L PUB. RADIO (July 16, 2015), <https://www.npr.org/sections/itsallpolitics/2015/07/16/423612441/obama-visits-federal-prison-a-first-for-a-sitting-president> [<https://perma.cc/K6E6-D8XC>].

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*occurred when they were incarcerated.*

Maintaining the current deliberate indifference standard for survivors of sexual assault by corrections officials extinguishes Congress's intended purpose behind section 1983 claims. Not only does it essentially embargo individual plaintiffs from pursuing redress, but it also makes light of decisionmakers' inexcusable ignorance of constitutional violations on their watch. An injured individual's longstanding right to a remedy dates back over two-hundred years to *Marbury v. Madison*,<sup>154</sup> that right cannot be denied merely because someone was sexually assaulted in confinement. In 1991, Justice White criticized the deliberate indifference standard because it deprived plaintiffs of the remedy they deserved after suffering unconstitutional conditions of confinement:

[H]aving chosen to use imprisonment as a form of punishment, a State must ensure that the conditions in its prisons comport with the contemporary standard of decency required by the Eighth Amendment. . . . [S]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end. . . . The ultimate result of today's decision, I fear, is that *serious deprivations of basic human needs will go unredressed due to an unnecessary and meaningless search for "deliberate indifference."*<sup>155</sup>

The Supreme Court eloquently explained the overarching policy purpose of section 1983 claims in *Owen v. City of Independence*:<sup>156</sup>

[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of

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154. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, whenever he receives an injury.").

155. *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., concurring) (internal citations omitted) (emphasis added).

156. *Owen v. City of Indep.*, 445 U.S. 622 (1980).

unintentional infringements on constitutional rights. Such behavior may be particularly beneficial in preventing those “systemic” injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.<sup>157</sup>

By effectively eradicating supervisory liability, opinions like *Rivera v. Bonner* undermine section 1983’s important purpose.

*B. The deliberate indifference standard strips courts of their responsibility under section 1983: to protect incarcerated individuals from commonplace sexual assault.*

Congress designated the courts to provide meaningful review of section 1983 claims; instead, judicial review of such claims is hardly effective. Courts should protect incarcerated individuals from routine sexual assault.<sup>158</sup> Scholars and politicians argue that the regularity of sexual assault in the United States confinement system violates the Eighth Amendment prohibition against cruel and unusual punishment. Just like everyone else, “an inmate has a constitutional right to be secure in [his or her] bodily integrity and free from attack by prison guards.”<sup>159</sup>

People who are incarcerated are among the most vulnerable people in the United States. They have no choice but to rely entirely on prison officials to fulfill their basic needs.<sup>160</sup> As one scholar summarizes, “[t]he power imbalance between inmate and staff, presumptions about character and credibility, rape myths, discretion in investigation, and a culture of protection and acceptance among correctional staff all contribute to the difficulty for an inmate to find justice through an investigation.”<sup>161</sup>

Plaintiffs seeking policy changes because a corrections official raped them should not face a nearly impossible burden of proof. The Court should soften the deliberate indifference standard when section 1983 plaintiffs allege supervisory liability for sexual assault by corrections officials, at least when the official has confessed or has been criminally charged like Officer Fierros in *Rivera*.<sup>162</sup> The qualified immunity doctrine has expanded to disproportionately shield

157. *Id.* at 651-52 (internal citations omitted).

158. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1882 (2017) (Brennan, J., dissenting) (“[T]he Constitution . . . delegates to the judiciary the duty to protect an individual’s fundamental constitutional rights.”).

159. *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (citing *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986)); see also *Brenner*, *supra* note 3, at 935.

160. See *DeShaney v. Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general wellbeing.”).

161. See *Brenner*, *supra* note 3, at 906.

162. *Rivera v. Bonner*, 691 F. App’x 234, 236; *Cohen*, *supra* note 78.

government officials from liability, at the expense of our system's centuries-old ideals of fairness and dignity. A New Jersey prosecutor confronting six prison guards who had sexually assaulted female inmates in their custody maintained:

In these cases the victims were particularly vulnerable as inmates . . . The corrections officers had complete power over every aspect of their lives behind bars. We have in our society a system of punishing those who violate our laws. *And when imprisonment is the punishment, it is our correction officers that must carry out the duty of ensuring the welfare, safety and security of the inmates.*<sup>163</sup>

Inmates' vulnerability should lead to greater protections, not less. State statutes reflect this value judgment; almost all states criminalize sexual contact between inmates and corrections officers,<sup>164</sup> codifying inmates' inability to give legal consent.<sup>165</sup> Someone raped by a prison guard in confinement deserves the same legal standard in his or her fight for justice as anyone else raped in a different setting. One survivor of officer-perpetrated sexual assault described her experience: "Imagine being raped inside a stranger's house and being confined to that stranger's house for months afterwards, even years."<sup>166</sup>

Incarcerated women are particularly susceptible to sexual abuse by corrections officials because many of them suffered sexual abuse before their detainment.<sup>167</sup> Three-quarters of incarcerated women have experienced "severe physical abuse" during adulthood and "82% suffered serious physical or sexual abuse as children."<sup>168</sup> At least one court has considered inmates' disproportionately abusive history when it decided that male guards should not perform clothed searches that "required 'kneading,' 'pushing,' and 'squeezing'

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163. Joshua Rhett Miller, *Corrections officers indicted for sexually abusing female inmates*, N.Y. POST (Jan. 24, 2017, 12:27 PM), <https://nypost.com/2017/01/24/corrections-officers-indicted-for-sexually-abusing-inmates/> [<https://perma.cc/54UK-QJB2>] (emphasis added).

164. Margaret Penland, Note, *A Constitutional Paradox: Prisoner Consent to Sexual Abuse in Prison under the Eighth Amendment*, 33 L. & INEQ. 507, 510 (2015).

165. See Brenner, *supra* note 3, at 900 ("Sexual victimization that occurs in prison differs from outside society due to in large part to the power imbalance between staff and inmates and the general prohibition on sexual relations between inmates or between inmates and staff – expressed statutorily by making it impossible for an inmate to legally give consent to staff.").

166. Brenner, *supra* note 3, at 903.

167. See, e.g., *Women's Incarceration: the experience in New York's prisons*, CORR. ASS'N OF N.Y.: FACT SHEET (<https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5cc08885fa0d60251a568084/1556121734338/2019+Women%27s+Incarceration+Fact+Sheet.pdf>).

168. Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J.F. 772, 786 (Feb. 25, 2019) (citing *Survivors of Abuse and Incarceration*, CORR. ASS'N OF N.Y., <https://www.correctionalassociation.org/issue/domestic-violence> [<https://perma.cc/J2PJ-YGEA>]).

the bodies of the female inmates.”<sup>169</sup> In *Jordan v. Gardner*, the Tenth Circuit “relied heavily upon evidence that demonstrated the psychological harm which would likely occur as a result of the searches.”<sup>170</sup> In *Jordan*, “[e]ighty-five percent of the inmates had histories of serious abuse, including rapes, molestations, beatings, and slavery. The Tenth Circuit recognized that these women had ‘particular vulnerabilities that would cause the cross-gender clothed body searches to exacerbate symptoms of pre-existing mental conditions.’”<sup>171</sup>

The increase of incarcerated women in the United States calls for closer scrutiny of sexual assault by corrections officials. As the number of incarcerated women has escalated, society has increasingly acknowledged officer-perpetrated sexual assault.<sup>172</sup> Yet, the legal standard that precludes recourse for survivors inexplicably remains stagnant. Today, women are the fastest growing incarcerated population.<sup>173</sup> The number of incarcerated women and girls is eight times what it was in 1980, which is double the rate of the increase of incarcerated men.<sup>174</sup> Furthermore, given the disproportionate rate of incarceration for low-income communities of color,<sup>175</sup> the judiciary is an especially important safety net, holding government institutions accountable for civil rights violations.<sup>176</sup> The rapid increase in incarcerated populations overall has also generated significant consequences. Professor James Robertson explained, “[t]he

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169. *Hovater v. Robinson*, 1 F.3d 1063, 1067 (10th Cir. 1993) (quoting *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc)).

170. *Hovater*, 1 F.3d at 1067.

171. *Id.*

172. See, e.g., Steven A. Holmes, *With More Women in Prison, Sexual Abuse by Guards Becomes Greater Concern*, N.Y. TIMES (Dec. 27, 1996), <http://www.nytimes.com/1996/12/27/us/with-more-women-in-prison-sexual-abuse-by-guards-becomes-greater-concern.html> [<https://perma.cc/5MYD-HZED>].

173. *Facts About the Over-Incarceration of Women in the United States* (2018), ACLU, <https://www.aclu.org/other/facts-about-over-incarceration-women-united-states> [<https://perma.cc/94RH-BZ38>].

174. *Id.*; Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, PRISON POLICY INITIATIVE (2018) [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html) [<https://perma.cc/7VVL-XL2H>].

175. See *Criminal Justice Fact Sheet*, NAT’L ASS’N OF COLORED PEOPLE (2019), <https://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/GWH2-77VL>]; Elizabeth Hinton, LeShae Henderson, & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 10 (May 2018), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/for-the-record-unjust-burden/legacy\\_downloads/for-the-record-unjust-burden-racial-disparities.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/for-the-record-unjust-burden/legacy_downloads/for-the-record-unjust-burden-racial-disparities.pdf) [<https://perma.cc/3QS5-NSEN>].

176. While the framers intended democratically elected legislatures to represent majoritarian views, the judiciary ideally ensures that majoritarian values do not completely subsume minority rights. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991) (“[M]any lawyers embrace a tradition that views state governments as the quintessential threat to individual and minority rights, and federal officials—especially federal courts—as the special guardians of [minority] rights.”).

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unprecedented growth in the inmate population has aggravated the chronic shortage of well-trained, experienced correctional officers.”<sup>177</sup>

The deliberate indifference standard perpetuates corrections staff’s common practice of protecting each other from discipline for abusive conduct. According to the United States Supreme Court, “[i]nhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison; sometimes over a long period of time.”<sup>178</sup> This recognized hive-like behavior erodes access to the fair investigations and legal avenues ideally afforded to sexual assault survivors.<sup>179</sup> Despite a unique professional environment which may further cripple plaintiffs’ meritorious section 1983 actions, the deliberate indifference standard poses an additional barrier to certain sexual assault survivors’ pursuit of justice because of *where* they were raped.

#### IV. MODIFYING THE STANDARD FOR OFFICER-PERPETRATED SEXUAL ASSAULTS AGAINST DETAINEES WOULD NOT DRAMATICALLY DEPART FROM SECTION 1983 AS IT CURRENTLY EXISTS.

Changing the standard is a far cry from a radical proposal for two main reasons. First, altering the standard so that it provides plaintiffs with some realistic ability to seek recourse more accurately reflects the statute’s original intent. Second, leaders in the legal field have recognized the lamentable degradation of section 1983 due to the expansion of qualified immunity, and at least four current Supreme Court justices (Breyer, Ginsburg, Kagan, and Sotomayor), have previously resisted the judiciary’s attempts to limit supervisory liability.

##### *A. Altering the standard for sexual assault allegations in specific circumstances echoes the remedial goals of section 1983.*<sup>180</sup>

Without supervisory liability, section 1983 cannot satisfy the goals it was enacted to serve: awarding damages to individual plaintiffs, demanding accountability from government institutions, and incentivizing modifications to institutions’ deficient policies and practices.<sup>181</sup> “Supervisors are more likely to have resources to satisfy judgments than low-level officials who commit wrongdoing.”<sup>182</sup> Additionally, “a judgment against a supervisor is more likely to

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177. James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 470 (2003).

178. *Wilson v. Seiter*, 501 U.S. 294, 310 (1991) (White, J., concurring).

179. *See* Brenner, *supra* note 3, at 908 (“Correctional staff tends to protect each other, a dynamic that may interfere with their ability to conduct impartial, fair investigations.”).

180. Levinson, *supra* note 7, at 276.

181. *See* Cohen, *supra* note 78.

182. Levinson, *supra* note 7, at 276.

lead to change in the municipal culture, customs, practices or policies that facilitate the challenged conduct that led to the judgment.”<sup>183</sup>

Accordingly, a carve-out exception for sexual assault allegations adequately maintains protections for government officials and simultaneously adheres more closely to congressional intent. An officer’s right to assert a strong qualified immunity defense still stands. Even so, to preserve Congress’s goal of balancing competing interests,<sup>184</sup> it should not be effectively impossible for plaintiffs to satisfy the deliberate indifference standard. Additional protections already safeguard officials from frivolous actions.<sup>185</sup> *Iqbal* requires that plaintiffs’ claims are plausible,<sup>186</sup> and courts afford correctional officers great deference in section 1983 lawsuits.<sup>187</sup> Moreover, the Prison Reform Litigation Act (“PLRA”) imposes restrictions unique to prisoners’ section 1983 actions.<sup>188</sup> The PLRA’s goal of reducing prisoner lawsuits has come to fruition: “2001 filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide.”<sup>189</sup>

Importantly, changing the standard for sexual assault claims is considerably less controversial than changing it for all abuse claims. A key purpose of qualified immunity is to protect government actors when they exercise discretion, as the prospect of a lawsuit may deter officials from vigorously performing their duties when confronting a split-second or high-pressure decision.<sup>190</sup> Thus, a plaintiff’s excessive physical force claim could be defeated if the defendant-officer argued such force was necessary during a heated moment of tension and hostility. However, no matter one’s views regarding use of force, no equivalent exists for sexual assault. An officer cannot legitimately argue that a sexual assault resulted from an instantaneous exercise of discretion essential to accomplishing a job responsibility.

*B. Revising the deliberate indifference standard falls within the purview of current legal discussion regarding the qualified immunity doctrine.*

The deliberate indifference standard’s constricting impact on certain section 1983 actions is undeniable; it nearly eliminates supervisory liability for corrections officials’ sexual assault of detainees. Altering the standard aligns

183. Ivan E. Bodensteiner, *Congress Needs to Repair the Court’s Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 51 (2010).

184. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989).

185. See, e.g., *Harlow*, 477 U.S. at 807 (directing courts to firmly apply the Federal Rules of Civil Procedure to deter frivolous claims).

186. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (requiring that the allegations in Plaintiff’s complaint are “plausible,” and not merely “conceivable.”).

187. *Brenner*, *supra* note 3, at 933.

188. *Fallon*, *supra* note 1, at 1008.

189. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559-60 (2003).

190. See *id.* at 1673.



with current and former Supreme Court justices' refusals to abolish supervisory liability under section 1983.<sup>191</sup>

In May 2011, Justice Stevens encouraged the Supreme Court to revise its *Connick v. Thompson* holding and instead to “adopt the common law doctrine of *respondeat superior*, which reflects ‘the intent of the Congress that enacted [section] 1983.’”<sup>192</sup> Justice Ginsburg’s *Connick* dissent, joined by Breyer, Kagan, and Sotomayor, starkly diverged from the majority opinion; the four justices agreed that the District Attorney’s conduct amounted to deliberate indifference and thus, section 1983 liability.<sup>193</sup> Similarly, while *Ashcroft v. Iqbal* vastly limited plaintiffs’ supervisory liability claims, another strongly worded four-justice dissent opposed that decision.<sup>194</sup> The proposal to modify the deliberate indifference standard deserves serious consideration if some of today’s greatest legal minds find the current interpretation flawed.

#### V. CONCLUSION

*Rivera v. Bonner* is an example of the deliberate indifference standard’s startling departure from section 1983 and qualified immunity’s traditional intent. The standard renders it nearly impossible for a court to find supervisory liability when a detained plaintiff accuses a corrections official of sexual assault. “When government officials abuse their offices, ‘action[s] for damages may offer the *only avenue* for vindication of constitutional guarantees.’”<sup>195</sup> Yet, the Fifth Circuit denied Ezmerelda Rivera this sole form of recourse when it held that Hale County Jail supervisors were not liable for their employee’s decision to rape her during her single night in their jail.<sup>196</sup> Even after two rapes by jail officers against detainees within six months, nothing required the Hale County Jail supervisors to change any jail policy or pay any damages.<sup>197</sup> A poster reminding employees that raping detainees constitutes a felony fulfilled their supervisory responsibilities, avoided potentially substantial damages, and closed the door on public pressure against the Jail to reform its practices.<sup>198</sup>

The current qualified immunity doctrine effectively eliminates this “only avenue” for some of the most vulnerable people in the United States to vindicate

191. *See, e.g.* *Ashcroft v. Iqbal*, 556 U.S. 662, 693 (2009) (Souter, J., dissenting) (“The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects.”).

192. Levinson, *supra* note 7, at 275 n.17.

193. *Connick v. Thompson*, 563 U.S. 51, 79-80 (2011); *see also id.* at 91 (“Over 20 years ago, we observed that a municipality’s failure to provide training may be so egregious that, even without notice of prior constitutional violations, the failure ‘could be characterized as “deliberate indifference” to constitutional rights.’” (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 n.10)).

194. *See Iqbal*, 556 U.S. at 692-93.

195. *Anderson v. Creighton*, 483 U.S. 635, 637 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)) (emphasis added).

196. *Rivera v. Bonner*, 91 F. App’x 234, 242 (5th Cir. 2017).

197. *Id.* at 236.

198. *Id.*

their rights.<sup>199</sup> As women are increasingly incarcerated, and corrections officials account for about half of their sexual assaults,<sup>200</sup> the traditional form of recourse, section 1983, has been diluted so much as to essentially leave no form of recourse at all.

A fair justice system demands that the qualified immunity doctrine hold value for all people seeking redress under section 1983. Otherwise, the courts risk invalidating the statute's underlying purpose. No legal standard should leave some of our most vulnerable populations remedy-less after suffering confessed sexual assault at the hands of corrections officials, especially when section 1983 was created to provide the very redress being denied.

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199. See, e.g. James Ridgeway & Jean Casella, *Woman Prisoner Sent to Solitary for Reporting Rape by Guard*, MOTHER JONES (May 8, 2010), <http://www.motherjones.com/crime-justice/2010/05/woman-prisoner-sent-solitary-reporting-rape-guard/> [https://perma.cc/9MMX-R3T2].

200. Fields, *supra* note 4.