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Qualified Immunity, Supervisor Liability, and Gender Violence: Barriers to Accountability

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QUALIFIED IMMUNITY, SUPERVISOR LIABILITY, AND GENDER VIOLENCE: BARRIERS TO ACCOUNTABILITY

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INTRODUCTION

The notion of accountability figures prominently in reckonings around racial and gender-based violence.[1] One thread of advocacy aims to improve accountability through civil rights litigation asserting that violence committed by state actors violates constitutional rights;[2] a piece of that advocacy has included calls to eliminate qualified immunity, a judicially created doctrine that limits the possibility of redress through civil rights litigation.[3]

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1. *See, e.g.*, Dayvon Love, *Police Accountability*, AM. BAR ASS'N: HUMAN RIGHTS (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/police-accountability/ (calling for a community-based, co-designed, and culturally informed ecosystem of institutions that are dedicated to collective healing to repair the damage from white supremacist dehumanization of Black life); Don Owens, *Police Accountability Has Not Been Addressed Federally, Civil Rights Groups Urge Action*, LAWYERS' COMM. FOR CIV. RIGHTS UNDER L. (June 17, 2021), https://www.lawyerscommittee.org/police-accountability-has-not-been-addressed-federally-civil-rights-groups-urge-congressional-action/ (calling for a range of reforms to improve accountability); *Promoting Accountability,* THE OPPORTUNITY AGENDA, TRANSFORMING THE SYSTEM, POLICING PRACTICES, https://Transformingthesystem.org/criminal-justice-policy-solutions/create-fair-and-effective-policing-practices/promoting-accountability/ (urging reforms to promote accountability); LAW ENFORCEMENT ACCOUNTABILITY PROJECT, https://www.leapaction.org/ (pursuing narrative change around police abuse).

2. This Article focuses on civil rights claims seeking redress for harms resulting from gender violence under 42 U.S.C. § 1983 (Section 1983).

3. *See, e.g.*, Owens, *supra* note 1 (calling for, *inter alia*, legislative reforms that would enhance civil penalties, including ending qualified immunity); Laura Pitter & John Raphling, *Human Rights Watch, Recommendations for the Justice in Policing Act,* HUM. RTS. WATCH (Feb. 5, 2021), https://www.hrw.org/news/2021/02/05/human-rights-watch-recommendations-justice-policing-act (calling for, *inter alia*, eliminating qualified immunity and enhancing other civil rights remedies to address police violence and its impact on Black, Latinx, and Indigenous people); *Civil Rights Leaders Call on Congress to Pass George Floyd Justice in Policing Act*, NAACP: THE CRISIS (Feb. 24, 2021), https://naacp.org/articles/civil-rights-leaders-call-congress-pass-george-floyd-justice-policing-act (calling for, *inter alia*, eliminating qualified immunity); *Promoting Accountability*, *supra* note 1 (identifying civil lawsuits as one mechanism to promote accountability). *See also* Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus (detailing how qualified immunity has made it "easier for [police] officers to kill or injure civilians with impunity").

Advocacy and scholarship supporting the elimination of qualified immunity has grown in response to highly publicized accounts of police killings, including the murders of George Floyd, Breonna Taylor, and so many others. As Andrea Ritchie, Professors Kimberlé Crenshaw and Beth Richie, and other activists and scholars have detailed, law enforcement misconduct is pervasive and ingrained in law enforcement culture.[4] It is both gendered and raced, manifest in racial and sexualized violence particularly impacting women of color, Trans, and gender non-conforming people. The question how law can and should respond to the resulting harms is complex. This is particularly the case given the extent to which state violence is deeply entrenched in our history and culture, raising the question, among others, of whether state accountability is an achievable goal.[5] Nevertheless, civil rights lawsuits seeking redress under 42 U.S.C. § 1983 for violations of constitutional rights offer one tool through which those harmed by state violence can obtain financial compensation, and a tool that can play a role in shaping policies and norms.[6]

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4. *See infra* Part I.

5. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th ed. 2020); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017) [hereinafter INVISIBLE]; JYOTI PURI, SEXUAL STATES (2016); Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, AM. BAR. ASS'N: HUM. RTS. MAG., VOL. 26, NO. 2: CIVIL RIGHTS REIMAGINING POLICING (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/; Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police; Khalil Gibran Muhammad, *The History of Lynching and the Present of Policing*, THE NATION (May 17, 2018), https://www.thenation.com/article/archive/the-history-of-lynching-and-the-present-of-policing/; Anna North, *How Racist Policing Took Over American Cities, Explained by a Historian*, VOX (June 6, 2020), https://www.vox.com/2020/6/6/21280643/police-brutality-violence-protests-racism-khalil-muhammad; Sarah Brady Siff, *Policing the Police: A Civil Rights Story*, ORIGINS (last updated Apr. 2016) https://origins.osu.edu/article/policing-police-civil-rights-story?language_content_entity=en.

6. This Article acknowledges the limitations of civil rights litigation in redressing violations of civil rights. *See, e.g.*, GERALD P. LÓPEZ, REBELLIOUS LAWYERING (1992) (critiquing traditional approaches to public interest lawyering and conceptualizing an approach to lawyering that empowers poor clients); MICHAEL MCCANN, LAW AND SOCIAL MOVEMENTS (2006) (exploring the extent to which law impacts and informs social movements). Alternative strategies to increase accountability and fund

When civil rights suits are brought against state actors, qualified immunity frequently becomes a barrier to recovery. Law enforcement officers and other state actors alleged to have committed civil rights violations often raise qualified immunity as a defense, and often do so early in the litigation, before a full hearing on the merits.[7] An officer's good faith assertion of the defense shifts the burden to the plaintiff to demonstrate that qualified immunity is not available.[8] Courts will grant officials' requests for qualified immunity unless a plaintiff can establish that they suffered a constitutional violation and that the violation was "clearly established" based on prior case law.[9] All too often, the motions are granted and the lawsuits are dismissed.[10]

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compensation should be centered in efforts to end carceral approaches, reduce police violence, and repair harm. *See, e.g.*, Paul Butler, *The Problem of State Violence*, 151 DAEDALUS 22 (2022), https://www.jstor.org/stable/48638127#metadata_info_tab_contents (exploring the role of the State in responding to state violence and offering examples of collaborations between state actors and community programs); Andrea J. Ritchie & Maurice BP-Weeks, *In Calling to Defund Police, Don't Fixate on Costs of Police Settlements*, TRUTHOUT (Sept. 12, 2020), https://truthout.org/articles/in-calling-to-defund-police-dont-fixate-on-costs-of-police-settlements/ (critiquing civil rights litigation and strategies focusing on improving settlements and calling for reparations and strategies that end police violence). *See also infra* notes 51–58 and accompanying text (detailing other limitations of civil rights litigation seeking state accountability for state violence).

7. *See, e.g.*, *Examining Civil Rights Litigation Reform, Part I: Qualified Immunity: Hearing Before the Subcomm. on the Const. and Civ. Just. of the H. Comm. on the Judiciary*, 117th Cong. (2022) (written testimony of Alexander A. Reinert, Max Freund Professor of Litigation and Advocacy, Benjamin N. Cardozo School of Law) (noting the Court has directed lower court judges to resolve qualified immunity prior to trial, if possible, and summarizing the procedural accommodations that allow defendants to delay resolution); David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives*, 98 DENV. L. REV. 629, 665–677 (2021) (illustrating how qualified immunity motions raised as interlocutory appeals frustrate the purpose of civil rights claims).

8. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).

9. *See infra* notes 59–65 and accompanying text.

10. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6–7 (2017) (recognizing widespread belief among legal scholars and other commentators that qualified immunity operates to reduce lawsuits against police and law enforcement).

This Article adds to the substantial commentary and advocacy efforts urging that the qualified immunity doctrine be abolished.[11] Specifically, it reviews cases alleging violations of constitutional rights arising from gender violence committed by state actors. Those cases reveal that, while courts may reject qualified immunity for state actors who commit rape, the doctrine often insulates state actors who commit gender violence that falls outside traditional notions of rape. The cases also illustrate how the Supreme Court's formidable standard for supervisory liability combines with qualified immunity to effectively insulate state-actor supervisors from civil liability for their failure to train, investigate, or otherwise respond to the risk of violence.[12] Moreover, courts often blur the inquiries into whether there was a constitutional violation and whether the violation was clearly established, making it difficult to disentangle the substantive standard for liability from the qualified immunity analysis.[13]

The cases underscore problematic inconsistencies in the ways gender violence cases are handled in different contexts. For cases alleging constitutional civil rights violations by supervisors, the doctrines of qualified immunity and supervisory liability combine to leave survivors of gender violence by law enforcement facing greater barriers to redress than in claims for analogous harms from sexual harassment in the workplace brought under statutory remedies such as Title VII of the 1964 Civil Rights Act.[14] In that context, for example, an employer will be vicariously liable for hostile environment sexual harassment when a supervisor takes a tangible job action against the target of the harassment.[15] By contrast, states will be liable in constitutional Section 1983 claims for circumstances that would constitute hostile environment sexual harassment only if a plaintiff can prove that a supervisor was "deliberately indifferent" to a harm recognized

11. *See infra* notes 70–73 and accompanying text.

12. *See infra* Part C.

13. *Id*.

14. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

15. At the same time, the Title VII legal framework falls short of addressing survivors' needs and is ripe for reform. *Id. See also infra* notes 156–160 and accompanying text for further discussion of the standards for holding employers accountable under Title VII.

as a "clearly established" violation of their constitutional rights in factually similar circumstance.[16]

This Article looks at the issue from the perspective of prevention. Studies analyzing effective strategies for ending sexual harassment at work emphasize supervisory accountability and leadership as key to preventing and ultimately ending gender violence.[17] International human rights law also underscores the importance of supervisory accountability in prevention strategies.[18] These sources highlight the limitations of the supervisory liability standard and should remind courts concerned with prevention of the critical role that supervisors play in setting cultural norms and reducing bias. Although eliminating qualified immunity will not directly address the unduly restrictive standard for supervisory liability, it would remove the additional barrier to recovery imposed by the "clearly established" requirement and would eliminate an affirmative defense that allows defendants to escape liability, even before a full hearing on the merits.

This Article first reviews the prevalence of gender violence committed by state actors and its disproportionate impact on people of color, LGBTQIA+ survivors and others from historically disenfranchised groups.[19] It then addresses qualified immunity. It summarizes the commentary critiquing the doctrine,[20] and analyzes caselaw in Section 1983 claims brought against both those who commit rape or other acts of gender violence,[21] and those, including supervisors, who allegedly facilitated the harm.[22] The Article then summarizes the literature detailing best practices for the analogous problem of sexual harassment at work,[23] and international human rights law's principles for prevention.[24] These sources chart a sharp contrast with the high legal threshold for accountability by state actors in the United States.

16. *See infra* notes 59–65 and accompanying text.
17. *See infra* Part III.
18. *See infra* Part IV.
19. *See infra* Part I.
20. *See infra* Part II.A.
21. *See infra* Part II.B.
22. *See infra* Part II.C.
23. *See infra* Part III.
24. *See infra* Part IV.

I. STATE COMMITTED GENDER VIOLENCE: REVIEWING THE DATA

Scholars and activists increasingly shine a light on the prevalence and persistence of gender violence committed by state actors.[25] As Andrea Ritchie has detailed, many people do not think of sexual misconduct when they think about police brutality.[26] Yet police sexual misconduct and gender violence are rampant forms of police misconduct that are underrecognized and that all too often escape accountability.[27] For example, one report found that, on average, a police officer engages in sexual abuse or misconduct every five days, though many other instances are either never caught or go unreported altogether.[28] Another report found that sexual misconduct by law enforcement was the second-most common form of misconduct reported

25. This Article addresses gender violence, which includes sexual assault and rape, other forms of sexual misconduct, and intimate partner violence. It specifically focuses on gender violence committed by state actors, which includes, but is not limited to police and law enforcement.

26. *See generally* Andrea J. Ritchie, *#SayHerName: Racial Profiling and Police Violence Against Black Women*, 41 HARBINGER 187, 189 (2016). *See also* INVISIBLE, *supra* note 5; Michelle S. Jacobs, *Sometimes They Don't Die: Can Criminal Justice Reform Measures Help Halt Police Sexual Assault on Black Women?*, 44 HARV. J. L & GENDER 251, 256 [hereinafter *Sometimes They Don't Die*] (2021) (detailing and contextualizing sexual violence against Black women and women of color by police officers).

27. For scholarship detailing the scope of the problem, see INVISIBLE, *supra* note 5; BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012). *See also* KIMBERLÉ CRENSHAW, ANDREA RITCHIE, RACHEL ANSPACH, RACHEL GILMER & LUKE HARRIS, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015); Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CAL. L. REV. 1487, 1494–1498 (2020); Jacobs, *Sometimes They Don't Die*, *supra* note 26; Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39 (2017); Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L.J. 651, 657 (2016); Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153 (2016); *see also* Anastasia Cassisi, *Sexual Misconduct by Law Enforcement: A New Meaning to Stop and Frisk?*, 33 J. CIV. RTS. & ECON. DEV. 141, 146–156 (2019).

28. Matthew Spina, *When a Protector Becomes a Predator*, THE BUFFALO NEWS (Nov. 22, 2015), https://s3.amazonaws.com/bncore/projects/abusing-the-law/index.html.

in 2010, the year studied.[29] Sexual assault rates by police are significantly higher when compared to the general population.[30] Much of the harm is inflicted on minor victims.[31] Examples of law enforcement personnel abusing their power through sexual misconduct abound.[32] The problem is not unique to the United States; global examples also illustrate the scope of the problem.[33]

Law enforcement violence disproportionately impacts Black women and other women of color.[34] Professor Kimberlé Crenshaw

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29. CATO INSTITUTE: NAT'L POLICE MISCONDUCT REPORTING PROJECT, 2010 ANNUAL REPORT 1 (2011), https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf.

30. *Id.* at 2.

31. *Id*. *See also* PHILIP MATTHEW STINSON, SR., JOHN LIEDERBACH, STEVEN P. LAB & STEVEN L. BREWER, JR., POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED (2016), https://www.ncjrs.gov/pdffiles1/nij/grants/249850.pdf (finding that almost one half of known victims of sex related police crimes were children).

32. For examples of documented law enforcement sexual misconduct, see Sam Levin, *'I Didn't Think I'd Survive': Women Tell of Hidden Sexual Abuse by Phoenix Police*, THE GUARDIAN (Aug. 10, 2020), https://www.theguardian.com/us-news/2020/aug/10/phoenix-police-officers-rape-sexual-assault; Sukey Lewis, Sandhya Dirks & Alex Emslie, *Patterns of Sexual Abuse Show Gaps in Police Disciplinary System*, NAT'L PUB. RADIO: ALL THINGS CONSIDERED (June 24, 2021), https://www.npr.org/2021/06/24/1009802477/patterns-of-sexual-abuse-show-gaps-in-police-disciplinary-system; Eliott C. McLaughlin, *Police Officers in the U.S Were Charged With More Than 400 Rapes Over a 9-year Period*, CNN (Oct. 19, 2018, 10:46 AM), https://www.cnn.com/2018/10/19/us/police-sexual-assaults-maryland-scope/index.html; Isidoro Rodriguez, *Predators Behind the Badge: Confronting Police Sexual Misconduct*, THE CRIME REPORT (Mar. 12, 2020), https://thecrimereport.org/2020/03/12/predators-behind-the-badge-confronting-hidden-police-sexual-misconduct/; Purvis & Blanco, *supra* note 27; Sedensky & Merchant, *infra* note 52; *Spina*, *supra* note 28. For additional studies detailing the prevalence and nature of law enforcement sexual violence, see Peter B. Kraska & Victor E. Kappeler, *To Serve and Pursue: Exploring Police Sexual Violence Against Women*, 12 JUST. Q. 1, 87 (1995), http://dx.doi.org/10.1080/07418829500092581, and Josephine Ross, *What the #MeToo Campaign Teaches About Stop and Frisk*, 54 IDAHO L. REV. 543, 551–554 (2018).

33. *See, e.g.*, MIA. L. HUM. RTS. CLINIC, COURAGE IN POLICING PROJECT, IMPROVING LAW ENFORCEMENT RESPONSES TO GENDER-BASED VIOLENCE: A HUMAN RIGHTS ANALYSIS 9 [hereinafter MIAMI LAW HUMAN RIGHTS CLINIC] (citing global examples of officer-perpetrated gender-based violence).

34. *See* Andrea Ritchie, *Expanding our Frame: Deepening our Demands for Safety and Healing for Black Survivors of Sexual Violence*, NAT'L BLACK WOMEN'S JUST. INST. (2019).

and Andrea Ritchie's "#SayHerName" project, which collects the names of Black women and girls killed by police, brings the issue into sharp relief.[35] All too often, police violence takes the form of sexual misconduct.[36] Throughout the United States' history, Black women, Trans, and gender-nonconforming people have been systemically subjected to sexual violence, but it remains largely invisible.[37] The case of former Oklahoma City Police Officer Daniel Holtzclaw, who targeted women who had prior arrests or warrants, and who was eventually convicted for sexually assaulting thirteen African-American women, is a stark example.[38] Trans and gender non-conforming people are also disproportionately subjected to sexual assault by law enforcement and other state actors.[39] Eighty-six percent of survey respondents identifying as Trans who either interacted with police while doing sex work, or who were mistakenly believed to be doing sex work, reported being attacked, harassed, sexually assaulted, or mistreated by police.[40] Despite

35. Kimberlé Crenshaw & Andrea J. Ritchie, *Say Her Name: Black Women are Killed by Police Too*, THE AFR. AM. POL'Y F. (last visited Dec. 13, 2022), https://www.aapf.org/sayhername.

36. Law enforcement officers also commit intimate partner violence at high rates. *See, e.g.*, Leigh S. Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183 (2015); Sandra N. Heib, *Police Officers as Perpetrators of Crimes Against Women and Children* 2, 8 (2013) http://justicewomen.com/wjc-project-final.pdf.

37. Ritchie, *supra* note 34, at 3.

38. Susan Welsh, Joseph Diaz, Andrew Paparella, Eric M. Strauss & Alexa Valiente, *How the Daniel Holtzclaw Jury Decided to Send the Ex-Oklahoma City Police Officer to Prison for 263 Years*, ABC NEWS (May 20, 2016), https://abcnews.go.com/US/daniel-holtzclaw-jury-decided-send-oklahoma-city-police/story?id=38549442.

39. *See, e.g.*, Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Motet & Ma'Ayan Anafi, *2015 U.S Transgender Survey: Executive Summary*, NAT'L CTR. FOR TRANSGENDER EQUAL. 12 (2016), https://Transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf [hereinafter *Executive Summary*] (finding more than half of the survey respondents who interacted with police or law enforcement officers who thought or knew the respondents were transgender experienced mistreatment, including physical or sexual assault along with being forced by officers to engage in sexual activity to avoid arrest).

40. *Id.*

the years of research on police sexual misconduct, efforts to address it have not achieved any measurable success.[41]

For incarcerated people, the risk of being subjected to sexual violence by guards or other officers is even higher.[42] For example, the Prison Rape Elimination Act of 2003 (PREA) requires the Bureau of Justice Statistics (BJS) to carry out a comprehensive statistical review and analysis of the incidence and effects of prison rape for each calendar year.[43] A 2021 BJS report of sexual victimization reported by adult correctional authorities found a fourteen percent increase in allegations of sexual victimization in 2018 as compared with 2015.[44] Prison administrators reported 2.5 times as many allegations of sexual victimization in 2018 as in 2012, and jail administrators reported 3.5 times as many alleged sexual victimizations in 2018 as in 2012.[45] One article concluded that women are thirty times more likely to experience sexual assault *in* prison than outside.[46] State juvenile systems report similar trends: from 2013 to 2016, state juvenile systems

41. Jacobs, *supra* note 26, at 256. *See also, e.g.*, Jonathan Ostrowsky, *#MeToo's Unseen Frontier: Law Enforcement Sexual Misconduct and the Fourth Amendment Response*, 67 UCLA L. REV. 258, 270–71 nn. 68–73 (2020) (citing studies).

42. For discussions of sexual assault in prison, see, for example, Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons,* 42 HARV. C.R.-C.L. L. REV. 45 (2007); Elana M. Stern, *Comment: Accessing Accountability: Exploring Criminal Prosecution of Male Guards for Sexually Assaulting Female Inmates in U.S. Prisons*, 167 U. PENN. L. REV. 733 (2019). *See also* Sage Martin, *Comment: The Prison Rape Elimination Act: Sword of Shield*, 56 TULSA L. REV. 283 (2021) (discussing PREA standards and analyzing the laws limitations).

43. Prison Rape Elimination Act (PREA) of 2003, 34 U.S.C. §§ 30301–09.

44. *See* Amy D. Lauger & Laura M. Maruschak, *PREA Data Collection Activities, 2021*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 3 (2021), https://bjs.ojp.gov/library/publications/prea-data-collection-activities-2021. *See, e.g.*, D Dangaran, *Note: Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 HARV. J. L. & GENDER 161, 189–91 (2021) (collecting studies on prison violence towards Transgender people).

45. Laura M. Maruschak & Emily D. Buehler, *Survey of Sexual Victimization in Adult Correctional Facilities*, *2012-2018 Statistical Tables*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 1 (2021), https://bjs.ojp.gov/library/publications/survey-sexual-victimization-adult-correctional-facilities-2012-2018.

46. Elizabeth Stoker Breunig, *Why Americans Don't Care About Prison Rape*, THE NATION (Mar. 2, 2015), https://www.thenation.com/article/archive/why-americans-dont-care-about-prison-rape/.

and local and private facilities saw their rates of allegations of sexual victimization more than double.[47]

As with state-committed sexual violence outside of prison, the harms of state-perpetrated gender-based violence inside prisons fall disproportionately on Black people, other people of color, and Trans people. For example, the National Transgender Discrimination Survey found that Black Trans women were sexually assaulted three times as often as white Trans women in jail.[48] Other surveys similarly found that incarcerated Trans people are subjected to higher rates of sexual violence than other incarcerated people.[49]

II. QUALIFIED IMMUNITY AND GENDER VIOLENCE

The following section examines how courts analyze qualified immunity when it is raised in civil rights cases stemming from gender violence. It first summarizes the doctrine of qualified immunity. It then analyzes cases in which the person alleged to have committed gender violence claims qualified immunity. It then turns to cases in which supervisors and others whose actions are alleged to have played

47. Lauger & Maruschak, *supra* note 44, at 3. *But see, e.g.*, Erica L. Smith & Jessica Stroop, *Sexual Victimization Reported by Youth in Juvenile Facilities, 2018*, U.S. DEP'T OF JUST., OFF. JUST. PROGRAMS 1 (2019), https://bjs.ojp.gov/library/publications/sexual-victimization-reported-youth-juvenile-facilities-2018 (finding that the overall rate of sexual victimization reported by youth declined between 2012 and 2018).

48. Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY AND LESBIAN TASK FORCE 168 (2011), https://www.Transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [https://perma.cc/YJ66-S4TJ].

49. Allen J. Beck, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates* 2 (2014) (in 2011 to 2012, transgender incarcerated people were sexually victimized at over eight times the rate of the general prison population). *See also* Sandy E. James, C. Brown & I. Wilson, *2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents*, NAT'L CTR. FOR TRANSGENDER EQUAL. 17 (2017), https://ncvc.dspacedirect.org/handle/20.500.11990/1300?show=full (Black survey respondents were sexually assaulted by jail and prison facility staff at rates nearly twice as high as the general trans population and ten times higher than in the overall incarcerated U.S. population); *Executive Summary*, *supra* note 39, at 13 (finding that trans survey respondents who were held in jail, prison, or juvenile detention in the previous year were over five times more likely to be sexually assaulted by facility staff than the U.S. Population in similar facilities).

a role in facilitating the violence seek qualified immunity. The analysis shows how qualified immunity poses a formidable obstacle to recovery in many gender violence cases, and especially in claims against those such as supervisors whose actions may have played a part in authorizing or facilitating it.[50]

A. Qualified Immunity and Barriers to Accountability

Despite the magnitude of violence they commit, officers often escape accountability due to a combination of factors, including the culture of immunity surrounding police misconduct, limited data, advocacy by police unions, and laws and practices immunizing officers from liability.[51] Although the Associated Press found that approximately 1,000 officers lost their badges in a six-year period for committing rape, sodomy, or other sexual assaults, that number is unquestionably an undercount.[52] Laws allowing officers to argue that sexual

50. *See, e.g.*, Melissa Stein, *Rape, Resign, Repeat: How the Deliberate Indifference Standard Denies Redress to Detainees Raped by Corrections Officials*, 34 WIS. J.L. GENDER & SOC'Y 83 (2019) (arguing that qualified immunity shields supervisors from liability for a subordinate's allegedly unconstitutional conduct and arguing for the elimination of the deliberate indifference standard).

51. *See, e.g.*, Jacobs, *supra* note 26, at 281–287 (discussing the "Blue Wall of Silence," issues with police training, and a lack of transparency and accountability); Purvis & Blanco, *supra* note 27 (detailing the prevalence of the problem, the failure of law enforcement policies, and the role of law enforcement culture); Cara E. Rabe-Hemp, Jeremy Braithwaite, *An Exploration of Recidivism and the Officer Shuffle in Police Sexual Violence*, 16 POLICE Q. 127 (2013) (reviewing reports of police sexual violence and concluding that more than 41% of police sexual violence cases are committed by recidivist officers); McLaughlin, *supra* note 32 (recounting case of police officer charged with raping a woman during a traffic stop who pleaded not guilty and discussing the lack of accountability); Fabiola Cineas, *The Sexual Assault Allegations Against an Officer Involved in Breonna Taylor's Killing Say a Lot About Police Abuse of Power*, Vox (Jun. 12, 2020, 10:10 AM), https://www.vox.com/2020/6/12/21288932/police-officers-sexual-violence-abuse-breonna-taylor (discussing sexual assault allegations against one of the officers involved in the murder of Breonna Taylor). *See also infra* Part II.

52. Matt Sedensky & Nomaan Merchant, *Hundreds of Officers Lost Licenses Over Sex Misconduct*, ASSOCIATED PRESS (Nov. 1, 2015), https://apnews.com/article/oklahoma-police-archive-oklahoma-city-fd1d4d05e561462a85abe50e7eaed4ec; McLaughlin, *supra* note 32 (referencing experts who observe that "[d]ata on sexual assaults by police are almost nonexistent).

acts are consensual contribute to the problem.[53] Limitations of federal criminal civil rights laws operate to preclude prosecution.[54] In civil rights suits, arguments that the officer was not acting "under color of law" have insulated them from liability.[55] Incarcerated people face additional barriers to civil rights redress due to laws, such as the Prison Litigation Reform Act of 1995, and conditions of confinement that operate to preclude claims.[56] Even when officials are found liable, they are often indemnified by the state for any damages owed.[57] Be-

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53. *See* Purvis & Blanco, *supra* note 27, at 1492, 1499–1507; *see also* Albert Samaha, *An 18-year Old Said She Was Raped While in Police Custody. The Officers Say She Consented*, BUZZFEED NEWS (Feb. 7, 2018), https://www.buzzfeednews.com/article/albertsamaha/this-teenager-accused-two-on-duty-cops-of-rape-she-had-no (discussing laws allowing officers to claim detainees consented to sexual contact); Allison Danish, *Closing the loophole on police sexual violence*, 1 PUB. HEALTH REV. 1 (2018) (discussing laws allowing police to argue that those arrested, detained, or in custody consented to sexual contact). As one example of a case illustrating the issue, see, for example, Doe v. Chee, 514 F. Supp.3d 1330, 1341 (D. N.M. 2021) (holding: (1) sexual abuse of an incarcerated person by a guard violates the Eighth Amendment; and (2) the guard could not argue that the incarcerated person consented to sexual contact).

54. *See* Taryn A. Merkl & Eric H. Holder Jr., *Protecting Against Police Brutality and Official Misconduct*, BRENNAN CTR. FOR JUST. (Apr. 29, 2021), https://www.brennancenter.org/our-work/research-reports/protecting-against-police-brutality-and-official-misconduct.

55. *See, e.g.*, Roe v. Humke, 128 F.3d 1213, 1216 (8th Cir. 1997) (concluding the off-duty officer was not acting under color of law when he allegedly hugged, kissed, and fondled a minor female he knew through security programming at her school); Leeper v. City of Tacoma, No. C20-5467 BHS-DWC, 2021 WL 4452845, at *1, *4 (W.D. Wash. Sept. 28, 2021) (concluding the off-duty officer who was wearing his full uniform and carrying his service pistol and handcuffs was not acting under color of law when he assaulted plaintiff at the store where she worked); Chavez v. Guerrero, 465 F. Supp. 2d 864, 871 (N.D. Ill. 2006) (concluding the officer was not acting under color of law when he obtained plaintiff's phone number from a police report and persistently called and harassed her).

56. *See, e.g.*, Kim Shayo Buchannan, *Impunity: Sexual Abuse In Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 69–70 (2007) (detailing the bases for impunity for sexual abuse in prison).

57. *See, e.g.*, Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1804–06 (2018) (detailing how a combination of law, policy, and litigation dynamics lead to officers virtually never being required to pay for settlements or judgments against them); Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (finding that police officers are almost always indemnified for settlements and judgments in civil rights damages actions); Richard

yond these challenges, qualified immunity imposes a doctrinal barrier to civil rights claims seeking redress.[58]

Qualified immunity is a judge-made doctrine that shields governmental officials from personal liability for constitutional violations unless they violated a federal statutory or constitutional right, and unless the unlawfulness of their conduct was "clearly established" at the time.[59] The Supreme Court has determined that, for the unlawfulness of a challenged action to be "clearly established" it must be "sufficiently clear" that "every 'reasonable official would understand that what he [sic] is doing is unlawful.'"[60] The Court has strictly interpreted this standard; as it has stated, "existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'"[61] Accordingly, the doctrine protects "all but the plainly incompetent or those who knowingly violate the law."[62] By contrast, to avoid immunity, the legal principle must clearly prohibit the officer's conduct in the particular circumstances facing them.[63] Courts must evaluate the facts of all claims of qualified immunity with a high "degree of specificity."[64] In recent decisions, the Court has determined that lower courts may exercise their discretion with respect to the order in which they analyze the two prongs of the qualified immunity analysis; whether the facts allege a constitutional violation, and whether the right at issue was clearly established.[65]

Emery & Ilann M. Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587 (2000) (arguing that indemnifying police officers who are found liable in civil suits does not deter officers from engaging in future misconduct and assessing victim compensation).

58. Lawsuits against police departments face additional barriers. *See, e.g.*, Brett Raffish, *Municipal Liability in Police Misconduct Lawsuits*, LAWFARE (Oct. 19, 2020), https://www.lawfareblog.com/municipal-liability-police-misconduct-lawsuits.

59. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 46 (2018). *See also* D.C. v. Wesby, 138 S. Ct. 577, 589 (2018).

60. D.C. v. Wesby, 138 S. Ct. at 589 (citing Ashcroft v. al-Kidd, 563 U.S. at 741).

61. *Id.* (citing Ashcroft v. al-Kidd, 563 U.S. at 735).

62. *Id.* (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)).

63. *Id.* at 590 (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)).

64. *Id.* (citing Mullenix v. Luna, 577 U.S. 7, 13 (2015)).

65. *See* Pearson v. Callahan, 555 U.S. 223, 236–37 (2009).

The doctrine originally developed to shield police officers who acted in good faith from damages liability.[66] It purportedly would balance "the need to hold government officials accountable when they exercise power irresponsibly, with the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[67] The Court has articulated its justifications in terms of facilitating the defeat of "insubstantial claims,"[68] and of shielding officials from the costs of trial and the burdens of discovery, while also recognizing the public interest in deterrence of unlawful conduct.[69]

Yet, the doctrine and its interpretation increasingly has been subject to critique. Many argue that the doctrine does not achieve its intended policy goals of protecting public servants who act in good faith.[70] Others challenge the legal premises on which the immunity was based.[71] Experts maintain that the increasingly stringent requirements imposed by the Supreme Court are out of step with how the doctrine is applied in practice.[72] Perhaps most important for the pur-

66. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

67. Pearson v. Callahan*,* 555 U.S. at 231 (2009); *see* Anderson v. Creighton, 483 U.S. 635, 638 (1987).

68. Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982).

69. *Id.* at 817–19.

70. *See, e.g.*, Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018) (critiquing qualified immunity and concluding that the doctrine is beyond repair); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (arguing that qualified immunity has no basis in common law, does not achieve its intended policy goals, and renders the constitution hollow).

71. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful*?, 106 CALIF. L. REV. 45 (2018) (critiquing the legal bases of qualified immunity); Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999 (2018) (arguing the Court, not Congress, is best positioned to address critiques of qualified immunity); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. (forthcoming Jan. 2023) (arguing the doctrine is premised on a flawed application of a canon of statutory construction and that modern interpretations ignore the originally-enacted version of Section 1983). *See also* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (reviewing state-officer immunity under nineteenth-century common law).

72. *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (critiquing qualified immunity's requirement that officers may only be liable for violating "clearly established law" based on a study revealing that officers are not trained on the facts of analogous cases); Joanna C. Schwartz,

pose of this paper, many object to the way the doctrine thwarts civil rights accountability claims.[73] Increasingly, many are calling for qualified immunity to be abolished.[74] Proposals have been introduced in Congress, though to date none have gained traction.[75] Qualified

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How Qualified Immunity Fails, 127 YALE L.J. 2 (2017) (analyzing cases asserting Section 1983 claims in five federal court districts over a two year period and concluding that qualified immunity rarely shielded defendants from discovery and trial).

73. *See, e.g.*, Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065 (2018) (reporting on empirical analysis evaluating the impact of qualified immunity at trial and finding that juries are rarely asked to answer questions pertaining to qualified immunity even though qualified immunity can be a powerful barrier to plaintiffs' success); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U.L. REV. 1101 (2020) (concluding that qualified immunity increases the cost, risk, and complexity of constitutional litigation but also finding that the doctrine does not appear to screen "insubstantial" cases). *See also* Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, THE APPEAL (June 19, 2019), https://theappeal.org/the-lab/explainers/qualified-immunity-explained/ (arguing qualified immunity hinders protection of civil rights by reducing officer accountability, reducing claims that will reach trial and effectively freezing constitutional law by requiring a clearly established case on point in order to establish a claim); CONST. ACCOUNTABILITY CTR., *Qualified Immunity: Beyond Policing*, https://www.theusconstitution.org/think_tank/qualified-immunity-beyond-policing/ (summarizing cases in which qualified immunity was granted in egregious circumstances not involving law enforcement); *Examining Civil Rights Litigation Reform, Part One: Qualified Immunity: Hearing Before the Subcomm. on the Const. and Civ. Just. of the H. Comm. on the Judiciary,* 117th Cong. (2022) (statement of Arthur Ago, Director, Criminal Justice Project, Lawyers' Committee for Civil Rights Under Law) (explaining how qualified immunity prevents victims of police misconduct from obtaining justice).

74. *See* ACLU, *We Must Abolish Qualified Immunity to Prevent Further Police Harm – Especially for People in Mental Health Crises* (Mar. 19, 2021), https://www.aclu.org/news/criminal-law-reform/we-must-abolish-qualified-immunity-to-prevent-further-police-harm-especially-for-people-in-mental-health-crises; QUALIFIED IMMUNITY PROJECT, https://www.publicjustice.net/what-we-do/access-to-justice/qualified-immunity-project/ (last visited Dec. 13, 2022); James Craven, Jay Schweikert, & Clark Neily, *End Qualified Immunity,* CATO INSTITUTE, https://www.cato.org/qualified-immunity; INNOCENCE PROJECT, *Tell Congress to Eliminate Qualified Immunity*, https://innocenceproject.org/petitions/tell-congress-to-eliminate-federal-qualified-immunity/ (last visited Dec. 13, 2022).

75. *See, e.g.*, Ending Qualified Immunity Act, S. 492, 117th Cong. (2021) (as introduced to Comm. on the Judiciary, Mar. 1, 2021) (eliminates the qualified immunity defense in Section 1983 actions); Ending Qualified Immunity Act, H.R. Res. 1470, 117th Cong. § 2 (2021) (as referred to the Subcomm. on the Const. and Civ. Just. Of the H. Comm. on the Judiciary, Apr. 28, 2021) (same) *See also* George

immunity has been recognized as one of the factors that limits law enforcement accountability for gender violence.[76] The following analysis examines those cases in detail.

B. Qualified Immunity for Those Who Commit Gender Violence

As the following discussion shows, when defendants seek qualified immunity in civil rights cases seeking redress for gender violence, the outcome may depend on whether the offense alleged resembled traditional notions of rape, or whether the person seeking immunity was in a supervisory or administrative position. Courts have denied qualified immunity in cases involving rape or sexual assault.[77] For example, in *Miller v. Shaker Heights*, a woman alleged constitutional violations by a police officer and the city of Shaker Heights after a police officer who had issued her a ticket earlier that day contacted her, asked to sleep with her, offered to "make her ticket go away" if she would meet with him, and eventually raped her.[78] He was wearing his uniform and carried handcuffs and his duty weapon during the encounter.[79] The court denied the officer's claim seeking qualified immunity, reasoning:

> There can be no question that a [constitutional] right to body integrity is well established, and this right means that citizens have the right to be free from sexual abuse . . . Further, a reasonable officer would understand that coercing sexual relations through an implicit threat of force, retaliation, or abuse of official power, would violate that right of body integrity . . . More specifically, . . . a reasonable officer should understand that taking personal contact information gathered during a traffic stop, using that information to contact the subject of the traffic stop, and then propositioning [the subject of

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Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (as passed by H. Rep., Mar. 3, 2021) (limits qualified immunity as a defense).

76. *See* Jacobs, *supra* note 26, at 290 (detailing qualified immunity and the role of police unions and law enforcement culture as obstacles to accountability).

77. Defeating a motion for qualified immunity of course does not mean that the plaintiff has prevailed on the merits of her claim.

78. Miller v. Shaker Heights, 438 F. Supp.3d 829, 833–34 (N.D. Ohio 2020).

79. *Id.* at 834.

> the traffic stop] for sex in exchange for fixing or getting rid of the ticket that resulted from that stop would be illegal behavior.[80]

Similarly, in *Tyson v. County of Babine*, the Fifth Circuit Court of Appeals denied qualified immunity to an officer, concluding that his use of coercion to compel a woman he visited to conduct a welfare check, to engage in sex acts against her will, violated her right to bodily integrity.[81] There, the officer pressured her to strip naked and then manually manipulated her private parts while he masturbated.[82] The district court had disagreed with the plaintiff that her rights had been violated and had dismissed the plaintiff's constitutional claims against the officer.[83] The Fifth Circuit Court of Appeals reversed in part after it concluded that those acts constituted an "outrageous abuse of power that shock[ed] the conscience and violated [the survivor's] right to bodily integrity.[84] The court further concluded that the constitutional violation was "obvious" because the sexual abuse alleged was particularly egregious and extreme."[85]

Employing similar reasoning, the court in *Ward v. Petow* denied an officer's request for qualified immunity at the summary judgment stage, after recognizing that "an unreasonable grabbing of a female's breast by an officer during a detention or arrest was 'clearly established' as unlawful."[86] It further concluded that "it is hard to believe that an officer in [the defendant's] position would not have known that grabbing a female defendant's breast would violate the rule of law."[87]

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80. *Id.* at 841, 838. At the same time, the court granted summary judgment to the City. *Id.* at 838.

81. Tyson v. Cnty. of Babine, 42 F.4th 508, 508, 512 (5th Cir. 2022); *see also* Bernie Pazanowski, *Officer Who Made Woman Strip During Welfare Check Must Face Suit*, BLOMBERG LAW (July 28, 2022), https://news.bloomberglaw.com/us-law-week/officer-who-made-woman-strip-during-welfare-check-must-face-suit.

82. Tyson, 42 F.4th at 512.

83. *Id.* at 514.

84. *Id.* at 518.

85. *Id.* at 520.

86. Ward v. Petow, No. 18-496-JJM-PAS, 2020 WL 1929125, at *4–5 (D.R.I. 2020). Notably, the court reached this conclusion even though the plaintiff had not identified a case involving "materially similar conduct"; instead, the court relied on several cases in which courts of appeal from different circuits recognized that sexual assault violates a person's substantive due process right to bodily integrity. *Id.*

87. *Id.* at *5.

The Second Circuit Court of Appeals in *Raspardo v. Carlone* similarly denied qualified immunity for an officer who allegedly engaged in unwanted physical contact and comments of a sexual nature with other officers who they supervised.[88] The court concluded that those acts constituted an "outrageous abuse of power that shocks the conscience and violated the plaintiff's right to bodily integrity.[89] The court further concluded that the constitutional violation was "obvious."[90]

Courts have similarly denied qualified immunity in cases in which an officer or agent violated privacy rights in connection with sexual violence. For example, in *Kane v. Barger,* a court denied an officer's request for qualified immunity in a claim brought by a woman who had gone to the hospital for a rape kit after she had been sexually assaulted.[91] She alleged that the officer who came to the hospital to collect the kit used his personal cell phone to photograph and touch her "intimate areas, including her breasts and buttocks."[92] The court concluded that the officer's behavior "underscores a conscience-shocking disregard for [the woman's] right to bodily integrity."[93] It reasoned that the law gave the officer "fair warning" that his conduct violated her privacy rights against being sexually fondled and illicitly photographed by a state actor in the course of official business.[94] Likewise, in *Ione v. Hodges,* the court denied an IRS agent's request for qualified immunity where the agent, in the course of a property search of a woman's home, made her pull up her dress while she used the restroom.[95] Similar to the rape-kit case, the court recognized that it was

88. *See* Raspardo v. Carlone, 770 F.3d 97, 117–29 (2d Cir. 2014) (denying qualified immunity to supervising officer who engaged in unwanted physical contact and commented on the plaintiff's body over ten times throughout a one-year period; but granting qualified immunity to other defendants whose individual actions failed to rise to a constitutional violation). *See also* Poehl v. Randolph, No. 4:05CV00400 ERW, 2006 WL 1236838, at *6 (E.D. Mo. May 3, 2006) (denying qualified immunity to police officer alleged to have raped a woman who had reported having trouble with the police and previous incidents of domestic violence with her boyfriend).

89. *Id.* at 13.

90. *Id.* at 15.

91. Kane v. Barger, 902 F.3d 185, 189 (3d Cir. 2018).

92. *Id.* at 189.

93. *Id.* at 194.

94. *Id.* at 195.

95. Ioane v. Hodges, 939 F.3d 945, 950 (9th Cir. 2018).

"clearly established" that an individual's naked body is the "most basic subject of privacy."[96]

Courts have employed similar reasoning in cases involving sexual assault by prison officials accused of rape and/or other sexual assault. For example, in *Brown v. Flowers*, the Tenth Circuit Court of Appeals held that the jailer at a county justice center who twice raped a pretrial detainee was not entitled to qualified immunity.[97] The court concluded that the circumstances in which the jailer's use of force was "in no way related to his duties as a jailer," placed the unconstitutionality of his conduct "beyond debate."[98] The Tenth Circuit reached the same conclusion in *Ullery v. Bradley,* where it denied qualified immunity to a prison guard who physically and sexually assaulted an incarcerated person.[99] Despite the absence of binding precedent specifically adjudicating the precise facts at issue, the court concluded that the "consensus of persuasive authority from [other circuit courts] . . . places the constitutional question in this case 'beyond debate.'"[100] Other circuit court of appeals have reached the same conclusion.[101]

However, not all cases reach this result. For example, the Supreme Court granted qualified immunity to a school principal, administrative assistant, and school nurse who subjected a student to a strip search when they suspected that she possessed non-authorized medications, ruling that the constitution prohibited strip searches in these circumstances was not "clearly established."[102] Similarly, the Seventh Circuit Court of Appeals affirmed the lower court's grant of qualified immunity in an admittedly "limit[ed]" case in which an officer in-

96. *Id.* at 956–57.

97. Brown v. Flowers, 974 F.3d 1178, 1180 (10th Cir. 2020).

98. *Id.* at 1187 (noting the jailer's use of coercion and the utter absence of any indication of consent).

99. Ullery v. Bradley, 949 F.3d 1282, 1297–98, 1301 (10th Cir. 2020).

100. *Id.* at 1294 (analyzing the plaintiff's Eighth Amendment claim).

101. *See, e.g.*, E.D. v. Sharkey, 928 F.3d 299, 307 (3d Cir. 2019) (finding allegations of sexual assault by immigration family center employee plausibly established a constitutional violation); Rafferty v. Trumbull County, 915 F.3d 1087, 1095, 1097 (6th Cir. 2019) (finding allegations that corrections officer demanded that prisoner expose her breasts and masturbate are "sufficiently serious" to establish a constitutional violation under well-established precedent).

102. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368–69, 378–79 (2009).

duced a confidential informant to engage in sex as part of a sting operation.[103] Seemingly referencing traditional definitions, the court concluded that "the police did not rape [the informant] in the ordinary sense."[104] Therefore, the court could not conclude "that it would have been obvious to the average officer that the deceit employed in this case rose to the level of a constitutional violation."[105]

Other courts similarly have granted immunity when allegations fall short of traditional notions of rape or sexual assault. For example, in *Copeland v. Nunan*, the Fifth Circuit Court of Appeals granted qualified immunity to a pharmacist who fondled an incarcerated person's penis and anus through the food slot of his cell.[106] The court concluded that there was no Eighth Amendment violation because the allegations amounted to no more than "*de minimis* physical or psychological injuries," and therefore did not rise to a constitutional violation that would preclude immunity.[107]

C. Qualified Immunity and Supervisory Accountability

Claims against individuals in supervisory roles who may have facilitated the violent act through failure to supervise, train or intervene, face even greater challenges.[108] Since defendants will be granted qualified immunity if the plaintiff has not alleged a clearly established constitutional violation, the substantive law governing when a supervisor's actions rise to the level of a constitutional violation serves as a threshold. Consequently, the law governing supervisory liability fur-

103. Alexander v. DeAngelo, 329 F.3d 912, 918 (7th Cir. 2003).

104. *Id.* at 919.

105. *Id.*

106. Copeland v. Nunan, No. 00-20063, 2001 WL 274738, at *1–4 (5th Cir. 2001).

107. *Id.* at *2.

108. A comprehensive discussion of the scope of supervisory liability for gender violence or other civil and human rights violations is beyond the scope of this paper. Nevertheless, these cases illustrate one additional way qualified immunity disserves accepted notions of accountability —by incorporating the cramped doctrine governing supervisory liability and adding the requirement that the violation must be "clearly established".

ther defines the applicability of qualified immunity at the outset of litigation.[109]

Generally, in order for supervisors to be held liable for their role in law enforcement misconduct by a subordinate, the plaintiff must prove that the supervisor's actions caused the constitutional violation; this has been interpreted to mean that the supervisor must have acted with "deliberate indifference" to the accused employee's allegedly unconstitutional conduct.[110] In order to defeat a motion seeking qualified immunity, a plaintiff seeking to hold a supervisor liable, for example, for failing to train or failing to supervise, would have to establish that the law establishing supervisory liability under the facts of her particular case, was "clearly established."

1. Shielding Supervisors

The "deliberate indifference" standard and the "clearly established" requirement for overcoming qualified immunity operate together to insulate supervisors from accountability for their employees' acts of gender violence. For example, in *Whitley v. Hanna*, the court affirmed the district court's decision granting qualified immunity to supervisory officers.[111] *Whitley* involved a young woman who had been sexually assaulted by a police sergeant who ran a school and work-based program that introduced young people to law enforcement

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109. The standard for supervisor liability, particularly following the Supreme Court decision in Ashcroft v. Iqbal, 556 U.S. 662 (2009), has provoked commentary and critique. *See, e.g.*, Alexander A. Reinert, *Supervisory Liability and Ashcroft v. Iqbal*, 41 CARDOZO L. REV. 945 (2020) (discussing critique of the *Iqbal* decision's impact on supervisory liability and reviewing post-*Iqbal* supervisory liability caselaw). For a discussion of some of the challenges in establishing supervisory liability for constitutional violations in prison, see Ryan E. Johnson, *Supervisors without Supervision: Colon, McKenna, and the Confusing State of Supervisory Liability in the Second Circuit*, 77 WASH. & LEE L. REV. 457 (2019).

110. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009); City of Canton v. Harris, 489 U.S. 378, 388 (1989). *See also* Reinert, *supra* note 109; Karen M. Blum, *Supervisory Liability After Iqbal: Misunderstood but Not Misnamed,* 54 URB. LAW. 541 (2011); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279 (2010). For further discussion of the "deliberate indifference" standard in the context of prison rape cases, see, for example, Stein, *supra* note 50.

111. Whitley v. Hanna, 726 F.3d 631, 635 (5th Cir. 2013).

as a vocation.[112] The sergeant allegedly engaged in unwanted sexual advances, sent sexually suggestive texts, and gave gifts to young women who were participants in the program.[113] The court rejected claims against the sergeant's supervisors; even though it found that they had conducted a faulty investigation and had failed to stop the sergeant from violating the plaintiff's bodily integrity, it concluded but that they were not "deliberately indifferent."[114] It reached this conclusion even though the supervisors were aware of a pattern of wrongful conduct by the sergeant, and knew he had made ongoing sexual advances even after the supervisors were made aware of the misconduct.[115] The result here is all the more egregious because the young people were assaulted while participating in a program designed to introduce them to careers in law enforcement.

In another similar case, a sheriff and an independent contractor who administered a post-plea drug treatment program were granted qualified immunity after five female program participants alleged that a lieutenant who had acted as a "tracker" for the drug court sexually abused them. [116] The court rejected arguments that the sheriff had acted with deliberate indifference to the program participants' rights, noting that negligence could not be the basis for the claim; instead, the court required that the officials must have had actual notice of a pattern of unconstitutional conduct.[117]

Cases involving sexual assault in prison further illustrate the harsh operation of the "clearly established" requirement within the context of supervisory liability. For example, in *Perry v. Durborow,* the Tenth Circuit Court of Appeals reversed a lower court's denial of qualified immunity for a county sheriff who supervised a detention of-

112. *Id.* at 635.

113. *Id.*

114. The officials apparently determined to "catch" the offending officer in the act of abusing the young woman rather than take other action to prevent him from committing additional harm. *Id.* at 636.

115. *Id.* at 641–48.

116. *See* S.M. v. Krigbaum, 808 F.3d 335, 337–38 (8th Cir. 2015).

117. *Id.* at 340–42. The court also rejected the plaintiffs' argument that the sheriff had failed to enforce a policy requiring deputies to call in mileage when transporting persons of the opposite sex because that policy "was designed to protect persons; therefore, it did not 'give rise to unconstitutional conditions.'" *Id.* at 342.

ficer who had raped an incarcerated person.[118] The court recognized that the sheriff had violated the person's constitutional rights, but nevertheless concluded that the right was not clearly established because it did not find a case that would put the constitutional question "beyond debate".[119]

Other cases involving sexual assault in prison reflect how courts conflate the deliberate indifference and clearly established inquiries to shield officials from liability. For example, in *Rivera v. Bonner,* the Fifth Circuit Court of Appeals affirmed the grant of qualified immunity to prison supervisors of a jail officer who had raped a detainee while she was in their custody.[120] The court opined that the plaintiff failed to establish deliberate indifference in hiring because a reasonable supervisor would not have concluded that her rape was a "plainly obvious consequence" of the supervising officials' actions in hiring the officer who raped her, despite the fact that the officer had prior arrests for sexual contact with a child.[121] The court additionally concluded that the supervisors were not deliberately indifferent in their training and supervision, even though a prior incident of sexual abuse had occurred a month earlier and even though they had taken little action to train and educate jailers regarding sexual misconduct.[122] The court concluded that there was not a consensus of persuasive authority at the time such that reasonable supervisors would have known their actions were illegal.[123]

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118. Perry v. Durborow, 892 F.3d 1116, 1127 (10th Cir. 2018).

119. *Id.* at 1122, 1127.

120. *See, e.g.*, Rivera v. Bonner, 952 F.3d 560, 566–70 (5th Cir. 2017). For further discussion of this case, see Stein, *supra* note 50.

121. *Id.* at 566–67.

122. *Id.* at 567.

123. *Id.* at 567–570. This decision builds on others similarly conflating the "deliberate indifference" and "clearly established" requirements in the context of granting officers qualified immunity. *See also* Doe v. Robertson, 751 F.3d 383, 388, 391–92 (5th Cir. 2014) (granting qualified immunity to federal officials who failed to prevent a subcontractor's employee from sexually assaulting detainees, notwithstanding a previously recorded sexual assault of a detainee in her cell by the same subcontractor). This decision also illustrates how cases awarding qualified immunity build on one another to create a jurisprudence holding that alleged abuse does not violate clearly established law. *See* Rivera v. Bonner, 952 F.3d at 569 (citing *Robertson* in holding that the supervisors in *Bonner* could reasonably have concluded that their limited response to the prior sexual abuse did not violate the constitution).

The Second Circuit Court of Appeals in *Tangreti v. Bachmann* similarly reversed a lower court's denial of qualified immunity to a prison official despite allegations that an incarcerated woman was being sexually assaulted by several guards under the official's supervision, ruling that the record did not establish that the supervisory official acted with deliberate indifference.[124] It was not enough to show that the official was negligent, or even grossly negligent; instead, the record must establish that the official was "subjectively aware of the risk."[125] The court concluded that the supervisor's observations of inappropriate conduct, the complaints she had received about the inappropriate conduct and the fact that she noticed Tangreti's changed physical appearance and emotional behavior were not enough to rise to the level of deliberate indifference, and awarded immunity.[126]

2. Limiting Qualified Immunity for Supervisors

Nevertheless, in cases involving facially egregious violations, some courts have denied qualified immunity motions by administrative or supervisory personnel. For example, in *Keith v. Koerner*, the court first rejected arguments that a supervisory warden's failure to train led to an incarcerated person's rape, after finding an absence of evidence that training would have prevented the misconduct.[127] However, the court recognized material issues of fact with respect to the warden's personal involvement in allowing sexual misconduct to persist by failing to create and enforce policies to prevent misconduct by employees.[128] Accordingly, the court reversed the district court's grant of summary judgment in favor of the warden.[129] The court reasoned that the numerous complaints and inadequate investigations could support a finding of the warden's deliberate indifference to the risk of sexual misconduct by his employees to the incarcerated person's clearly established right to have prison officials take "reasonable measures to guarantee" her safety.[130]

124. Tangreti v. Bachmann, 983 F.3d 609, 619–20 (2d Cir. 2020).
125. *Id.*
126. *Id.*
127. Keith v. Koerner, 843 F.3d 833, 846–47 (10th Cir. 2016).
128. *Id.* at 846-47.
129. *Id.* at 850.
130. *Id.* at 849–50.

Similarly, in *Maslow v. Evans*, the court denied qualified immunity to the Deputy Commissioner of Administration and the Director of the Bureau of Professional Responsibility of the Pennsylvania State Police.[131] The court found genuine issues of fact with respect to whether there was a pattern of misconduct, whether these defendants had knowledge of it, and whether they made sufficient attempts to correct the pattern through effective training, supervision or discipline.[132] The court reasoned that "a police officer's sexual molestation and improper sexual advances are entirely unacceptable, and a citizen's right to be free from molestation is clearly established."[133]

Other courts have denied qualified immunity to supervisory prison officials who knew of ongoing violations and failed to act. For example, in *E.D. v. Sharkey*, the Third Circuit Court of Appeals denied qualified immunity to a jailer's co-workers who knew of ongoing violations by prison staff and failed to adequately respond.[134] The court recognized the right "to have state supervisory officials that neither condone nor authorize, through either their actions or inactions, sexual assault committed by another state actor."[135] This right extended to immigration detainees like the plaintiff.[136] Other courts have recognized supervisors' role in preventing sexual assault between incarcerated people from a known risk of sexual abuse by prison employees."[137]

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131. Maslow v. Evans, Nos. 01-CV-36365, 00-CV-5660, 00-CV-5805, 01-CV-1538, 01-CV-2166, 2004 WL 1447835, at *1 (E.D. Pa. June 25, 2004).

132. *Id.* at *4, *5.

133. *Id.* at *7. *See also* Benninger v. Ohio Township Police Dep't, No. 2:19-CV-00524-PLD, 2020 WL 264967, at *3 (W.D. Pa. Jan. 17, 2020) (rejecting the Police Department's responsive arguments to allegations it was "deliberately indifferent" because of its policies and practices of, *inter alia*, inadequate training, condoning or sanctioning harassment, improper investigations of complaints and failure to appropriately discipline officers who violated the public's constitutional rights).

134. E.D. v. Sharkey, 928 F.3d 299, 307 (3d Cir. 2019).

135. *Id.* The court further concluded that the plaintiff's right to be free from sexual assault was "'so obvious' that it could be deemed clearly established even without materially similar cases." *Id.* at 308.

136. *Id.* at 306.

137. *See* Walton v. Dawson, 752 F.3d 1109, 1119–20 (8th Cir. 2014) (affirming the prison official whose failure to train workers to lock cell doors overnight was not entitled to qualified immunity). *Accord* Green v. Padilla, 484 F. Supp. 3d 1098, 1160–65 (D.N.M. 2020) (denying qualified immunity to supervisory prison officials

While these cases demonstrate that courts do not uniformly grant qualified immunity in cases seeking supervisory liability, the breadth of the cases granting qualified immunity, and the harsh application of the "clearly established" and "deliberate indifferent" standards to preclude liability, are cause for concern. Recent studies analyzing best practices for eliminating the analogous issue of sexual harassment in the workplace demonstrate the limitations in the ways qualified immunity is applied, particularly in cases of supervisory liability.

III. THE IMPORTANCE OF SUPERVISORY ACCOUNTABILITY

Supervisor accountability is critical because of supervisors' role in creating and enforcing workplace culture. Law enforcement sexual violence is reflective of and reinforced by a culture that condones violence, including gender violence.[138] Professor Angela Harris has surfaced the connections between a culture of masculinity and police violence, and has argued for a "disruption" of the gendered culture of policing to reduce law enforcement gender-based violence.[139] Professor Michelle Jacobs has detailed how the "blue wall of silence" serves as one of the main obstacles to reform.[140] As Jacobs describes, "the combination of the violence of police culture and the culture of male sexual violence creates a dangerous environment for marginalized women."[141] Professor Dara Purvis and Melissa Blanco similarly argue that police sexual violence is reflective of the broader cultural problem of the hegemonic masculinity accepted in policing culture.[142] These insights draw on and complement scholarship delineating the

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who failed to take reasonable measures to protect incarcerated people from a known risk of sexual abuse); Ortiz v. New Mexico, 550 F. Supp.3d 1020, 1158 (D.N.M. 2021) (holding prison officials who were aware that a corrections officer had repeatedly raped an incarcerated person not entitled to qualified immunity while granting immunity to those officers who were *not* aware of the risk).

138. While analogous arguments may be made to address supervisory accountability for other forms of police violence, this Article focuses on the role of supervisory liability in gender violence cases seeking law enforcemen accountability.

139. Angela Harris, *Gender*, *Violence, Race and Criminal Justice*, 52 STAN. L. REV. 777, 804 (2000).

140. *See* Jacobs, *supra* note 26, at 281–82.

141. *Id.* at 286–87.

142. Purvis & Blanco, *supra* note 27, at 1511–20, 1528–29.

relationship between toxic masculinity and police violence more generally.[143]

Supervisors and other managers are responsible for developing and implementing the policies that form the basis for workplace culture. Police administrators are uniquely positioned to shape police officer's conduct through policy implementation.[144] Clear written policies defining and prohibiting sexual violence by law enforcement are key to addressing the problem.[145] Ineffective policies and training play a role in creating the cultures that allow law enforcement sexual violence to continue.[146] Supervisors also are in a unique position to be aware of reported incidents of sexual violence committed by their subordinates. For example, data surveying law enforcement misconduct complaints reveal that a number of officers had been the subject of at least five, and in some cases ten or more, complaints.[147] In addition to highlighting the need for transparency about the source of complaints, this data underscores that supervisors may well be aware of problematic officer conduct and may be in a position to address it.

Lessons from sexual harassment in the workplace reinforce the importance of supervisory accountability in eradicating gender and other discriminatory conduct. Sexual harassment encompasses a range of conduct, including sexual assault and other forms of sexual and gender violence, as well as other forms of gender-based harass-

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143. *See, e.g.*, Frank Rudy Cooper, "*Who's the Man?*": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 679–93 (2009) (delineating the relationship between masculinity and the police, and the ways that race and gender combine to produce harm); Ann McGinley, *Policing and the Clash of Masculinities*, 59 HOWARD L. REV. 221, 265–67 (2015) (arguing that police departments should incorporate into trainings understandings about the damage hypermasculine behaviors and attitudes can create); Jordan Blair Woods, *Destabilizing Policing's Masculinity Project*, 89 G.W. L. REV. 1527 (2022) (exploring the role of masculinity in police violence within the context of criminology).

144. Purvis & Blanco, *supra* note 27, at 1524.

145. *Id.* at 1524–25.

146. *See* Jacobs, *supra* note 26, at 283–87 (discussing the limitations of police trainings); Rudy Cooper, *supra* note 143, at 729–40 (calling for new forms of police officer training).

147. Keith Alexander, Steven Rich & Hannah Thacker, *The Hidden Billion-dollar Cost of Repeated Police Misconduct*, WASH. POST (Mar. 9, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/.

ment.[148] The Supreme Court has recognized sexual harassment, including claims of sexual assault, as an impermissible form of workplace discrimination.[149] It follows that research on sexual and gender harassment at work should inform law and policy aimed at eliminating sexual and gender violence by law enforcement and other state actors.

Recent studies detail the pervasiveness of sexual harassment and the importance of leadership and accountability in eliminating it. One study, which defined sexual harassment broadly, found that nationwide, 81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime.[150] Over 50% of women and nearly 20% of men said they had been subjected to unwelcome touching or groping.[151] Experts conclude that leadership and accountability are critical to prevention. For example, the EEOC Select Task Force on the Study of Harassment in the Workplace emphasized that "[t]he importance of leadership cannot be overstated."[152] The Task Force report concluded that:

> Accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or re-

148. *See Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/sexual-harassment (last visited June 7, 2022) (defining sexual harassment as including unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature, or other remarks about or relating to a person's gender).

149. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (recognizing a Black woman's allegations that her supervisor coerced her to have sexual relations with him and made demands for sexual favors at work was impermissible sex discrimination); Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (recognizing that penetration with a bar of soap and threats of rape of a male oil rig worker by other men at work constituted impermissible sexual harassment).

150. *2018 Study on Sexual Harassment and Assault*, STOP STREET HARASSMENT, https://stopstreetharassment.org/our-work/nationalstudy/2018-national-sexual-abuse-report (last visited Oct. 14, 2022).

151. *Id.*

152. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL. EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, https://www.eeoc.gov/select-task-force-study-harassment-workplace (last visited Dec. 13, 2022).

> spond to harassment should be rewarded for doing that job well (or penalized for failing to do so).[153]

Similarly, a study of sexual harassment within science, technology, and related academia concluded that "[o]rganizational climate is, by far, the greatest predictor of the occurrence of sexual harassment."[154] Other experts confirm that leadership is crucial to creating environments where sexual harassment is not tolerated.[155]

To recognize employers' legal responsibility for remedying workplace sexual harassment under Title VII, the Supreme Court has held employers vicariously liable for sexual harassment committed by supervisors who have the power to take, and who take, tangible employment actions such as hiring and firing.[156] If no tangible employment action is taken, the employer may escape liability by establishing the affirmative defense that 1) the employer exercised reasonable care to prevent and correct harassing behavior; and 2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities the employer provided.[157] In other words, when no tangi-

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153. *Id.*

154. NAT'L ACADS. OF SCI., ENG'G, AND MED. 2018, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (last visited Oct. 14, 2022), https://nap.nationalacademies.org/download/24994. *Accord* Kathryn B. H. Clancy et al., *Use Science to Stop Sexual Harassment in Higher Education*, 117 NAT'L ACAD. OF SCI. PROC. 37 (2020) (confirming the importance of leadership and the need to "overhaul the structures of power that support [sexual harassment]" in order to prevent it); Brendan L. Smith, *What it Really Takes to Stop Sexual Harassment*, 49 AM. PSYCH. ASSOC. 2 (Feb. 2018), https://www.apa.org/monitor/2018/02/sexual-harassment (underscoring the role of culture in increasing or decreasing the likelihood of sexual assault and harassment).

155. *See, e.g.*, Jocelyn Frye, *How to Combat Sexual Harassment in the Workplace*, CTR. FOR AM. PROGRESS (Oct. 19, 2017), https://www.americanprogress.org/article/combat-sexual-harassment-workplace/ (identifying leadership and culture change as key to workplace change); James C. Quick & M. Ann McFadyen, *Sexual Harassment: Have We Made Any Progress?*, 22 J. OCCUPATIONAL HEALTH PSYCH. 286, 295 (2017) (identifying leadership that focuses on preventing the abuse of power as a factor that may reduce sexual harassment).

156. *See* Vance v. Ball State Univ., 570 U.S. 421, 424 (2013). Legislative proposals would extend employers' vicarious liability for sexual harassment by lower-level supervisors who direct daily work activities. *See also* BE HEARD In The Workplace Act, H.R. No. 5994, 117th Cong. § 206 (as referred to the Subcomm. on Oversight & Investigations, Nov. 29, 2021).

157. Vance, 570 U.S. at 424.

ble employment action has been taken, employers are vicariously liable for sexual harassment by supervisors, unless the employer can establish the affirmative defense.[158] Employers will be liable for sexual harassment by non-supervisory employees if the employer knew, or should have known about the harassment and failed to take prompt and effective remedial action.[159] While these standards rightly have been critiqued as insufficient,[160] they are nevertheless more rigorous than those governing supervisory liability for gender violence committed by state actors.

The contrasting standard for supervisory liability by state actors alleged to have committed constitutional violations, in which the Court has rejected strict liability and negligence, and which requires a finding of deliberate indifference, stands in stark contrast.[161] Yet state actors' heightened obligations to serve the public, and, in the case of law enforcement officers, to advance safety and prevent harm, should justify greater, not lesser, accountability.[162] Thus, the doctrine shielding supervisors from liability—even in the face of gross gence[163]—stands in stark contrast to guidance emphasizing the importance of leadership and accountability by those in a position to address harassment.[164] Qualified immunity adds an additional barrier to accountability by shielding supervisory officials from liability not

158. In practice, the affirmative defense has come to figure centrally in determining whether employers will be held accountable for sexual harassment. *See* Johanna L. Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943, 964–66 (2021).

159. *See* Vance, 570 U.S. at 426.

160. *See, e.g.*, *Congress Reintroduces BE HEARD Act that Covers All Workers, Regardless of Size of Workplace*, NAT'L WOMEN'S LAW CTR. (Nov. 17, 2021), https://nwlc.org/press-release/congress-reintroduces-be-heard-act-that-covers-all-workers-regardless-of-size-of-workplace-2/ (noting a few of the changes the BE HEARD Act would address). *See also* BE HEARD in the Workplace Act, *supra* note 156.

161. *See* text accompanying *supra* note 110.

162. *See* MIAMI LAW HUMAN RIGHTS CLINIC, *supra* note 33, at 10 (arguing that states have a heightened duty to address officer-perpetrated gender violence).

163. *See* Tangreti v. Bachmann, 983 F.3d 609, 620 (2d Cir. 2020). *But see* Whitely v. Hanna, 726 F.3d 631, 641 (5th Cir. 2013) (distinguishing "negligence" and "gross negligence" from "deliberate indifference," which is required to establish a constitutional violation).

164. *See, e.g.*, text accompanying *supra* notes 152–155.

because of a finding on the merits, but because of an absence of a previously decided factually identical case.[165] The preceding discussion of the qualified immunity caselaw illustrates both the harsh impact of the "deliberately indifferent" standard for supervisory liability, and the ways the additional "clearly established" requirement for overcoming qualified immunity disserve the goals of prevention established by experts and recognized in other analogous contexts.

IV. LESSONS FROM INTERNATIONAL HUMAN RIGHTS LAW

International human rights law confirms the importance of accountability generally, and of supervisory accountability specifically.[166] As one example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) explicitly holds States responsible for "acts or omissions" of agents that constitute gender violence.[167] It further explains that States are responsible for preventing gender violence through training, implementation and monitoring of policies, for investigating, prosecuting and applying appropriate legal sanctions, and for providing financial reparation to those harmed.[168]

Similarly, the Council of Europe Convention on preventing and combating violence against women and domestic violence ("Istanbul Convention"), requires states to "refrain from engaging in any act of violence against women" and to "ensure that [state actors] act in conformity with this obligation.[169] The treaty requires that States make available "adequate civil remedies" against both the person who commits acts such as rape and sexual assault, and against the State "if the State has failed to take preventive and protective measures."[170]

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165. *See* Perry, 892 F.3d at 1123; Rivera, 952 F.3d at 567–70.

166. *See* MIAMI LAW HUMAN RIGHTS CLINIC, *supra* note 33, at 8–11.

167. UN Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/GC/35, ("CEDAW") at ¶¶ 2, 22 (July 26, 2017).

168. *Id.* at ¶¶ 23, 46.

169. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, ("Istanbul Convention"), Nov. 5, 2011, No. 210, 11.V.2011, at Art. 5.

170. *Id.* at Art. 29.

Other treaties also require states to provide redress for rights violations, which include the right to be free from gender violence.[171]

International human rights tribunals have held States accountable for failing to take steps to prevent or remedy gender violence committed by state actors, including military or security personnel. For example, in *Raquel Martin de Mejia Peru,* the Inter-American Commission on Human Rights (the "Commission") unequivocally declared that "[c]urrent international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights."[172] The Commission determined that Ms. Mejia had been raped by a member of the security forces and, therefore, found the Peruvian State responsible and ordered that it compensate her.[173]

The Commission similarly held the Mexican State responsible for the rape of three young indigenous women by military members in

171. *See, e.g.*, American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123, at Art. 4 (1) (right to life); 5(1) (right to have physical, mental, and moral integrity respected); 7 (right to personal liberty and security); 11 (right to privacy); 25 (right to simple and prompt and effective recourse); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, at Art. 3 (prohibition of torture); Art. 5 (right to liberty and security); Art. 13 (right to an effective remedy); Art. 41 (providing right to reparation);; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"), Jun. 6, 1994, 33 I.L.M. 1534 (1994) (prohibiting acts of "violence against women" by State parties and ensuring "that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation"); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiBqNXz_en6AhV4kokEHeOTBocQFnoECBcQAQ&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FWomen%2FWG%2FProtocolontheRightsofWomen.pdf&usg=AOvVaw1m1nHmCq0uYhPWP36Wpbqq, at Art. 2 (elimination of discrimination against women); Art. 3 (right to dignity), Art. 4 (rights to life, integrity and security of the person).

172. Raquel Martin de Mejia Peru, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, § V.B.3.a. (1996).

173. *Id.* § VI.2, VII.3 (finding the Peruvian State responsible for violations of the right to human treatment (Art. 5) and the right to protection of honor and dignity (Art. 11) and recommending that the Peruvian State pay fair compensation for the violations).

Ana, Beatriz & Celia Gonzalez Perez.[174] In addition to ordering a "complete, impartial, and effective investigation," the Commission ordered Mexico to "[a]dequately compensate" the women.[175] Reflecting the same principle, in *Maria Dolores Rivas Quintanilla (El Salvador),* the Commission held the El Salvadorean government responsible for the rape of a seven-year-old by a military soldier in her home while her mother was away, and ordered both an investigation and compensation.[176]

Other international tribunals have held States responsible for sexual assault by prison officials of people in custody. For example, in *Salmanoglu and Polattas v. Turkey*, the European Court of Human Rights required Turkey to compensate a group of female detainees who alleged they had been subjected to physical and sexual abuse in prison.[177] It similarly found a violation of Article 3 of the European Convention when officials beat, placed a detainee in a tire, hosed her with pressurized water, stripped her naked, and then raped her.[178] Other international courts have held States accountable for gender violence committed during public stops and interactions, as well as for gender violence committed by security sector actors such as members of the military, police, and correctional officers.[179] Importantly, tribunals have also recognized the intersectional nature of the harm when women of color are subjected to gender violence.[180]

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174. *See* Ana, Beatriz & Celia Gonzales Perez, Case 11.565, Inter-Am. Comm'n H.R., Report No.53/01, ¶ 45, ¶ 94 (2001) (holding that sexual violence committed by security forces of a State violates the American Convention and that the Mexican State violated the petitioner's rights).

175. *Id.* ¶ 96 (1–2).

176. *See* MIAMI LAW HUMAN RIGHTS CLINIC, *supra* note 33, at 10 (citing Maria Dolores Rivas Quintanilla v. El Salvador, Case 10.772, Inter-Am. Comm'n H.R., Report No. 6/94 (1994).

177. Salmanoglu v. Turkey, Eur. Ct. H.R., App. No. 15828/03 at ¶ 110 (2009) (ordering compensation for pain and distress resulting from physical and sexual abuse while in custody).

178. Aydin v. Turkey, Eur. Ct. H.R., App. No. 23174/94 at ¶¶ 78, 79 (1997).

179. *See* MIAMI LAW HUMAN RIGHTS CLINIC, *supra* note 33, at 10 (citing cases).

180. *See* B.S. v. Spain, Eur. Ct. H.R., App. No. 47159/08 at ¶¶ 8, 47 (2012) (recognizing as a violation of the European Convention when a police officer verbally and physically assaulted a Nigerian woman working in Spain as a prostitute, stating, e.g., "get out of here you black whore"). In this way, the decisions address the

These non-exhaustive examples illustrate the accepted principle of holding supervisory and administrative personnel accountable for civil and human rights violations by those for whom they are responsible. The contrast between international norms and the United States' standard for accountability is stark. The comparison further illustrates how the qualified immunity doctrine is out of step with both best practices for prevention and international norms.

CONCLUSION

Gender violence committed by state actors is an under-recognized but widespread form of civil rights violation that encompasses sexual violence by police and law enforcement as well as by other state actors. For those seeking redress for the resulting harms through civil rights litigation, qualified immunity imposes a significant hurdle to accountability. While courts may decline to grant qualified immunity to the individual alleged to have committed an act such as rape, courts far more readily grant qualified immunity to supervisors who may have known, or who should have known, about gender violence committed by those they supervise. The threshold for liability, requiring proof of caselaw establishing that the precise violation was "clearly established," and, for supervisors, that the violation was caused by their "deliberate indifference," leave many immune.

For those committed to prevention, the qualified immunity doctrine, particularly as it applies to supervisors, should be particularly concerning. Best practices from the field of workplace sexual harassment, which is also a form of gender violence, underscores the importance of supervisory accountability in preventing sexual harassment at work. International human rights principles similarly underscore how principles of supervisory accountability reinforce emerging norms about prevention. This Article adds to the growing body of commentary urging the elimination of qualified immunity, as one thread of advocacy efforts aiming to eliminate and provide redress for gender-based and other forms of discriminatory violence by state actors.

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disproportionate impact of law enforcement sexual violence on women of color. *See supra* notes 34–41 and accompanying text.