

No. 16-4234

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

DELORES HENRY, ET AL., on behalf of a class
Plaintiffs-Appellants,

v.

MELODY HULETT, FORMER WARDEN OF LINCOLN CORRECTIONAL CENTER, ET AL.
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois,
No. 3:12-cv-03087
Hon. Richard Mills

**BRIEF OF AMICI CURIAE LAW PROFESSORS AND SCHOLARS OF SEXUAL
VIOLENCE, AMERICAN CIVIL LIBERTIES UNION, JUST DETENTION
INTERNATIONAL, RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER,
UPTOWN PEOPLE'S LAW CENTER, AND WOMEN'S PRISON ASSOCIATION IN
SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING *EN BANC***

Daniel M. Greenfield
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

Jennifer Wedekind
ACLU NATIONAL PRISON PROJECT
915 15th Street N.W.
Washington, DC 20005
(202) 548-6610

Anjana Samant
ACLU WOMEN'S RIGHTS PROJECT
125 Broad Street
New York, NY 10004
(646) 885-8341

Benjamin S. Wolf
Camille E. Bennett
ACLU OF ILLINOIS
150 North Michigan Avenue
Suite 600
Chicago, IL 60601
(312) 201-9740

Counsel for Amici Curiae

Appellate Court No: 16-4234

Short Caption: Henry, et al. v. Hulett, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Civil Liberties Union, American Civil Liberties Union of Illinois (NEW), Brett Dignam (NEW), Gina Fedock, Claudia Flores, Jennifer M. Green, Just Detention International, Michele Leiby, Fionnuala Ni Aolain, Roderick & Solange MacArthur Justice Center, Kim Thuy Seelinger, Uptown People's Law Center, Women's Prison Association, Elisabeth Jean Wood

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center, American Civil Liberties Union (REVISED), Roger Baldwin Foundation of ACLU (REVISED)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Daniel M. Greenfield

Date: August 20, 2019

Attorney's Printed Name: Daniel M. Greenfield

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 375 East Chicago Avenue, Chiacgo, IL 60611-3069

Phone Number: (312) 503-8538

Fax Number: (312) 503-1272

E-Mail Address: daniel-greenfield@law.northwestern.edu

Appellate Court No: 16-4234

Short Caption: Henry, et al. v. Hulett, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Civil Liberties Union, American Civil Liberties Union of Illinois, Brett Dignam, Gina Fedock, Claudia Flores, Jennifer M. Green, Just Detention International, Michele Leiby, Fionnuala Ni Aolain, Roderick & Solange MacArthur Justice Center, Kim Thuy Seelinger, Uptown People's Law Center, Women's Prison Association, Elisabeth Jean Wood

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center, American Civil Liberties Union, Roger Baldwin Foundation of ACLU

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Jennifer Wedekind

Date: August 20, 2019

Attorney's Printed Name: Jennifer Wedekind

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 915 15th Street NW, Washington, DC 20005

Phone Number: (202) 548-6610

Fax Number: _____

E-Mail Address: _____

Appellate Court No: 16-4234

Short Caption: Henry, et al. v. Hulett, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Civil Liberties Union, American Civil Liberties Union of Illinois, Brett Dignam, Gina Fedock, Claudia Flores, Jennifer M. Green, Just Detention International, Michele Leiby, Fionnuala Ni Aolain, Roderick & Solange MacArthur Justice Center, Kim Thuy Seelinger, Uptown People's Law Center, Women's Prison Association, Elisabeth Jean Wood

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center, American Civil Liberties Union, Roger Baldwin Foundation of ACLU

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Anjana Samant

Date: August 20, 2019

Attorney's Printed Name: Anjana Samant

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 125 Broad Street, New York, NY 10004

Phone Number: (646) 885-8341 Fax Number: _____

E-Mail Address: _____

Appellate Court No: 16-4234

Short Caption: Henry, et al. v. Hulett, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Civil Liberties Union, American Civil Liberties Union of Illinois, Brett Dignam, Gina Fedock, Claudia Flores, Jennifer M. Green, Just Detention International, Michele Leiby, Fionnuala Ni Aolain, Roderick & Solange MacArthur Justice Center, Kim Thuy Seelinger, Uptown People's Law Center, Women's Prison Association, Elisabeth Jean Wood

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center, American Civil Liberties Union, Roger Baldwin Foundation of ACLU

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Benjamin S. Wolf

Date: August 20, 2019

Attorney's Printed Name: Benjamin S. Wolf

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: Roger Baldwin Foundation of ACLU, Inc.
150 North Michigan Avenue, Suite 600, Chicago, IL 60601

Phone Number: (312) 201-9740 Fax Number: (312) 288-5225

E-Mail Address: bwolf@aclu-il.org

Appellate Court No: 16-4234

Short Caption: Henry, et al. v. Hulett, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Civil Liberties Union, American Civil Liberties Union of Illinois, Brett Dignam, Gina Fedock, Claudia Flores, Jennifer M. Green, Just Detention International, Michele Leiby, Fionnuala Ni Aolain, Roderick & Solange MacArthur Justice Center, Kim Thuy Seelinger, Uptown People's Law Center, Women's Prison Association, Elisabeth Jean Wood

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roderick & Solange MacArthur Justice Center, American Civil Liberties Union, Roger Baldwin Foundation of ACLU

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Camille E. Bennett Date: August 20, 2019

Attorney's Printed Name: Camille E. Bennett

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: Roger Baldwin Foundation of ACLU, Inc.
150 North Michigan Avenue, Suite 600, Chicago, IL 60601

Phone Number: (312) 201-9740 Fax Number: (312) 288-5225

E-Mail Address: _____

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE.....1

SUMMARY OF ARGUMENT1

I. Sexual Violence Is A Common Attribute Of Many Of The Darkest Chapters In Recorded History.2

II. The Sexual Violence Endured By The Class Members Shares Several Characteristics With The Sexual Violence Employed By Universally Condemned Regimes.....6

III. Forced Public Exposure Does Violence To The Most Fundamental Aspects Of Our Being And Is Bounded By The Fourth Amendment.9

CONCLUSION11

TABLE OF AUTHORITIES

Cases

<i>Henry v. Hulett</i> , 930 F.3d 836 (7th Cir. 2019)	7, 10
<i>King v. McCarty</i> , 781 F.3d 889 (7th Cir. 2015)	10, 11
<i>Stoudemire v. Mich. Dep’t of Corr.</i> , 705 F.3d 560 (6th Cir. 2013)	11
<i>Thogmorton v. Reynolds</i> , 12–CV–3087, 2016 WL 11265636 (C.D. Ill. Apr. 14, 2016)	6, 7

Statutes

730 ILL. COMP. STAT. ANN. 5/3-2-5.5 (2018)	9
--	---

Other Authorities

Alex Obote-Odora, <i>Rape and Sexual Violence in International Law: ICTR Contribution</i> , 12 NEW ENG. J. INT’L & COMP. L. 135 (2005)	4
Alexander Lowen, <i>In Defense of Modesty</i> , 4 J. SEX RES. 51 (1968)	10, 11
Alvin Rosenfeld et al., <i>Parental Perceptions of Children’s Modesty: A Cross-Sectional Survey of Ages Two to Ten Years</i> , 47 PSYCHIATRY 351 (1984)	9
Candace Kruttschnitt & Rosemary Gartner, <i>Women’s Imprisonment</i> , 30 CRIME & JUST. 1 (2003)	7
Catherine C. Classen et al., <i>Sexual Revictimization: A Review of the Empirical Literature</i> , 6 TRAUMA, VIOLENCE, & ABUSE 103 (2005)	8
DEBORAH GRAY WHITE, <i>AR’N’T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH</i> (1985)	2, 3

Documentation of Atrocities in Northern Rakhine State,
United States Department of State (Aug. 2018)5

Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State,
The Public International Law & Policy Group (2018)5

Elisabeth Jean Wood, *Conflict-related sexual violence and the policy implications of recent research*,
96 INT’L REV. RED CROSS 457 (2014)6

Fionnuala Ni Aolain, *Sexual Violence and the Holocaust*,
12 YALE J.L. & FEMINISM 43 (2000)3, 4

Jessica Reichert & Lindsay Bostwick, *Post-traumatic Stress Disorder and Victimization Among Female Prisoners in Illinois*,
Ill. Crim. Just. Info. Auth. 8 (2010)8

Katherine R. Allen & Abbie E. Goldberg, *Sexual Activity During Menstruation: A Qualitative Study*, 46 J. SEX RES. 535 (2009)9

Kevin Barlow, *Rauner signs law creating IDOC women’s division*,
THE PANTAGRAPH, Jan. 17, 20189

Michele Leiby, *The Promise and Peril of Primary Documents: Documenting Wartime Sexual Violence in El Salvador and Peru*, in UNDERSTANDING AND PROVING INTERNATIONAL SEX CRIMES 315 (Morten Bergsmo, Alf Butenschøn Skre, and Elisabeth J. Wood eds., 2012).....6

Naomi Breslau et al., *Previous Exposure to Trauma and PTSD Effects of Subsequent Trauma: Results from the Detroit Area Survey of Trauma*, 156 AM. J. PSYCHIATRY 902 (1999)8

Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment
(Int’l Crim. Trib. for Rwanda Sept. 2, 1998).....2, 4

Prosecutor v. Kunarac, Kovac and Vukovic, IT-96-23 & IT-96-23/1,
Judgment
(Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001)4, 5

Rabuy & Kopf, Prison Policy Initiative, <i>Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned</i> (2015)	8
Ruth Seifert, <i>The Second Front: The Logic of Sexual Violence in Wars</i> , 19 WOMEN’S STUDIES INT’L FORUM 35 (1996).....	6
Sharain Suliman et al., <i>Cumulative Effects of Multiple Trauma on Symptoms of Posttraumatic Stress Disorder, Anxiety, and Depression in Adolescents</i> , 50 COMPREHENSIVE PSYCHIATRY 121 (2009).....	8
Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten – Security Council Briefing on Myanmar (Dec. 12, 2017).....	5
U.N. Secretary-General, <i>Report of the Secretary-General on Conflict-Related Sexual Violence</i> , U.N. Doc. S/2018/250 (Mar. 23, 2018)	5
WALTER JOHNSON, <i>SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET</i> (1999).....	2

INTEREST OF AMICI CURIAE

Amici are law professors, scholars of sexual violence, and nonprofit organizations that seek to enforce constitutional rights. More detailed information on amici appears in the appendix to this brief.¹

A jury determined that there was no Eighth Amendment remedy against a shocking abuse of state power—here, mass sexual violence—because corrections officers allegedly strip-searched prisoners for training purposes rather than with the express intent to harm. A fractured panel of this Court then—erroneously—held that the Fourth Amendment did not regulate the misconduct because corrections officers did not physically touch the prisoners; rather, they ordered them to violate and degrade themselves. The proper resolution of this case is a matter of grave concern to amici because the panel’s error leaves every prisoner incarcerated in Illinois, Indiana, and Wisconsin vulnerable to state-sponsored sexual violence that has no place in a civilized society.

SUMMARY OF ARGUMENT

1. Sexual violence is a hallmark of eras and regimes that repulse us. From the auction blocks of the American South to the fields of Myanmar, sexual violence has been relied upon to dehumanize and set the stage for domination.

¹ No counsel for a party authored any part of this brief and no person other than amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

2. Forced public nudity—here, gratuitous strip- and cavity-searches—is a form of sexual violence. While not part of a campaign of armed conflict, genocide, or enslavement, the ordeal endured by the prisoners nonetheless shares several characteristics with the sexual violence utilized by universally reviled regimes. It was inflicted upon marginalized people. It was inflicted upon vulnerable people. It violated fundamental mores regarding public exposure.

3. Even behind prison walls, the Fourth Amendment guards against government encroachment. Here, it continued to shield 200 women from a gratuitous and aberrant search, notwithstanding the fact that they were forced to degrade and violate themselves.

I. Sexual Violence Is A Common Attribute Of Many Of The Darkest Chapters In Recorded History.

“Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard ... in front of a crowd, constitutes sexual violence.”²

On auction blocks throughout the American South, enslaved women were stripped naked so that prospective buyers could ogle and jeer.³ Primarily, the

² Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶ 688 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

³ DEBORAH GRAY WHITE, AR’N’T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH 32-33 (1985); WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET, 147-49 (1999).

scrutiny was for the sinister purpose of assessing reproductive capability.⁴ But sellers and buyers did not shy away from taking pleasure in dehumanizing the women.⁵ They exchanged degrading remarks—“there’s a breast for you”—while assessing women as a commodity.⁶ Enforced nudity did not end with the auction.⁷ With frequency, the women, once sold, were “tied up and exposed to the public gaze of all.”⁸

In the concentration camps of World War II, Jewish women “not immediately sent to the gas chambers were forced to remove their clothing, their bodies subject to the scrutiny and ridicule” of guards.⁹ Women were then “shaved of all their bodily hair” in an act of “public spectacle” intended to humiliate.¹⁰ It was an “effective act of sexual violation” and dehumanization in part because it was such an “abnormal and grotesque experience.”¹¹ The “shame and humiliation” felt by secular women was amplified among the religiously observant.¹² The ordeal was designed to

⁴ White, *supra*, at 32-33.

⁵ *Id.*

⁶ *Id.* at 32.

⁷ *Id.* at 33.

⁸ *Id.* (citation omitted).

⁹ Fionnuala Ni Aolain, *Sexual Violence and the Holocaust*, 12 YALE J.L. & FEMINISM 43, 55 (2000).

¹⁰ *Id.*

¹¹ *Id.* at 63

¹² *Id.*

“demonstrate” both “the women’s sexual vulnerability” and the community’s powerlessness.¹³

During the Rwandan genocide, Tutsi women were routinely stripped in public and then forced to degrade themselves.¹⁴ For example, one woman was commanded to sit naked in the mud.¹⁵ Another was subjected to a forced march while not wearing clothing.¹⁶ Others were ordered to perform calisthenics in public while nude.¹⁷ Such acts of forced public nudity, the International Criminal Tribunal for Rwanda held, were a form of sexual violence constituting a crime against humanity.¹⁸

In the former Yugoslavia, the story was much the same. Muslim women were stripped and ordered to humiliate themselves.¹⁹ Some were forced to dance naked atop tables.²⁰ Others were marched through the streets without their clothing.²¹ One victim described not only terror, but the dehumanizing feeling of being “owned” by

¹³ *Id.*

¹⁴ *See* Prosecutor v. Akayesu, *supra*, ¶ 697.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at ¶¶ 692-94, 697; *see also* Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT'L & COMP. L. 135, 146-50 (2005).

¹⁹ *See* Prosecutor v. Kunarac, Kovac and Vukovic, IT-96-23 & IT-96-23/1, Judgment, ¶¶ 766-74 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

²⁰ *Id.*

²¹ *Id.* at ¶ 770.

another.²² These atrocities, too, resulted in convictions for crimes against humanity.²³

Even now, in Myanmar, military forces are utilizing forced public nudity, invasive strip searches, and other forms of sexual violence intended to dehumanize, to further a campaign of ethnic cleansing against the Rohingya.²⁴ Victims described being terrorized by soldiers who “forced [them] to strip naked to show their underwear” during searches for contraband.²⁵ Those methods, according to victims and observers, are a calculated “tool of dehumanization.”²⁶

As exemplified by the preceding episodes, sexual violence is a common feature of many of the darkest chapters in recorded history. Its ubiquity is a testament to its effectiveness. Sexually violated targets—*i.e.*, the immediate victims, their

²² *Id.* at ¶¶ 71–72, 86, 766–74.

²³ *See id.* at ¶¶ 766–774.

²⁴ *E.g.*, U.N. Secretary-General, *Report of the Secretary-General on Conflict-Related Sexual Violence*, ¶ 55, U.N. Doc. S/2018/250 (Mar. 23, 2018); Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten – Security Council Briefing on Myanmar (Dec. 12, 2017), <https://www.un.org/sexualviolenceinconflict/statement/statement-by-the-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-security-council-briefing-on-myanmar-12-december-2017/> [hereinafter Statement of Patten].

²⁵ *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State* 39, The Public International Law & Policy Group (2018), [shorturl.at/ovxB5](https://www.pilpg.org/shorturl.at/ovxB5); *see also* *Documentation of Atrocities in Northern Rakhine State*, United States Department of State 5-6, 14-17 (Aug. 2018) (similar), <https://www.state.gov/wp-content/uploads/2019/01/Documentation-of-Atrocities-in-Northern-Rakhine-State.pdf>.

²⁶ Statement of Patten.

families, and communities—are weakened and therefore easier to vanquish.²⁷ Sexual violence tamps down opposition by emphasizing the risks of dissent.²⁸ Sexual violence is intended to dehumanize its victims, which, once achieved, further emboldens the perpetrators; we are less likely to empathize with those we regard as subhuman.²⁹

II. The Sexual Violence Endured By The Class Members Shares Several Characteristics With The Sexual Violence Employed By Universally Condemned Regimes.

After being roused by a tactical squad, approximately 200 women were herded—without explanation—into a prison gymnasium.³⁰ The women were culled into smaller groups and then ordered to “stand naked, nearly shoulder-to-shoulder with 8-10 other inmates in a room where they could be seen by others not conducting the searches, including male officers.”³¹ Menstruating women were forced to “remove their tampons and sanitary pads” in front of other prisoners and corrections

²⁷ See Elisabeth Jean Wood, *Conflict-related sexual violence and the policy implications of recent research*, 96 INT’L REV. RED CROSS 457, 463 (2014); Ruth Seifert, *The Second Front: The Logic of Sexual Violence in Wars*, 19 WOMEN’S STUDIES INT’L FORUM 35, 39-41 (1996).

²⁸ See Michele Leiby, *The Promise and Peril of Primary Documents: Documenting Wartime Sexual Violence in El Salvador and Peru*, in UNDERSTANDING AND PROVING INTERNATIONAL SEX CRIMES 315, 351 (Morten Bergsmo, Alf Butenschøn Skre, and Elisabeth J. Wood eds., 2012).

²⁹ Seifert, *supra*, at 39-41.

³⁰ R. 109-1 at 18-23.

³¹ *Thogmorton v. Reynolds*, 12–CV–3087, 2016 WL 11265636, at *2 (C.D. Ill. Apr. 14, 2016).

officers, including those of the opposite gender, and “many got blood on their bodies and clothing and blood on the floor.”³² They were then forced to “stand barefoot on a floor dirty with menstrual blood and raise their breasts, lift their hair, turn around, bend over, spread their buttocks and vaginas.”³³ The correctional officers conducting the searches directed derogatory comments at the women, telling them that they were “dirty bitches,” “fucking disgusting,” and “smell like death.”³⁴

Forced public nudity—here, gratuitous strip- and cavity-searches—is a form of sexual violence. While of course not part of a campaign of armed conflict, genocide, or enslavement, the ordeal endured by the prisoners nonetheless incorporates several characteristics of the sexual violence utilized by universally condemned regimes.

First, like the Rohingya, the women belong to an oppressed and marginalized cohort, rendering them susceptible to targeting without sustained opposition from those with political capital. Women prisoners come from the most “economically and politically disadvantaged” segments of society.³⁵ They exist at the intersection of four populations that are traditionally disfavored and discriminated against, the cumulative effect of which is to render them acutely vulnerable to predation: they

³² *Id.*

³³ *Id.*

³⁴ *Henry v. Hulett*, 930 F.3d 836, 841 (7th Cir. 2019) (Lee, J., dissenting).

³⁵ Candace Kruttschnitt & Rosemary Gartner, *Women’s Imprisonment*, 30 CRIME & JUST. 1, 4, 18 (2003).

are prisoners; they are women; they are (almost certainly) disproportionately poor; they are (again, almost certainly) disproportionately of color.³⁶ Thus, by virtue of identity, the women may be seen as less deserving of our attention, let alone protest; they were easy targets.

Second, like enslaved Black women ogled on auction blocks, the prisoners were primed to be especially traumatized by sexual violence. Decades of research demonstrate that prior trauma exacerbates subsequent trauma.³⁷ This general proposition applies with particular force to sexual trauma.³⁸ And data show that women prisoners are overwhelmingly likely to have histories of sexual abuse.³⁹ In

³⁶ The qualifier “almost certainly” is utilized out of an abundance of caution but hardly seems necessary. In 2011, for example, women of color constituted 55% of the Lincoln Correctional Center population, despite constituting a much smaller percentage of the Illinois population. *Compare* <https://www2.illinois.gov/idoc/reportsandstatistics/Pages/Prison-Population-Data-Sets.aspx> with <https://www.census.gov/quickfacts/IL>. And, to a striking degree, incarcerated women are impoverished, even prior to imprisonment. *E.g.*, Rabuy & Kopf, Prison Policy Initiative, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned* (2015), available at, <https://www.prisonpolicy.org/reports/income.html>.

³⁷ Sharain Suliman et al., *Cumulative Effects of Multiple Trauma on Symptoms of Posttraumatic Stress Disorder, Anxiety, and Depression in Adolescents*, 50 *COMPREHENSIVE PSYCHIATRY* 121 (2009); Naomi Breslau et al., *Previous Exposure to Trauma and PTSD Effects of Subsequent Trauma: Results from the Detroit Area Survey of Trauma*, 156 *AM. J. PSYCHIATRY* 902 (1999).

³⁸ Catherine C. Classen et al., *Sexual Revictimization: A Review of the Empirical Literature*, 6 *TRAUMA, VIOLENCE, & ABUSE* 103, 117-119 (2005).

³⁹ Jessica Reichert & Lindsay Bostwick, *Post-traumatic Stress Disorder and Victimization Among Female Prisoners in Illinois*, *Ill. Crim. Just. Info. Auth.* 8 (2010) (noting that 75% of women prisoners in Illinois had experienced some form of sexual abuse and 98% had experienced physical abuse).

fact, shortly after former Governor Rauner toured a women's prison, he signed a bill reflecting the prevalence of sexual assault survivors among prisoners in Illinois.⁴⁰

Third, like all women subjected to enforced nudity, the prisoners were especially susceptible to harm because the public exposure was aberrant. All children—especially girls—are socialized to prioritize bodily modesty.⁴¹ Intimate views are reserved for intimate relations.⁴² And when it comes to menstruation, many women maintain a zone of privacy, even from intimate relations.⁴³ The search was a particularly potent act of sexual humiliation and dehumanization precisely because it was so abnormal.

III. Forced Public Exposure Does Violence To The Most Fundamental Aspects Of Our Being And Is Bounded By The Fourth Amendment.

In each of the exemplars plucked from the annals of atrocity, sexual violence was expressly *intended* to cause harm—*e.g.*, to dehumanize the targets of a campaign of hostility. Thus, the perpetrators were—in constitutional terms—

⁴⁰ See Kevin Barlow, *Rauner signs law creating IDOC women's division*, THE PANTAGRAPH, Jan. 17, 2018, https://www.pantagraph.com/news/local/rauner-signs-law-creating-idoc-women-s-division/article_4b467bc9-aa96-591f-a4e4-e91deb2db56e.html; 730 ILL. COMP. STAT. ANN. 5/3-2-5.5 (2018).

⁴¹ Alvin Rosenfeld et al., *Parental Perceptions of Children's Modesty: A Cross-Sectional Survey of Ages Two to Ten Years*, 47 PSYCHIATRY 351, 353, 358 (1984).

⁴² *Id.* at 364.

⁴³ Katherine R. Allen & Abbie E. Goldberg, *Sexual Activity During Menstruation: A Qualitative Study*, 46 J. SEX RES. 535 (2009).

deliberately indifferent, a subjective intent that would render their actions cognizable under the Eighth Amendment.⁴⁴

Here, in contrast, the summary judgment evidence is that the sexual violence endured by the class members was instituted for training purposes rather than as an assertion of power intended to humiliate and dehumanize the prisoners.⁴⁵ In the absence of a finding of deliberate indifference, the Eighth Amendment is rendered toothless, as happened here.

Yet the majority now holds the Fourth Amendment powerless, too, because corrections officers did not touch the prisoners.⁴⁶ Instead, they forced women to degrade and violate themselves.⁴⁷ That is a distinction without a difference where, as here, the search was aberrant and gratuitous.

The reason enslaved women in the United States, Muslim women in Yugoslavia, Jewish women across Europe, and Rohingya women in Myanmar were forced to undress and expose themselves in public was because it was deeply humiliating and dehumanizing to be compelled to do this against their will. We are taught that control over the most intimate portions of our body—our genitals, for example—is ours and ours alone.⁴⁸ It is understood that, absent circumstances not

⁴⁴ *E.g., King v. McCarty*, 781 F.3d 889, 897 (7th Cir. 2015).

⁴⁵ *Henry*, 930 F.3d at 837.

⁴⁶ *Henry*, 930 F.3d at 838.

⁴⁷ *Id.*

⁴⁸ Alexander Lowen, *In Defense of Modesty*, 4 J. SEX RES. 51, 52 (1968).

present here, we retain the sole and inviolable power to determine whether and under what conditions we permit access to our “private parts.”⁴⁹ That the violation of this fundamental social compact came in a prison setting does not diminish its impact.⁵⁰

Even in prison, the Fourth Amendment stands as a barrier to gratuitous and imperious applications of state power.⁵¹ That amendment is aimed at making sure that when the government intrudes upon liberty or autonomy in the course of carrying out necessary state functions—*e.g.*, investigating crime, preserving evidence—its power is still bounded and the government is still held to account for its exercise.⁵² The Fourth Amendment does not vanish behind prison walls.

CONCLUSION

In Illinois in 2011, 200 women were forced by corrections officers—under implied threat of physical violence and severe sanction—to cede to the government dominion over the most fundamental and private aspect of their physical and psychological being despite the lack of a legitimate penological interest. It is quintessentially the province of the Fourth Amendment to regulate that conduct. And

⁴⁹ *Id.*

⁵⁰ *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 575 (6th Cir. 2013) (noting the “well established. . . right not to be subjected to a humiliating strip search in full view of . . . others *unless the procedure is reasonably related to a legitimate penological interest.*” (emphasis original)).

⁵¹ *See King*, 781 F.3d at 903 (Hamilton, J., concurring in part).

⁵² *Id.* at 901 (Hamilton, J., concurring in part).

it is the full panoply of rights conferred by the Constitution that preserves our laudable distinction from the worst regimes and practices in recorded history. Amici respectfully urge the Court to rehear this case *en banc*, and hold the Fourth Amendment applicable to the gratuitous sexual violence inflicted upon the class members.

Dated: August 20, 2019

Respectfully Submitted,

s/ Daniel M. Greenfield

Daniel M. Greenfield*

Counsel of Record

RODERICK & SOLANGE

MACARTHUR JUSTICE CENTER

NORTHWESTERN PRITZKER SCHOOL OF LAW

375 East Chicago Avenue

Chicago, IL 60611

(312) 503-8538

daniel-greenfield@law.northwestern.edu

Jennifer Wedekind

ACLU NATIONAL PRISON PROJECT

915 15th Street N.W.

Washington, DC 20005

(202) 548-6610

Anjana Samant

ACLU WOMEN'S RIGHTS PROJECT

125 Broad St.

New York, NY 10004

(646) 885-8341

Benjamin S. Wolf

Camille E. Bennett

ACLU OF ILLINOIS

150 N. Michigan Ave., Suite 600

Chicago, IL 60601

(312) 201-9740

Counsel for Amici Curiae

* Northwestern Pritzker School of Law student Arielle Tolman, Georgetown University Law Center student Janae Stacier, and Stanford Law School student Noah Breslau contributed substantially to the preparation of this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman typeface.

Date: August 20, 2019

s/ Daniel M. Greenfield
Daniel M. Greenfield

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: August 20, 2019

s/ Daniel M. Greenfield
Daniel M. Greenfield