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# SEXUAL ABUSE OF WOMEN IN UNITED STATES PRISONS: A MODERN COROLLARY OF SLAVERY

*Brenda V. Smith\**

## I. INTRODUCTION

I initially began working on this paper in connection with a project that looked at the transatlantic abolition movement in the United States and Europe from 1830 to 1870 with a focus on early feminist efforts.<sup>1</sup> In that initial effort, it became clear that sexual abuse of women in prison and the sexual abuse of female slaves shared many similarities. This paper addresses the sexual abuse of women in custody as a more contemporary manifestation of slavery. Part II situates the sexual abuse of women in custody in the historical context of the creation of the first penitentiaries in the United States. Part II also briefly charts the “Reform Movement” in prisons, which was led by Quaker women who were also involved in the abolition movement and later the suffrage movement.<sup>2</sup> It further examines the impact that women’s entry into male prisons as workers in the 1970s

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\* Brenda V. Smith is a Professor at the Washington College of Law. I would like to thank my colleagues for their helpful suggestions and feedback on this paper. The manuscript of Prof. Pamela Bridgewater and her thoughtful comments were particularly helpful. I would also like to thank my research assistants, Loren Ponds, Sundeep Patel, and Nairi Simonian, who provided key research assistance.

1. See *SISTERHOOD AND SLAVERY* (Kathryn Kish Sklar & James B. Stewart eds., Yale University Press, forthcoming).

2. See Carole D. Spencer, *Evangelism, Feminism and Social Reform: The Quaker Woman Minister and the Holiness Revival* (1999), <http://www.messiah.edu/whwc/Articles/article.htm> (search “Spencer”) (remarking that a prominent Quaker woman, Rhoda Coffin, was championed for her trailblazing efforts on behalf of women prisoners and is credited with founding the first state prison for women, the Women’s Prison and Girls’ Reformatory at Indianapolis, Indiana). Spencer notes that Coffin’s pioneering work on behalf of women prisoners, including the passage of legislation in Indiana that resulted in the administration of women’s prisons consisting entirely of women, contributed to Coffin’s image as not only a woman who worked on behalf of women prisoners, but one who championed the equality of all women in all spheres of life. *Id.*

and 1980s—pursuant to Title VII<sup>3</sup>—had on the sexual abuse of women in custody. Part III will discuss the congruencies and the differences that exist between the sexual abuse of women in custody and slavery. Part IV discusses modern advocacy efforts to address sexual abuse of women in custody and explores the relative lack of advocacy by national women's organizations on this issue. Part V concludes that the sexual abuse of women in custody is a serious contemporary issue, similar to slavery, and that the appropriate societal response to this problem is impeded by deeply imbedded views of women in custody as unworthy and undeserving of attention, and to some degree, as responsible for their own victimization.<sup>4</sup>

## II. HISTORICAL CONTEXT OF SEXUAL ABUSE OF WOMEN IN CUSTODY

As long as there have been prisons<sup>5</sup> and women in them,<sup>6</sup> women have

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3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994). The text of Title VII is as follows:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. This paper is part of a larger scholarly project, which documents, explains, and enhances legal and other responses to women in custody. *See generally* BRENDA V. SMITH, AN END TO SILENCE: PRISONERS' HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL MISCONDUCT (2d ed. Washington College of Law 2002); BRENDA V. SMITH, FIFTY STATE SURVEY OF STATE CRIMINAL LAWS PROHIBITING THE SEXUAL ABUSE OF PRISONERS (2005) (on file with author) [hereinafter SMITH, 50 STATE SURVEY]; BRENDA V. SMITH, INSTRUCTOR'S GUIDE: STAFF SEXUAL MISCONDUCT WITH INMATES (Nat'l Inst. of Corr. 2002); Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUMB. J. GENDER & L. 185 (2006); Brenda V. Smith, *Sexual Abuse Against Women in Prison*, 16 A.B.A. CRIM. JUST. MAG. 1, 30 (2001); Brenda V. Smith, *Watching You, Watching Me: Cross-Gender Supervision of Prisoners*, 15 YALE J.L. & FEMINISM 225 (2003).

5. *See* Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 342 n.16 (crediting Michel Foucault with doing seminal work in the area of tracking the historical birth and rise of the penitentiary); *see also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977) (Pantheon 1975) (detailing the birth and rise of the prison).

6. *See* U.S. Dep't of Justice, Sourcebook on Criminal Justice Statistics Online 2002, <http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section6.pdf> [hereinafter U.S. Dep't of Justice, Online Sourcebook]. Table 6.34 offers statistics on the total number of women incarcerated in federal and state prisons throughout the country. At the end of 2002, there were 97,941 women incarcerated in the United States, with 86,257 of them being housed in state institutions. The largest number of women are incarcerated in the South, which includes states from Florida to Texas to Maryland. *Id.* The median age of incarcerated women of all ethnicities was thirty-three years old in state prisons and thirty-six years-old in

been sexually victimized.<sup>7</sup> Women in the earliest prisons were poor women, usually of the non-ruling or minority class, and women who had deviated from prevailing social norms for their gender.<sup>8</sup>

In the 1860s, women reformers in the United States raised public awareness about the increasing number of women in prison and the terrible conditions of confinement they faced, in particular the sexual abuse of women prisoners by male guards.<sup>9</sup> These reformers pointed out that men

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federal prisons. In the thirty to thirty-four-year-old age group, 129 White women, 662 Black women, and 216 Hispanic women out of every 100,000 in the general population for each racial group were incarcerated. In the thirty-five to thirty-nine-year-old age group, 106 White women, 566 Black women, and 193 Hispanic women out of every 100,000 women in the general population for each racial group were incarcerated. See Online Sourcebook, *supra*, at Table 6.27; see also LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 7, 11 (1999) (indicating crimes, sentences and racial makeup of women prisoners). Greenfeld and Snell found that out of every 1000 women, by age thirty, three White women, twenty Black women, and seven Hispanic women were incarcerated. By age forty the numbers jumped to four White women, thirty-one Black women, and twelve Hispanic women. *Id.* at 11.

7. See NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN IN STATE PRISONS, 1800-1935, at 97-98 (1985). Rafter gives a first-person account of the especially poor situation of women prisoners in the South, detailing their living conditions, which includes the constant supervision by male corrections officers. *Id.* She details an account of Molly Forsha, who was convicted of murder in the mid-1870s, and gave birth to twins while incarcerated at Nevada State Prison at Carson City—allegedly as a result of sexual activity with the prison warden. *Id.* at 98. Rafter also discusses the opening of the Indiana Women's Reformatory by Charles and Rhoda Coffin in 1873. *Id.* at 29-33. The Coffins had observed that the conditions endured by women prisoners when housed with male offenders were abhorrent, and often resulted in women being forced to engage in sexual activity at the whims of their jailers. This was due largely to the fact that the male corrections officers held the keys to the women's cells. The Coffins' Reformatory, as a result, was the first one to employ an entirely female staff. *Id.* at 29-31; see also Sheryl Pimlott & Rosemary C. Sarri, *The Forgotten Group: Women in Prisons and Jails*, in WOMEN AT THE MARGINS: NEGLECT, PUNISHMENT AND RESISTANCE 55, 63 (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002) [hereinafter Pimlott & Sarri, *The Forgotten Group*] (citing an incident of sexual and physical abuse—and subsequent pregnancy—at the Auburn New York State Prison in 1865, which led to the opening of a separate women's facility, the Mount Pleasant Female Prison).

8. See RAFTER, *supra* note 7, at 13 (detailing the viewpoint of early eighteenth century scholar, Francis Leiber, that convicted women were essentially morally bankrupt, and therefore prone to commit heinous crimes more quickly and easily than their male counterparts). Rafter notes that Leiber's opinion, shared by many of his contemporaries, was essentially an articulation of the perception that a woman prisoner personified the archetypal "dark Lady—dangerous, strong, erotic, evil—a direct contrast to the obedient, domestic, chaste . . . Fair Lady." This characterization, Rafter suggests, justified the need to separate the women from men, even when both sexes were physically present in one prison facility. *Id.* at 12.

9. JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME AND JUSTICE 159 (2d ed. 2001) (discussing how, following the civil war, reformers wanted to limit social disorder by restoring "women's inherent purity").

were luring women and girls into prostitution.<sup>10</sup> Women prison reformers complained that prisons degraded rather than reformed women by subjecting them to sexual abuse.<sup>11</sup> Thus, the sexual abuse of women existed even in the earliest United States prisons.

Around 1870, there was a movement to improve the conditions of incarcerated women. This “Reform Movement”<sup>12</sup> was led, in large part, by Quaker men and women involved in, or sympathetic to, the abolition of slavery and gaining suffrage for women.<sup>13</sup> They believed that women who had run afoul of the law were in need of reforming,<sup>14</sup> and thus opened “reformatories” staffed by “matrons” to teach women the skills they needed to make their way in the world—sewing, gardening, laundry, and cooking.<sup>15</sup> The Reform Movement lasted until the 1930s, when it lost the support of some women’s groups who felt that women’s efforts needed to be focused on gaining the vote for women rather than prison reform.<sup>16</sup>

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10. *Id.* (noting that it was not unusual for women prisoners to be lashed until they gave in to sex with male prison guards).

11. ESTELLE B. FREEDMAN, *THEIR SISTERS’ KEEPERS* 59 (1981).

12. The Reform Movement should be differentiated from the concurrent movement of “Custodial Imprisonment.” Custodial Imprisonment initially supported women and men being housed together, but subsequently advocated housing women prisoners in separate wings, wards, or floors of men’s prisons. Only after all these manifestations of “separate” areas for housing women prisoners were tested (and failed) did truly separate women’s institutions come about. See RAFTER, *supra* note 7, at 103.

13. See *id.* at 24 (crediting a group of Indiana Quakers with starting “the first entirely independent, female-staffed women’s prison,” which operated on the Reform Movement principle that rehabilitation is preferred to punishment). Rafter also reports the observations of Dorothea Dix, who noted that Quakers were very active in what is regarded as the precursor to the opening of actual reformatories: the lay visiting of women inmates at the Eastern Penitentiary in Pennsylvania. The women at Eastern, numbering roughly twenty at any given time, were subjected to solitary confinement for the duration of their sentences, although they were allowed to have visitors. Lay visiting, like the Reformatory Movement, had its roots in religious obligation and the desire to bring some kind of meaning to the lives of the prisoners. *Id.* at 15; see generally JULIE ROY JEFFREY, *THE GREAT SILENT ARMY OF ABOLITIONISM: ORDINARY WOMEN IN THE ANTISLAVERY MOVEMENT* (1998) [hereinafter JEFFREY, *THE GREAT SILENT ARMY*] (discussing Quaker women’s role in the abolition movement).

14. See PRISONS IN AMERICA 8 (Nicole Hahn Rafter & Debra L. Stanley eds., 1999) (acknowledging the “Declaration of Principles,” a product of an 1870 meeting of prison officials and scholars in Cincinnati, which established the primary goal of the Reform Movement as providing “religious, vocational and remedial education for prisoners”).

15. See RAFTER, *supra* note 7, at 26 (noting that Zebulon Brockway, an early proponent of the Reformatory Movement, believed that a matronly, respectable woman figure in the presence of the prisoners was an essential element of reformation). *But see* Pimlotte & Sarri, *The Forgotten Group*, *supra* note 7, at 63 (accusing the Reform Movement of reinforcing stifling gender and class roles, as well as societal moral standards). Pimlotte & Sarri posited that the Reform Movement was essentially just another form of punishment.

16. See RAFTER, *supra* note 7, at 81-82 (describing how the original reformatory

This “abandonment” left the Reform Movement lethargic and left female prisoners languishing in institutions that retained the old characteristics of reformatories,<sup>17</sup> without formal backing from established and respected women’s groups.<sup>18</sup> Even after suffrage was granted, there was a definite fracture of the women’s movement, with some feminists voicing the idea that scarce resources were being wasted on the task of “reforming” women offenders.<sup>19</sup>

For the next forty years, women’s reformatories became the norm. While they had abandoned many of the more salutary principles of the Reform Movement, they continued to be run with many of the outer trappings of reformatories including all female staff and “gender-appropriate” training in cooking, sewing, gardening, and cleaning.<sup>20</sup>

In the 1960s and 1970s, women correctional officers seeking job advancement used Title VII’s<sup>21</sup> proscription against discrimination in employment to obtain positions in male prisons.<sup>22</sup> Concerned with the threat of Title VII litigation, prison officials supported women’s entry into previously all-male settings, despite frequent challenges raised by male

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population, consisting primarily of minor offenders, was severely diluted by felons and misdemeanants who were again sentenced to local jails).

17. *Id.* at 34-35.

18. See BELKNAP, *supra* note 9, at 162 (stating that “the reform movement for incarcerated women temporarily died down and there was little change in women’s imprisonment in the middle of the twentieth century”).

19. See generally RAFTER, *supra* note 7.

20. See *Canterino v. Wilson*, 546 F. Supp. 174, 212 (W.D. Ky. 1982) (concluding that defendants were falling short of their constitutional obligation to provide a parity of programs and facilities for women, which include the areas of prison industries, institutional jobs, vocational education and training, and community release programs).

21. 42 U.S.C. § 2000e-2(a) (1994).

22. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977) (challenging discriminatory employment practices in corrections). The Supreme Court determined that gender was a bona fide occupational qualification (BFOQ) in an Alabama maximum security prison given the poor conditions of confinement, which would have exposed women staff to sexual assault, but held that height and weight requirements were not bona fide occupational qualifications. *Id.* at 332 (discussing height and weight), 336-37 (discussing gender); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1374 (11th Cir. 1982) (challenging a corrections policy which barred women from applying for deputy sheriff position; male gender not a bona fide occupational qualification); *Griffin v. Mich Dep’t of Corrs.*, 654 F. Supp. 690, 705 (E.D. Mich. 1982) (holding that women were permitted to work in institutions housing male inmates); *Harden v. Dayton Human Rehab. Ctr.*, 520 F. Supp. 769, 774 (S.D. Ohio 1981) (holding that female plaintiff had right to work as Rehabilitation Specialist in all male corrections institutions); *Gunther v. Iowa State Men’s Reformatory*, 462 F. Supp. 952, 958 (N.D. Iowa 1979) (holding that gender is not bona fide occupational qualification for positions in men’s reformatory beyond a certain position); see also *Everson v. Mich Dep’t of Corrs.*, 391 F.3d 737, 761 (6th Cir. 2004) (holding that given the problem of sexual abuse in Michigan’s female facilities, gender-specific posts are reasonably necessary to the normal operation of its female prisons).

staff and male inmates.<sup>23</sup> As a result, most restrictions on male officers' employment in women's prisons that predated the Title VII were removed and, by some estimates, male officers working in women's prisons now outnumber their female counterparts.<sup>24</sup>

Women's entry into male institutions and their abandonment of women's institutions created opportunities for male staff who had been prohibited by custom, if not by law, from working in women's institutions. Male and female correctional staff's entry into institutions housing female prisoners resulted in complaints, litigation, and reports of sexual abuse.<sup>25</sup> These complaints were met with law suits requesting same-sex supervision. By and large, male prisoners have lost challenges to cross-gender supervision.<sup>26</sup> However, female prisoners have had much greater success, with courts routinely recognizing a greater need and expectation of privacy for women.<sup>27</sup>

### III. HISTORICAL CONTEXT OF SEXUAL ABUSE OF WOMEN SLAVES

Sexual abuse was a prominent feature of the enslavement of African women in the United States.<sup>28</sup> While slavery visited horrific and

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23. See generally Brenda V. Smith, *Watching You, Watching Me*, *supra* note 4 (charting courts' jurisprudence in analyzing claims of cross-gender supervision of male and female inmates).

24. See HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 2* (1996) [hereinafter *HUMAN RIGHTS WATCH, ALL TOO FAMILIAR*]; Online Sourcebook, *supra* note 6 at Table 1.96 (providing statistics on prison workers).

25. See Rita J. Simon & Judith D. Simon, *Female Guards in Men's Prisons*, in *IT'S A CRIME: WOMEN AND JUSTICE* 226-41 (Roslyn Muraskin & Ted Alleman eds., 1993) (discussing the entry of male employees into women's prisons). For example, in *Lucas v. White*, three female inmates housed at the federal prison in Dublin, California sued the Federal Bureau of Prisons seeking monetary damages, changes in prison procedures, and staff training. Robin Lucas, Valerie Mercadel, and Raquel Douthit alleged that they were placed in a men's security unit and sold as sex slaves by male staff to male inmates. The women prevailed and were each awarded \$500,000 in damages. Significantly, as part of the settlement, the Federal Bureau of Prisons agreed to and undertook a national training program on staff sexual misconduct with inmates and developed a confidential reporting system to protect women from retaliation. See *Lucas v. White*, 63 F. Supp. 2d 1046, 1051 (N.D. Cal. 1999). For further discussion of litigation that has addressed staff sexual misconduct of prison staff with women inmates, see *infra* Section IV.A (detailing important litigation on behalf of women prisoners that illuminated widespread sexual misconduct against these prisoners).

26. Smith, *Watching You, Watching Me*, *supra* note 4, at 244-76.

27. *Id.*

28. See generally Pamela Bridgewater, *Ain't I A Slave: Slavery, Reproductive Abuse and Reparations*, Internal Faculty Speaker Series (Oct. 29, 2004) (unpublished manuscript, on file with author) (discussing a gender-specific slavery that took the form of sexual abuse).

unimaginable abuse on all slaves, women slaves experienced abuse that was particularly related to their gender.<sup>29</sup> Women slaves were routinely used as concubines for male slave owners, their relatives and their owner's guests.<sup>30</sup> They were systematically impregnated by their owners, and at their owner's request, by other slaves in order to produce children that were sold, worked or in turn bred to raise other slaves.<sup>31</sup> Much of the early abolitionist work by women reformers, the same reformers who led the movement to create women's prisons, focused on sexual abuse of female slaves.<sup>32</sup>

In fact, Harriet Jacobs, one of the early female abolitionists and a former slave wrote extensively of the sexual exploitation of female slaves.<sup>33</sup> At the same time the sexual degradation of female slaves was also used rhetorically by early women's rights groups who compared their lack of rights to that of female slaves—making the plea that their treatment should be better than that of female slaves.<sup>34</sup> Their failure to get that “better” treatment moved them to abandon both the abolition movement and the reform of women's prisons, in favor of gaining suffrage.<sup>35</sup>

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29. *Id.*

30. *Id.* (discussing the sexual exploitation of slaves by their masters).

31. *Id.* at 28-35 (discussing the profitable business of slave breeding and the economic benefits of raping and impregnating female slaves).

32. See Spencer, *supra* note 2 (noting that the prominent suffragette, Elizabeth Cady Stanton, advocated prison reform as a significant prong in her feminist advocacy). Spencer notes that Stanton's prison reform views mirrored those of Rhoda Coffin, who was a prominent prison reformer in her own right. Specifically, Coffin tied prison reform to the larger idea of women's rights by characterizing both in terms of “the belief in the value and dignity of every human being, even the most debased criminal.” *Id.* Stanton was more direct in her approach, arguing that “fear, coercion, and punishment are the masculine remedies for moral weakness.” *Id.*; see also Nancy A. Hewitt, *Abolition & Suffrage*, <http://www.pbs.org/stantonanthony/resources/index.html?body=abolitionists.html> (last visited Jan. 27, 2006).

33. See HARRIET JACOBS, *INCIDENTS IN THE LIFE OF SLAVE GIRL, WRITTEN BY HERSELF* 35, 51, 55, 77 (L. Maria Child & Jean F. Yellin eds., Harvard Univ. Press 1987) (1861).

The slave girl is reared in an atmosphere of licentiousness and fear. The lash and the foul talk of her master and his sons are her teachers. When she is fourteen or fifteen, her owner, or his sons, or the overseer, or perhaps all of them, begin to bribe her with presents. If these fail to accomplish their purpose, she is whipped or starved into submission to their will.

*Id.* at 51.

34. See *Declaration of Sentiments*, *infra* note 96, at 95-97.

35. See Elizabeth Cady Stanton, *Address to the Legislature of the State of New York*, in *GENDER AND LAW: THEORY, DOCTRINE, AND COMMENTARY* 57-58 (Katherine T. Bartlett & Angela P. Harris eds., 1998).



#### IV. SEXUAL ABUSE OF WOMEN IN PRISON AND SLAVERY: CONGRUENT OPPRESSION(S)?

Slavery<sup>36</sup> and sexual abuse of women in prison share many congruencies and certainly obvious differences. The sexual abuse of slaves differed from sexual abuse of women in prison in at least one fundamental and important way—its legality. Slavery and the sexual abuse of slaves that occurred as a result of it were legally sanctioned in the United States, while arguably sexual abuse of women in custody is not.<sup>37</sup> It would be tempting to say that sexual abuse in institutional settings primarily affects women, and therefore—like slavery—an identifiable group is targeted for discriminatory treatment. That, however, is not true. Both male and female prisoners frequently face sexual abuse by both staff and other inmates as a means of domination.<sup>38</sup>

Similar to sexual abuse in prisons, sexual abuse of slaves also was not limited to abuse of females. Though sexual abuse of male slaves did not take the same form as sexual abuse of women slaves, male slaves were targeted for abuse related to their sexuality—often facing castration as a form of oppression.<sup>39</sup> Thus, a congruency of both sexual abuse of women in prison and women in slavery is that sexual abuse was and is used as a tool of oppression.

##### A. Sexual Violence as a Tool of Oppression

Sexual violence has been used as a means of oppression, control and

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36. See Slavery Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (providing the earliest version of an international treaty denouncing slavery and the trafficking of humans, promulgated by the League of Nations). This treaty defines slavery as: “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” Slavery Convention of 1926, art. 1. This document was later updated and adopted by the United Nations, and is now called the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, sec. I, art. 1(a), *opened for signature* Sept. 7, 1956, 226 U.N.T.S. 3. Other international human rights documents that contain prohibitions on slavery include the Universal Declaration of Human Rights, G.A. Res. 217A(III), at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) and the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

37. See generally Prison Rape Elimination Act [PREA], 42 U.S.C. §15601 (2003); SMITH, 50 STATE SURVEY, *supra* note 4 (providing a detailed analysis of each state’s laws about sexual misconduct in prisons, as well as those codified at the federal level).

38. See generally HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) [hereinafter HUMAN RIGHTS WATCH, NO ESCAPE] (documenting the sexual abuse of male inmates in U.S. prisons).

39. See Jenny B. Wahl, *Slavery in the United States*, <http://www.eh.net/encyclopedia/?article=wahl.slavery.us> (noting that castration was one of the punishments male slaves endured).

retribution against women in custody both domestically and internationally. On the international stage, in times of war, sexual abuse, usually against women, is frequently used during investigation as a means of intimidation or torture.<sup>40</sup> The literature on the experience of women in slavery and that of women prisoners is replete with accounts of the sexual abuse of women.<sup>41</sup>

An offshoot of sexual violence is the complicated relationships that sometimes emerge between captive and captor. Both in slavery and in prison, the roles of the oppressed and the oppressor can become confused—sometimes resulting in relationships that stretch traditional boundaries of captor and captive.<sup>42</sup> There are many accounts of women

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40. See Jan Goodwin, *Silence=Rape: While the World Looks The Other Way, Sexual Violence Spreads in the Congo*, THE NATION, Mar. 8, 2004, at 18 (reporting on the use of rape as a weapon of war in the Congo); Brian Knowlton, *U.S. Installed Government in Iraq is Cited by U.S. for Rights Abuses*, N.Y. TIMES, Mar. 1, 2005, at A1 (reporting prosecutions of police officers in Baghdad who systematically raped and tortured female detainees); *Rwanda: Witness Tells of Sexual Assault by Soldiers*, AFRICA NEWS, Sept. 20, 2005 (reporting on a genocide survivor's testimony at the trial of senior Rwandan military officials about how she was raped by soldiers during the 1994 genocide); *Woman Tells How She Was Tortured By Saddam Thugs*, BELFAST NEWS LETTER, Dec. 7, 2005, at 17 (reporting how female detainees in Iraqi prisons lost their virginity to guards); *The Reach of War: Latest Report on Abu Gharib: Abuse of Iraqi Prisoners 'Are Without Question Criminal*, N.Y. TIMES, Aug. 26, 2004, at A11 (reporting the use of threats of sexual abuse and assault, forced masturbation, and forced nudity to degrade prisoners of war); Olivia Ward, *Rape: A Deadly Weapon of War*, THE TORONTO STAR, July 24, 2004, at A11 (reporting that in western Sudan, girls as young as eight are being routinely raped and forced into sexual slavery by Arab militias).

41. See generally HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, *supra* note 33, at 27-30 (alluding to her sexual victimization by her master, Dr. Flint); HUMAN RIGHTS WATCH, ALL TOO FAMILIAR, *supra* note 24 ; RAFTER, *supra* note 7, at 59-61 (discussing the sexual abuse of women prisoners at the hands of prison guards and officials); Bridgewater, *supra* note 29 (discussing the legal ramifications of raping a black female slave in the U.S.); Daniel Burton-Rose, Daniel Burton-Rose, *Our Sister's Keepers*, in PRISON NATION: THE WAREHOUSE OF THE POOR 258, 258 (Tara Herivel & Paul Wright eds., 2003) (describing the abuses suffered by women prisoners at Correction Corporation of America's Central Arizona Detention Center in Florence).

42. The complex relationships that formed between slave and slave-owner is illustrated by the following narration of a letter written by a female slave, Virginia Boyd, to a slave trader, R.C. Ballard, on May 6, 1853 requesting that he did not sell her unborn child, or previous children, all conceived with her masters:

I am in the present in the city of Houston in a Negro traders yard, for sale, by your orders. I was present at the Post Office when Doctor Ewing took your letter out through mistake and [read] it a loud, not knowing I was the person the letter alluded to. I hope that if I have ever done or said any thing that has offended you that that you will for give me, for I have suffered enough Cince in mind to repay all that I have ever done, to anyone, you wrote for them to sell me in thirty days, do you think after all that has transpired between me & the old man, (I don't call names) that its treating me well to send me off among strangers in my situation to be sold without even my having an oppportunity of my children to sell his own

slaves bearing children and having long-term relationships with their owners.<sup>43</sup> The same is true for women in custody.<sup>44</sup> The reasons for these relationships are quite complex. They can certainly be motivated by love,<sup>45</sup> sexual desire,<sup>46</sup> or desire to bear children<sup>47</sup>—even under oppressive conditions.<sup>48</sup> These relationships, in the context of slavery, were often motivated by need—the oppressor had access to items that would make slavery or imprisonment more bearable—better food or clothing, better work assignments, protection from other oppressors, and increased status within the framework.<sup>49</sup> The same is true for women prisoners.<sup>50</sup>

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offspring. Yes his own flesh & blood . . .

See *Africans in America: Judgement Day Part 4: 1832-1865* (PBS Television Broadcast, 1999).

43. See GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 47-48 (Katherine T. Bartlett & Angela P. Harris eds., 1998) (detailing a relationship between a white man and his freed slave partner, whom he never married, but with whom he lived for a number of years and fathered two children that he acknowledged as his own, and to whom he bequeathed the majority of his estate upon death).

44. See Robert Worley et al., *Prison Guard Predators: An Analysis of Inmates Who Established Inappropriate Relationships with Prison Staff, 1995-1998*, 24 *DEVIANT BEHAV.: AN INTERDISC. J.* 175, 181-93 (2003) (discussing how some inmates pursue consensual, romantic relationships with correctional employees).

45. See Stephanie L. Phillips, *Claiming our Foremothers: The Legend of Sally Hemings and the Tasks of Black Feminist Theory*, 8 *HASTINGS WOMEN'S L.J.* 401, 405 (1997) (detailing her theory for the “love story” dynamic between a black slave and her white master as an explanation for a sexual relationship, and citing as an example the love affair between Sally Hemings and Thomas Jefferson); see also Kathleen Trigiani, *Societal Stockholm Syndrome*, [http://web2.iadfw.net/ktrig246/out\\_of\\_cave/sss.html](http://web2.iadfw.net/ktrig246/out_of_cave/sss.html) (describing the bank robbery, hostage situation and ensuing close relationships between the hostages and the robbers that gave the syndrome its name and characterizing the syndrome as possibly attributable to the true “emotional bonding between captors and captives”). Trigiani notes that two of the hostages from Stockholm eventually became engaged to two of the bank robbers. *Id.*

46. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire* 101 *COLUM. L. REV.* 181, 205 (2001) (inviting feminists to rethink women’s sexuality and desire as being outside of the confines of reproduction, and suggesting that sexual desire is malleable, and often shaped by a woman’s environment).

47. See *id.* at 186:

Reproduction raises numerous sticky normative questions, yet underexplored within feminism, with respect to choice, coercion, and policies that incentivize or disincentivize reproductive uses of women’s sexual bodies—not only for women who occupy law’s margins, such as lesbians and women of color, but also for women whose reproduction we regard as unproblematic.

It goes without saying that women prisoners would likely be categorized in the group of “problematic reproducers,” along with lesbians and women of color.

48. See *supra* notes 40-43 and accompanying text.

49. See DEBORAH G. WHITE, *AREN’T I A WOMAN: FEMALE SLAVES IN THE PLANTATION SOUTH* 99-120 (1990) (describing how black female slaves were often rewarded with extra food, better clothing, and an increased standing in the slave community if they submitted to their owner’s sexual advances).

Because of the imbalance of power inherent to the position of authority that captors hold over the captured, the concept of consent may have only limited value in evaluating these relationships.<sup>51</sup> In slavery, however, consent was not an issue. Slave masters owned slaves and their wives. Neither wife nor slave<sup>52</sup> could protest sexual relations and had little power over what happened to the products of those unions. Wives and slaves also had little say over the custody, disposition, and education of children.<sup>53</sup> Unless state law provided otherwise, or separate arrangements were made prior to marriage, all of a woman's property belonged to her husband.<sup>54</sup> As for slaves, anything they produced—human or material—belonged to the slave owner.

In prison, staff—primarily male—have exploited the prison setting as an opportunity to abuse women prisoners.<sup>55</sup> When courts and state law fail to

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50. See Anthea Dinos, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281, 283-84 (2000) (highlighting the unequal distribution of power between corrections officers and prisoners, and noting that the former are aware of the latter's dependency on them for "basic necessities").

51. See Carrigan v. Davis, 70 F. Supp. 2d 448, 459-61 (D. Del. 1999) (discussing inmates' inherent lack of meaningful capacity to consent to sexual contact with correctional institution staff); see also U.N. Econ & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ¶ 55, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999) (prepared by Radhika Coomaraswamy) [hereinafter U.N. ECOSOC, *Report of the Special Rapporteur*] (attributing the ease with which corrections officials are able to exploit women prisoners to the hierarchical nature of the prison system, as well as to the inherent power imbalance that is attendant to such a hierarchy).

52. See generally Claire Midgley, *British Abolitionism and Feminism in Transatlantic and Imperial Perspective*, in *SISTERHOOD AND SLAVERY* (forthcoming 2005) (manuscript at 3, on file with the author) (noting that the "abolitionist-feminist" form of rhetoric as was by the Garrisonian-American suffragettes to "equate sexual and racial bondage"); Karen Offen, *How and Why the Analogy of Marriage with Slavery Provided the Springboard for Women's Rights Demands in France*, in *SISTERHOOD AND SLAVERY* (forthcoming 2005) (manuscript at 3, on file with the author) (remarking that the earliest French scholars' allusions to slavery were not race-specific, but rather focused on sex when discussing the imbalance of power and rights).

53. See JAMES MELLON, *BULLWHIP DAYS: THE SLAVES REMEMBER, AN ORAL HISTORY 197* (1988) (giving first-person accounts of the prohibition on slaves literacy). Some slaves, however, did learn to read and write, usually from mistresses sympathetic to their plight. Unfortunately, many more unlucky slaves had owners who would cut off fingers or entire hands if they caught slaves reading or writing. *Id.*

54. See NORMA BASCH, *In The Eyes of the Law*, in *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 11* (Katharine T. Bartlett & Angela P. Harris eds., 1998) (discussing the common law position that the matrimonial union of a man and woman resulted in one legally-recognized being, the man).

55. It cannot be assumed that women prisoners are entirely safe when they are in the absolute control of female guards rather than male guards. See *Daskalea v. District of Columbia*, 227 F.3d 438, 443 (D.C. Cir. 2000) (describing how a female sergeant forcibly

respond to sexual abuse against women prisoners, they effectively “privatize” it.<sup>56</sup> Like slaves, women prisoners have few means to protest these sexual relations.<sup>57</sup> Thus, the authority of the corrections personnel who have the power to protect women from sexual abuse or ignore and perpetrate that abuse becomes similar to the patriarchal authority of the husband and slave-owner seen in the nineteenth century.

### B. The Impact of Economic and Political Forces on the Institution

Undoubtedly, there were powerful political and economic interests supporting slavery.<sup>58</sup> The political and economic forces which shape criminal justice policy, and which in turn support imprisonment are powerful as well.<sup>59</sup> Slavery helped stabilize the economy of the early

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restrained an inmate, as another inmate sexually assaulted her).

56. See Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 754 (2005). “This uncritical judicial deference, which abandons prisoners’ well-being almost entirely to the discretion of guards and wardens, effectively privatizes the abuse of prisoners: prisoners, and their treatment, have been removed from the public realm.” *Id.* at 763; see also Teresa A. Miller, *Keeping the Government’s Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 882 (2000-2001) (remarking that although prisons are quintessentially public institutions, they exist within a separate, “closed” sphere of discipline and punishment).

57. See Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 WOMEN’S STUD. Q. 102, 107, 110 (2004) (discussing the inadequate reporting procedures, threats of retaliation, and the author’s belief that “imprisonment necessitates that these women have no choice but to comply”).

58. See Bridgewater, *supra* note 29, at 113-14 (detailing the sexual exploitation of female slaves, and noting that while such domination resulted in the “physical exploitation” of the women, there were also economic incentives; sexual exploitation was a method of forced breeding, which resulted in more slaves, which increased the owner’s personal wealth).

59. See Bonnie Kerness, *Breeding Monsters*, FORTUNE NEWS, Summer 2001, <http://www.prisoncentral.org/Prisoncentral/Supermax/Articles/Fortune%20Society/Breeding%20Monsters.htm> (noting that the prison industry is among those that are growing the fastest in the United States, and suggesting that those viewed as “economic liabilities” in free society become “economic assets” once incarcerated). Kerness, the Associate Director of the Criminal Justice Program of the American Service Friends Committee, goes on to suggest that those who are most often perceived as economic liabilities are young men of color. *Id.* This is reflected in prison statistics. See Online Sourcebook, *supra* note 6, at Table 6.27 (reporting that in 2002, for every 100,000 prisoners 3437 were Black men as compared to only 450 White men); see generally MARC MAUER, RACE TO INCARCERATE (1999) (examining the explosion of the prison population in the last twenty years, discussing which demographic groups have been disproportionately impacted by the explosion, and inquiring whether the explosion has had a positive effect on curtailing crime); Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLOR LINES (Fall 1998), [http://www.arc.org/C\\_Lines/CLArchive/story1\\_2\\_01.html](http://www.arc.org/C_Lines/CLArchive/story1_2_01.html) (discussing the inherent racism that exists in the ideology behind incarceration, and suggesting that the American public has been hoodwinked into believing that incarceration is a necessary evil if public

colonies by providing a cheap source of labor for the benefit of a few wealthy landowners.<sup>60</sup> Cheap slave labor was a standard means of economic growth until emancipation, when slave plantations were dismantled—and then quickly replaced by prisons.<sup>61</sup> Soon after emancipation, the composition of prisons shifted from predominantly white to predominantly black.<sup>62</sup> Thus, in spite of—or perhaps because of—emancipation, the enslavement of blacks was quickly converted to the subjugation of blacks through imprisonment, furthering the goal of feeding the economy.<sup>63</sup>

Prisons have become the primary economic development project in many communities, providing economic growth and stability to economically marginal communities.<sup>64</sup> Private prison concerns such as Wackenhut and Corrections Corporation of America<sup>65</sup> are publicly traded on the New York Stock Exchange and build prisons not just in this country, but around the world.<sup>66</sup> Prisoners are seen as a commodity that these

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safety is not to be sacrificed).

60. RANDALL G. SHELDEN, CENTER ON JUVENILE AND CRIMINAL JUSTICE, SLAVERY IN THE THIRD MILLENNIUM 2 (2005), available at [www.sheldenessays.com/res\\_thirteen.htm](http://www.sheldenessays.com/res_thirteen.htm).

61. See MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878 (1980) (describing the transition from prison to plantation and to prison again in the development of South Carolina and Massachusetts colonies); see also Garvey, *supra* note 5, at 339-57.

62. See generally SHELDEN, *supra* note 60, at 2-5 (discussing convict leasing and how it helped to perpetuate slavery).

63. See HINDUS, *supra* note 61; Garvey *supra* note 5, at 355 (stating that prison labor in the form of convict leasing “formed a vital part of the postbellum system of racial oppression” which “prevented the migration of emancipated blacks out of the South and kept their wages artificially depressed”).

64. See James Brooke, *Prisons: A Growth Industry for Some; Colorado County is a Grateful Host to 7,000 Involuntary Guests*, N.Y. TIMES, Nov. 2, 1997, at 120. Brooke’s article examines Fremont County, Colorado, home to the Federal Bureau of Prisons’s ADX Supermax prison, as well as three other federal prisons, and details the ways the presence of the prisons boosted the local economy. *Id.* Specifically, Brooke notes that the “four [federal] institutions employ slightly more than 1,000 workers, with an average salary of about \$30,000.” *Id.*

65. For more information on Corrections Corporation of America and Wackenhut Corporation, visit their websites at [www.wackenhut.com](http://www.wackenhut.com) and [www.correctionscorp.com](http://www.correctionscorp.com).

66. See Rick Brooks, *Prison Concern Agrees to Settle Inmate Lawsuit*, WALL ST. J., Mar. 2, 1999, at 1 (reporting that Prison Realty agreed to pay \$1.65 million to settle a lawsuit instituted by prisoners at its Youngstown, Ohio facility, and also noting that Prison Realty was formed as a result of a merger of Corrections Corporation of America with CCA Prison Realty); *Business Brief, Prison Realty Corp: Medium-Sized Facility is Being Built in Arizona*, WALL ST. J., Mar. 9, 1999, at 1 (discussing the private Prison Realty’s business of building and managing corrections and detentions facilities, and noting that the company expected the new Arizona facility to generate yearly receipts of about \$31 million; see generally JOSEPH T. HALLINAN, GOING UP THE RIVER: TRAVELS IN A PRISON NATION (2001) (exploring all aspects of the private prison industry, and offering a critique of the system,

corporate entities house as a service to states. In many states, the most powerful labor unions are police and correctional employee unions.<sup>67</sup>

Political forces are also strong in promoting imprisonment. Getting “tough on crime”<sup>68</sup> is a certain way to enhance the political standing of elected officials. With such strong political forces and economic benefit,<sup>69</sup> like the slave plantations of the past, it is not surprising that sexual abuse of women in the prison system, much like the rape and breeding of slave women, is often overlooked as one of the byproducts of a necessary institution.

### C. Legal Protection From Unwanted Sexual Relations

It goes without saying that there was no legal protection from sexual abuse for female slaves.<sup>70</sup> Women prisoners, at least, have some legal protection from forced sex by correctional staff.<sup>71</sup> Twenty-three states specifically provide by law that a prisoner’s consent is not a defense to criminal prosecution of staff sexual misconduct.<sup>72</sup> These states recognize that the difference in power between prisoners and correctional staff negates claims of consent. Notwithstanding this majority view, there continues to be debate among courts about the ability of prisoners to consent and the impact this consent should have on the availability of relief for violations of constitutional rights.<sup>73</sup> Several states have made it a

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which combines with political and economic forces to incarcerate more and more people every year).

67. See *COs Major Part of Union’s Success*, 9 AFSCME CORRECTIONS UNITED NEWS 2, 4 (2002) (discussing trends that have emerged in the past year that show how an increasing number of corrections officers, especially in Kentucky and Puerto Rico, are organizing themselves to seek better pay and benefits); Mark Lifsher, *Union Aims To Battle Prison Firms*, WALL ST. J., Apr. 21, 1999, at CA1 (discussing the attempts of a California union, the Correctional Peace Officers Association, to block the building of two private prisons, built by competitors Corrections Corporation of America and Wackenhut Corrections Corporation).

68. See generally George M. Anderson, *Parole Revisited*, AM. MAG., Mar. 4, 2002, available at <http://www.americamagazine.org/gettext.cfm?articleTypeID=1&textID=1621&issueID=363> (describing how, in the last thirty years, the opportunities for prisoners to obtain early release has decreased dramatically because of get-tough-on-crime laws).

69. See Garvey, *supra* note 5, at 370-71 (noting that in 1993 the Federal prison labor’s net sales exceeded \$400 million).

70. See *supra* note 40 and accompanying text; Bridgewater *supra* note 29, at 24-27 (stating that “[e]nslaved women were without legal recourse because they had no standing, under civil or criminal law, to accuse their owners of rape”).

71. See generally PREA, 42 U.S.C. § 15601 (2003); SMITH, 50 STATE SURVEY, *supra* note 4.

72. See SMITH, 50 STATE SURVEY, *supra* note 4.

73. See *Carrigan v. Davis*, 70 F. Supp. 2d 448, 458-61 (D. Del. 1999) (discussing whether it is appropriate to characterize the “consensual” sexual activity as true consent or

separate criminal offense for an offender to have “consensual” sex with a staff person.<sup>74</sup> These states, Arizona, Nevada and Delaware, can separately sanction prisoners and staff for “consensual” sex.<sup>75</sup> Not surprisingly, there are few criminal prosecutions for custodial sexual misconduct in states against correctional staff.<sup>76</sup>

While there is legal protection in the modern context for sexual abuse of women in custody, women prisoners still have little choice about whether to become sexually involved with correctional staff. Like slaves, women prisoners are often wholly dependent upon correctional staff for their lives and their livelihoods. Correctional staff, like slave owners, determine the ways in which women will serve their time: where they will be housed; where they will work; how much contact they will have with the outside; what they will eat; and how they will be clothed. This exercise of dominion and control severely limits—if not obviates—consent. Like slaves who lacked freedom of choice, women prisoners must often use their sexuality to negotiate within the prison system. Thus, the sexual abuse of female slaves and female inmates are congruent and merit legal protection.

The Thirteenth Amendment of the Constitution outlawed slavery and slavery-like conditions by both private and state conduct.<sup>77</sup> Courts have construed the Thirteenth Amendment to abolish not only chattel slavery but

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as waiver, and ultimately deciding that the heightened standard of a “voluntary, knowing and intelligent” waiver applies when determining whether the inmate consented to a violation of her constitutional rights); *see also* *New Hampshire v. Foss*, 148 N.H. 209, 211-13 (Sup. Ct. 2002) (elucidating the theories of consent (victim-focused) and coercion (corrections officer-focused). The court held that even if the inmate did consent, the defendant is barred from arguing that such consent is a complete defense to coercion. *Id.* at 212-13. Nevertheless, the court found that the state had failed to prove that the defendant-correctional officer had coerced the inmate to have sex and overturned the defendant’s conviction. *Id.* at 214.

74. *See generally* SMITH, 50 STATE SURVEY, *supra* note 4 (providing a detailed analysis of each state’s sexual misconduct in correctional institution laws, as well as those codified at the federal level).

75. *See* ARIZ. REV. STAT. ANN. § 13-1414(B) (1989); DEL. CODE ANN. tit. 11, § 1259 (1995); NEV. REV. STAT. § 212.187(1) (1997).

76. *See also* BECK & HUGHES, *infra* note 165, at 9 (reporting that “[t]he most common sanction imposed on staff involved in sexual harassment of inmates was discipline but not discharge or prosecution”).

77. *See* U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction.”); *see also*, Akil Amar, *Child Abuse As Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1359 (1992) (“The Amendment embraced not only those slaves with some African ancestry, but all persons, whatever their race or national origin.”); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude And The Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 212 (1992).



to “abolish all prospective forms of slavery” as well.<sup>78</sup> The Thirteenth Amendment, however, has a specific exclusion allowing such conditions as a punishment for crimes that result from a legitimate conviction. Nevertheless, sexual abuse is “not part of the penalty” that women prisoners are expected to pay for their crime<sup>79</sup> and thus women prisoners should receive protection from sexual abuse notwithstanding the Thirteenth Amendment exclusion. The Thirteenth Amendment applies both in letter and spirit to the protection of slaves and prohibits slavery-like conditions or treatment, even if the “slave” is a woman prisoner subjected to sexual abuse by the state and its agents; well beyond the boundaries of punishment for her crimes.

In the early twentieth century case *Butler v. Perry*,<sup>80</sup> the United States Supreme Court held that involuntary servitude included “those forms of compulsory labor akin to African Slavery which in practical operation would tend to produce undesirable results.”<sup>81</sup> “Involuntary servitude” is broader than the term slavery.<sup>82</sup> Involuntary servitude is “control by which the personal service of one [person] is disposed of or coerced for another’s benefit,”<sup>83</sup> whereas slavery, at least in the U.S. context, is tied to race.<sup>84</sup>

Contemporary criminal involuntary servitude cases reflect an economic view of the Thirteenth Amendment and have focused primarily on forced labor and peonage.<sup>85</sup> This narrow view, however, fails to recognize that slavery and involuntary servitude were more than forced labor. In the case of female slaves it was forced sex and reproduction. The international

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78. McConnell, *supra* note 77, at 212.

79. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

80. 240 U.S. 328 (1916).

81. *See Butler*, 240 U.S. at 332; *see also* *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897). Thus, the forms of involuntary servitude are varied. Peonage is a form of involuntary servitude prohibited by the Thirteenth Amendment arising from the indebtedness to a master. Labor is coerced, either through legal sanction or physical force or threats of either, to pay off debt. *Clyatt v. United States*, 197 U.S. 207, 215-18 (1905). Involuntary servitude is also the “[c]ompulsion of . . . service by the constant fear of imprisonment under the criminal laws” where a person fined for a misdemeanor could contract with another to pay off his or her debts, but the law has made the breach of the contract a crime. *United States v. Reynolds*, 235 U.S. 133, 146 (1914).

82. *See Clyatt*, 197 U.S. at 215-18.

83. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U.L. REV. 480, 491 (1990).

84. Slavery for Akil Amar is *not* tied to race. He defines slavery as “a power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons.” Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1365 (1992). The problem with this definition is that the word chattel implies forced labor.

85. *See id.*

human rights view of slavery is much more nuanced and has recognized that slavery and slavery-like conditions included sexual violence which violates the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Slavery Convention.<sup>86</sup>

A competing and more accurate view is that slavery and involuntary servitude were more than economic systems of free labor, they were complex social systems.<sup>87</sup> For example, women's services included not only those that could have been provided by substitute wage labor, but also sexual and reproductive services that clearly fall outside the wage-labor system.<sup>88</sup> Given that, courts have found that Congress intended for the Thirteenth Amendment to prohibit anything with characteristics of chattel slavery and that there is ample evidence that sexual exploitation of women slaves was a recognized evil of the chattel slavery system. In much the same way, coerced sexual services of women prisoners should be considered as falling within the scope of the involuntary servitude prohibition.

Women who are sexually abused while incarcerated are protected by § 1983, a provision enacted pursuant to the Thirteenth Amendment.<sup>89</sup> Section

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86. International Covenant on Civil and Political Rights, *supra* note 36, art. 8; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1 §1, art. 2 §3, G.A. Res. 39/46, Annex, U.N. GAOR 39th Session, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984); Slavery Convention, *supra* note 36.

87. *The Compelling Need of Diversity in Higher Education*, Expert Report of Eric Fonor, Gratz v. Bollinger et al., No. 97-75321 (E.D. Mich. 1998) ("The breadth of the impact of slavery and involuntary servitude challenges the rigid theoretical boundaries between public and private, the market and family spheres.").

88. See Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 26 ("[B]lack women . . . performed a reproductive function which was crucial to the economic interest of the slaveholders."); see also A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES, 309, 313 (Herbert Aptheker ed., 1951) (Frederic Douglas stated, "more than a million women . . . through no fault of their own, [are] consigned to a life of revolting prostitution . . . slave breeding is relied upon . . . Every slaveholder is . . . a guilty party . . . he deserves to be held up before the world as the patron of lewdness.").

89. See, e.g., Riley v. Orlong, 282 F.3d 592, 597 (8th Cir. 2002) (holding officials liable in official and personal capacity under §1983 for rape of female prisoner by correctional officer); Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia, 877 F. Supp. 634 (D. D.C. 1994) (overturned in part on other grounds) (concluding that the district was liable under § 1983 for Eighth Amendment violations because corrections officials were "deliberately indifferent" to physical and sexual assaults the prisoner suffered, to medical care and to living conditions at two facilities, and fire safety at one); Daskalea v. District of Columbia, 227 F.3d 433, 444 (D.C. Cir. 2000) (holding the District of Columbia liable for the §1983 violation where a prisoner was forced to dance naked upon a table in the cafeteria); see generally NATHAN NEWMAN & J.J. GASS, BRENNAN CENTER FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, A NEW BIRTH OF FREEDOM: THE FORGOTTEN HISTORY OF THE 13TH, 14TH, AND 15TH AMENDMENTS (2004), available at

1983 prohibits deprivation of any rights guaranteed by the constitution, law or ordinance by a person acting under color of state laws.<sup>90</sup> Agencies, city officials and individual correctional staff are persons acting under color of state law for purposes of § 1983.<sup>91</sup> Women in custody have successfully used this statute in litigating cases of sexual abuse in custody,<sup>92</sup> and courts have consistently found sexual abuse creates a cause of action under § 1983 and violates the Eighth Amendment prohibition on cruel and unusual punishment.<sup>93</sup> Likewise, courts have found that other degrading treatment that does not rise to the level of rape—including violations of women's privacy—are actionable under §1983 and violate the Eighth Amendment of the Constitution.<sup>94</sup> This protection is aimed at protecting vulnerable citizens from the power of the state.

#### IV. FEMINIST ADVOCACY ON BEHALF OF WOMEN IN PRISON

Given that the focus of feminist efforts has always been to right the power imbalance between men and women, perhaps the most surprising congruency between slavery and abuse of women in custody is the lack of consistent and forceful feminist advocacy. As with slavery, the feminist

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<http://www.brennancenter.org/resources/ji/ji5.pdf>.

90. See 42 U.S.C. § 1983 (stating that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress”).

91. *Gilmore v. Salt Lake Cmty. Action Program*, 710 F.2d 632,637 (1983) (finding that a state agency is a state actor, although not all actions by the agency may be state actions); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 (5th Cir. 1994), *cert. denied*, 513 U.S. 815 (1994) (holding that state employees, when acting in their official capacity, are state actors under §1983); see also *Riley*, 282 F.3d at 597 (holding prison officials liable in official and personal capacity under §1983 for rape of female prisoner by correctional officer).

92. See, e.g., *Riley*, 282 F.3d at 597; *Women Prisoners*, 877 F. Supp. at 665.

93. See *Riley*, 282 F.3d at 597; *Women Prisoners*, 877 F. Supp. at 665.

94. *Women Prisoners*, 877 F. Supp. at 665 (“[T]he lack of privacy within (prison) cells and the refusal of some male guards to announce their presence in the living areas of women prisoners constitute a violation of the Eighth Amendment since they mutually heighten the psychological injury of women prisoners.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1196-97 (9th Cir. 2000) (holding guard's attempted rape of prisoner constituted Eighth Amendment violation); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (upholding jury verdict for violation of privacy interests of female inmate who was forced to undress in the presence of male guards); *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980). *Forts* held that the privacy of female inmates was protected under §1983 where male guards were accused of viewing female inmates while sleeping, changing clothes or using the toilet. The district court's injunction was only reversed because the state had suggested accommodations of those interests, such as the issuance of nighttime garments and allowing the cell windows to be covered for periods at night.

response to the abuse of female prisoners has been varied and sporadic, with mixed results as to its impact on the problem.

The history of feminist activism on slavery is mixed.<sup>95</sup> While white feminists often tied their struggle to that of slaves—comparing their lack of rights to that of slaves—they just as often distinguished themselves based on race and privilege.<sup>96</sup> For example, in the struggle for the vote, some white feminists parted ways with abolitionists on giving the franchise to newly emancipated male slaves.<sup>97</sup> They felt strongly that white women

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95. See Nell Painter, *Sojourner Truth: A life, A Symbol, in GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 107-09 (Katherine T. Bartlett & Angela P. Harris eds., 1998) (criticizing Frances D. Gage's account of Truth's famous "Arn't I A Woman?" speech, and accusing Gage of "play[ing] on the irony of white women advocating women's rights while ignoring women who [were] black."). Women abolitionists particularly sympathized with women slaves because of the sexual oppression that women slaves suffered. See Ellen C. DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836, 839-40 (1987); Stanton, *supra* note 35, at 102-05 (comparing the rights of women to the rights of slaves). There were, of course, several abolitionist factions, and these different factions and the women who belonged to them held differing viewpoints regarding the equality of blacks and whites. See Rhoda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 493 (2003). Some believed in the gradual granting of civil and political rights, while others were much more insistent upon the immediate equality of slaves. See JEFFREY, THE GREAT SILENT ARMY, *supra* note 13, at 18 (discussing the faction of the Society of Friends (Quakers) in the late 1820s, and noting that the Orthodox Friends largely became followers of William Lloyd Garrison, who regularly called for immediate emancipation in his abolitionist newspaper, *The Liberator*). Others simply were not interested in abolition, insofar as it impeded the granting of rights to women exclusively. See GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY, *supra* note 43, at 109-10 (detailing feminist efforts to play on pro-slavery feelings in order to obtain the vote for women).

96. Compare Stanton, *supra* note 35, at 102-05 (analogizing the oppressive situation of white women with that of slaves, and characterizing the white marital dynamic as the same as that between master and slave) with Sojourner Truth: Reminiscences by Francis D. Gage, Akron Convention, in GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY, *supra* note 43, at 65 (Katherine T. Bartlett & Angela P. Harris eds., 1998) (citing Gage's experiences at the convention where Truth gave her famous speech, and noting the horror many white suffragettes exhibited when confronted with the prospect of a free black woman speaking in front of white men—the same men they viewed as the "masters" of their fates). Gage memorialized one convention attendee's plea: "Don't let her speak, Mrs. Gage, it will ruin us. Every newspaper in the land will have our cause mixed up with abolition and niggers, and we shall be utterly denounced." *Id.*; see also Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 633-47 (detailing the founding of Washington College of Law by two "radical," white women, Ellen Spencer Mussey and Emma Gillett). While Gillett was only able to obtain her law degree because Howard University School of Law, a historically black law school, admitted her, she and co-founder Ellen Spencer Mussey refused admission to blacks—male or female—at Washington College of Law. *Id.*

97. See Stanton, *supra* note 35.

should have the right to vote before black men.<sup>98</sup> Lost completely in that discourse was the situation of black women—who were dually burdened by gender and race.

Similarly, modern feminist advocacy on behalf of women in custody has been mixed. In the struggle to address sexual abuse of women in custody, national feminist organizations have been slow to react.<sup>99</sup> The primary advocates have been individual women with a background of work on criminal justice issues, poverty issues or international law.<sup>100</sup> For example, national women's organizations that were very vocal in lobbying for the passage of the Violence Against Women Act of 1994 ("VAWA I")<sup>101</sup> have by and large not taken up the issue of abuse of women in custody.<sup>102</sup> There

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98. See BELL HOOKS, *AIN'T I A WOMAN?* 127-131 (1981) (acknowledging the pervasive racism during the early years of the (white) women's rights movement, and commenting on the opposition met by many prominent, black women leaders of the era, including Sojourner Truth, Mary Church Terrell, and Josephine Ruffin).

99. By national feminists organizations, I refer to the National Partnership on Women and Families (formerly Women's Legal Defense Fund), Legal Momentum (formerly National Organization for Women Legal Defense and Education Fund), and the National Women's Law Center.

100. For example, consider the pioneering work of Deborah LaBelle, counsel in *Everson v. Michigan Department of Corrections*, 391 F.3d 737, 753 (6th Cir. 2004) (concluding that female gender is a BFOQ for the corrections officers, resident unity office positions, and program specialist, U.S. Dept. of Justice, National Institute Of Corrections) and *Glover v. Johnson*, 198 F. 3d 557 (6th Cir. 1999) (moving to terminate District Court's jurisdiction over plan to remedy equal protection violations identified in female inmates' civil rights action). LaBelle recently authored an article alleging that judicial neglect and gender bias combine to create conditions of incarceration that violate our basic precepts of fairness and humane treatment. See *Women, the Law, and the Justice System: Neglect, Violence, and Resistance*, in *WOMEN AT THE MARGINS: NEGLECT PUNISHMENT, AND RESISTANCE*, *supra* note 7, at 347. Other trailblazing women include, Anadora Moss, former Assistant Deputy Commissioner of Operations for the Georgia Department of Corrections (engineered the Department of Justice, National Institute Of Corrections' response to sexual abuse of women in custody); Dorothy Q. Thomas, former director of the Human Rights Watch (author of numerous reports of human rights violations against women in custody in the U.S.); Sheila Dauer, head of the Women's Rights Division of Amnesty International; and Geri Green, counsel in *Lucas v. White*, 63 F. Supp. 2d 1046 (N.D. Cal. 1999) (litigating in response to allegations that male officers repeatedly gave male inmates access to female inmates for sex).

101. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C.) (VAWA I), *reauthorized in* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1462 (codified as amended in scattered sections of 42 U.S.C., 22 U.S.C. §§7101-7710) (VAWA II).

102. A notable exception is the National Women's Law Center, where I litigated *Women Prisoners of the D.C. Department of Corrections v. District of Columbia*, 877 F. Supp. 634 (D. D.C. 1994), one of the seminal cases addressing sexual abuse of women in custody. The National Women's Law Center was also one of the few organizations that did not support VAWA I, because of the impact of the enhanced criminal penalties on Native Americans and its failure to provide funding for services for women prisoners affected by sexual and

was a significant debate among women's groups and church-based organizations about whether to support VAWA I's initial approach of enhanced penalties and criminalization as the primary method to battle violence against women. As initially enacted, VAWA I, and as reauthorized in 2000, as VAWA II, the statute has prohibited the use of its funds for any persons in custody.<sup>103</sup> While initially enacted to prevent male perpetrators from gaining access to funds meant to assist female victims, the prohibition found in both VAWA I and VAWA II on the use of funds for any individual in custody, means that the significant number of women in prison with histories of physical and sexual abuse both prior to and during imprisonment<sup>104</sup> are ineligible for services funded by VAWA II, the largest source of funding nationally for these programs.

In actuality, modern feminist organizations have been slow to stake out any position on criminal justice except one related to women as victims of crime.<sup>105</sup> According to Ratna Kapur, this reticence directly rejects the mainstream feminists' tendency to adopt the "victim subject" as an ideal

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domestic violence. The National Women's Law Center also supported a legal services program for women prisoners in the District of Columbia for nine years. This critique does not attempt to evaluate the effort of local women's groups and women's commissions who have consistently made efforts to address the needs of women in custody.

103. The Attorney General makes funds available to assist victims of abuse pursuant to the Victims of Crime Act (VOCA), through the Victims Assistance Grant Program, which states that "[s]ubgrantees cannot use VOCA funds to offer rehabilitative services to perpetrators or offenders. Likewise, VOCA funds cannot support services to incarcerated individuals, even when the service pertains to the victimization of that individual." 67 Fed. Reg. 56444-01 (Sept. 3, 2002). There is no acknowledgement in the report that prisoners could *themselves* be victims. The exclusion of prisoner continued with the reauthorization of VAWA II, *supra* note 101.

104. See Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J.L. & PSYCHIATRY 301, 319 (1999), reprinted in 3 CRIM. JUST. REP. 74 (2002) (noting that the time incarcerated women spend in prison can be used to their advantage, and "targeted interventions" would likely provide ease in making the transition to life in prison as well as re-transitioning to life outside of prison). VAWA II does not provide funding for this targeted intervention, even though the majority of incarcerated women have been victims, at one time or another, of sexual or non-sexual violence.

105. See Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 5-6 (2002); see also Elizabeth Bruch, MODELS WANTED: THE SEARCH FOR AN EFFECTIVE RESPONSE TO HUMAN TRAFFICKING (unpublished manuscript, on file with author) (criticizing traditional approaches to human trafficking that focus on the sexual victimization of women and fail to account for the complexities surrounding sex work, exploitive labor, migration, and related issues); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and The Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1585 (attacking Doriane Lambelat Coleman's interpretation of "victimhood," and suggesting that instead of weighing competing interests within the narrow confines of the law, as Coleman does, one should approach "victimhood" as "more contingent, and less categorical").

model.<sup>106</sup> Kapur attributes such a tendency to the movement's constant reliance on essentialism as a basis for making claims and seeking relief.<sup>107</sup> Kapur goes on to note that gender essentialism is seriously flawed because it lumps a large group of women together based on a single shared experience. In the case of women slaves and women prisoners, the shared experience is sexual violence. Such a stance, argues Kapur, is oversimplification in its worst form, as this "victim" theory "cannot accommodate a multi-layered experience," which is obtained through the lens of varying cultures, races, religions, and sexual orientations.<sup>108</sup> This essentialism fails to consider the complexities of individual women's experience of sexual oppression and accommodations they make in order to survive and achieve some "normalcy" within the confines of the oppression.<sup>109</sup>

Very little feminist advocacy is devoted to the many primarily poor and non-white women who are prisoners. This contrasts with the historical movement, where women and women's organizations were the primary movers for improvement and reform of women in the justice system.<sup>110</sup> There exists legitimate critique that this advocacy was religiously based and focused on making white women who had strayed conform to the middle class standard of womanhood and motherhood, as women of African descent were not incarcerated in the earliest prisons.<sup>111</sup>

In recent efforts to combat the sexual abuse of women in custody, advocates—not associated with national women's organizations—have

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106. See, e.g., NICOLA LACEY, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 104-24 (1998) (analyzing a woman's autonomy in the context of rape and criminal law); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 239 (1989) (explaining that no law explicitly gives men the right to rape women, yet no law has undermined men's entitlement to sexual access to women). *But see* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 353-86 (1995) (questioning how feminists might formulate theories that highlight both women's oppression and the possibilities of women's agency under oppression); Katharine T. Barlett, *MacKinnon's Feminism: Power on Whose Terms?*, 75 CAL. L. REV. 1559, 1565 (1987) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987)) ("MacKinnon has given inadequate attention to how power *should* be used. Indeed, she seems entirely uninterested in what women should do with power, should they ever get any.").

107. Kapur, *supra* note 105, at 6-11.

108. *Id.* at 6.

109. See Worley, *supra* note 44, at 178 ("Rather, prisoners can, through staff manipulation, actively exert control over their personal situation to mediate or lessen the pains of imprisonment.").

110. See *supra* notes 7, 13 and accompanying text (discussing women's activism in the reform movement).

111. See Rafter, *supra* note 7, at 13.

used a multi-pronged approach that has included litigation aimed at systematic reform, public education, and legislative reform.

#### A. Litigation on Behalf of Women

One approach to litigating on behalf of women prisoners is embodied in *Canterino v. Wilson*,<sup>112</sup> where Susan Deller Ross,<sup>113</sup> who was employed as an attorney at the U.S. Justice Department, Civil Rights Division, Special Litigation Division, argued for better programming for a class of women prisoners on equal protection grounds.<sup>114</sup> The prisoners were contesting the prison's refusal to allow them to take vocational classes viewed as "traditionally male" disciplines, and instead limited the women's choices to "business office education" and upholstery.<sup>115</sup> The women were ultimately successful due to Ross's attack on the disparate treatment of men and women prisoners on equal protection grounds, however, nowhere in the case did any issues regarding sexual abuse of the women prisoners arise.

In 1993, while at the National Women's Law Center,<sup>116</sup> I co-counseled a case, *Women Prisoners of the D.C. Department of Corrections v. District of Columbia*,<sup>117</sup> which challenged a pattern and practice of discrimination against a class of female prisoners in the District of Columbia. The claims in *Women Prisoners* included the sexual abuse of women in three District of Columbia prisons and female prisoner's unequal access to educational, vocational and religious opportunities. The court found that the District of Columbia and its officials had violated the Fifth and Eighth Amendments of the Constitution and D.C. Code Section 24-442, which provided for the care and safekeeping of prisoners and ordered the District to implement practices that remediated the identified problems.<sup>118</sup>

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112. 546 F. Supp. 174 (W.D. Ky. 1982).

113. Professor Ross is Director of the National Women's Law Center's Women's International Human Rights Clinic. See Georgetown Law, <http://www.law.georgetown.edu> (search "Faculty", then "Faculty Profiles", then "Susan Deller Ross").

114. *Canterino*, 546 F. Supp. at 180.

115. *Id.* at 188-89.

116. Though I was able to pursue work related to women in custody for nine of the ten years that I worked at the National Women's Law Center, that work did not continue after my departure.

117. See *Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia*, 877 F. Supp. 634, 639-43, 656-62 (D. D.C. 1994) [hereinafter *Women Prisoners I*]; *stay denied and motion to modify granted in part*, *Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia*, 899 F. Supp. 659 (D. D.C. 1995); *vacated in part, remanded*, *Women Prisoners of D.C. Dep't of Corrs. v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996); *cert. denied*, *Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia*, 520 U.S. 1196 (1997).

118. *Women Prisoners I*, 877 F. Supp. at 664-65.



This case represented an “equality plus” approach, in which women’s rights were asserted within the framework of Eighth Amendment cruel and unusual punishment violations. Evidence of these constitutional violations was in the form of compelling prisoner testimony which detailed numerous incidents of sexual abuse.<sup>119</sup> Yet another approach to the problem of sexual abuse has been to combine human rights and equality advocacy to change female prisoners’ conditions of confinement.

Deborah LaBelle,<sup>120</sup> a Michigan sole practitioner, has litigated several cases in which she has combined international human rights principles and United States constitutional law to obtain victories on behalf of women prisoners suffering sexual abuse at the hands of corrections officers.<sup>121</sup> Using human rights in the context of sexual abuse of women in custody was precipitated by a “confluence of factors”, including both domestic and international attention and directives.<sup>122</sup>

Ellen Barry,<sup>123</sup> the founder of Legal Services for Prisoners with Children in California, however, took another approach, and focused on maternal and child health issues as a litigation targets.<sup>124</sup> For example, in *Shumate v. Wilson*,<sup>125</sup> the complaint alleged that the California Institute for Women and the Central California Women’s Facility had “furnished inadequate sick call, triage, emergency care, nurses, urgent care, chronic care, specialty referrals, medical screenings, follow-up care, examinations and

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119. *Id.* at 639-41.

120. Deborah LaBelle *See* American Civil Liberties Union, <http://www.aclu.org> (search “LaBelle”); Open Society Institute, [http://www.soros.org/initiatives/justice/focus\\_areas/justice\\_fellows/grantees/deborah\\_labelle](http://www.soros.org/initiatives/justice/focus_areas/justice_fellows/grantees/deborah_labelle). She is a Senior Soros Fellow and cooperating attorney with the ACLU and has an impressive body of legal and scholarly work on issues involving women in prison, juveniles, and discrimination against individuals who are Lesbian, Gay, Bisexual, or Transgendered.

121. *See* Mich. Dep’t of Corrs., 391 F.3d at 756-58 (litigating right of female inmate survivors of sexual abuse to same gender supervision in housing units under the Fourth, Eighth, and Fourteenth Amendments of the Constitution).

122. *See* Sexual Abuse of Women in Prison: A Thematic Case Study, *in* CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES 99-101 (Larry Fox & Dorothy Q. Thomas eds., 2004), available at [http://www.fordfound.org/publications/recent\\_articles/docs/close\\_to\\_home/part4.pdf](http://www.fordfound.org/publications/recent_articles/docs/close_to_home/part4.pdf) [hereinafter CLOSE TO HOME] (chronicling a series of events spearheaded by recognizable human rights organizations, starting with the publishing of *All Too Familiar* by the Human Rights Watch in the United States, and culminating with a visit from the Special Rapporteur on Violence Against Women, Radhika Coomaraswamy).

123. Ellen Barry is the founding Director of Legal Services for Prisoners with Children (LSPWC). *See* LSPWC, <http://www.prisonerswithchildren.org> (search “Ellen Barry”).

124. *See* <http://prisonerswithchildren.org/news/lspc25mile.htm> for a list of cases filed by Ellen Barry and Legal Services for Prisoners with Children.

125. No. CIV S-95-0619 (E.D. Cal. Aug. 21, 2000).

tests, medical equipment, medications, specialty diets, terminal care, health education, dental care, and grievance procedures, and that the provision of medical care featured unreasonable delays and disruptions in medication.”<sup>126</sup>

While these approaches have been quite different, they have all resulted in positive change for women prisoners.<sup>127</sup> In fact, they represent an evolution of litigation; rather than being formulaic in its approach, essentializing women in custody, advocacy on behalf of women prisoners has taken many forms and addressed a broad range of women’s experience in custody—worker, victim and mother. While litigation is an important tool in combating past abuses, public education holds the greatest promise of preventing sexual abuse of women prisoners.

### B. Public Education

To some extent, the visibility of staff sexual misconduct with inmates and other examples of abuse in institutional settings in the media have informed the public’s perception about the problem of sexual abuse in institutional settings.<sup>128</sup> These accounts have convinced a once skeptical public<sup>129</sup> that sexual abuse can and does occur in institutional settings.

A more difficult group to convince has been those in the corrections

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126. *Plata v. Davis*, 329 F.3d 1101,1103 (9th Cir. 2003) (citing *Shumate v. Wilson*, No. CIV S-95-0619 (E.D. Cal. Aug. 21, 2000)).

127. See CLOSE TO HOME, *supra* note 122, at 98-101 (discussing Smith, LaBelle, and Barrys’ efforts to help prisoner-victims who suffer as a result of an inadequate legal system and widespread abuses).

128. See, e.g., *Army Calls Sex Bias Widespread*, DALLAS MORNING NEWS, Sept. 12, 1997, at 1A (“sexual harassment exists throughout the Army crossing gender, rank, and racial lines”); Rick Brundrett, *11 Youths Sue Couth Carolina Juvenile Prison System*, THE STATE (Columbia, S.C.), June 19, 2002, at 1 (reporting on \$27 million suit alleging prison official failed to protect juvenile detainees from sexual and physical abuse by other youths or staff members); Jackie Calmes, *White House Tries to Stick to Business Amid Scandal*, WALL ST. J., Mar. 30, 1998, at A20 (discussing sexual harassment lawsuit brought against former President Bill Clinton); Steve Fry, *Rape at Jail Draws 10 Years*, THE CAPITOL-JOURNAL (Kansas), Nov. 19, 2005, [http://www.cjonline.com/stories/11905/loc\\_jones.shtml](http://www.cjonline.com/stories/11905/loc_jones.shtml); Kendra Hurley, *Heed Lessons of Church Scandal*, USA TODAY, July 25, 2002, at A13 (seizing opportunity to discuss pervasiveness of sexual abuse against children in foster care system amid highly publicized Catholic church sexual abuse controversy); William Lobdell, *Turmoil in the Church, Dioceses’ Policies Reflect Settlement*, L.A. TIMES, Apr. 28, 2002, at B1 (discussing overhaul of church’s policies in light of recent settlement with sexual abuse victim).

129. See generally U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001 (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/> (providing comprehensive information on the human rights practices of all countries who are members of the United Nations).

hierarchy. Schooled to believe that prisoners always lie<sup>130</sup>—women prisoners' corrections agencies especially, have been slow to recognize that sexual misconduct is a pervasive problem in institutional settings. At about the time that the directors of Departments of Corrections began losing their jobs over sex scandals in prisons,<sup>131</sup> heads of corrections agencies identified sexual abuse of individuals in custody as a major problem and took positions decrying these practices.<sup>132</sup>

Recognizing the need for training and technical assistance on this issue, the National Institute of Corrections (NIC), under the leadership of Anadora Moss,<sup>133</sup> who had been involved in directing Georgia's response to a sexual abuse scandal,<sup>134</sup> began to develop a systemic approach to

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130. See BUD ALLEN & DIANA BOSTA, *GAMES CRIMINALS PLAY: HOW YOU CAN PROFIT BY KNOWING THEM* 7-10, 33-37 (1971) (discussing essential conflict between the "keeper" and the "kept," and identifying inmate techniques for setting up professionals who deal with them); GARY CORNELIUS, *THE ART OF THE CON: AVOIDING OFFENDER MANIPULATION* 13-18, 25-30, 43-69 (2001) (describing sociopathic personalities in the general and the inmate populations and how inmates cope with incarceration through a process known as "prisonization," and the several methods inmates use to manipulate officers). These texts have formed the basis of many prisons' staff training programs.

131. See, e.g., Michael Novick, *Second Guard Arrested For Sex With Susan Smith; Inmate Informed Prison Authorities of Liaison*, ASSOCIATED PRESS, Sept. 27, 2000, available at <http://www.prisonactivist.org/pipermail/prisonact-list/2000-September/003149.html> (detailing the indictment of a second correctional officer in a South Carolina prison who confessed to having had sexual relations with the inmate Susan Smith); Peter Sigal, *Bucks County Warden Resigns After Turbulent Year*, PHILADELPHIA INQUIRER, Feb. 7, 2002, at A1 (detailing the resignation of the Bucks County Prison Warden amid several scandals, including the arrest of three correctional officers and an inmate counselor, who were arrested and accused of having sex with female inmates).

132. See NAT'L SHERIFFS ASS'N, RESOLUTION: DEV. OF POLICIES ON STANDARDS OF CONDUCT FOR JAIL AND LOCAL CORR. FACILITY STAFF 1 (2002), available at <http://www.wcl.american.edu/faculty/smith/0507conf/nsaresolution.cfm> (offering the Association's support to its members to strongly enforce policies and practices against staff sexual misconduct, and indicating that such policies and practices should be clearly defined and regularly and vigorously communicated to staff members); ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS CONST. RESOLUTIONS, ESTABLISHMENT OF POLICIES REGARDING SEXUAL HARASSMENT ACTIVITY OR ABUSE 4 (1999) (noting that it is the responsibility of administrators to ensure that corrections staff members undertake their duties with the highest standard of professionalism).

133. Andie is President of The Moss Group, Inc., a Washington, D.C.-based criminal justice consulting firm. See Commission on Safety and Abuse in America's Prisons, [http://www.prisoncommission.org/public\\_hearing\\_1\\_witnesses\\_moss.asp](http://www.prisoncommission.org/public_hearing_1_witnesses_moss.asp). Ms. Moss has a long history of work on sensitive correctional management issues. As an assistant deputy commissioner in the Georgia Department of Corrections during the *Cason v. Seckinger* lawsuit in the early 1990s, and as a Program Manager with the National Institute of Corrections (NIC) from September 1995 to February 2002, Andie was involved in the development of early strategies to address staff sexual misconduct in the field of corrections. *Id.*

134. *Cason v. Seckinger*, 231 F.3d 777 (11th Cir. 2000). The initial lawsuit claimed that prison conditions were unconstitutional because, it was alleged, there was, amongst other

addressing staff sexual misconduct with offenders. NIC began an aggressive campaign in 1995 to assist state departments of corrections to address staff sexual misconduct with inmates—focusing on leadership, policy, law, management, investigation and agency culture.<sup>135</sup> NIC offered training programs for key state corrections' decision makers; on-site technical assistance on policy development and the drafting of legislation; and developed training programs for corrections staff.<sup>136</sup>

While the correctional hierarchy has begun to address its lack of awareness through training and technical assistance, they have been slow to permit similar training for inmates.<sup>137</sup> Correctional officials believed that inmates would use the information to control staff by making false complaints of sexual abuse.<sup>138</sup> Many states only mention sexual violence

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things,

- (1) pervasive sexual abuse of female inmates by staff; (2) pervasive sexual harassment of female inmates by staff; (3) an inadequate classification system; (4) use of excessive force, physical violence, and verbal abuse; (5) the illegal use of stripping and restraints on mentally ill inmates; (6) violations of basic privacy rights and illegal stripping

135. According to statistics obtained from the NIC, forty-five of fifty states, and Guam and Puerto Rico, have participated in training programs in addressing staff sexual misconduct with inmates. Telephone Interview with Carol Bruce, NIC, Wash. D.C. (Jan. 31, 2006) (notes on file with the author.) Washington, D.C., Georgia, Nevada, North Dakota and Utah have *not* participated in training. All statistics are current as of January 31, 2006.

136. NIC reinforced its own efforts by completing two important studies, completed in 1996 and 2000, respectively. The 1996 study sought to determine the sexual misconduct climate, as it were, in corrections agencies throughout the country. The study determined in which agencies there was sexual misconduct activity, and also noted which jurisdictions were involved in litigation at the time the study was conducted. *See generally* U.S. DEP'T OF JUSTICE NATIONAL INSTITUTE OF CORRECTIONS, *SEXUAL MISCONDUCT IN PRISONS: LAW, AGENCY RESPONSE, AND PREVENTION* (Nov. 1996) [hereinafter U.S. DEP'T OF JUSTICE, *LAW, AGENCY RESPONSE, AND PREVENTION*]. The second NIC study served as a progress report, noting which corrections agencies had taken proactive steps to address sexual misconduct, and how these agencies were responding to the problem (i.e., through legislation, internal policies, etc.). *See generally* U.S. DEP'T OF JUSTICE NATIONAL INSTITUTE OF CORRECTIONS, *SEXUAL MISCONDUCT IN PRISONS: LAW, REMEDIES, AND INCIDENCE* (May 2000) [hereinafter U.S. DEP'T OF JUSTICE, *LAW, REMEDIES, AND INCIDENCE*].

137. *See* U.S. DEP'T OF JUSTICE, *LAW, AGENCY RESPONSE, AND PREVENTION*, *supra* note 136, at 8 (incorrectly paginated in original as page 6).

138. Several states have written penalties into their laws and prison policies that specifically provide for penalties for inmate false reports. Typically, these states have been hostile to scrutiny related to staff sexual misconduct. *See generally* HUMAN RIGHTS WATCH, *NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS 14-17* (1998) [hereinafter HUMAN RIGHTS WATCH, *NOWHERE TO HIDE*] (detailing events surrounding the denial of entry into Michigan prisons). Such prohibitions have an incredibly chilling effect on inmate reporting of sexual abuse. Inmates fear that they will be subject to retaliation and further abuse by prison staff. They also believe that if their complaints cannot be substantiated, they will be accused on making a false report. *See generally* *Riley v. Olk-Long*, 282 F.3d 592, 593 (8th Cir. 2002) (citing inmate's failure to report sexual assault as

as part of the brief orientation that inmates received when they entered the correctional system.<sup>139</sup> The majority of those that provided more detailed training to inmates did so as part of an agreement reached in litigation.<sup>140</sup> In recent years however, several states have begun to voluntarily offer training about sexual violence to inmates.<sup>141</sup> Advocates critical of the correctional hierarchy have tried remedying this situation by providing materials to inmates and the public on preventing and addressing staff sexual misconduct with inmates.<sup>142</sup> Moving beyond public education and training, legislators have begun to draft and enact legislation penalizing women prisoners' abusers.

### C. Legislation Addressing Staff Sexual Misconduct with Inmates

The moving force behind the first piece of modern legislation addressing sexual abuse of women in custody was the Women's Rights Division of Human Rights Watch, under the leadership of Dorothy Q. Thomas.<sup>143</sup> The Women's Rights Division had published numerous reports dealing with sexual abuse of women in custody, seeking to document human rights abuse in the United States,<sup>144</sup> and had received positive response to these

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attributable to her fear that prison officials would not believe her).

139. See U.S. DEP'T OF JUSTICE, LAWS, REMEDIES, AND INCIDENCE, *supra* note 136.

140. See *United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz. Mar. 11, 1999) (requiring inmate training on sexual misconduct as a condition of the court's consent decrees); *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. Aug. 17, 1999); see also *supra* note 136 and accompanying text.

141. See, e.g., MICH. DEPT. OF CORRS., WOMEN PRISONER'S GUIDE TO IDENTIFYING AND ADDRESSING GENDER-BASED MISCONDUCT 11 (2001) (advising that "sex between prisoners and staff is never ok"); CAL. DEPT. OF CORR., SEXUAL ABUSE/ASSAULT PREVENTION AND INTERVENTION: AN OVERVIEW FOR OFFENDERS, KNOW YOUR RIGHTS & RESPONSIBILITIES (2000) (providing inmates with an informational brochure on sexual assault within correctional facilities); ARLINGTON COUNTY DETENTION FACILITY, SEXUAL MISCONDUCT BROCHURE (2000) (identifying for inmates specific behavior which constitutes sexual misconduct and reporting procedures for inmates); see also California's Sexual Abuse in Detention Elimination Act, CAL. PENAL CODE § 2635 et seq. (West 2005).

142. See generally BRENDA V. SMITH, AN END TO SILENCE, *supra* note 4 (updating the first edition to address abuse of men in prison and addressing sexual abuse in prison as a violation of international human rights).

143. Dorothy Q. Thomas is an independent consultant on human rights in the United States. From 1990-1998 she served as the founding director of the Human Rights Watch Women's Rights Division. See Human Rights Watch, <http://www.hrw.org> (search "Dorothy Thomas"). In 1998, she received the Eleanor Roosevelt Human Rights Award from President Clinton. See Wikipedia, <http://en.wikipedia.org> (search "Eleanor Roosevelt Award for Human Rights").

144. See, e.g., HUMAN RIGHTS WATCH, ALL TOO FAMILIAR, *supra* note 24; HUMAN RIGHTS WATCH, HUMAN RIGHTS VIOLATIONS IN THE U.S.: MODERN CAPITAL OF HUMAN RIGHTS? ABUSES IN THE STATE OF GEORGIA 99-119 (1996)[hereinafter HUMAN RIGHTS WATCH, ABUSES IN THE STATE OF GEORGIA] (discussing the problem in Georgia); HUMAN

reports. For example, Radhika Coomaraswamy, the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences, issued a highly critical report of the United States' practices with regard to women in custody.<sup>145</sup> The report was delivered at the Fifty-Fifth Session of the United Nations Human Rights Commission in April 1999.<sup>146</sup> Prior to that meeting, however, the United States Department of Justice embarked on a visual campaign to highlight its interest in improving the conditions of women in custody.<sup>147</sup> Following up on those reports, the Women's Division gained the support of Michigan Congressman John Conyers who introduced the Prevention of Custodial Sexual Assault by Correctional Staff Act ("Custodial Sexual Assault Act") as part of omnibus legislation reauthorizing the Violence Against Women Act.<sup>148</sup>

The legislation called for the establishment of a registry for correctional employees found involved in custodial sexual misconduct.<sup>149</sup> It also called for withholding federal law enforcement funds from those states that failed to enact legislation criminalizing staff sexual misconduct with inmates.<sup>150</sup> While VAWA passed, the Prevention of Custodial Sexual Assault by Correctional Staff Act did not.<sup>151</sup>

Two years later, Human Rights Watch, under the leadership of Wendy Patten,<sup>152</sup> authored another report, *No Escape: Male Rape in U.S. Prisons*,

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RIGHTS WATCH WOMEN'S RIGHTS PROJECT, NOWHERE TO HIDE, *supra* note 138 (detailing events surrounding the denial of entry into Michigan prisons).

145. See U.S. EOCSCO, *Report of the Special Rapporteur*, *supra* note 51, para. 11.

146. *Id.*

147. See, e.g., Plenary Presentation, Building the Case—Why Focus on Women Offenders?—Women in Conflict with the Law in the International Context, National Symposium on Women Offenders, Dec. 1999 (Washington, D.C.).

148. See Violence Against Women Act, H.R. 357, 106th Cong. (1999) [hereinafter VAWA Omnibus Reauthorization Bill]; Press Release, Rep. John Conyers, Conyers Introduces Omnibus Bill to Stop Violence Against Women and Their Children (May 12, 1999), available at <http://www.house.gov/conyers/pr051299.htm>. The Custodial Sexual Assault Act is found at sections 341-346 of VAWA I.

149. See AFSCME Opposes Measure on Sexual Assault, 6 AFSCME CORRECTIONS UNITED NEWS 1 (1999), available at <http://www.afscme.org/publications/acunews/acu19907.htm>

(voicing objection to the creation of the national database, and questioning its validity, since "corrections facilities do not hire officers convicted of sexual misconduct").

150. See VAWA I, *supra* note 101. The bill that was the precursor to the Prison Rape Reduction Act also encouraged withholding federal funds from organizations that did not comply with the provisions of the act. See Stop Prisoner Rape, <http://www.spr.org/pdf/122501bill.pdf>.

151. VAWA II *supra* note 101. It is ironic that the act was included in VAWA omnibus legislation, but could not secure enough support for passage. Yet, VAWA II includes protections for immigrant, battered, and trafficked women. *Id.*

152. Wendy Patten is the director of research and programmatic development at Central

this time documenting the sexual abuse of male prisoners.<sup>153</sup> Teaming with Stop Prisoner Rape, an organization originally founded by male prison rape survivors,<sup>154</sup> but led by a woman, Lara Stemple,<sup>155</sup> Human Rights Watch pushed for the enactment of another piece of legislation, the Prison Rape Reduction Act of 2002.<sup>156</sup> The initial legislation, which was introduced with bipartisan support, focused primarily on prisoner-on-prisoner sexual assault and provided for penalties only in cases of prison rape.<sup>157</sup> While there was bipartisan support for the bill, the failure to include the perspectives of accrediting organizations such as the American Correctional Association, the Association of State Correctional Administrators and groups who had worked primarily on issues related to sexual abuse of prisoners by staff slowed enactment of the bill.<sup>158</sup>

The Prison Rape Reduction Act was reintroduced in 2003, with significant amendments—changing the name to the Prison Rape Elimination Act (PREA), and including coverage of staff sexual abuse of persons in custody and grants to assist states in their efforts to prevent, reduce, and prosecute prison rape.<sup>159</sup> The legislation passed unanimously

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European and Eurasian Law Initiative. See American Bar Association, Central European and Eurasian Law Initiative (CEELI), <http://www.abanet.org/ceeli/bios/patten.html>.

153. See generally HUMAN RIGHTS WATCH, NO ESCAPE, *supra* note 38.

154. See Stop Prisoner Rape, <http://www.spr.org> (last visited Jan. 31, 2006). SPR was founded in 1980 by Russell D. Smith as People Organized to Stop the Rape of Imprisoned Persons (POSRIP). Smith himself was a survivor of rape behind bars. Renamed “Stop Prisoner Rape”, the organization is now a national 501(c)(3) human rights advocacy group that works to end sexual violence against men, women, and youth. *Id.*

155. Lara Stemple is the Director of Graduate Studies at UCLA School of Law. See UCLA School of Law, <http://www.ucla.edu> (search “faculty profiles”).

156. H.R. 4943, 107th Cong. (2002).

157. See *Hearing on the Prison Rape Reduction Act of 2002 Before the Senate Committee on the Judiciary*, 107th Cong. (2002) (statement of Wendy Patton, U.S. Advocacy Director, Human Rights Watch), available at <http://www.hrw.org/reports/2001/prison/rapebill-statement.pdf> (discussing the organization’s study, NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 38, and proposing several changes to the legislation, none of which included expanding the act’s scope to address sexual abuse of women prisoners).

158. See *Hearing on the Prison Rape Reduction Act of 2003 before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary House of Representatives*, 108th Cong. (2003) (in particular, the testimony of Ashbel T. Wall, II, Director of the Department of Corrections in Rhode Island, and Charles J. Kehoe, President of the American Correctional Association), available at <http://www.house.gov/judiciary>. Interestingly, unions who had been quite vocal in their opposition to the Prevention of Custodial Sexual Assault by Correctional Staff Act of 1999 took no position on the PREA, likely believing that the focus on the initial bill which focused on prisoner rape excluded custodial sexual abuse by correctional staff. Unions were not represented at Congressional hearings on PREA, and the AFSCME Corrections United did not publicly take a stand on the bill. It appears that unions were relatively unconcerned about PREA’s impact on their members. See *id.*

159. H.R. 1707, 108th Cong. (2003).

on September 23, 2003.<sup>160</sup>

As enacted, PREA establishes a “zero tolerance” policy for rape in custodial settings,<sup>161</sup> requires data collection on the incidence of rape in each state, and establishes a National Prison Rape Elimination Commission (“Commission”). The Commission is required to issue a report on the causes and consequences of prison rape,<sup>162</sup> and to develop recommendations for national standards on the prevention, detection and punishment of prison rape.<sup>163</sup> While PREA does not create a private cause of action<sup>164</sup> for prisoners, it does create a system of incentives and disincentives for states, correctional agencies and correctional accrediting organizations who fail to comply with its provisions. Each correctional agency must, upon request by the Bureau of Justice Statistics (BJS), report the number of instances of sexual violence in its facilities.<sup>165</sup> On an annual basis, the three states with the highest incidence and two states with the lowest incidence of prison rape will appear before the Review Panel on Prison Rape to explain what they are doing in their facilities.<sup>166</sup> States and

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160. Pub. L. 108-79 (codified at 42 U.S.C.S. § 15601, et. seq. (2005)). The speed of passage and bipartisan support for this legislation, when compared to the lack of support for the Custodial Sexual Abuse Act, which sought to address staff sexual abuse primarily against women inmates, supports and reinforces gendered notions of the acceptability of violence against women.

161. *See* Prison Rape Elimination Act of 2003, 42 U.S.C.S. § 15609 (defining prisons, jails, police lockups, and juvenile facilities).

162. *Id.* § 15606 (d)(3).

163. *Id.* §§ 15602 (3), 15606 (e).

164. In its purpose section, it notes that one purpose of PREA is “to protect the 8th Amendment rights of prisoners.” *See id.* § 15602(7). *But see* *Alexander v. Sandoval*, 532 U.S. 275, 291 (2003) (holding that, in the absence of explicit authorization by Congress, no private right of action is created simply by statute).

165. *See* ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUST. STAT., PRISON RAPE ELIMINATION ACT OF 2003 1, 10-12 (July 2005) (describing the methodology used to produce the study); *see* BECK & HUGHES *supra*, at 3 (stating that sexual violence was measured “by disaggregating sexual violence into two categories of inmate-on-inmate sexual acts and two categories of staff sexual misconduct. The inmate-on-inmate categories reflected uniform definitions formulated by the National Center for Injury Prevention and Control in KATHLEEN C. BASILE & LINDA E. SALTZMAN, SEXUAL VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS (Center for Disease Control and Prevention 2002).

166. *See* 42 U.S.C. § 16503(b)(3)(A) (2003). A high incidence of prison rape does not necessarily mean that a state does not address the issue. In fact the contrary may be true. A state with a credible grievance process and aggressive investigation may have higher reporting than a state that does poor investigations and has a compromised grievance process. *See generally* Michele Deitch, *Deitch: On Prison Rape, Texas Tries to Report it Right*, AUSTIN AM. STATESMAN, Nov. 9, 2005; *see also* Susan W. McCampbell & Allen L. Ault, Lessons Learned, Miles to Go, Preventing Staff Sexual Misconduct with Offenders 3, 8 (unpublished manuscript, on file with author) (May 14, 2003). The information in this article is based on work done under four National Institute of Corrections’ Cooperative



accrediting organizations stand to lose five percent of federal funds for criminal justice activities for failure to implement or develop national standards.<sup>167</sup> As an incentive to comply, PREA provides grant assistance to states to implement practices that reduce, prevent, or eliminate prison rape.<sup>168</sup>

Like litigation, the enactment of legislation is a critical element in responding to staff sexual abuse of women in custody. Legislation sends a message to the public, prisoners and correction staff that sexual misconduct is a serious public policy concern that merits prosecution and appropriate penalties. Yet, state legislation has not had the broad prophylactic effect that policymakers, advocates and many corrections officials anticipated. Unfortunately, sexual abuse in institutional settings is even less likely to be reported and prosecuted than sexual assault in the community.<sup>169</sup> Interestingly, major legislative efforts to address sexual abuse of persons in custody, particularly women in custody, were for the most part engineered by women who had strong feminist credentials, but worked in organizations that were more aligned with prisoners rights and human rights. While the influence of feminism is clear, the lack of involvement of women's organizations in leading this effort was a missed opportunity for feminists and women in custody.

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Agreements by the Center for Innovative Public Policies, Inc. The article highlights how correctional agencies are “[d]etermining that if there are no reported incidents of sexual misconduct, that no misconduct is occurring.” *Id.* The article also discusses that “[a] key operational priority is the orientation of offenders to the agency’s policies and how to report misconduct . . . . Agencies who orient inmates find that there is an initial testing of the system—both by employees and inmates. Complaints are made to see if the agency is serious about accepting all allegations as well as investigating.” *Id.*

167. *See* 42 U.S.C. § 15607(c)(2)(2003).

168. *Id.* § 16505.

169. *See* U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL: DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 3 (2005) (noting that sexual abuse of female inmates is both underreported and alarmingly prevalent); *see also* AMNESTY INT’L USA, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN 15 (2001); U.S. GOV’T ACCOUNTING OFFICE (GAO), WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF, REPORT TO THE HONORABLE ELEANOR HOLMES NORTON, HOUSE OF REPRESENTATIVES, GAO/GGD-99-104 at 8 (Jun. 1999) [hereinafter U.S. GAO, STAFF MISCONDUCT IN FEMALE PRISONS] (finding that despite increasing legislation, inmates in the jurisdictions studied made at least 506 allegations of staff-on-inmate sexual misconduct between 1995 and 1998, of which only eighteen percent resulted in administrative sanctions); Dinos, *supra* note 50, at 284-85 (citing several decisive factors that keep female inmates from reporting sexual abuse: the inmate’s own lack of credibility, the specter of “protective segregation” from the rest of the prison population, fear of the accused’s retaliation, and the unlikelihood of a favorable outcome in litigation).

## VI. CONCLUSION

The sexual abuse of women in custody is akin to the sexual abuse of female slaves. At base, both slave-owners and correction officers used sexual domination and coercion of women to reinforce notions of domination and authority over the powerless. Like women slaves, women prisoners are seen as untrustworthy, promiscuous, and seductive. They are the archetypal “Dark Lady” who is responsible not only for her own victimhood, but also for the corruption of men.<sup>170</sup> Like women slaves, women in custody have sometimes “chosen”<sup>171</sup> to align with their captors—for reasons of convenience,<sup>172</sup> sexual expression,<sup>173</sup> desire,<sup>174</sup> material need,<sup>175</sup> or survival.<sup>176</sup> Because she is the “other” woman, poor

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170. See *supra* note 8 and accompanying text (discussing this archetype and common ideas about women prisoners).

171. See generally Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999) (examining the ways in which the law has been used to either add to or detract from women’s agency, and using those trends to suggest manners in which women can use the law in their favor to fight oppression); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993) (discussing the impact that race and gender have on women of color in their experiences with violence); Kapur, *supra* note 105 (discussing the various definitions of victimhood).

172. See HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, *supra* note 33, at 57 (Jean Fagan Yellin ed., 1987) (recounting the mixed emotions she felt when she learned of her master’s plan to build her a cottage: “other feelings mixed with those I have described. Revenge, and calculations of interest, were added to flattered vanity and sincere gratitude for kindness.”) (emphasis added); see also CRISTINA RATHBONE, A WORLD APART, WOMEN, PRISON AND LIFE BEHIND BARS 64 (2005) (describing a female inmate’s mixed emotions concerning a male correctional officer: “Part of it was guilt. He was a good officer and a good guy, and she’d given him the come-on and then bailed. He wasn’t the kind to mess around, she berated herself, and he’d seemed genuinely to like to her.”). But see *Africans in America, Modern Voices: Margaret Washington on Harriet Jacobs*, [www.pbs.org/wgbh/aia/part4/4:3089.html](http://www.pbs.org/wgbh/aia/part4/4:3089.html) (last visited Jan. 31, 2006) (explaining how Harriet Jacobs chose to be with a white lawyer, Mr. Sands, who comforted her when her master was pursuing her and essentially took her life into her own hands by “deciding” to become involved with Mr. Sands).

173. See Franke, *supra* note 46, at 181 (commenting that characterizing women’s sexuality in terms of dangerousness ignores the complex and positive reasons why women want to have sex); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 225 (1988) (“People have a strong, affirmative interest in sexual expression and relationships.”).

174. See Franke, *supra* note 46 and accompanying text (encouraging the use of different characterizations of women’s sexuality, outside the constraints of reproduction).

175. See BARBARA OWEN, OVERVIEW REPORT: FACILITY FOCUS GROUPS 23 (forthcoming 2006) (on file with author) (reporting the staff’s belief “that when inmates were victimized sexually, they were also more likely to be exploited in other ways,” and discussing the fact that “[r]eports of sexually victimized inmates giving their assaulter money, clothes, food, commissary items and other commodities appeared in several of the focus groups”); *c.f.* Ice v. Dixon, No. 4:03CV2281, 2005 U.S. Dist. LEXIS 13429 (N.D. Ohio July 6, 2005)

and often black, she is relegated to the margins, outside of the coalition<sup>177</sup> by traditional feminists, black men, and those advocating for poor people.<sup>178</sup>

While litigation, public education and legislation, have yielded concrete gains in addressing abuse of women in custody, much remains to be done. Demands for supervision of women inmates by women correctional staff have met with some success.<sup>179</sup> Poor record-keeping by federal, state and county correctional authorities, however, makes it difficult to gauge the prevalence of the problem, thereby rendering it anecdotal at best and invisible at worst.<sup>180</sup> This lack of record keeping or naming the problem

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(alleging that defendant Dixon promised to arrange for Ice's release if she performed oral sex and other sex acts upon him); *see also* Worley, *supra* note 44, at 185-89 (discussing "exploiters," or inmates who aggressively forge inappropriate relationships with staff members to make illicit profits in the underground prison economy).

176. *See* Dinos, *supra* note 50 and accompanying text (remarking on many women prisoners' reliance on correctional officers for the basic necessities, thus obviating all of the alternatives to compliance when faced with "quid pro quo" sexual activity); *see also* JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, *supra* note 33, at 55 (calculating the pros and cons of becoming the mistress of a white man who was not her master, and weighing the loss of her master's gift of a soon-to-be completed cottage against the prospective receipt of the boon of freedom for herself and her children).

177. *See* HOOKS, AIN'T I A WOMAN?, *supra* note 98 and accompanying text (discussing Sojourner Truth's—and others'—exclusion from the women's rights movement, even while advocating for the same rights).

178. *See generally* Gwen Rubenstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 37-58 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing the impact that denial of public assistance can have on women offenders); Patricia Allard, *The Unintended Victims of the Lifetime Welfare Ban*, 3 *WOMEN, GIRLS & CRIM. JUST.* 33 (2002) (discussing the impact of the Welfare Reform Act's lifetime ban of welfare benefits to women who are convicted of a state or federal drug-related offense).

179. *Compare supra* note 100 and accompanying text (discussing cases where courts held that gender-based assignments in Corrections Officer and Resident Unity Office positions were considered a BFJQ even though they constituted gender-based discrimination) *with* *Jordan v. Gardner*, 986 F. 2d 1521, 1530-31 (9th Cir. 1992) (holding that clothed body searches by male guards on female inmates constitutes cruel and unusual punishment in violation of the Eighth Amendment) *and* *Torres v. Wis. Dep't. of Health and Soc. Svcs.*, 859 F.2d 1523, 1529-32 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989) (holding that defendants were required to meet an unrealistic, and therefore unfair burden in displaying the validity of their bona fide occupational qualification theory, and that, under *Turner*, "prison administrators have always been expected to innovate and experiment") *and* *Colman v. Vasquez*, 142 F. Supp. 2d. 226, 239 (D. Conn. 2001) (refusing to dismiss—on qualified immunity grounds—a woman inmate's Fourth and Eighth Amendment claims regarding a cross-gender pat search).

180. *See* U.S. DEP'T OF JUSTICE, *DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES* 3 (2005); U.S. GAO, *STAFF MISCONDUCT IN FEMALE PRISONS*, *supra* note 169; U.S. GAO, *WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEM, A REPORT TO THE HONORABLE ELEANOR HOLMES NORTON, HOUSE OF REPRESENTATIVES*, GAO/GGD-00-22, Dec. 1999 [hereinafter U.S. GAO, *ISSUES AND CHALLENGES*

means that bad actors can resign prior to or in lieu of firing or prosecution, free to obtain employment in other corrections institutions.<sup>181</sup> It also means that little accountability exists for states that fail to remedy the abuse of women in custody.<sup>182</sup>

The lack of support or services for women who are abused in custody or who come into custodial settings at greater risk for abuse because of past histories of physical and sexual abuse remains despite the enactment of VAWA, the largest appropriation of funds to combat violence against women in this nation's history.<sup>183</sup> Moreover, the lack of visible prosecutions of sexual abuse in custody and appropriate sanctions for those found guilty<sup>184</sup> sends the message that corrections officials, employees, and agencies can act with impunity.<sup>185</sup> Hopefully, the passage of the Prison Rape Elimination Act, with its focus on documentation, data collection and the development of standards will begin to remedy the sexual abuse of women in custody and increase the accountability of states and correctional officials.

Finally, the record of advocacy by national women's organizations of addressing the concerns of women in custody is mixed at best. Fortunately, there are a host of creative and determined women advocates who were trained or worked in women's organizations and took up the concerns of women in custody. These women advocates have addressed not only sexual violence of women in custody, but health, education, and vocation needs of female inmates.<sup>186</sup> In this way, they have claimed the history of early feminists abolitionists like Rhoda Coffin,<sup>187</sup> who were able to reconcile advocacy for women in custody with advocacy that advanced women as a

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181. See BECK & HUGHES, *supra* note 165, at 2 (reporting that most correctional staff are discharged when they are accused of allegations of sexual misconduct or sexual harassment by an inmate).

182. *But see* 42 U.S.C. § 15602 (6)(2003) (providing that one of PREA's purposes is to "increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape").

183. See *supra* notes 99-104 and accompanying text.

184. Sexual abuse of women in custody is a sex offense and correctional offenders should be subject to registry like other sex offenders. Offenders of laws prohibiting sexual abuse of individuals in custody must register as sex offenders in Florida, Colorado, New York, and California, for example. See SMITH, 50 STATE SURVEY, *supra* note 4 (enumerating various state penalties for violations of sexual misconduct against prisoners).

185. See U.N. ECOSOC, *Report of the Special Rapporteur*, *supra* note 51, para. 75-77 (discussing impunity and corrections officers as it relates to women in United States prisons).

186. See *supra* section IV.A and notes 100-02, 112-23 and 130-33 and accompanying text.

187. See *supra* note 2.

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