

BEYOND PARITY AND EQUAL PROTECTION:
WOMEN PRISONERS' RIGHTS LITIGATION IN THE 1990S

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Since the 1960s, when courts shook off the long-practiced "hands-off doctrine,"¹ the prisoners' rights movement has pushed its way into the courts to secure institutional reform and has heightened public consciousness about civil rights violations in America's prisons and jails. During the 1960s and 1970s, courts increasingly heard prisoners' claims alleging violations of their First, Eighth, and Fourteenth Amendment rights, such as denial of access to religious services, racial segregation, and cruel and unusual conditions of confinement.² During the late 1970s and 1980s, women prisoners began to join in on the action and importantly changed the landscape of the prisoners' rights movement. Notably, these new claims took on a different form, with plaintiffs highlighting disparities in conditions and programs between men's and women's facilities.³

¹ The "hands-off doctrine" describes the approach of federal district courts and courts of appeals from the late 1940s to the mid-1960s. Judges employing this tradition of law would, when presented with inmates' conditions of confinement claims, refuse to take jurisdiction. See PHILLIP J. COOPER, *HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* 210 (1988) (citing the note which coined the phrase "hands-off," see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *YALE L.J.* 506 (1963)).

² See, e.g., *Lee v. Washington*, 390 U.S. 333 (1968) (racial segregation); *Cooper v. Pate*, 378 U.S. 546 (1964) (religious freedom). For a historical view of the prisoners' rights movement in the United States, see COOPER, *supra* note 1, at 207-16; JAMES B. JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 34-47 (1983).

³ See *infra* Part I.

During the 1990s, the face and strategy of the prisoners' rights movement has remade itself once again. The litigation of the past decade has highlighted sexual harassment and abuse by prison officials in women's prisons, presenting courts with complaints listing the most egregious civil rights violations by prison officials. This paper examines the changing landscape of the women prisoners' rights movement, from mid-1970s to present — describing its shift from predominantly equal protection and Title IX claims to sexual misconduct and adequacy of health care claims. Of particular interest is an inquiry into the reasons why and how women prisoners' rights litigation has remade itself from a movement motivated by traditional feminist principles of equality and parity, to a movement comfortable with female victim status, emphasizing the distinct characteristics of the female inmate population compared to the male inmate population. This paper will consider three informal models of institutional reform litigation as explanations for the development of women prisoners' rights litigation from the mid-1970s to present. The three "models" are prisoner-driven litigation, lawyer-driven litigation, and litigation driven by the energy and resources of other movements such as the feminist and civil rights movements. After considering and rejecting these models as thorough explanations of women prisoners' rights litigation today, this paper offers its own reasons that in combination, help explain these developments — increased number of women prisoners, strategic response to anti-prisoner attitudes, and previously unlitigated areas emerging out of the implementation of gender-neutral prison

policies. Finally, this paper considers the limits of institutional reform litigation in this context, nevertheless concluding that in women's prisons, litigation may still be an effective tool.

I. THE PARITY CASES

The "parity cases" represent an early line of women prisoners cases that challenged disparities in programs and conditions in women's prisons compared to facilities for male inmates. Commentators have suggested multiple reasons for the development of these cases during the late-1970s to 1980s, including inadequate facilities and programs due to limited funding for smaller women prisoner populations, stereotype-induced judgments about the abilities and interests of female inmates,⁴ and unresponsiveness by prison officials to the demands and complaints of female inmates.⁵ *Mitchell v. Untreiner*⁶ was arguably the first successful reported parity case, decided by a district court in Florida in 1976. In *Mitchell*, the court held that denying women inmates certain privileges that were available to their male counterparts — such as contact visits, regular outdoor exercise, educational opportunities, regular access to religious services,

⁴ See Ralph R. Arditi, Frederick Goldberg, Jr., M. Martha Hurtle, John H. Peters, William R. Phelps, Note, *The Sexual Segregation of American Prisons*, 82 YALE L.J. 1229, 1243 (1973).

⁵ See Judith Magid, *Glover v. Johnson: Totality Litigation Against Womens Institutions*, 2 PRISON LAW MONITOR 89, 92 (1979).

⁶ 421 F. Supp. 886 (N.D. Fla. 1976).

and “trustee” status⁷ — amounts to a violation of the Equal Protection Clause of the Fourteenth Amendment, among other things.⁸ Parity cases like *Mitchell* began to appear in larger numbers after the mid-1970s,⁹ bolstered in part by the sex discrimination case *Craig v. Boren*.¹⁰ Since 1976, the Supreme Court’s holding in *Craig* — that classifications must serve an important governmental objective and be substantially related to such objective¹¹ — has been “the basis for lower courts’ analysis of the parity issue in the correctional context.”¹² Notably, however, no court has called for the availability of *identical* programs for men and women, thus recognizing the limits of equal protection claims.¹³

⁷ Inmates who attain “trustee” status enjoy unique privileges unavailable to their fellow inmates such as permission to eat in a dining room. See *Mitchell*, 421 F. Supp. 886, 889. More generally, “trustee” status means that an inmate has greater freedom and is subject to fewer restrictions. See *id.*

⁸ See *id.* at 893. The court also found violations of the female inmates’ rights under the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments, as well as the laws of the state of Florida. See *id.* See also William C. Collins, *The Female Offender: Parity Cases 2* (Apr. 1985) (unpublished manuscript, on file with the Nat’l Inst. of Corrections Info. Ctr.).

⁹ See, e.g., *Klinger v. Nebraska Dep’t of Corrections*, 824 F. Supp. 1374 (D. Neb. 1993); *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989); *Canterino v. Wilson*, 546 F. Supp. 194 (W.D. Ky. 1982); *McMurry v. Phelps*, 544 F. Supp. 742 (W.D. La. 1982); *United States v. Houston* 12 M.J. 907 (N.M.C.M.R. 1982); *Dawson v. Kendrick*, 527 F. Supp. 1252 (S.D.W.V. 1981); *Bukhari v. Hutto*, 487 F. Supp. 1162 (E.D. Va. 1980); *Batton v. North Carolina*, 501 F. Supp. 1173 (E.D.N.C. 1980); *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979).

¹⁰ 429 U.S. 190 (1976).

¹¹ See *id.* at 197.

¹² Collins, *supra* note 8, at 1.

¹³ See Barbara Willett Jones, February 1991 Summary of Correctional Law 9 (1991) (unpublished manuscript, on file with the Nat’l Inst. of Corrections Info. Ctr.). The Ninth Circuit in *Jeldness v. Pearce* sought to clarify the distinction between parity and identity, noting, “Strict one-for-one identity of classes may not be required . . . [b]ut there must be reasonable opportunities for similar studies at the women’s prison and women must have an equal opportunity to participate

*Glover v. Johnson*¹⁴ was one of the largest and most well-known parity cases, spanning more than twenty years in the District Court for the Eastern District of Michigan and the Sixth Circuit. In 1977, five named and several unnamed women prisoners at the Huron Valley Women's Facility (HVWF) in Ypsilanti, Michigan filed a complaint in federal court naming Michigan Department of Corrections officials as defendants. The complaint alleged violations the prisoners' Eighth Amendment rights, violations of due process and equal protection, and violations of Title IX of the Education Amendments of 1972 ("Title IX").¹⁵ With respect to the equal protection claim, the plaintiffs alleged disparities between men's and women's facilities in education and vocational training, adequacy of institutional facilities, prison industry and wage rates, and work pass programs.¹⁶ For example, women at HVWF did not have the opportunity to earn a bachelor's degree or take classes on the campus of a community college; male prisoners housed in other Michigan facilities, however, could do both.¹⁷ In the area of vocational training, men had access to twenty-two vocational courses teaching marketable skills while women had access to training

in women's programs. . . . Although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality." 30 F.3d 1120, 1228-29 (9th Cir. 1993).

¹⁴ 478 F. Supp. 1075 (E.D. Mich. 1979).

¹⁵ *Glover*, 478 F. Supp. at 1077.

¹⁶ *See id.*

¹⁷ *See Magid, supra* note 5, at 89.

in only five areas with dubious marketability.¹⁸ This litigation challenged thoughtless stereotyping in the implementation of programs in women's prisons, and the women prisoners enjoyed early success in their litigation efforts. The court in *Glover* held that women's programs must be "substantially equivalent in substance if not form" and ordered substantial changes and increased choices in educational and vocational programming, emphasizing attention to "the interests and needs of the female inmates."¹⁹ The defendants argued that the smaller women prisoner population in Michigan and lack of funding made parity unfeasible.²⁰ Nevertheless, the court held that Michigan's proffered defenses for its inferior programs for women did not survive the equal protection analysis that the Supreme Court demanded in *Craig*.²¹

*Canterino v. Wilson*²² reached the federal courts shortly after *Glover*, and like its predecessor, alleged "the denial of opportunities for vocational training and education" for women inmates, as well as "disparate treatment of men and women inmates," including gender-based disparities in prison classification systems²³ and conditions.²⁴ In 1980, the plaintiff class, made up of inmates housed

¹⁸ See *id.* The areas of vocational training in the women's facility included: "Building Maintenance," which was taught at a junior high level; "Food Service," which was more a home economics course than a commercial food service course; and "Business Science," which was merely a typing course. See *id.* at 89-90.

¹⁹ *Glover*, 478 F. Supp. at 1079, 1087.

²⁰ See *id.* at 1078.

²¹ See *id.*

²² 546 F. Supp. 174 (W.D. Ky. 1982).

²³ The Levels System was the classification system used at the Kentucky Correctional Institution for Women, described as a behavior modification

at the Kentucky Correctional Institution for Women (KCIW), filed a complaint in federal court alleging violations of the Equal Protection Clause of the Fourteenth Amendment and Title IX. The *Canterino* court applied the equal protection standard adopted by the court in *Glover* and announced that the equal protection clause requires parity, but not identity. The court noted, "The fourteenth amendment's equal protection clause requires the state to be evenhanded in the allocation of facilities, benefits, and burdens between male and female inmates in its prison system."²⁵

In spite of the early courtroom successes of parity cases like *Mitchell*, *Glover*, and *Canterino*, *Klinger v. Nebraska Department of Corrections*²⁶ marked a heartbreaking turning point for women prisoners and their advocates. *Klinger* began in 1988 when four female inmates at the Nebraska Center for Women (NCW) filed a complaint *pro se*, alleging, among other things, unequal treatment compared to the treatment male inmates housed at the Nebraska State Penitentiary (NSP), particularly with respect to education programs and law

program which regulated "virtually every dimension of each inmate's life," including visitation, phone calls, bedtime, personal belongings, and clothing. *Id.* at 180. The Levels System was regarded as "the most harsh system of allocating privileges" and was notably absent in such restrictive form in any of Kentucky's male facilities. This disparity provided the basis for one of the plaintiffs' equal protection claims. *Id.* at 182.

²⁴ *Id.* at 179.

²⁵ *Id.* at 213.

²⁶ 824 F. Supp. 1374 (D. Neb. 1993) [hereinafter *Klinger I*], *rev'd*, 31 F.3d 727 (8th Cir. 1994) [hereinafter *Klinger II*], *on remand*, 887 F. Supp. 1281 (D. Neb. 1995) [hereinafter *Klinger III*].

library access.²⁷ The prisoners charged that the Nebraska Department of Correctional Services, a recipient of federal funds to operate educational programs, had violated their rights under the Equal Protection Clause of the Fourteenth Amendment and Title IX.²⁸ Although the district court made a finding of liability on the equal protection claim, in 1994 the Eighth Circuit reversed in *Klinger II*.²⁹ The appellate court noted, “NSP and NCW are different institutions with different inmates each operating with limited resources to fulfill different specific needs. Thus, whether NCW lacks one program that NSP has proves almost nothing.”³⁰ Emphasizing the different characteristics of female inmates compared to men — for example, women are more likely to be primary caregivers and victims of physical or sexual abuse³¹ — the *Klinger II* court concluded that “[d]issimilar treatment of dissimilarly situated persons does not violate equal protection.”³² The court continued, “[C]omparing programs at NSP to those at NCW is like the proverbial comparison of apples to oranges.”³³ The appellate court’s reasoning essentially obliterated opportunity for favorably analysis in parity cases by finding that male and female inmates were not

²⁷ *Klinger I*, 824 F. Supp. at 1381.

²⁸ *Id.* at 1383.

²⁹ *Klinger II*, 31 F.3d at 734.

³⁰ *Id.* at 732.

³¹ *See id.* at 731-32. For a critique of the majority’s analysis in *Klinger II*, see Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM. J. GENDER & L. 1, who points out the irony of the court’s sensitivity to the special needs of female inmates, who are more often victims of abuse and nonviolent offenders, but its failure to comprehend the discriminatory effects of the prison’s educational and vocational programming. *See id.* at 8-9.

³² *Klinger v. Nebraska Dep’t of Corrections Servs.*, 31 F.3d 727, 731 (8th Cir. 1994).

“similarly situated,” thus eliminating the heightened scrutiny standard from its equal protection analysis.³⁴ The plaintiffs then suffered another blow when the district court reversed its Title IX liability determination, reasoning that in light of *Klinger II*, there was no longer “a basis for [the] previous liability finding regarding Title IX”³⁵

II. BEYOND PARITY AND EQUAL PROTECTION

With the disappointments of *Klinger II* and *III*, women prisoners’ rights advocates took pause to reassess the viability of their parity litigation strategy. As Deborah LaBelle explained, “*Klinger* scared people into not doing such cases; parity cases like *Glover* have been devastated.”³⁶ Furthermore, even when courts have issued rulings and consent decrees demanding parity in women’s prisons, prison administrators, some with defiant attitudes and others faced with limited budgets, responded by “leveling-down,” or cutting programs in men’s prisons to make them “equal” to women’s programs. Describing the rise and fall of equal protection and Title IX cases, LaBelle recalled, “For a long time, no attention was paid to women prisoners, then parity cases appeared and many were resolved without litigation — these were the sweetheart cases where plaintiffs would

³³ *Id.* at 733.

³⁴ See *id.*; Julie Kocaba, *The Proper Standard of Review: Does Title IX Require “Equality” or “Parity” of Treatment When Resolving Gender-Based Discrimination in Prison Institutions?* 25 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 607, 637 (1999).

³⁵ *Klinger v. Nebraska Dep’t of Correctional Servs.*, 887 F. Supp. 1281, 1282 (D. Neb. 1995).

threaten litigation and prison administrators would go to their legislatures for more funding to address the plaintiffs' complaints, and the problems would be largely resolved without litigation. At that time, there was a general acknowledgment that prisons have to provide similar programming to women inmates. Then, prisons began to respond by slashing programming for everyone."³⁷ Widney Brown, Advocacy Director of the Women's Rights Division of the Human Rights Watch, explained, "Vocational education, rehabilitative programs (Title IX) claims are failing because the state is just likely to remove programs from men's prisons to establish parity. This is all a part of the current 'punitive mentality.'"³⁸

In spite of "leveling-down" and the elimination of an effective doctrinal hook for equal protection and Title IX litigation, women prisoners' litigation has continued to occupy the courts. An analysis of data collected by the Bureau of Justice Statistics (BJS) indicates that in 1995, the percentage of women's state prisons under court order or consent decree returned to its 1984 level after a dip in 1990 — from 21.9% in 1984, to 17.2% in 1990, to 23.2% in 1995.³⁹ An analysis of

³⁶ Telephone Interview with Deborah LaBelle, Attorney for Plaintiffs in *Glover v. Johnson* (Mar. 21, 2000) [hereinafter Interview with Deborah LaBelle].

³⁷ *Id.*

³⁸ Telephone Interview with A. Widney Brown, Advocacy Director of the Women's Rights Division of the Human Rights Watch, Author of *NOWHERE TO HIDE* (Mar. 31, 1999) [hereinafter Interview with Widney Brown].

³⁹ During this same time period, the number of men's state prisons under court order or consent decree showed a mild increase — from 19.9% in 1984, to 20.4% in 1990, to 24.4% in 1995. Data are derived from the BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE ADULT CORRECTIONAL FACILITIES, 1984 (ICPSR 8444) (1997) [hereinafter BJS1984 PRISON CENSUS];

average daily populations (ADP)⁴⁰ for male and female inmates reinforces the impression that women prisoners' litigation has not been subdued by the disappointments in parity litigation of the 1990s. While the percentage of men housed at state prisons under court order or consent decree decreased — from 38.9% to 34% to 33.4% in 1984, 1990, and 1995, respectively — the percentage of women inmates housed at state prisons under court order or consent decree in 1995 “recovered” to its 1984 level, after a noticable dip in 1990 — from 36% to 25.9% to 35.6% in 1984, 1990, and 1995, respectively.⁴¹ Although these findings may not be particularly dramatic, what is notable about the development of the women prisoners' rights movement during this time period has been its ability to remake itself after the disappointments of the 1980s and early-1990s. *

A. Guard-on-Inmate Sexual Harassment and Abuse

Over the past decade, the trend in women prisoners' rights litigation has been toward sexual abuse claims, and away from parity cases — a reflection of not only unsuccessful efforts in parity litigation, but also an increasing awareness

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1990 (ICPSR 9908) (1993) [hereinafter BJS 1990 PRISON CENSUS]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 1995 (ICPSR 6953) (1998) [hereinafter BJS 1995 PRISON CENSUS]. In raw numbers, the number of women's prisons under court order or consent decree were: 16 out of 73 in 1984, 15 out of 87 in 1990, and 29 out of 125 in 1995.

⁴⁰ The ADP is calculated by adding the number of inmates for each day during a given annual period and dividing the results by 365.

⁴¹ Data are derived from BJS 1984 PRISON CENSUS, *supra* note 39; BJS 1990 PRISON CENSUS, *supra* note 39; BJS 1995 PRISON CENSUS, *supra* note 39.

among women prisoners' rights advocates of newly developing problems of sexual misconduct in women's prisons. At the same time, punitive anti-prisoner attitudes have been increasingly reflected in prison policies and legislation.⁴² Commentators suggest that possible reasons for the emergence of a "punitive mentality" are the Victim's Rights Movement, growing skepticism about the efficacy of rehabilitation, and the advent of "just deserts," "which dictates the equalization of penalties for all people committing the same crime by focusing on the offense rather than the offender."⁴³ With the dominance of punitive attitudes in current American political thought, sexual abuse cases, highlighting the victimhood of female inmates, have been the most successful, with notable settlement agreements with the Georgia,⁴⁴ Arizona,⁴⁵ and Michigan⁴⁶ prison systems. "Unlike male prison rape . . . which usually stems from abuse at the hands of other inmates, sexual abuse of female inmates tends to take a different form. In some ways, the sexual abuse experienced by female prisoners is more repugnant from a legal and policy standpoint, as the abusers are often actors of

⁴² See *infra* p. 44.

⁴³ Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN L. & POL'Y REV. 133, 133 (1999).

⁴⁴ For a discussion of the Georgia lawsuit, *Cason v. Seckinger*, Civ. No. 84-313-1-MAC, see ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS, HUMAN RIGHTS WATCH, WOMEN'S RIGHTS PROJECT 127-173 (1996) [hereinafter ALL TOO FAMILIAR].

⁴⁵ See *United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz. Mar. 11, 1999) (settlement agreement), available at <<http://www.usdoj.gov/crt/split/documents/azsa/htm>>.

⁴⁶ See *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. May 25, 1999) (settlement agreement), available at <<http://www.usdoj.gov/crt/split/documents/michigansa.htm>>.

the state, usually male prison officials.”⁴⁷ Additionally, commentators speculate that these cases have been most successful in part because lawyers have been able to show *clear* violations by prison officials.⁴⁸ The presence of such egregious harms — for example, in Michigan, a prisoner complained that in 1989, she was being raped repeatedly and in Dublin, California, three women were pimped out to male inmates by guards — make it difficult for even the most unsympathetic judicial decisionmaker to ignore.⁴⁹

Female inmates initiating lawsuits against state prisons have the ability to bring their claims under § 1983, which is available to individuals suffering violations of constitutional rights at the hands of the state.⁵⁰ In addition, the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA)⁵¹ gives the Attorney General the authority to institute lawsuits against publicly owned and operated institutions, including jails, prisons, institutions for mentally ill persons, and juvenile correctional facilities.⁵² CRIPA provides that the Attorney General may institute a civil action for equitable relief against an institution for “subjecting persons . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or

⁴⁷ Cheryl Bell, Martha Coven, John P. Cronan, Christian A. Garza, Janet Guggemos & Laura Storto, Developments in Policy Article, *Rape and Sexual Misconduct in the Prison System: Analyzing America’s Most “Open” Secret*, 18 YALE L. & POL’Y REV. 195, 202 (1999).

⁴⁸ Interview with Widney Brown, *supra* note 38.

⁴⁹ *See id.*

⁵⁰ *See* 42 U.S.C. § 1983 (1994).

⁵¹ 42 U.S.C. §§ 1997-1997j (1994).

⁵² *See* 42 U.S.C. § 1997.

laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights”⁵³ For example, in 1997 the United States Department of Justice brought actions pursuant to CRIPA against the Arizona and Michigan prison systems, alleging that correctional officers and staff have subjected inmates to a variety of sexual misconduct, and that the defendants were consciously aware of, but deliberately indifferent to such conditions.⁵⁴ In the sexual misconduct context, plaintiffs, whether individual inmates or the United States of America, have most often alleged treatment amounting to “deliberate indifference” in violation of the Eighth Amendment.⁵⁵ In order to establish an Eighth Amendment claim, plaintiffs must show that 1) the sexual misconduct is “objectively sufficiently serious;” and 2) a prison official has “sufficiently culpable state of mind.”⁵⁶ In addition to Eighth Amendment violations, women inmates have made privacy claims alleging, for example, that prison policies allowing male guards to observe female inmates while they shower and use the toilet, as well as more direct harms like sexual assault,

⁵³ 42 U.S.C. § 1997a.

⁵⁴ See *United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz. filed Mar. 10, 1997), *available at* <<http://www.usdoj.gov/crt/split/documents/arizcomp/htm>>; *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. filed Mar. 10, 1997), *available at* <<http://www.usdoj.gov/crt/split/documents/michcomp/htm>>.

⁵⁵ See, e.g., *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998); *Women Prisoners v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996).

⁵⁶ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

encroach on their privacy rights.⁵⁷ This analysis has required courts to make an accommodation between "1) the right of a prison inmate to some minimum of privacy; and 2) the right of equal job opportunity regardless of sex."⁵⁸

A 1996 survey of fifty-three departments of corrections (DOCs) found that since 1991, at least twenty-four DOCs have faced class action or individual damage suits related to sexual misconduct.⁵⁹ Most of the cases brought against DOCs were individual damage suits rather than class action suits; however, at the time of the survey, Alaska, the District of Columbia, Michigan, and New York were defendants in class actions.⁶⁰ In 1999, another survey found that legal actions have been brought on the state and county level against the District of Columbia, Colorado, Louisiana, Georgia, Washington, California, and the jail system in Santa Clara County, California.⁶¹

Propelling many of these litigation efforts have been the investigative and public awareness campaigns of human rights organizations like Human Rights

⁵⁷ See Bell, Coven, Cronan, Garza, Guggemos & Storto, *supra* note 47, at 215-16. See, e.g., *Forts v. Ward*, 471 F. Supp. 1095, 1097-98 (S.D.N.Y. 1978).

⁵⁸ *Forts*, 471 F. Supp. at 1098.

⁵⁹ See NATIONAL INST. OF CORRECTIONS INFO. CTR., U.S. DEP'T OF JUSTICE, SEXUAL MISCONDUCT IN PRISONS: LAW, AGENCY RESPONSE, AND PREVENTION 1 (Nov. 1996) [hereinafter SEXUAL MISCONDUCT IN PRISONS].

⁶⁰ See *id.*

⁶¹ See Nina Siegal, *Locked Up In America: Slaves to the System*, SALON MAG. (Mar. 31, 1999) <http://www.salonmagazine.com/mwt/feature/1998/09/cov_01.feature2.html>. See, e.g., *Giron v. Corrections Corp. of Am.*, 14 F. Supp. 2d 1252 (D.N.M. 1998), *aff'd in part, rev'd in part*, No. 98-2231, 1999 U.S. App. LEXIS 21646 (10th Cir. Sept. 10, 1999); *Webb v. Lawrence County*, 950 F. Supp. 960 (W.D.S.D. 1996), *aff'd*, 144 F.3d 1131 (8th Cir. 1998); *Carrigan v. Delaware*, 956 F. Supp. 1376 (D. Del. 1997); *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd*, 178 F.3d 385 (5th Cir. 1999); *Women Prisoners v. District of Columbia*, 877

Watch and Amnesty International. The 1996 release of the Human Rights Watch report *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* highlighted the extent of abuses by prison officials in California, the District of Columbia, Georgia, Illinois, Michigan, and New York, and offered recommendations for reform at both the state and federal levels.⁶² For example, the report recommended legislation requiring that states, as a precondition to receiving federal funding, criminalize all sexual contact between staff and prisoners, the establishment of a toll-free telephone hotline to be maintained by the U.S. Department of Justice, which would receive complaints of sexual misconduct, and the establishment of independent monitors to oversee correctional facilities.⁶³ The Human Rights Watch followed up in 1998 with *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, which described ongoing litigation efforts against the Michigan Department of Corrections for patterns of sexual misconduct and retaliation by prison officials.⁶⁴ More recently, the 1999 Amnesty International report "*Not part of my sentence*": *Violations of the Human Rights of Women in Custody* exposed human rights violations in women's prisons,

F. Supp. 634 (D.D.C. 1994).

⁶² See ALL TOO FAMILIAR, *supra* note 44.

⁶³ See *id.* at 9-15.

⁶⁴ See NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS, HUMAN RIGHTS WATCH (1998) [hereinafter NOWHERE TO HIDE].

including sexual assault by prison officials, intrusive strip and pat searches by male guards, shackling of inmates in labor, and denial of access to medical care.⁶⁵

Conditions in women's prisons have also caught the attention of lawmakers. In 1999, Congresswoman Eleanor Holmes Norton of the District of Columbia commissioned a report on women prisoners focusing on trends in the growth of female inmate populations in the Federal Bureau of Prisons, the California Department of Corrections, and the Texas Department of Criminal Justice.⁶⁶ A 1996 National Institute of Corrections survey found that at least thirty-six legislatures had proposed bills defining sexual misconduct of public employees, including correctional personnel, as a criminal offense.⁶⁷ In 1999, Amnesty International followed up on these and other proposals and found that thirty-six states, the District of Columbia, and the federal government had enacted laws *specifically* prohibiting sexual relations between prison and jail staff and inmates.⁶⁸

One of the more heavily publicized sexual misconduct cases, *Lucas v. White*,⁶⁹ heightened public consciousness about sexual assault by prison guards when three women prisoners brought an individual damages suit against the

⁶⁵ See "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, AMNESTY INTERNATIONAL (1999) [hereinafter NOT PART OF MY SENTENCE].

⁶⁶ See WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS, UNITED STATES GENERAL ACCOUNTING OFFICE 64 (1999) [hereinafter GAO REPORT].

⁶⁷ See SEXUAL MISCONDUCT IN PRISONS, *supra* note 59, at 2.

⁶⁸ See NOT PART OF MY SENTENCE, *supra* note 65, at 49.

⁶⁹ No. C. 96-02905 (N.D. Cal. filed Aug. 13, 1996).

Department of Justice and Bureau of Prisons (BOP) in 1996. The plaintiffs alleged that BOP officials violated their constitutional rights by subjecting them to “a pattern of serious sexual assaults, sexual harassment and unwelcome sexual advances orchestrated and facilitated by prison officials.”⁷⁰ The plaintiffs were incarcerated at a minimum-security facility in Dublin, California, but in August and September 1995, they were transferred to the J-2 Special Housing Unit at the Federal Detention Center, which was an otherwise all-male facility.⁷¹ While the plaintiffs’ were housed at the Federal Detention Center, correctional officers “allowed male prisoners to roam the corridors and harass [the] plaintiffs.”⁷² During the named plaintiff’s third night in the unit, a guard allowed a man into her cell who attacked her.⁷³ Similar attacks followed. Lucas sought out higher officials and made complaints, but shortly after she made an official complaint, three men entered her cell when she was asleep and restrained and handcuffed her from behind. The men then proceeded to beat, rape, and sodomize her, informing Lucas that the attack was in retaliation of her complaint.⁷⁴ Another plaintiff, Valerie Mercadel alleged that an officer demanded that she show him her breasts or genitals in order to receive a prison issued t-shirt.⁷⁵ In February

⁷⁰ *Lucas*, 63 F. Supp. 2d 1046, 1049-50 (N.D. Cal. 1999) (citing the amended complaint).

⁷¹ *See id.* at 1050.

⁷² *Id.*

⁷³ Siegal, *supra* note 61.

⁷⁴ Telephone Interview with Michael W. Bien, Attorney for Plaintiffs in *Lucas v. White* (March 31, 1999) [hereinafter Interview with Michael Bien]. *See Lucas*, 63 F. Supp. 2d at 1050.

⁷⁵ *See Lucas*, 63 F. Supp. 2d at 1050.

1998, the defendants signed a private settlement agreement in which they agreed to pay the three plaintiffs a total of \$500,000 and which required the BOP to implement reforms to policies, procedures, and personnel training designed to reduce the risk of staff-on-inmate sexual assaults and harassment.⁷⁶ Additionally, the agreement required the development of programming, counseling, and services to female prisoners who are victims of sexual assaults, as well as the adoption of measures to protect victim confidentiality.⁷⁷

Nunn v. Michigan Department of Corrections serves as an example of collaboration between private lawyers and the United States Department of Justice in challenging abusive conditions within a state prison system. In the Crane Women's Facility ("Crane") and Scott Correctional Facility ("Scott") in Michigan, women inmates and their lawyers reported pervasive sexual harassment and abuse including rape, sexual assault, groping and fondling during pat-frisks, and improper visual surveillance by guards. In addition to initial incidents of harassment and assault, women also reported retaliation by prison staff. The authors of *Nowhere to Hide* documented instances of retaliation such as "loss of 'good time' accrued toward early release, prolonged periods punitive segregation, . . . verbal harassments and threats, . . . abusive pat-frisks, being issued unwarranted disciplinary tickets, [and] loss of privileges."⁷⁸ For example, after reporting that she was raped by a guard at the Scott facility,

⁷⁶ See *Lucas v. White*, Civ. No. C96-2905 THE (N.D. Cal. Feb. 24, 1998) (settlement agreement) (on file with Margo Schlanger).

⁷⁷ See *id.*; *Lucas*, 63 F. Supp. 2d at 1051.

Ronesha Williams described being subjected to “unrelenting harassment and retaliation.”⁷⁹ More concretely, Williams was subjected to excessive pat-frisks accompanied by threatening comments (eighty-eight times in one month, compared to one a week prior to her report that she was raped), delayed release into a community-based program, and receipt of an excessive number of major misconduct tickets for apparently unexplainable reasons such as arriving early for breakfast, even though it was part of her job requirement as a worker in the food service section.⁸⁰

More generally, the *Nowhere to Hide* authors attribute the Michigan Department of Corrections’ failure to monitor and discipline such behavior as instrumental in creating an “institutional culture” in which officers may abuse and harass inmates with impunity.⁸¹ As the authors suggest, “Impunity in any context is a serious problem with a chilling effect on victims of violence and discrimination. However, impunity in prisons is particularly devastating because, quite simply, incarcerated women have no protection, no recourse, and nowhere to hide.”⁸²

In June 1995, the women plaintiffs at the Crane and Scott facilities filed a class action suit in the Eastern District of Michigan alleging constitutional

⁷⁸ NOWHERE TO HIDE, *supra* note 64, at 7.

⁷⁹ *Id.* at 23.

⁸⁰ *See id.* at 23-24.

⁸¹ *Id.* at 7.

⁸² *Id.*

violations, including retaliation, rape, and violations of their right to privacy.⁸³ In 1997, the United States Department of Justice joined in the class action suit against the Michigan Department of Corrections.⁸⁴ After months of intransigence and denial, as well as a highly publicized skirmish with the United Nations in which Michigan Governor John Engler barred Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence Against Women, from visiting women's prisons in Michigan,⁸⁵ the defendants settled in May 1999.⁸⁶ The *Michigan* settlement agreement, among other things, instituted a six-month moratorium on cross-gender pat-down searches on female inmates, prohibits male staff from being alone with female inmates in settings that are not clearly visible to other staff or inmates; requires male officers to announce their presence in areas where inmates could be undressed, strengthens preemployment screening to include

⁸³ See *Nunn v. Michigan Dep't of Corrections*, No. 96-CV-71416-DT (E.D. Mich. 1995).

⁸⁴ See *United States v. Michigan*, (E.D. Mich. filed March 10, 1997), *available at* <<http://www.usdoj.gov/crt/split/documents/michcomp/htm>>.

⁸⁵ See Thalif Deen, U.N. Official Barred from U.S. Women's Prisons, *available at* <<http://www.prisonactivist.org/news/current/US-Bars-UN-HR-Investigator.shtml>>. In a letter to the Office of the U.N. High Commissioner for Human Rights, Governor Engler said, "I view the United Nations as an unwitting tool in the Justice Department's agenda to discredit the state of Michigan in spite of the objective evidence that the state of Michigan has not violated the civil and constitutional rights of women inmates. . . . I must conclude that the Justice Department hopes to use the Special Rapporteur as a sword against the State in this unnecessary litigation. . . . I cannot permit, as a matter of both sound legal strategy and good common sense, the State to participate in such an effort." *Id.*

⁸⁶ *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. May 25, 1999) (settlement agreement), *available at* <<http://www.usdoj.gov/crt/split/documents/michigansa.htm>>.

search for history of domestic violence; and hired a Special Administrator to address sexual misconduct and invasions of privacy.⁸⁷

Nevertheless, in spite of the apparent successes of these recent litigation efforts, the path has been difficult, complicated by factors such as intransigent prison authorities,⁸⁸ lack of cooperation in carrying out (and lack of courts' ability to enforce) private settlement agreements,⁸⁹ and doctrinal barriers. More specifically, the inflexibility of courts' adherence to the "deliberate indifference"⁹⁰ and qualified immunity⁹¹ standards for prison officials has raised the bar of proof and made it particularly difficult for plaintiffs to win in court.⁹²

⁸⁷ See *id.*

⁸⁸ See *supra* pp. 20-21.

⁸⁹ See *infra* p. 55.

⁹⁰ See, e.g., *Carrigan v. Delaware*, 957 F. Supp 1376, 1382 (D. Del. 1997) (finding that even when an official was aware of sexual harassment within his prison, that awareness did not constitute "deliberate indifference to a substantial risk of harm"); *Giron v. Corrections Corp. of Am.*, 14 F. Supp. 2d 1225, 1259. (D.N.M. 1988) (rejecting plaintiffs' argument that the design of the correctional facility created a risk of male guards' intrusion into the women's quarters, reasoning that even if these circumstances "constituted objectively inhumane prison conditions (which they do not) without evidence of the sufficiently culpable state of mind . . . there can be no liability under the Eighth Amendment").

⁹¹ Courts apply the doctrine of qualified immunity to allow reasonable deference to the policy determinations of prison officials. The Harlow-Anderson formula grants defendants qualified immunity unless the plaintiffs: 1) state a claim that their constitutional rights have been violated; 2) demonstrate that the rights and law at issue are clearly established; and 3) show that a reasonably competent official should have known that his conduct was unlawful. See *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Harlow v. Fitzgerald*, 456 U.S. 800, 818 (1982). For example, in *Carrington* the court held that the prison administrator had qualified immunity because the law on sexual assault by a prison guard was not clearly established, see *Carrington*, 957 F. Supp. at 1387-88.

⁹² See *Bell, Coven, Cronan, Garza, Guggemos & Storto, supra* note 47, at 212-14.

B. Access to Medical Care

Another area of active litigation during the 1990s has been health care. While the complaints are not necessarily tied to availability of female-specific health care,⁹³ women inmates have filed complaints in significant numbers with respect to inadequate, incomplete, and inconsistent access to health care.⁹⁴ In particular the problem of “gate-keeping” frequently plagues women’s prisons.⁹⁵ “Gate-keeping” describes the fact of prison guards screening women for treatment and denying access to care. Generally, women inmates have more difficulty accessing health care than male inmates, in part because prison guards take women’s complaints less seriously, believing that women are “whiney” (while men are “stoic”) and often complain of physical or mental discomfort too frequently and unnecessarily.⁹⁶ So even when women’s complaints are not female-specific complaints, men are able to access health care more frequently.⁹⁷

⁹³ The 1999 GOA Report commissioned by Congresswoman Eleanor Holmes Norton found that the “the vast majority of U.S. correctional systems provided at least some health care related to female-specific issues.” GAO REPORT, *supra* note 66, at 64. Of the 44 jurisdictions surveyed, 43 provided gynecological and obstetrical services during 1998. *See id.* A 1997 Bureau of Justice Statistics survey found that about 90% of inmates reported that they had received a gynecological examination after admission to prison. *See id.*

⁹⁴ *See, e.g.,* United States v. Michigan, Civ. No. 97-CVB-71514-BDT (E.D. Mich. filed Mar. 10, 1997), available at <<http://www.usdoj.gov/crt/split/documents/michcomp.htm>> (alleging “fail[ure] to provide adequate care by, *inter alia*, failing to provide access to adequate care for serious medical needs” and “fail[ure] to provide adequate mental health care by, *inter alia*, failing to treat serious mental health needs of prisoners”).

⁹⁵ *See* Interview with Widney Brown, *supra* note 38.

⁹⁶ *See id.*

⁹⁷ *See id.*

Much of the litigation and settlement activity regarding health care has occurred in California, which has been notorious for poor health care.⁹⁸ In particular, prior to bringing their lawsuit *Shumate v. Wilson* in 1995, women prisoners housed at the California Institute for Women and the Central California Women's Facility (CCWF) in Chowchilla, the world's largest women's prison, lived in facilities that provided grossly inadequate healthcare. In light of the large number of inmates who have HIV and AIDS, the inadequate care, in particular gynecological care, made their conditions of confinement particularly dangerous.⁹⁹ The plaintiffs cited the experiences of Clarisse Shumate, who suffered from sickle cell anemia, heart problems, pulmonary hypertension, and asthma and experienced delays and interruptions in the provision of medication; Beverly Tucker, who had long-standing blood-clots in her legs and had to have her foot amputated as a result of inadequate care; and Cynthia Martin, who was denied physical therapy in her recovery from serious burns and was subsequently confined to a wheelchair.¹⁰⁰ The parties settled in 1997. Although by signing the agreement the defendants did not admit to any wrongdoing, they did agree to implement various health care policies to be assessed by health care experts.¹⁰¹ Shortly thereafter, the California Department of Corrections' Health Care Services Division issued additional policies concerning health care

⁹⁸ See *id.*

⁹⁹ See Judy Greenspan, *Struggle for Compassion: The Fight for Quality Care for Women with AIDS at Central California Women's Facility*, 6 YALE J. LAW & FEM. 383, 383 (1994).

¹⁰⁰ See NOT PART OF MY SENTENCE, *supra* note 65, at 75.

evaluations, examinations, and laboratory tests for newly arriving female inmates. The new policies contain recommended schedules for periodic examinations for female inmates, including breast examinations, mammograms, pelvic examinations, Pap smears, and tests for sexually transmitted diseases.¹⁰² Nevertheless, a 1998 assessment by the independent monitoring team found that the defendants had failed to comply with eleven of the fifty-seven substantive provisions of the settlement agreement.¹⁰³

III. THREE MODELS OF INSTITUTIONAL REFORM LITIGATION

As discussed earlier, in spite of the elimination of an effective doctrinal hook for parity cases, women prisoners' rights litigation has not disappeared — in fact, plaintiffs have continued turn to the courts for relief in significant numbers. Particularly noteworthy has been the building momentum in women prisoners' rights advocacy over the last five years, sparking the attention of scholars, legislators, and even prime time television. What is the story behind the continued and even increasing judicial, political, and media presence of women prisoners' rights litigation in the 1990s? The remainder of this paper will consider various hypotheses explaining the continued presence of women prisoners cases, and finally, will offer its own explanations.

¹⁰¹ See GAO REPORT, *supra* note 66, at 65-66.

¹⁰² See *id.*

¹⁰³ See *id.* at 75.

A. Prisoner-Driven Litigation

One well-understood model of institutional reform litigation can be described as “prisoner-driven litigation.” A prominent example of this style of litigation is exemplified by the protests of Black Muslim inmates against prison policies that denied them access to religious literature, clergy, and services. Black Muslim inmates succeeded in organizing themselves in prisons around the country¹⁰⁴ and initiated large numbers of lawsuits asserting denial of racial and religious equality — one count found that there were sixty-six reported federal court decisions pertaining to the rights of Muslims inmates between 1961 and 1978. In the most notable of these cases, *Cooper v. Pate*,¹⁰⁵ the Supreme Court held that the Muslim prisoners had standing to challenge religious discrimination under § 1983.¹⁰⁶ *Cooper v. Pate*, regarded as the Supreme Court’s “first modern prisoners’ rights case,” provided the “symbolic energizing” for a national prisoners’ rights movement with its simple, yet unambiguous announcement that prisoners have constitutional rights.¹⁰⁷ Describing the effectiveness of the organization of the Black Muslim prisoners’ rights movement as well as its influence on prisoners’ rights activism generally, James Jacobs writes, “The Black

¹⁰⁴ Although the Black Muslim prisoners rights cases are remembered as “prisoner-driven” litigation, the movement was also aided greatly by the efforts of the Black Muslim organization on the outside. See JACOBS, *supra* note 2, at 36; Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994, 2002 (1999) (REVIEWING MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998)).

¹⁰⁵ 378 U.S. 546 (1964).

¹⁰⁶ See *id.*

Muslims are undoubtedly the best organized and most solidary group to exist for any length of time in American prisons. They set an example for other prisoners, who soon began organizing themselves in groups and blocks, in contrast to the cliques of former times. . . . They showed how, through legal activism, prisoner groups could achieve solidarity and some tangible success.”¹⁰⁸

Although the struggle to protect the rights of women prisoners is certainly not unlike the struggles that male prisoners of the 1960s and 1970s faced in bringing their cases to court, it is far from clear that the women prisoners’ rights litigation we see today is emerging out of a well-organized movement among women prisoners. In the area of litigation for improved medical care, there are pockets of prisoner activism, but with respect to guard-on-inmate sexual abuse, inmates’ fear of retaliation by prison officials has silenced victims and created a culture hostile to prisoner-driven reform.

The experience of the women inmates housed at the Central California Women’s Facility in Chowchilla (“Central California”) tells a story of prisoner-driven reform and community activism. As described earlier, the inmates at Central California organized and initiated a class action lawsuit, *Shumate v. Wilson*.¹⁰⁹ In this case, the women inmates themselves were very active in organizing a community, publicizing their conditions of confinement, and advocating for more humane treatment. Before her death from AIDS-related

¹⁰⁷ JACOBS, *supra* note 2, at 36-37, 41.

¹⁰⁸ *Id.* at 37 (citations omitted).

¹⁰⁹ See *supra* pp. 23-24.

complications, Joann Walker, along with several other inmates “petitioned for medical releases for sick inmates, campaigned for better medical care, and with the help of San Francisco AIDS activists and organizations, organized a peer education program for sister prisoners.”¹¹⁰ Among their more highly publicized successes was winning a compassionate release for a fellow inmate dying of AIDS-related illnesses.¹¹¹ Outside of the prison, the Chowchilla Coalition, a community organization made up of lawyers and prisoners rights advocates in the Fresno and San Francisco areas, picketed the prison on January 29, 1994 to support the demands of the inmates.¹¹² In 1995, the inmates brought *Shumate v. Wilson* to federal court and reached a settlement in 1997.¹¹³ The activity at Central California suggests the existence of strong pockets prisoner-driven litigation, but a broader view of women prisoners litigation activity indicates something far from the mode of operation we saw among Black Muslim prisoners during the 1960s and 1970s.

The experiences of female victims of sexual harassment and abuse in prisons tell a story of denial and silence. Consciousness-raising among inmates

¹¹⁰ Greenspan, *supra* note 99, at 383. For more information about Central California, the summer issue of volume 6 of the Yale Journal of Law & Feminism issue contains letters from inmates living with AIDS, as well as Judy Greenspan’s longer piece about prisoner self-help in Chowchilla. See Deborah Paul, *Struggle for Compassion: The Fight for Quality Care for Women with AIDS at Central California — I’ve Finally Found My Purpose in Life*, 6 YALE J.L. & FEMINISM 391 (1994); Brenda Lee Ivy, *Struggle for Compassion: The Fight For Quality Care for Women with AIDS at Central California — To the Women Who Supported Me*, 6 YALE J.L. & FEMINISM 392 (1999).

¹¹¹ See Greenspan, *supra* note 99, at 384.

¹¹² See *id.* at 383.

during the 1980s was slow to develop, and by the time women were willing to speak out and take legal action, problems had gotten far out of hand. Deborah LaBelle described the attitudes and expectations among women prisoners in the Michigan prison system upon the arrival of male guards in 1985. Not anticipating any risk of guard-on-inmate sexual abuse and retaliation, female inmates initially welcomed male presence into their facilities.¹¹⁴ The inmates who did experience sexual abuse were timid to complain for fear of being labeled as lesbian by fellow inmates.¹¹⁵ Because of the combination of initial excitement over male presence and fear of stigma, a genuine understanding of the extent of sexual misconduct in the prisons developed very slowly. Even after women prisoners were united in their fear of sexual assault, Deborah LaBelle recalled that it was ten years before women inmates in the Michigan prison system would step forward with sexual abuse complaints out of fear of retaliation by prison guards.¹¹⁶ Although lawyers became aware of sexual abuse in women's prisons around 1988 and 1989, women inmates did not come forward in sufficient numbers to form a class of plaintiffs until 1996.¹¹⁷

B. Lawyer-Driven Litigation

¹¹³ See *supra* p. 24.

¹¹⁴ See Interview with Deborah LaBelle, *supra* note 36.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

Another model of institutional reform litigation may be described as “lawyer-driven litigation,” stemming from the support structures of rights-advocacy organizations, rights-advocacy lawyers, and strong sources of financing, and a fueled by “steady stream of rights cases that press toward shared goals.”¹¹⁸ An example of this sort of widespread and sustained rights-centered litigation can be seen in the work and organization of the National Association for the Advancement of Colored People (NAACP) in attacking segregation — from the years leading up to *Brown v. Board of Education*¹¹⁹ to the project of desegregating public facilities that followed in the late-1950s and 1960s.¹²⁰ The activities of the civil rights lawyers of the NAACP during this period marked the invention of a new form of complex litigation — lawyer-driven, characterized by well-studied coordination, political skill, and control. Although it may overstating history to characterize the NAACP’s successes as the unqualified product of deliberate design and clean execution,¹²¹ the NAACP’s lawyers nevertheless brought to public eye a type of public interest lawyering that had not been seen before; these lawyers developed personal contacts,

¹¹⁸ See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 18-19 (1998) (arguing that such a support structure for legal mobilization “has been essential in shaping the rights revolution,” *id.* at 3).

¹¹⁹ 347 U.S. 483 (1954).

¹²⁰ See EPP, *supra* note 118, at 48-51.

¹²¹ See MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 144 (1987) (disagreeing with other commentators’ characterization of the NAACP’s successful campaign against segregation as “the obvious product of plans that had been laid many years before”).

mobilized and educated communities, and coordinated their legal strategies on a national scale.¹²²

Rather than a well-organized machine, or even a well-defined sense of community, the litigation efforts on behalf of women prisoners have emerged idiosyncratically, in the absense of a broader support structure and driven by dedicated individual actors with varied backgrounds and commitments. That is not to say that the lawyers do not communicate with each other or are unaware of similar efforts, but the reality suggests something far from a directed and well-organized (or well-funded) movement. Although the impressions about the existence of an organized movement for women prisoners' rights litigation vary among individuals, the common sense among the lawyers is that there is not a particularly well-organized movement or community.

The lawyers in the landmark parity case *Canterino v. Wilson* recalled beginnings that pose a sharp contrast to the machine-like organization of the NAACP. Leslie Abramson, a law professor at the University of Louisville, represented the women plaintiffs in *Canterino*. Prior to *Canterino*, Abramson had not been involved in any women prisoners cases.¹²³ Professor Abramson's participation in *Canterino* arose out of a 1976 Kentucky men's prison case challenging conditions of confinement at Eddyville, a maximum security facility in Kentucky. At Eddyville, overcrowding became problem and the prisoners

¹²² See *id.* at 146-55.

¹²³ See Telephone Interview with Leslie W. Abramson, Attorney for Plaintiffs in *Canterino v. Wilson* (Mar. 30, 1999) [hereinafter Interview with Leslie Abramson].

were sent to a medium security facility, which then experienced overcrowding. In 1979, the judge in the Eddyville case contacted Professor Abramson to intervene on behalf of the medium security prisoners. Professor Abramson's case settled in May 1980 with a consent decree largely addressing medical care and the classification system. Shortly after this litigation, a woman prisoner contacted him with an equal protection case, which resulted in *Canterino v. Wilson*.¹²⁴

Canterino was not a case that was targeted by a lawyer with a particular interest in mobilizing women prisoners to assert their legal rights. In *Canterino*, "all of the plaintiffs stepped up themselves" and sought out their own lawyer in Professor Abramson.¹²⁵ Although the National Prison Project provided assistance early on, and the United States Department of Justice intervened in the late stages by providing prison and gender discrimination experts, Professor Abramson characterized the litigation effort as developing "within Kentucky" and involving "no outside influence."¹²⁶ He observed quite simply that *Canterino* "arose out of a common sense notion that women should get what men get," and that the success of the *Canterino* case lies largely in momentum from the male prisoners case.¹²⁷ Surprisingly, although *Canterino* is one of the earliest and most notable parity cases, Professor Abramson observed that very few women prisoners' rights lawyers have sought him out for advice or suggestions, and

¹²⁴ *See id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

observed that he was without any “impression of a coordinated effort” among lawyers for women prisoners.¹²⁸

More recently, Michael Bien, lawyer for the female inmates at the Federal Detention Center in Dublin, California, described a similar beginning regarding his involvement in *Lucas v. White*. As described earlier, *Lucas v. White* involved claims of sexual assault of female prisoners by male guards and inmates.¹²⁹ Like Leslie Abramson, Michael Bien had not been previously involved in women prisoners litigation.¹³⁰ Michael Bien is a private practice attorney who has been involved in prison litigation for ten to fifteen years, mostly involving the California Department of Corrections, particularly mental health care, HIV, and other health care issues.¹³¹ Although women’s issues were covered in some cases, Bien had never before litigated women prisoners-only cases. Bien only became involved in *Lucas v. White* when a family member of Robin Lucas told a criminal defense attorney about Robin’s treatment in the Federal Detention Center in Dublin.¹³² This attorney then contacted Bien because he was aware that Bien had previously done prison litigation. Although Bien viewed himself as very

¹²⁷ *Id.*

¹²⁸ *Id.* Professor Abramson estimated that around five lawyers have contacted him regarding his experiences in the *Canterino* case. *See id.*

¹²⁹ *See supra* pp. 17-19.

¹³⁰ *See* Interview with Michael Bien, *supra* note 74.

¹³¹ *See id.*

¹³² *See id.*

experienced in prison litigation, he lacked familiarity with women's issues and needed to seek out experts on harassment and other women's issues.¹³³

Since *Canterino*, a larger national network of women prisoners' lawyers has developed, and Bien was able to benefit from the resources and expertise of the small community of women prisoners' lawyers — using the internet, prison rights organizations such as the National Prison Project and Legal Services for Women Prisoners with Children.¹³⁴ Already, Bien senses that a small, but dedicated community of women prisoners rights lawyers is developing, observing that he receives calls from other lawyers now, often seeking advice, drafts, names of experts, among other things.¹³⁵ Bien's experience suggests that a community is growing, nevertheless, it is far from the type of lawyer-driven litigation that we saw from the NAACP.

Unlike Abramson and Bien, Brenda Smith, attorney for the plaintiffs in *Women Prisoners v. District of Columbia*,¹³⁶ self-identified as a women prisoner's rights activist well before her involvement in the *D.C. Women Prisoners* case.¹³⁷ Professor Smith offers the perspective of a person actively involved in trying to create a community of women prisoners' rights activists. *D.C. Women Prisoners*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ 877 F. Supp. 634 (D.D.C. 1994).

¹³⁷ See Telephone Interview with Brenda Smith, Attorney for Plaintiffs in *Women Prisoners v. District of Columbia* (Apr. 2, 1999) [hereinafter Interview with Brenda Smith].

was Smith's first class action.¹³⁸ Prior to her involvement in the case, she ran a program for women in prison, where once a week, she would organize educational, family law, and parole informational/dialogical programs.¹³⁹ During her involvement with this program, she became very aware of the problems that women prisoners face and grew increasingly frustrated with the D.C. Department of Corrections.¹⁴⁰ *D.C. Women Prisoners* took shape when Peter Nickels, a litigator at Covington & Burling, contacted Smith to see if there "was anything there" in women's prisons.¹⁴¹ The money and resources of a private firm, combined with Smith's familiarity with the problems in the D.C. correctional facilities spawned the *D.C. Women Prisoners* case. In January of 1993, Smith and Nickels began developing the facts of the case.¹⁴²

Although Smith has been actively involved in organizing a national network of women prisoner's rights activists for over a decade, her predictions about the emergence of a national movement propelling women prisoners litigation are cautious and modest. Professor Smith suggested that there is a network, at least in name — the National Network for Women in Prison, which is a loose coalition of women from around the country who have been working on these issues for many years.¹⁴³ Nevertheless, Professor Smith admits that this community is quite small and recognizes that women prisoner's rights is far

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

from an organized national movement.¹⁴⁴ Brenda Smith's experience with the *D.C. Women Prisoners* case suggests that even among those closely involved in women prisoner's rights, the appearance of opportunities for class action litigation on behalf of women prisoners is oftentimes serendipitous and unexpected.

Finally, because of the fact-intensiveness of investigations of women's prisons, the litigation that develops out of these investigations is highly individualized, making a national lawyer-driven movement less likely. Once litigation is underway, the immediacy in the need for a strong network of women prisoners' rights advocates is reduced. Professor Smith explained, "In litigation, development of ideas for litigation is very individual. Even though facts are very similar, the litigation is largely based on specific state laws and the personalities of individual players. For example, in D.C., the defendants aren't 'intransigent' like in Michigan, but there was a 'culture of acceptance' that those sorts of things happen to women. . . . Generally, work develops based on the local situation."¹⁴⁵

To the extent that a community of women prisoners' rights activists does exist, the community and its resources have played a surprisingly limited role in the drafting of settlement agreements. Although enough of a network exists that attorneys have access to settlement agreements from other cases involving

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ *Id.*

similar issues, lawyers seem to draw little from past settlement agreements and published standards by institutions like the Federal Bureau of Prisons (FBP) and the National Institute of Corrections (NIC). In *Lucas v. White*, the private settlement agreement was drawn “from scratch,” relying largely on the plaintiffs’ attorney’s past experience with settlement agreements and consent decrees.¹⁴⁶ Emphasizing the fact-specific nature of each case and constitutional limits on remedies, Shanetta Brown Cutlar described the settlement agreement in *United States v. Michigan*, “The facts dictated what needed to be done, and we didn’t really look at other settlement agreements. We leaned upon prison consultants out of need to be sensitive to security concerns, but we were creative in how to address problems; we brainstormed by looking at our specific goals.”¹⁴⁷ Mark Masling described a similar process in devising the settlement agreement for *United States v. Arizona*, and noted that even though the agreement refers to the policies and procedures of the FBP, Georgia DOC, and NIC, the agreement was largely “written from scratch.”¹⁴⁸

C. Partnership with the Feminist Movement

¹⁴⁶ Interview with Michael Bien, *supra* note 74. Bien noted, however, that the medical health care and mental health provisions were drawn from the *Georgia* settlement, but the agreement was amended and those provisions were “negotiated away.” *Id.*

¹⁴⁷ Telephone Interview with Shanetta Brown Cutlar, Special Litigation Section, Civil Rights Division, United States Department of Justice, Attorney in *United States v. Michigan* (Mar. 21, 2000).

Another possible model for the continued prominence of women prisoners' rights litigation is support, both ideological and financial, from other well-organized movements such as the feminist and civil rights movements. Certainly, a heightened feminist consciousness among lawyers, the public, and the prisoners themselves has fueled litigation efforts over the last two decades. In addition to raising more traditional conditions of confinement claims, women prisoners, their lawyers, and other activists have publicly articulated concerns unique to or prevalent among female prisoners. Such concerns include the need for female-specific health care,¹⁴⁹ mother-child visitation, HIV infection, substance abuse treatment, sexual abuse counseling, and parity in job training and vocational programs.

As the number of incarcerated women has increased, interested parties have taken great care to heighten public awareness about the distinct characteristics of the female inmate population, as opposed to the male inmate population. For example, in 1996 greater than forty-eight percent of women state prison inmates had been physically or sexually abused prior to incarceration (versus thirteen percent of men);¹⁵⁰ in 1996-97, the proportion of female violent

¹⁴⁸ Telephone Interview with Mark Masling, Special Litigation Section, Civil Rights Division, United States Department of Justice, Attorney in *United States v. Arizona* (Mar. 30, 1999).

¹⁴⁹ The most sustained efforts in this area have come from Ellen Barry of Legal Services for Women Prisoners with Children, who began doing litigation focusing on pregnancy and prenatal care over 20 years ago. See Interview with Brenda Smith, *supra* note 137.

¹⁵⁰ See NOT PART OF MY SENTENCE, *supra* note 65, at 79 (citing C.W. HARLAW, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES 1996 (1998)).

offenders was about half the rate of male violent offenders.¹⁵¹ Women prisoners also had higher levels of unemployment prior to incarceration compared to men, suggesting a greater need for educational programs and vocational training.¹⁵² These different circumstances “point to the need for different management approaches as well as different programming to ensure parity and to provide interventions that reduce recidivism.”¹⁵³

The influence of feminist consciousness can be seen particularly in the parity cases. Although these cases were not framed as overtly “feminist” causes, the influence of feminist philosophies is very apparent in this strain of litigation.¹⁵⁴ In *D.C. Women Prisoners*, for example, Brenda Smith’s presence at the National Women’s Law Center (NWLC) influenced the decision to frame the case as a sex discrimination matter.¹⁵⁵ As discussed earlier, the parity cases not only challenged the quantity of educational, vocational, and job training programs at women’s correctional facilities, but also highlighted sexual stereotyping in

¹⁵¹ See *id.* at 18 (citing SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997). In 1996-97, 28% of women and 49% of men in state prisons were convicted of violent crimes, and 6% of women and 12% of men in federal prisons were convicted of violent crimes. See *id.*

¹⁵² See *id.* at 19-20.

¹⁵³ Merry Morash, Timothy S. Bynum & Barbara A. Koons, *Women Offenders: Programming Needs and Promising Approaches*, NAT’L INST. OF JUST. RESEARCH IN BRIEF (U.S. Dep’t of Justice, Washington, D.C.), Aug. 1998, at 1.

¹⁵⁴ Interview with Brenda Smith, *supra* note 137.

¹⁵⁵ See *id.*

vocational and education programs and forced prison administrators to reconsider the design and goals of their programs.¹⁵⁶

Given that those who make up the community of women prisoners' rights activists carry interests that lie at the intersection of feminism and justice, one might expect that the more well-established feminist and civil rights movements would share some of their organizational might and money. Nevertheless, in spite of their common sympathies, both the feminist and civil rights movements have not played much of a role in the litigation efforts on behalf of women prisoners over the last two decades.¹⁵⁷

To those closely involved in women prisoners' rights, the mainstream feminist movement has been disappointingly quiet or even uninterested in playing a major role in advancing the cause for women prisoners. While working on *Lucas v. White*, Bien had hoped mainstream feminist organizations "would help out because litigation is so expensive, but there hasn't been much interest. There hasn't been an effective support base by NOW, etc."¹⁵⁸ Generally, "mainstream feminist organizations have been slow to pay attention to these

¹⁵⁶ See *supra* p. 3. See, e.g., *Canterino v. Wilson*, 546 F. Supp. 174, 192 (W.D. Ky. 1982) (describing how the Kentucky prison system offered to male inmates training and employment such as woodworking, but at the same time only offered employment for women in keypunch operation—"training in a low-paying, sexually stereotyped job which . . . will probably be rendered obsolete by improved technology in the near future").

¹⁵⁷ See Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 339 (1998) (observing that even though the themes of physical abuse are prevalent in the lives of incarcerated women, "the domestic violence and women's prison movements remain largely separate").

issues.”¹⁵⁹ The presence of Brenda Smith at the NWLC might suggest otherwise, but since her departure in 1998, the NWLC’s women prisoners program is no longer active. Although much credit should be given to the NWLC for supporting Smith’s interest in developing a program for women prisoners, Smith noted that realistically, women prisoners rights is not on the agenda on traditional feminist organizations.¹⁶⁰

The silence among mainstream feminist organizations with respect to women prisoners hints at an ambivalence among feminist activists. Professor Smith suggested, “Because feminist organizations are accustomed to seeing women in the role of victim, it is analytically hard to know what to do when women have committed a crime. It’s incongruous with the other issues on their agenda.”¹⁶¹ Additionally, women prisoners are not the typical participants in traditional feminist debate; “these women are women of color, immigrants, have mental health problems — they don’t fit in easily into the construct of advocacy.”¹⁶²

Although the general sentiment among women prisoners’ rights lawyers and activists is that mainstream feminist and civil rights organizations have played little to no role in supporting these litigation efforts, this attitude may be

¹⁵⁸ Interview with Michael Bien, *supra* note 74.

¹⁵⁹ Telephone Interview with Giovanna Shay, Soros Justice Fellow, National Prison Project, American Civil Liberties Union (Apr. 1, 1999) [hereinafter Interview with Giovanna Shay].

¹⁶⁰ Interview with Brenda Smith, *supra* note 137.

¹⁶¹ *Id.*

¹⁶² *Id.*

changing. While a small number of individual actors have long been committed to integrating the feminist and women prisoners' rights movements,¹⁶³ there are signs that such an understanding may be influencing increasing numbers of feminist and civil rights organizers. Deborah LaBelle observed, "Recently there has been greater feminist and civil rights involvement [in Michigan]. Earlier, there wasn't much outreach to feminist and civil rights groups, and that may explain some of their absence, but recently, we have seen involvement from the League of Women Voters and the NAACP — perhaps in recognition that the laws are so vindictive. There's an increasing understanding that these laws signal an encroachment on basic civil rights."¹⁶⁴ Additionally, lower crime rates have enabled feminist and civil rights organizations to feel "okay" about expending resources on protecting the civil rights of inmates. LaBelle explained, "When crime was high, there was a legitimate fear of crime. It's difficult to address that fear, but also recognize the need for a baseline in humane treatment of inmates."¹⁶⁵ More generally, increasing rates of incarceration of women has affected communities more deeply, and as more people have seen "their own" being imprisoned, we have seen the "humanizing of the prison population."¹⁶⁶

¹⁶³ For example, Professor Angela Davis has long been dedicated to the project of bringing to the mainstream feminist consciousness traditionally marginalized issues such as the plight of women of color, including incarcerated women. See, e.g., Davis, *supra* note 157, at 339-40 (offering an analysis of how the women's anti-violence movement and the women's prisoners' right movement are "far more integrally related . . . than is generally recognized").

¹⁶⁴ Interview with Deborah LaBelle, *supra* note 34.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

LaBelle noted, "This makes it easier to be generous."¹⁶⁷ "As these issues have become more caught up in families and communities, there has been a heightened sense of what is important."¹⁶⁸

IV. UNDERSTANDING WOMEN PRISONERS' RIGHTS LITIGATION

If the appearance of and continued presence of women prisoners' rights litigation does not fit neatly into the prisoner-driven or lawyer-driven models of litigation, and if it cannot be understood as a simple outgrowth of the mainstream feminist and civil rights movements, what does explain its continued and even increasing presence in the courts? This paper argues that a combination of factors — changing demographics, class action litigation strategy, and cross-gender employment policies — have contributed to the resurgence of women prisoners' rights litigation in the 1990s.

A. More Women Prisoners

The rise in women prisoners' rights litigation can be explained in part by the staggering increase in the number of incarcerated women over the last two decades.¹⁶⁹ Twenty-five years ago, approximately two-thirds of women sentenced in federal court received probation;¹⁷⁰ since that time, incarceration

¹⁶⁷ *Id.*

¹⁶⁸ Interview with Giovanna Shay, *supra* note 159.

¹⁶⁹ *Id.*

¹⁷⁰ See Acoca & Raeder, *supra* note 43, at 133 (citing Elizabeth F. Moulds, *Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System*, in *WOMEN IN*

rates have skyrocketed. Since 1980, the number of female inmates in federal and state correctional facilities increased by more than 500% — from 13,400 in 1980, to 44,100 in 1990, to 84,400 in 1998.¹⁷¹ In 1998, women accounted for 6.5% of all prisoners nationwide, up from 4.1% in 1980 and 5.7% in 1990.¹⁷² Although prison populations have been growing at dramatic rates generally, the growth in the female inmate population noticeably outpaced the male population: from 1990 to 1998, the female inmate population grew at an average annual rate of 8.5% while the male inmate population averaged a 6.6% growth rate each year.¹⁷³

Commentators attribute increased incarceration rates in part to more punitive incarceration attitudes among legislators and judicial decisionmakers. Acoca and Raeder describe, “Once legislators decided that being tough on crime was a nonpartisan issue that benefited both political parties, corrections became a growth industry.”¹⁷⁴ Policies such as mandatory minimums,¹⁷⁵ statutory enhancements for repeat offenders (commonly referred to as Two and Three Strikes laws), and Truth-in Sentencing laws, harsher penalties for violations of

THE CRIMINAL JUSTICE SYSTEM 277, 286-87 (Susan Datesman & Frank Scarpitti eds., 1980)).

¹⁷¹ See GAO REPORT, *supra* note 66 at 20.

¹⁷² See *id.*

¹⁷³ See *id.* at 18.

¹⁷⁴ See Acoca & Raeder, *supra* note 43, at 133.

¹⁷⁵ See, e.g., Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Omnibus Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (imposing mandatory minimums of five years to life in prison without parole for drug offenses). The Violent Crime Control and Law Enforcement Act of 1994, however, reduced the five-year mandatory minimum sentence to two years for certain low-level drug offenders. See Pub. L. No. 103-322, § 80001(b)(1)(B), 108 Stat. 1796, 1986 (1994).

probation and paroled conditions, and sentencing reforms that use guidelines developed for male criminals have all contributed to the arrival of more women in jails and prisons.¹⁷⁶ As Professor Chesney-Lind explains, "Simply put, it appears that the criminal justice system now seems more willing to incarcerate women."¹⁷⁷

More specifically, commentators point to the War on Drugs — or the "war on minorities and women living in poverty" as some call it¹⁷⁸ — as disproportionately affecting the women.¹⁷⁹ A 1999 GAO Report noted that "during the 1990s, drug offenders accounted for the largest source of total growth among female inmates."¹⁸⁰ From 1990 to 1997, the number of female inmates serving time for drug offenses nearly doubled; during the same time period, the number of male inmates serving time for the same reasons increased by 48%.¹⁸¹

¹⁷⁶ See Acoca & Raeder, *supra* note 43, at 133-34; Charlotte A. Nesbitt, The Female Offender in the 1990's is Getting an Overdose of Parity 3-4 (Mar. 14, 1995) (unpublished manuscript, on file with the Nat'l Inst. of Corrections Info. Ctr.) (reporting that "approximately two thirds of . . . women in prison are probation and/or parole violators"). Nesbitt writes, "Once arrested, the major fact that is influencing the increasing rate of women being jailed and then sent to prison is that women are being dealt with more harshly than in the past. Female Offenders are receiving an overdose of parity when it comes to sentencing." *Id.*

¹⁷⁷ Acoca & Raeder, *supra* note 43, at 134 (quoting Meda Chesney-Lind, *Patriarchy, Prisons, and Jails: A Critical Look at Trends in Women's Incarceration*, PRISON J., Spring-Summer 1991, at 57).

¹⁷⁸ Acoca & Raeder, *supra* note 43, at 133.

¹⁷⁹ See GAO REPORT, *supra* note 66, at 20-21; see generally Maia Szalavitz, US: War on Drugs, War On Women, On The Issues Magazine (Winter 1998) <<http://www.mapinc.org/drugnews/v99/n001/a06.html>>.

¹⁸⁰ *Id.* at 20.

¹⁸¹ See *id.*

Federal and state correctional authorities have responded to this dramatic growth by increasing the number of all-women facilities over the last two decades. The number of federal prisons for women increased from five to fifteen between 1980 and 1990.¹⁸² In spite of these efforts, however, federal and state correctional facilities have been unable to keep pace with the rapidly growing female inmate population. The 1999 GAO Report *Women in Prison* found that inmate populations in the three federal correctional institutions for women were about fifty-seven percent above rated capacity.¹⁸³ As one of the most egregious examples of prison overcrowding, the Danbury Federal Correctional Institution was about ninety-five percent above rated capacity as of August 6, 1999.¹⁸⁴

With the dramatic rise in the number of incarcerated women, federal and state correctional authorities have had difficulty meeting the needs of incarcerated women. While the sheer increase in numbers explains much of the rise in legal grievances among women prisoners, overcrowding, inattention to existing problems, and poorly trained and disciplined prison staff are also predictable contributing factors to these developments.¹⁸⁵ As Widney Brown observed, "The growth in the population of women prisoners makes court involvement inevitable."¹⁸⁶ Not surprisingly, according to available data from the Bureau of Justice Statistics, between 1984 and 1995, the number of women's

¹⁸² See GAO REPORT, *supra* note 66, at 35.

¹⁸³ See *id.* at 35-36. Men's prisons were about 40% above rated capacity.

¹⁸⁴ See *id.*

¹⁸⁵ See Interview with Deborah LaBelle, *supra* note 36.

¹⁸⁶ Interview with Widney Brown, *supra* note 38.

state prisons under court order or consent decree increased from sixteen to twenty-nine.¹⁸⁷ The absolute number of women incarcerated at these facilities increased from 6027 to 20,098.¹⁸⁸

B. The Most Sympathetic Plaintiffs

The increased prominence of litigation dealing with sexual assault of women prisoners may also be understood as a strategic response to an increasingly anti-prisoner mentality during these more conservative times. Traditional prison litigation for men reached the courts and enjoyed important successes during the 1960s and 1970s (largely 8th Amendment conditions of confinement cases and due process cases), but during the 1980s, the successes of male prisoners have stalled, with “[c]ourt-watchers . . . claim[ing] that the prisoners’ rights movement is dead.”¹⁸⁹ At the same time, however, women prisoners voiced their grievances in increasing numbers.¹⁹⁰ This explanation suggests that prisoners’ rights lawyers have redirected their attention to women prisoners, partly in response to the increased needs and grievances of women prisoners, but also as part of an effort to keep the prisoners’ rights movement

¹⁸⁷ Data are derived from the BJS 1984 PRISON CENSUS, *supra* note 39; BJS 1995 PRISON CENSUS, *supra* note 39.

¹⁸⁸ *See id.*

¹⁸⁹ Nicole Hahn Rafter, *Even in Prison, Women are Second Class Citizens: Through a Series of Lawsuits, Women Inmates are Forcing Us to Confront Basic Inequities in the American Justice System*, 14 HUM RTS. 28, 28 (1987).

¹⁹⁰ *See id.* (citing a 1984 National Institute of Corrections survey which noted that over the past decade, “litigation involving (incarcerated) adult female offenders has skyrocketed”).

alive during more politically conservative times. In particular, the testimonies of female inmates who have been sexually harassed and abused by prison officials have mobilized human rights organizations to initiate aggressive campaigns publicizing atrocious human rights violations in women's prisons. As a matter of strategy, some commentators believe that embracing the stereotype of "women as victims" may be the best way to overcome the powerful, negative stereotypes about criminals in general that have made legislators, judicial decisionmakers, and the public increasingly unsympathetic toward prisoners' rights.¹⁹¹ Recognizing that a "strong media campaign is a crucial component of any project for social change," Stefanie Fleischer Seldin explained, "There is no shame in capitalizing on public sympathy for women prisoners based on their gender."¹⁹²

In *Lucas v. White*, Michael Bien found an ideal plaintiff in Robin Lucas — a woman who had voluntarily turned herself in to authorities for conspiracy to commit bank fraud. While serving her thirty-month prison sentence at a minimum security facility, Lucas was treated as a "model inmate" — until she was placed in "the hole" where she was brutalized and repeatedly raped.¹⁹³ These facts arouse the sympathy and concern of even the most tough-on-crime lawmakers. As Michael Bien suggested, "Sexual abuse of women prisoners is an important issue, strategically. No one can argue that it isn't a legitimate issue.

¹⁹¹ See Seldin, *supra* note 31, at 32.

¹⁹² *Id.*

¹⁹³ Siegal, *supra* note 61.

This is an opportunity to really let people know that these are people in prison. It helps others see that prisoners are people and not just animals.”¹⁹⁴ Bien noted that of all the prisoners’ rights cases he has been involved in, *Lucas v. White* was not the biggest or most important, but it had attracted the most press, including *60 Minutes* and *Dateline*: “This is the one everyone wants to talk about.”¹⁹⁵ Soft-spoken nonviolent plaintiffs (oftentimes a mother, a victim of domestic violence),¹⁹⁶ coupled with the “sex component” — the facts of these sexual misconduct cases have been too much for courts, human rights organizations, and the media to turn away.

Not surprisingly, women inmates raising privacy and Eighth Amendment claims regarding sexual misconduct have enjoyed much greater success in courts than have male inmates.¹⁹⁷ While courts have been willing to recognize the privacy rights of female inmates who are victims of sexual misconduct, they have been less sympathetic to the privacy needs of male victims. Commentators have suggested that cases brought by male inmates “may be taken less seriously than those of women, as the notion that only women can be victims of rape continues

¹⁹⁴ Interview with Michael Bien, *supra* note 74.

¹⁹⁵ *Id.*

¹⁹⁶ For example, Ronesha Williams, a victim of sexual abuse at the Scott Facility in Michigan is described in *NOWHERE TO HIDE* as “[a] young, reserved woman who has done her best not to make waves while incarcerated.” Jackie Myrick is described as a “quiet, nervous woman with a long history of emotional problems stemming from various forms of abuse.” *NOWHERE TO HIDE*, *supra* note 64, at 23.

¹⁹⁷ See Bell, Coven, Cronan, Garza, Guggemos & Storto, *supra* note 47, at 217.

to pervade the legal culture.”¹⁹⁸ Intuitively, “it is easier for most members of our society, judges, included, to view rape as a woman’s burden and not a man’s.”¹⁹⁹

C. *The Rise of Gender-Neutral Approaches in Corrections*

As a result of the parity litigation during the late-1970s and 1980s, many of the more obvious disparities in treatment between male and female inmates have been resolved in women’s prisons.²⁰⁰ As noted earlier, one unfortunate response by prisons has been to “level-down,” or reduce programs for men to reach an equal level with women, rather than increase programs for women to reach an equal level with men;²⁰¹ nevertheless, for better or worse, “prisons have adopted less of a gendered way of treating women — prisoners are all the same.”²⁰² Although many of the “sameness issues” have been resolved, women prisoners’ rights activists now face the challenge of addressing problems that have emerged out of the failure to recognize gender-specific issues such as the unique

¹⁹⁸ *Id.* at 216.

¹⁹⁹ *Id.* at 222 (adding that “[t]he lack of sympathy for convicted criminals and homophobic sentiment are other explanations for the courtroom losses suffered by male victims of sexual misconduct in the prisons,” *id.* at 116).

²⁰⁰ See Interview with Deborah LaBelle, *supra* note 36. LaBelle noted, however, that in smaller prisons and jails, lack of parity is still an issue.

²⁰¹ See *supra* p. 10.

²⁰² Interview with Deborah LaBelle, *supra* note 36. For a critical discussion of gender-neutral approaches to corrections, see Seldin, *supra* note 31. Seldin argues that “[i]n the context of prison reform, the problems of family separation, drug dependency, and inadequate job skills must take gender into account.” *Id.* at 4-5.

characteristics of the women inmate population,²⁰³ health care, parenting responsibilities,²⁰⁴ and perhaps most notably, the vulnerability of women inmates to sexual abuse by male guards.

Policies allowing male guards to hold contact positions over women prisoners are widely recognized as a contributing factor to guard-on-inmate sexual abuse in U.S. prisons.²⁰⁵ Reports of sexual abuse began to surface in larger numbers following a number of Title VII claims brought by female guards. Before these Title VII cases, female officers worked only in women's prisons, which were often "merely an annex to male prisons and therefore under the

²⁰³ See *supra* p. 38. Acoca & Raeder take issue with gender-neutral policies not simply because they treat offenders as "all the same," but because they overlook the realities of the female inmate population and absorb them into existing stereotypes about male offenders: "So-called gender-neutral policies are based on the stereotype of violent males and major drug dealers, not on nonviolent women who act as mules or facilitate the criminal activity of their male intimates." Acoca & Raeder, *supra* note 43, at 133.

²⁰⁴ Female inmates are much more likely to be the primary caretakers of children compared to male inmates. About 60% of female inmates in federal prisons and about two-thirds in state prisons had at least one minor child. Prior to their incarceration, women were the primary caretakers for 84% of children whose mothers were in federal prison and 64% of children whose mothers were in state prisons. See GAO REPORT, *supra* note 66, AT 55. In spite of these facts, the Sentencing Guidelines adopt a "gender-neutral approach" and prohibit the consideration of the sex, family ties and responsibilities, and community ties in the determination of a sentence, see U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.6, 5H1.10 (1998). Acoca & Raeder assess, "The problem with such purportedly gender neutral policies is that they are not neutral, but male centered. Since more women have sole or primary childcare responsibility than their equivalent male offenders, why assume that any perceived leniency is an affront to equality which should be stamped out, rather than a concern about the welfare of children whose caretakers are typically their mothers?" Acoca & Raeder, *supra* note 43, at 135.

²⁰⁵ See NOWHERE TO HIDE, *supra* note 64, at 4.

control and supervision of the larger male-oriented facility.”²⁰⁶ *Dothard v. Rawlinson*²⁰⁷ was one of the first challenges to prison policies prohibiting cross-gender employment. In *Dothard*, the Supreme Court struck down height and weight requirements for officers in all male maximum security positions, finding that although the policy was facially neutral, it amounted to sex discrimination. At the same time, however, *Dothard* qualified its ruling by allowing prison employers to limit women’s employment opportunities if the employer believed such employment would compromise control over the facility or protection of inmates and staff.²⁰⁸ In the years following *Dothard*, departments of corrections “expanded the use of female guards in male facilities either by choice or as the result of litigation.”²⁰⁹

At the time, these changes seemed to benefit women generally by increasing opportunities for female guards to work in larger facilities. Although expanded employment opportunity was one result of courts’ rejection of the traditional gender-difference view of corrections, another was the removal of

²⁰⁶ Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER SOC. POL’Y & L. 1, 5 (1999).

²⁰⁷ 433 U.S. 321 (1977).

²⁰⁸ See *Dothard*, 433 U.S. at 336.

²⁰⁹ See Jurado, *supra* note 206, at 29 (citing LYNN E. ZIMMER, WOMEN GUARDING MEN 66-75 (1986)). See, e.g., *Forts v. Ward*, 471 F. Supp. 1095, 1096-97 (citing the “Guidelines for Assignment of Male and Female Corrections Officers,” a directive issued in compliance with Title VII whose stated purpose was, among other things, to “1. Maximize full employment opportunities regardless of sex; [and] 2. Minimize intrusions on individual privacy”).

restrictions on male officers working in women's prisons.²¹⁰ Problems began to surface almost immediately. In *Forts v. Ward*,²¹¹ for example, women inmates housed at the Bedford Hills Correctional Facility in New York sought injunctive relief against alleged invasions of their privacy by male guards only months after they began their duties in February 1977.²¹²

In spite of these early problems, male guards continued to find employment in women's prisons in larger numbers during the 1980s and 1990s.²¹³ A 1997 survey of prisons in forty states found that on average, 41% of correctional officers working with female inmates are men.²¹⁴ Cross-gender hiring policies, coupled with the absence of strong safeguards against custodial sexual harassment and abuse, have resulted in an epidemic of guard-on-inmate sexual abuse and retaliation in both state and federal prisons.²¹⁵

V. THE LIMITS OF LITIGATION

In spite of the promising developments in women prisoners' rights litigation over the last decade, prisoners' rights lawyers express cautious realism about the limits of their litigation efforts. In particular, the passage of the Prison

²¹⁰ See NOWHERE TO HIDE, *supra* note 64, at 4.

²¹¹ 434 F. Supp. 146 (S.D.N.Y. 1977).

²¹² See *id.* at 1097.

²¹³ Telephone Interview with Deborah LaBelle, *supra* note 36.

²¹⁴ See NOT PART OF MY SENTENCE, *supra* note 65, at 51 (citing FEMALE OFFENDERS: AS THEIR NUMBERS GROW, SO DOES THE NEED FOR GENDER-SPECIFIC PROGRAMMING, CORRECTIONS COMPENDIUM (March 1998)).

²¹⁵ See Interview with Deborah LaBelle, *supra* note 36.

Litigation Reform Act²¹⁶ (PLRA) and the struggle and disappointment over cases like *Glover* in securing effective remedies temper activists' enthusiasm about the extent to which litigation is an effective tool for improving the lives of incarcerated women. The PLRA, signed into law in 1996, has been described by its supporters as an effort to limit frivolous litigation, but for prisoners' rights lawyers, the PLRA has been devastating. The PLRA bars prisoners from bringing prison conditions suits until administrative remedies have been exhausted; it prohibits prisoner suits for mental or emotional injury in the absence of purposeful injury; it requires prisoners seeking in forma pauperis status to submit to the court certified statements of their prisoner accounts for the six month prior to suit and to pay filing fees and court costs; it prevents prisoners who have three or more prior actions dismissed for failure to state a claim from bringing an in forma pauperis suit, unless the prisoner "is under imminent danger of serious physical injury;" and it restrict attorneys' fees.²¹⁷ To those on the front lines, the PLRA has "basically destroyed prisoners' ability to bring lawsuits."²¹⁸ Because the PLRA has made it more difficult for plaintiffs to file claims, problems in prisons and jails fester and become much worse before any action is taken. As Deborah LaBelle put it, "The canary is really sick before anything happens."²¹⁹

²¹⁶ Pub. L. No. 104-134, 110 Stat. 1321 (1996).

²¹⁷ See 42 U.S.C. 1997e (1994 & Supp. II).

²¹⁸ Interview with Widney Brown, *supra* note 38.

²¹⁹ Interview with Deborah LaBelle, *supra* note 36.

Worries about the effect of the PLRA, however, are not limited to plaintiffs' abilities to raise claims. The PLRA also requires that prospective relief be "narrowly drawn [and] extend[] no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."²²⁰ The PLRA also allows defendants to request termination of prospective relief after two years.²²¹ Although some prisoners' rights lawyers believe that the PLRA has essentially done away with plaintiffs' ability to obtain consent decrees,²²² other commentators suggest that the effect of the PLRA has been much less dramatic, finding that consent decrees are still the more common mode of settlement.²²³ One undisputed outcome, however, is that since the PLRA, private settlement agreements have become much more common.²²⁴ Whatever the reason for increased use of private settlement agreements, such agreements appear to be the second choice of lawyers for women prisoners.²²⁵ Because judges do not have jurisdiction to enforce the agreement, plaintiffs have had difficulty enforcing the terms of private settlement agreements. For example, a year after the parties signed the settlement agreement in *Lucas v. White*, Michael Bien, attorney for the plaintiffs,

²²⁰ 18 U.S.C. § 3626(a)(1)(A).

²²¹ See 18 U.S.C., § 3626(b)(1).

²²² See Interview with Michael Bien, *supra* note 74; Interview with Widney Brown, *supra* note 38; Interview with Deborah LaBelle, *supra* note 36.

²²³ See Bill Taylor, *Apocalypse Not: The Impact of the Prison Litigation Reform Act on Settlement in Prison Conditions Cases* 24, 40 (May 1999) (unpublished manuscript, on file with Margo Schlanger).

²²⁴ See *id.* at 27; Interview with Michael Bien, *supra* note 74.

observed that prison authorities were continuing to ignore the plaintiffs comments regarding prison procedures and policies, and that the defendants had not provided progress reports and drafts of new policies, procedures, and training material as required by the agreement.²²⁶ Other post-PLRA settlement agreements, such as the Department of Justice's settlement in *United States v. Arizona*, have been criticized for failing to provide independent oversight, thus leaving male guards to police themselves.²²⁷

The PLRA aside, women prisoners' rights activists recognize the limits of individual litigation events in bringing about substantial change. Recognizing that court involvement is at times inevitable, Widney Brown nevertheless insists that "litigation isn't a good route." Pointing to the extended struggle with the defendants and the court in *Glover*, Brown explained, "If the [defendant] has no commitment [to making changes], litigation won't work."²²⁸ Lack of resources (money), coupled with the PLRA, will sharply limit the effectiveness of litigation. Brenda Smith suggested, "As a tool, litigation is a very blunt sword. The most important function in terms of systemic change in litigation is to 'dispel denial,'

²²⁵ See Interview with Michael Bien, *supra* note 74 (calling private settlement agreements "essentially weak consent decrees").

²²⁶ See *id.*

²²⁷ Interview with Widney Brown, *supra* note 38.

²²⁸ *Id.* See, e.g., Ken Murata, *Glover v. Johnson: Judicial Constraint that the Enforcement of Constitutional Rights in Prisons* (May 1999) (unpublished manuscript, on file with Margo Schlanger).

and get declaratory and injunctive relief, notwithstanding the PLRA and loss in attorney's fees."²²⁹

Although the strategic effectiveness of litigation in improving the treatment of women prisoners has been and may become more limited than lawyers had once hoped, litigation remains an important tool, often representing the only opportunity for the disenfranchised to seek out reform. As Giovanna Shay explained, "When a client is unpopular and unable to get the legislature to pass laws, litigation plays a great role. These are precisely the instances where [legal protection] is most needed."²³⁰ Particularly in conservative times filled with more punitive attitudes, prisoners rely on litigation as one of the few tools for effecting systemic change. "While litigation has its limits, it can be effective in bringing correctional officials to the bargaining table or publicizing the treatment of women prisoners."²³¹

With respect to publicizing (and politicizing) the mistreatment of women prisoners, litigation is a unique catalyst.²³² Lawsuits can make issues public; they heighten awareness and have the ability to stir up energy that can develop into a movement. Quite notably, individual damages suits and class action lawsuits alleging sexual abuse in state and federal prisons have motivated human rights organizations, and now increasingly civil rights and feminist organizations, to initiate their own women prisoners' rights campaigns, reaching more people

²²⁹ Interview with Brenda Smith, *supra* note 137.

²³⁰ Interview with Giovanna Shay, *supra* note 159.

²³¹ Seldin, *supra* note 31, at 31.

than the small number of women prisoners' rights lawyers could have done alone. The people that these campaigns reach out to — community members and politicians, in particular — are the people who can propel a cause from a small community of longtime activists into a powerful and sustained national movement.

CONCLUSION

The changing shape of women prisoners' rights litigation is a product of a combination of factors. In part, it is a strategic move, growing out of the disappointments of the parity cases. To the surprise and unease of some, this move reflects an understanding that embracing the "woman as victim" stereotype may be the most practical and effective means of compelling courts to recognize the special needs and vulnerabilities of female inmates. As Stefanie Fleischer Seldin explains, "At best, gender-neutrality provides women offenders with approximately the same opportunities as men. This ultimately results in women's needs being marginalized or ignored. While highlighting the 'woman as victim' stereotype might advance antiquated perceptions of women, the acknowledgment of women's differences is necessary in order to respond to reality and reform it."²³²

However, viewing present litigation efforts as merely a manipulation of the emotions of legislators and judicial decisionmakers would be to forget the

²³² Interview with Giovanna Shay, *supra* note 159.

fact of severe inadequacies and atrocities in women's prisons. Quite simply, the increased numbers of women in prisons has resulted in increased complaints and court involvement. Also, newly developing problems arising from the implementation of gender-neutral prison employment policies demand our attention. The continued presence (and occasional success) of women prisoners' rights litigation over the past decade reflects a growing understanding among lawyers, judges, and prison administrators that female inmates are a unique population whose needs and vulnerabilities demand something more than just equal protection.

²³³ Seldin, *supra* note 31, at 32.

Appendix A: Interviews

Telephone Interview with Leslie W. Abramson, Attorney for Plaintiffs in *Canterino v. Wilson* (March 30, 1999).

Telephone Interview with Michael W. Bien, Attorney for Plaintiffs in *Lucas v. White* (March 31, 1999).

Telephone Interview with A. Widney Brown, Advocacy Director of the Women's Rights Division of the Human Rights Watch, Author of *NOWHERE TO HIDE* (March 31, 1999).

Telephone Interview with Shanetta Brown Cutlar, Special Litigation Section, Civil Rights Division, United States Department of Justice, Attorney in *United States v. Michigan* (March 21, 2000).

Telephone Interview with Deborah LaBelle, Attorney for Plaintiffs in *Glover v. Johnson and Nunn v. Michigan Dep't of Corrections* (March 21, 2000).

Telephone Interview with March Masling, Special Litigation Section, Civil Rights Division, United States Department of Justice, Attorney in *United States v. Arizona* (March 30, 1999).

Telephone Interview with Giovanna Shay, Soros Justice Fellow, National Prison Project, American Civil Liberties Union (Apr. 1, 1999).

Telephone Interview with Brenda Smith, Attorney for Plaintiffs in *Women Prisoners v. District of Columbia* (Apr. 2, 1999).