BEYOND PARITY AND EQUAL PROTECTION:

WOMEN PRISONERS' RIGHTS LITIGATION IN THE 1990S

BY

JULIE CHO
904-8955-0

A Third-Year Paper
submitted to Professor Margo Schlanger
Seminar: Institutional Reform Litigation

HARVARD LAW SCHOOL
Cambridge, Massachusetts

May 1, 2000

BEYOND PARITY AND EQUAL PROTECTION:

WOMEN PRISONER'S RIGHTS LITIGATION IN THE 1990S

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 owns 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" status[7] — 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 objective[11] — 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 systems[23] 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 abuse[31] — 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 viablity 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 Michigan[46] 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 accomodation 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>.