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The Gender Gap: Treatment of Girls in the United States Juvenile Justice System

by Ossai Miazad*

Girls under the age of 18 have become the fastest-growing segment of the juvenile justice population in the United States. This trend has raised concerns over the treatment of girls in a traditionally male-oriented juvenile justice system. Two major issues have surfaced identifying a gap in treatment of girls compared to that of boys in the system. First, girls may be incarcerated for conduct that is more tolerated in boys; and second, once in detention facilities, girls may receive poorer treatment and have less opportunity for rehabilitation than do boys.

Both girls and boys who enter the juvenile justice system in the United States and face confinement are often subjected to brutal physical force, cruel punishment, and overcrowding coupled with low staff levels as well as inadequate healthcare, mental health counseling, and educational programs. The growing number of girls in this population faces the additional burden of entering a detention system largely tailored for a male population. If the goal is one of rehabilitation, as articulated by national and international standards, then detention facilities' female populations require distinct programs and treatment because girls' backgrounds and needs are significantly different from those of boys. As a 1999 Amnesty International Report on juvenile justice in the United States noted, "There is an important difference between equality in the availability of services and equity, or fairness." Fairness, as the report points out, is related to the level of services provided as it correlates to the juveniles' needs. The special needs of girls must be taken into consideration to guarantee that they receive equal opportunity for rehabilitation.

Profile of Girls Entering the Juvenile Justice System

Females accounted for 27 percent of the juvenile arrests reported in 1999. According to the Office of Juvenile Justice and Delinquency Prevention (OJJDP), the percentage of female arrests for most types of crime increased from 1980-2000. Despite this increase, girls continue to be arrested largely for non-violent crimes. According to FBI Uniform Crime Reports, the largest numbers of arrests among girls are for larceny, typically shoplifting, and for running away.

According to the OJJDP, the typical female entering the juvenile justice system is between the ages of 14 and 16, is from a minority community, lives in a poor neighborhood with a high crime rate, and has been the victim of physical, sexual, and/or emotional abuse. OJJDP reports that females in detention facilities tend to be younger than their male counterparts. A high percentage of female "delinquents," a reported 70 percent, have a history of sexual abuse, compared to a reported incidence rate of 30 percent reported incidents

for boys. Hans Steiner, professor of psychiatry at Stanford University School of Medicine, reports in a survey of youth labeled as juvenile offenders by the California Youth Authority, that girls scored high with respect to the prevalence of disorders such as posttraumatic stress disorder (PTSD), anxiety and depression, as well as behaviors such as physical and verbal aggression and delinquency. Dr. Steiner concluded that because girls experience more physical and sexual abuse, they tend to exhibit psychopathology including PTSD, suicidal behavior, disassociative disorder, and borderline personality disorder, more frequently than do boys. The study also found that aggressive behaviors are four times more common in girls than in boys. Other patterns that are more common among females include eating disorders and lower levels of self-esteem. Teen pregnancy is another factor unique to the female juvenile population.

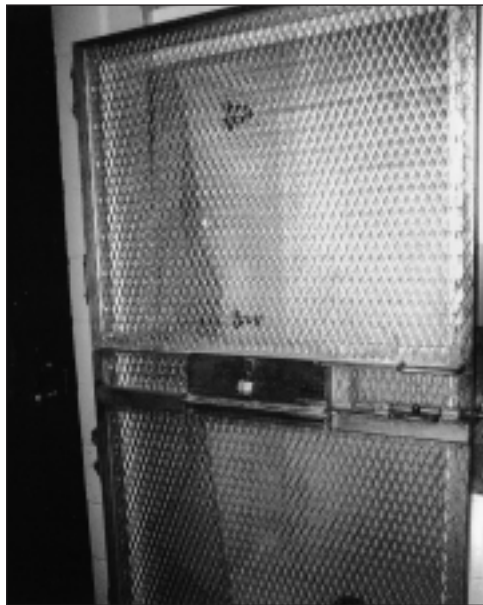
The Gender Gap

The Over-Incarceration of Girls

Between 1988 and 1997, girls' rate of detention increased more than twice that of boys. Research shows that the source of the increase is gender bias in the system and a systematic failure by a male-oriented system to understand the issues unique to girls. Although one might expect this increase to indicate higher levels of violent behavior among girls, the OJJDP suggests that the increase is not likely attributable to an increase in violent behavior in this population. According to its report, if growth in violent behavior led to an increase in assault arrests, then the arrest rate should have also increased in other categories of violent crime arrests such as robbery. More likely explanations of the increase in assault arrests are the re-labeling of girls' family conflicts as violent offenses, and changes in law enforcement practices

resulting in mandatory arrest laws for incidents regarding domestic violence.

According to a joint study by the American Bar Association and the National Bar Association, girls are more likely to find themselves detained for minor offenses that could be better dealt with in a less restrictive manner. In its 1999 National Report, the OJJDP revealed that while only 11 percent of juveniles in detention facilities for delinquency offenses (including criminal homicide, sexual assault, robbery, aggravated assault, burglary, theft, arson, and drug trafficking) were female, the proportion of females detained for committing status offenses was considerably higher. Status offenses refer to juvenile violations that would not be considered illegal if committed by an adult. The 1999 OJJDP National Report cites that girls comprise 63 percent of detained runaways;



Credit: Mark I. Soler

The steel door to the shower in the girls' unit of the South Dakota State Training School, a juvenile prison. Male staff in the vicinity could observe the girls while they were showering. The Youth Law Center filed suit against state officials for the abusive conditions of confinement of youth at the facility. This prison is no longer in use.

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47 percent of detained truants (unjustified failure to attend school); 44 percent of detained incorrigibles (serious or persistent misbehavior of a child, making reformation by parental control impossible); 35 percent of those held for underage alcohol offenses; and 28 percent of those detained for curfew violations. A study on detention patterns across various United States detention sites, conducted by the Annie E. Casey Foundation's Juvenile Detention Alternative Initiative (JDAI), supports the assertion that girls are more likely than boys to be detained for less serious offenses. In one JDAI study, 29 percent of girls were detained for minor offenses (public disorder, probation violations, status offenses and traffic offenses), compared to 19 percent of boys. The results of the joint bar study as well as juvenile justice expert opinions suggest that law enforcement's paternalistic attitudes have contributed to the growing number of girls in detention, especially with regard to status offenses such as running away, curfew violations, and loitering.

Although Congress passed the Juvenile Justice Act prohibiting the incarceration of status offenders in 1974, a 1998 amendment to the Act provides an exception for cases in which a youth violates a "valid court order." This exception gives courts the authority to confine female status offenders for contempt or for violations of court orders. Studies indicate that girls are more likely to face incarceration for contempt.

For instance, a Florida study found that the typical male entering the juvenile justice system had a 3.9 percent chance of incarceration, which increased to 4.4 percent if he was found in contempt. In comparison, the typical female entering the juvenile justice system had a 3.9 percent chance of incarceration that increased to 63.2 percent if she was held in contempt. Studies suggest that girls are more likely to be detained for technical violations of parole or probation than boys. In studying one location, the JDAI study found that girls were nearly three times more likely than boys to be detained for probation and parole violations. JDAI findings of detention recidivism indicate the existence of a gender gap in recidivism for probation violations, warrants, and program failure offenses. Across JDAI study sites, girls comprised only 14 percent of the total population. Of those, however, 30 percent returned to detention within one year, with 53 percent returning due to warrant, probation, parole violation, or program failure. Only 41 percent of boys returned to detention for the same offenses. Those girls returning twice within one year for the same reasons totaled 66 percent, as compared to 47 percent for boys. Finally, in comparing girls and boys returning to detention three times within one year, girls had a return rate of 72 percent versus 49 percent for boys.

Evidence suggests that the system fails to address appropriately the gender dimension of juvenile delinquency. For

example, the disproportionate representation of girls in runaway arrests is likely related to the equally disproportionate number of incarcerated girls who report sexual abuse. Reports indicate that girls who are victims of sexual abuse are more likely to run away, and that girls are more likely than boys to be detained for running. The system also routinely misdirects its attention on the behavioral problems of "delinquent" girls rather than the underlying depression that is so common within this population.

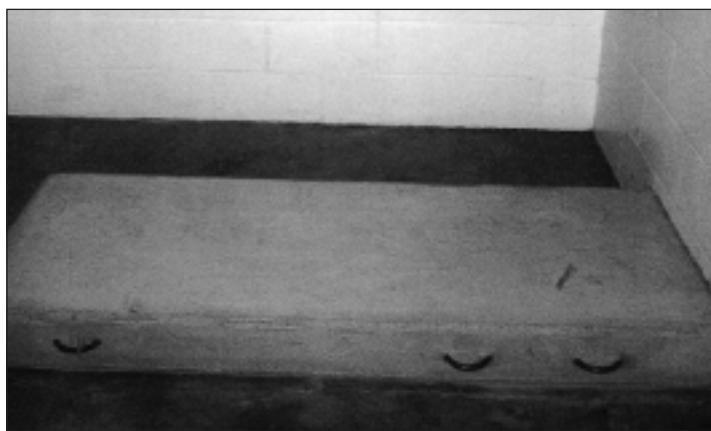
Principle of the Least Restrictive Alternative

International legal standards and many state statutes mandate the use of the least restrictive alternative when addressing juveniles in the justice system. The least restrictive alternative recognizes that depriving a child of her liberty and removing her from her community will likely have significant repercussions, and should be avoided whenever possible. Considering that girls enter the justice system

largely for non-violent offenses, it is difficult to imagine incarceration as the "least restrictive alternative." U.S.-based organizations, such as Girls Incorporated, have noted the correlation between the lack of community-based services for girls, and the fact that girls are being incarcerated in increasing numbers and for less serious offenses.

Article 37(b) of the UN Convention on the Rights of the Child (CRC) asserts that detention or imprisonment of a child should be used only "as a measure of last resort and for the shortest appropriate time period." Notably, the United States

and Somalia are the only two UN member states that have not ratified the CRC. International minimum standards related to juvenile justice also advocate against excessive incarceration. Although these standards do not have the legal authority of treaties, the UN General Assembly, in which the United States is represented, has adopted them. Point 1 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UN Rules) supports imprisonment as an option of last resort. Rule 5 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) espouses the "principle of proportionality" stating that the reaction to a juvenile offense should be in proportion to the circumstances of both the juvenile and the offense. Further, Rule 17 of the Beijing Rules suggests that, "[r]estrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum." During the recent UN General Assembly Special Session on Children, international child rights experts highlighted the principle of detention as a last resort, and criticized New York City's overuse of detention centers and its plans to expand the city's juvenile jail system.



A concrete slab that served as a bed in a lockdown cell in the girls' unit of the South Dakota State Training School. Staff handcuffed the girls, shackled their ankles, and restrained their wrists and ankles to the sides of the slab. Girls were left in four-point restraints for hours at a time.

Credit: Mark J. Soler

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Failed Rehabilitation

Insufficient Mental Health Care

Rehabilitation can be a difficult struggle for girls as they enter a system of treatment and controls created for a male juvenile delinquent population. The mental health needs of the entire juvenile justice population are severely underserved, but for the female population, the impact is particularly devastating due to their overwhelming need for mental health care. Research indicates that girls in the juvenile justice system have different and arguably greater therapeutic needs. One study of the mental health condition of delinquents concluded, “The female delinquents in the sample manifested more depressive and anxious symptoms than their male counterparts, presented a greater suicide risk, and evidenced more severe abuse histories and traumatic after effects of that abuse.” Other studies of male and female delinquent adolescents have led to the conclusion that girls’ problematic or criminal behaviors are typically related to abusive, sexually exploitative, or traumatizing home life, whereas boys’ criminal activities are typically related to their involvement with antisocial peers.

There is a notable absence of programming specifically directed toward assisting incarcerated girls. Detention centers often fail to screen for more general mental health needs or for prior sexual abuse. Furthermore, those staffing detention centers often lack training that would sensitize them to the issues of mental illness and prior abuse among the female detained population.

International standards, U.S. laws, and national correctional standards explicitly provide that children deprived of their liberty are entitled to physical and mental health care services. A federal district court judge in Connecticut recently held in *Emily J. v. Weicker* that the state’s neglect of mentally ill and traumatized children in its juvenile detention centers violates their Fourteenth Amendment right to due process. The judge reasoned, “It is essentially undisputed that these children are not getting timely and adequate mental health services. In fact, the evidence shows that their condition can, and has, become worse while being held in detention. That adds up to a violation of their Fourteenth Amendment due process right to timely and adequate medical care.”

Point 1 of the UN Rules requires, “The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles.” More specifically, Point 27 asserts the need for immediate psychological evaluation of a child entering detention to determine the appropriate level of care and programming. When special rehabilitation is required, Point 27 mandates the creation of an individualized treatment plan for the child. Further, Rule 26.2 of the Beijing Rules articulates, “Juveniles in institutions shall receive care, protection and all necessary assistance—social, educational, vocational, psychological, medical and physical—that they may require because of their age, sex, and personality and in the interest of their wholesome development.”

Violence

Girls are often re-victimized once in detention centers. For example, interviews with girls in detention centers across the United States indicate the use of demeaning and sexually abusive language by staff. Girls subject to detention by the California Youth Authority reported being called “hood rat,” “slut,” and “little hooker.” In a detention center in Massachusetts, girls described being called “whore” and “trash.” This abuse is coupled with a lack of effective accountability mechanisms in many facilities.

Point 87(a) of the Beijing Rules reads, “No member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever.” Further, the Eighth Amendment of the U.S. Constitution prohibits the imposition of cruel and unusual punishment. The U.S. Supreme Court, and lower courts, have interpreted the prohibition of cruel and unusual punishment, and other provisions of the U.S. Constitution, as guaranteeing individuals in prisons and jails a range of rights in matters such as physical safety, medical care, access to the courts, and procedural safeguards in disciplinary hearings.

The rapid increase of girls entering detention centers has led to overcrowding in some facilities, often resulting in increased use of restraints and isolation as mechanisms of control. According to Francine Sherman, director of Boston College of Law’s Juvenile Advocacy Project, facilities are inconsistent in training staff in gender appropriate restraint methods for girls. Professor Sherman notes that use of such measures can prove particularly harmful considering that some of these girls may be pregnant and that many girls may relive the trauma of sexual and other forms of abuse when restrained or placed in isolation.

Despite international standards prohibiting inhuman and degrading treatment, solitary confinement of children is a common punishment in U.S. juvenile facilities. The UN Rules specifically prohibit punishing children by using “closed or solitary confinement,” on the grounds that such confinement is cruel, inhuman or degrading treatment that may compromise a child’s physical or mental health. Studies show that isolation increases the risk of suicide in adolescents. While isolation is dangerous and ineffective for the juvenile justice population generally, given that twice as many girls as boys attempt suicide, the risk for girls is perhaps even more severe.

Gender-Specific Approaches: National and International Law

Facilities in the United States should implement gender-sensitive programming in detention facilities to comply with U.S. and international legal standards focusing on the best interests of the child and on rehabilitation. Girls entering a system that does not take their special circumstances and needs into consideration are likely to have less opportunity for rehabilitation. This absence of rehabilitation likely translates into harmful repercussions for the future of both girls in detention and society in general.

National Standards

The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP) sets forth specific requirements for states to meet in order to access federal juvenile justice funds. It was not until 1992, as part of the Reauthorization of the JJDP, that states applying for federal grants were required to identify gaps in their ability to provide services to girls entering the system. The new voluntary standards for facilities commissioned by the OJJDP specify the need for gender-specific services. The OJJDP considers that, “programs to address the unique needs of female delinquents have been and remain inadequate in many jurisdictions.” Additionally, most states reference “rehabilitation” and/or “best interests and welfare” of the child in their Juvenile Court Acts. For example, the Pennsylvania purpose clause for juvenile corrections reads, “The purpose of the youth development centers is to promote and safeguard the social well-being and general welfare of minors of this Commonwealth by providing social services

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and facilities for the rehabilitation of delinquent minors who require care, guidance and control." In Illinois, the purpose clause for delinquency proceedings includes the development of educational, vocational, social, emotional and basic life skills [to] enable a minor to mature into a productive member of society." Meeting the purpose of rehabilitation requires that the juvenile detention system, both structurally and substantively, recognize and address the particular needs of the female population.

International Standards

Many human rights requirements relating to incarcerated children are evaluated under international standards that do not have the legal authority of treaties. They have, however, been adopted by the UN General Assembly, providing a certain level of moral force. Additionally, the United States participated in their drafting and agreed on the necessity of their adoption. International minimum standards on juvenile justice, through their emphasis on rehabilitation and the best interests of the child, advocate for gender-specific programming. Rule 26.4 of the Beijing Rules reads, "Young female offenders placed in an institution deserve special attention as to their personal needs and problems." Further, Point 28 of the UN Rules mandates that juvenile detention should only take place under conditions that take into account the unique needs and circumstances of the child, according to specified categories including gender. Finally, Point 12 of the UN Rules requires that, "[j]uveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and

sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society."

Conclusion

While national law has moved toward recognizing the dilemma posed by a growing number of girls entering a juvenile justice system ill-equipped to address their needs, the current voluntary standards have not been sufficient in encouraging many jurisdictions to improve their services for the female juvenile population. National lawmakers should create greater incentives and provide stricter guidelines, encouraging facilities to implement gender-specific programming. Considering the overwhelming number of traumatized and sexually abused girls who enter the juvenile justice system, it is unconscionable to deprive them of their liberty while also denying them access to counseling and treatment.

State legislatures must evaluate the effectiveness of the services provided to girls in state detention facilities and allocate funding for the development of appropriate programs and the hiring and training of staff. In addition, states should move toward exercising the "least restrictive alternative" by exploring community-based alternatives to incarceration. Community-based alternatives can move the United States away from a trend of over-incarceration of girls and closer to meeting both nationally and internationally prescribed goals of rehabilitation. ☹

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Court held that the plaintiffs provided evidence showing that Unocal's alleged assistance had a "substantial effect" in perpetrating the alleged abuses because the abuses "most probably would not have occurred in the same way" if Unocal had not hired and directed SLORC.

Second, the Court held that a reasonable factfinder could conclude that Unocal's actions met the *mens rea* requirement of the aiding and abetting standard because Unocal knew or should have known that its actions would assist SLORC in committing crimes. The Court based this finding on the district court's holding that the plaintiffs' evidence suggests that Unocal knew of and benefited from SLORC's human rights abuses connected with the project.

It should be noted that the Court did not preclude other theories of liability by choosing to apply an aiding and abetting standard in *Doe v. Unocal*. The Court specifically stated that the plaintiffs' claims that Unocal is liable for SLORC's human rights abuses under other liability theories, like joint venture, agency, negligence, and recklessness, may be viable theories in this case and other ATCA cases. In fact, the concurring judge in the Ninth Circuit decision would have reversed the district court's summary judgment decision for Unocal using the federal common law liability theories of agency, joint venture, and reckless disregard.

Conclusion

The Ninth Circuit's *Doe v. Unocal* decision is important for a number of reasons. Specifically, the decision reaffirms the important principle that forced labor is tantamount to slav-

ery. It also reaffirms the district court's decision at the motion to dismiss stage that corporations can be held liable for violations of international law under the ATCA. Most importantly, however, the decision sets out a well reasoned liability standard that comports with well established principles of law.

The recent *Doe v. Unocal* decision is in no way revolutionary in that it simply applies legal standards, established since Nuremberg, in a way that holds transnational corporations accountable for their involvement in human rights abuses in violation of international law. At the same time, the decision does not go so far as to state that a corporation can be held liable for a government's abuses simply by doing business in a country, as misinformed critics claim. The Ninth Circuit's aiding and abetting liability theory tempers the unreasonably high "smoking-gun" liability standard that the district court attempted to apply at the summary judgment stage. This "smoking-gun" standard flew in the face of basic legal liability concepts by making it necessary for Unocal subjectively to want SLORC to commit human rights abuses.

The Ninth Circuit's decision is important because it defines a standard for liability, based on well established legal concepts and plain common sense, that puts transnational corporations on notice that if a corporation knowingly assists or encourages the perpetration of a crime, the company will be held responsible for its actions. ☹

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