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ESSAY

Reforming, Reclaiming or Reframing Womanhood: Reflections on Advocacy for Women in Custody

Brenda V. Smith*

I. INTRODUCTION

I was asked to present one of the keynote addresses for this important symposium, *Behind Bars: The Impact of Incarceration on Women and Their Families*, sponsored by the Women's Rights Law Reporter at Rutgers University School of Law in Newark.¹ I am happy to write the introductory essay for this meaningful publication which arose from that symposium. This is a particularly hospitable and appropriate environment for this publication given Rutgers University's important place in feminist scholar-

ship and discourse—both in its graduate and undergraduate programs² and in its publication arm—Rutgers University Press.³ Historically, the Women's Rights Law Reporter has been a critical site for conversation and dialogue on significant and emerging issues in feminist scholarship.⁴

This essay addresses why it is imperative to reclaim the discourse about women in prison and discusses how the other papers that appear in this issue aid in that project.

*Brenda V. Smith is a Professor of Law at American University's Washington College of Law, Director of the National Institute of Corrections Project on Addressing Prison Rape and a member of the National Prison Rape Elimination Commission. This work is drawn from a keynote presentation that I was asked to do in connection with the symposium sponsored by the Rutgers Women's Law Reporter.

1. I would like to thank Belinda Jacobus, Ava Majlesi, Moira Dillaway, Asaf Orr and all of the Women's Rights Law Reporter staff for their leadership and persistence in putting together this important event and this issue of the journal. They worked over the course of two academic years with the challenging schedule and shifting priorities of both students and authors to pull together this important publication.

2. Rutgers University has a number of important spaces for discourse on women, both at the graduate and undergraduate level. Particularly impressive is its Women's & Gender Studies program which was inaugurated as a department in 2001. Rutgers Department of Women's and Gender Studies, <http://womens-studies.rutgers.edu/> (last visited Dec. 28, 2007).

3. Rutgers University Press was founded in 1936 as a non-profit publisher and publishes books in humanities, social sciences, and science disciplines. Rutgers University Press, <http://rutgerspress.rutgers.edu/NEWSITE/mission.html> (last visited Dec. 28, 2007).

4. Representative articles include Danielle Evans, Note, *Non-Equity Partnership: A Flawed Solution to the Disproportionate Advancement of Women in Private Law Firm*, 28 WOMEN'S RTS. L. REP. 93 (2007) (discussing existence and increasing popularity of non-equity partnership for women in firms and the need for more research); Yvonne A. Tamayo, *"I Just Can't Handle It": The Case of Hernandez v. Robles*, 28 WOMEN'S RTS. L. REP. 61 (2007) (arguing that the *Hernandez* decision reinforces belief that gender identity determines husband and wife roles); Suzanne Wilhelm, *Perpetuating Stereotypical Views of Women: The Bona Fide Occupational Qualification Defense in Gender Discrimination under Title VII*, 28 WOMEN'S RTS. L. REP. 73 (2007) (arguing that bona fide occupational qualification defense to Title VII claims perpetuates stereotypes of women).

II. THE MOMENT

It is necessary to talk about women in prison because we, as a nation, and more particularly as advocates, scholars, free women, and women in conflict with the law,⁵ are at a different place than we have ever been in discussing the situation of women in prison. Several factors have come together to create that “moment” including: (1) the increasing numbers of women in custody;⁶ (2) research and scholarship on gender responsive strategies for addressing the needs of women in custody;⁷ (3) federal legislation which has both worsened and has offered opportunities for advocacy related to women in prison;⁸ and (4) the inclusion of the human rights discourse into discussions about the treatment of women in conflict with the law.⁹

5. In this essay, I will refer to both “women in prison” and “women in conflict with the law”. The latter term is a broader concept meant to encompass both women who are in prison and women who have been released from prison. These women have criminal histories and involvement in the criminal justice system that affects their trajectories in society.

6. See WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2006 5 (2006), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (reporting that from 2005-2006 the female prison population increased 4.6% compared to a 2.7% increase in the male prison population); *see also* The Sentencing Project, <http://www.sentencingproject.org/IssueAreaHome.aspx?IssueID=6> (last visited on Oct. 29, 2007) (discussing that the number of women in prison is increasing at nearly double the rate of men).

7. See BARBARA BLOOM ET AL., NAT'L INST. OF CORR., GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 1 (2003), *available at* www.nicic.org/pubs/2003/018017.pdf [hereinafter Bloom et al., Research, Practice and Guiding Principles] (noting that the increasing number of women under supervision requires development of a gender-responsive policy to address their needs); Patricia L. Hardyman & Patricia Van Voorhis, Nat'l. Institute of Corrections, Developing Gender-Specific Classification Systems for Women Offenders 1 (2004), *available at* www.nicic.org/Downloads/PDF/2004/018931.pdf (suggesting that female offenders' family concerns, trauma histories and mental health issues require different risk assessment tools); Susan W. McCampbell, The Gender-Responsive Strategies Project: Jail Application 2 (2005), *available at* www.nicic.org/pubs/2005/020417.pdf (summarizes and describes how to apply research from Gender-Responsive Strategies).

8. *See generally* Prison Rape Elimination Act of 2003, 42 U.S.C. §15601 (2003) (establishing a “zero-tolerance standard” for rape in custodial settings and providing funds for research, prevention, intervention and treatment of prison sexual violence); Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th

III. WOMEN IN CONFLICT WITH THE LAW

Since the United States started imprisoning women—well over 100 years ago—movements or discussions about women in conflict with the law have always been about reforming, reframing and reclaiming their womanhood.

A. Reforming Women in Conflict with the Law

The earliest movements were led by churchwomen who were often part of the abolition movement as well. These churchwomen were concerned with reforming women, and re-educating imprisoned women to take their proper places as wives and domestics.¹⁰

Cong. § 2 (2005) (addressing reentry-related needs of former offenders with the goal of reducing recidivism and enhancing public safety); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115, 2118 (1997) (codified as amended at 42 U.S.C. § 675(5)) (requiring states to move toward the adoption of children in foster care within 15 months of entry into the foster care system); Welfare Reform Bill, Pub. L. 104-193, 110 Stat. 2105 (1996) (now codified in various sections of 42 U.S.C.) (ending entitlement to public assistance and requiring welfare recipients to work).

9. *See generally* WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons, (1996), *available at* www.aclu.org/hrc/PrisonsStates.pdf [hereinafter HUMAN RIGHTS WATCH, ALL TOO FAMILIAR] (discussing research of the sexual abuse of women in U.S. prisons and calling for the U.S. to be bound by constitutional and international requirements that prohibit such behavior); *see also* LARRY COX & DOROTHY Q. THOMAS, FORD FOUNDATION, CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES 99-101 (2004), *available at* <http://www.fordfound.org/impact/bookss-studies> (follow “Close to Home” hyperlink) [hereinafter Cox & THOMAS, CLOSE TO HOME] (chronicling a series of events that introduced the human rights discourse into work with women inmates, starting with publishing ALL TOO FAMILIAR by the Human Rights Watch in the United States, and culminating with a visit from the Special Rapporteur on Violence Against Women, Radhika Coomaraswamy).

10. *See generally* ANDI RIERDEN, THE FARM: LIFE INSIDE A WOMEN'S PRISON (1997) (discussing the reformatory movement and the history of women's prisons highlighting the transition of women's prisons from a place for women of immoral character to a place for retributive style punishment); *see also* Carole D. Spencer, *Evangelism, Feminism and Social Reform: The Quaker Woman Minister and the Holiness Revival*, 80 QUAKER HISTORY 24, 36 (1991), *available at* <http://www.whwomencclergy.org/articles/article6.php> (re-marking that Rhoda Coffin, a prominent Quaker woman, was championed for her trailblazing efforts on behalf of women prisoners); JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME AND JUSTICE 158-60 (2d ed. 2001).

The Reform Movement,¹¹ as it was called, was certainly not about equality. In fact, suffragists like Elizabeth Cady Stanton and Susan B. Anthony parted ways with churchwomen who were more concerned with reforming imprisoned women and freeing slaves than with obtaining suffrage and equal rights for women.¹² Both suffragists and the opponents of suffrage, saw the “reformation” project as less radical than women’s efforts to assist slaves and women prisoners.¹³ Those projects of reformation were consistent with the accepted belief that women, because of their “higher moral character,” would and should be working for the poor and less fortunate.¹⁴ Ministering to slaves and prisoners was consistent with church teaching¹⁵ and notions of women’s roles as the moral compass for the nation and the family.

The movement’s objective of reforming women in conflict with the law lasted well into the 1970s; to some extent this objective still exists in places where women inmates are being

groomed for and receive education and training suited for traditional domestic positions, such as secretaries, cosmetologists, seamstresses, domestics and telemarketers.¹⁶

B. Reframing Women in Conflict with the Law

In the 1970s, with momentum from the women’s rights movement and the entry of women as workers into male prisons and out of women’s prisons,¹⁷ correctional institutions began to treat women inmates differently. At the same time that female correctional staff gained entrance into male institutions, male staff began demanding access and rights to work in female institutions. Yet, a counterpoint to this change in treatment was always domesticity—home and children.¹⁸ Consequently, these years saw the rise of programs aimed at enhancing the motherhood opportunities for women in con-

11. The Reform Movement can be traced to the United States in the 1820s. BELKNAP, *supra* note 10, at 158-59; see also RIERDEN, *supra* note 10, at 45-49.

12. See Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 573, 577 n.32, 578 n.34 (2006) (noting that early abolitionist work by women reformers focused on sexual abuse of women slaves and that Elizabeth Cady Stanton advocated prison reform as a significant prong in her feminist advocacy) [hereinafter, Smith, *A Modern Corollary of Slavery*]; see also Nancy A. Hewitt, *Abolition & Suffrage*, <http://www.pbs.org/stantonanthony/resources/index.html?body=abolitionists.html> (last visited Dec. 30, 2007).

13. ESTELLE FREEDMAN, *THEIR SISTER’S KEEPERS: WOMEN’S PRISON REFORM IN AMERICA, 1830-1930*, at 25 (1981) (noting that in the 19th century, most women active in the prison reform movement were considered “traditional women” and only a few actively supported the women’s rights movement when it emerged midcentury).

14. *Id.* at 22-35.

15. See, e.g., Spencer, *supra* note 10, at 27-28, 35-37; Hewitt, *supra* note 12. See also Matthew 25:34-46 (King James) (promising the kingdom of heaven to those that do good works).

16. See *Canterino v. Wilson*, 546 F. Supp. 174, 212 (W.D. Ky. 1982) (concluding that defendants “are under a constitutional obligation to provide parity of programs and facilities for women. They are falling short of that obligation in the areas of prison industries, institutional jobs, vocational education and training, and community release programs.”); see also DORIS FORTIN, *CORRECTIONAL SERVICE OF CANADA, PROGRAM STRATEGY FOR WOMEN OFFENDERS*, 16-20, (2004) (discussing that employment and social programs are important for offenders to reduce recidivism, while many of the social programs deal with motherhood); *Women Develop Beauty Skills Behind Bars*, WCCO.COM, May 9, 2006, <http://wcco.com/local/cosmetology.hair.makeup.2.358403.html> (last visited on Oct. 29, 2007) (reporting on a program in St.

Cloud, Minnesota in which female offenders participate in a cosmetology program).

17. See *Gunther v. Iowa State Men’s Reformatory*, 462 F. Supp. 952, 957 (N.D. Iowa 1979) (holding that gender is not a bona fide occupational qualification for positions in men’s reformatory beyond a certain position); see also *Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977) (challenging the discriminatory employment practices in corrections and finding that gender is a bona fide occupational qualification for direct supervision positions in an Alabama maximum security prison but striking down the height, weight and strength requirements); *Tipler v. Douglas County*, 482 F.3d 1023, 1027, 1028 (8th Cir. 2007) (holding that gender based staffing policy of county jail does not violate Title VII or Equal Protection Clause); *Everson v. Mich. Dep’t of Corrs.*, 391 F.3d 737, 761 (6th Cir. 2004) (finding that given the problem of sexual abuse in Michigan’s female facilities, gender-specific posts were reasonably necessary to the normal operation of its female prisons); see generally Joseph R. Carlson et al., *Cross-Gender Perceptions of Corrections Officers in Gender-Segregated Prisons*, 39 J. OFFENDER REHAB. 1, 83-103 (2004) (exploring the similarities and differences between female and male correctional officers in an all men and an all women prison in a Midwestern state); see also Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225 (2003) (charting courts’ jurisprudence in analyzing cross-gender supervision challenges raised by male and female inmates) [hereinafter Smith, *Watching You*].

18. Brenda V. Smith, Remarks at the Feminism and Legal Theory Project: Celebrating 20 Years of Pedagogy, Praxis and Prisms (Mar. 19, 2004) (discussing intimacy, sexuality and fertility for women in custody and its challenge to feminist theory); Brenda V. Smith, Keynote Address at Women’s Rights Law Reporter Symposium: Behind Bars: The Impact of Incarceration on Women and Their Families (Mar. 7, 2007) (outlining the history of women in prison and the focus on domesticity and motherhood).

flict with the law¹⁹ and litigation aimed at securing equality for women in custody.²⁰ Advocates like Ellen Barry,²¹ Jean Fox-Way,²² Gail Smith,²³ and Sandra Barnhill,²⁴ campaigned for litigation to improve reproductive health care for women in prison;²⁵ increased programs and visitation for children and mothers;²⁶ provided

legal services to represent women in legal proceedings related to parental rights;²⁷ and organized programs for women in conflict with the law, caregivers and the children of incarcerated parents. This group of advocates focused on motherhood for a variety of reasons. First, it was politically expedient and powerful to link

19. Legal Services for Prisoners with Children ("LSPC") was founded in 1978 to focus on legal and social policy issues affecting incarcerated mothers and their families. Legal Services for Prisoners with Children Homepage, <http://prisonerswithchildren.org/> (last visited Dec. 29, 2007). Legal Services for Prisoners with Children's mission "is to advocate for the civil rights and empowerment of incarcerated parents, children, family members and people at risk for incarceration through responding to requests for information, trainings, technical assistance, litigation, community activism and the development of more advocates. Our focus is on women prisoners and their families, and we emphasize that issues of race are central to any discussion of incarceration." LSPC History, <http://prisonerswithchildren.org/history.htm> (last visited Jan. 8 2008). Aid to Imprisoned Mothers ("Foreverfamily") was founded in 1987 to focus on children with incarcerated parents. Foreverfamily, with its founder Sandra Barnhill, focuses its efforts on providing children with an opportunity to be surrounded and supported by family. Aid to Incarcerated Mothers ("AIM") was founded in 1980 as Massachusetts' first organization to serve women prisoners. AIM Homepage, <http://www.aim-mass.org/> (last visited Dec. 29, 2007). AIM, through executive director, Jean Fox, offers women holistic services. *Id.* See also Prisoners Re-Entry Working Group Homepage, <http://exoffenderresources.org/content.php?id=21#homelesswomen> (last visited Dec. 29, 2007).

20. See *Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia*, 877 F. Supp. 634, 639-43, 656-62 (D.D.C. 1994), *stay denied and motion to modify granted in part*, 899 F. Supp. 659 (D.D.C. 1995), *vacated in part, remanded*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) (finding that sexual abuse of women in custody violates the Eighth Amendment and that denial of equal educational and vocational opportunities violates the Fourteenth Amendment); *Klinger v. Dep't of Corrs.*, 107 F.3d 609, 615 (8th Cir. 1997) (finding no constitutional issues with providing differing educational and vocational opportunities to women prisoners as compared to those at the men's prison); *Pargo v. Elliot*, 69 F.3d 280, 281 (8th Cir. 1995) (affirming judgment that court's findings were not erroneous when it found that any differences in the treatment of women were rationally related to legitimate penological interests of security and rehabilitation); see also *Canterino*, 546 F. Supp. at 207 (W.D. Ky. 1982) (ruling that the prisons' levels system and the denial of vocational training and education to all female inmates violated both the Equal Protection and the Due Process Clauses of the Fourteenth Amendment).

21. Ellen Barry is the Founding Director of LSPC. LSPC Historical Milestones, 1978-2003, <http://www.prisonerswithchildren.org/news/lspc25mile.htm> (last visited Jan. 9, 2008). This webpage also contains a compilation of cases filed by Ellen Barry and LSPC. *Id.* See also Ellen Barry et al., *Legal Issues for Prisoners with Children*, in *CHILDREN OF INCARCERATED PARENTS* (Katherine Gabel & Denise Johnston eds., 1995).

22. Jean Fox-Way is the Executive Director of Aid to Incarcerated Mothers (AIM). AIM Homepage, <http://www.aim-mass.org/> (last visited Dec. 29, 2007).

aim-mass.org/ (last visited Dec. 29, 2007). AIM provides a variety of services in Massachusetts to incarcerated mothers during and after their incarceration. AIM's Programs, <http://www.aim-mass.org/> (then select "Programs" on the top navigation bar) (last visited Jan. 9, 2008).

23. Gail Smith is the Executive Director of Chicago Legal Advocacy for Incarcerated Mothers (CLAIM). Chicago Legal Advocacy for Incarcerated Mothers Homepage, <http://www.claim-il.org/index.html> (last visited Dec. 29, 2007). Ms. Smith has provided legal aid, client education and public advocacy to thousands of women prisoners and their families. She is a founding member of the National Network for Women in Prison, serves on the board of the Family and Corrections Network, and is the winner of the 2005 YWCA Chicago Racial Justice Award. *YWCA Honors Gail T. Smith, Our Voice* (YWCA of Metropolitan Chi., Chi., Ill.), October 2005, www.ywca.org/atf/cf/{03A476D3-A58C-4305-A3DC-94383F98DBF4}/October%202005.htm (last visited on Feb. 14, 2008).

24. Sandra Barnhill is a pivotal member of Foreverfamily. See Aid to Imprisoned Mothers: Aid to Imprisoned Mothers History, <http://www.takingaim.net/history.asp> (last visited Dec. 29, 2007). As an Annie E. Casey Foundation fellow, she was recognized for her ability to bring together diverse groups for a common social goal. See *id.* Throughout the years, Ms. Barnhill has also authored numerous articles and handbooks, including work published in the Encyclopedia of Childbearing and Corrections Today. *Id.*

25. See LSPC Historical Milestones, *supra* note 21 (referencing settled class action lawsuits filed by Ellen Barry and LSPC on behalf of pregnant women prisoners such as *Harris v. McCarthy*, *Yeager v. Smith*, and *Jones v. Dyer*).

26. LSPC was involved in advocating for the creation of the California Mother Infant Care Program ("MIC"). Legal Services for Prisoners with Children: Mother Infant Care Program, www.prisonerswithchildren.org/issues/pwemic.htm (last visited Dec. 29, 2007). MIC, created in 1978, is a cost efficient method of reunifying incarcerated mothers with their children in a structured and supportive environment that promotes good parenting and recovery from drug addiction. *Id.*

27. For example, in 2003, LSPC launched "All of Us or None," a grassroots organizing initiative of former prisoners fighting to combat the many forms of discrimination faced by people with felony convictions. All of Us or None, <http://prisonerswithchildren.org/news/allousornone.htm> (last visited Jan. 10, 2008). The year before LSPC formed "Lift Every Voice/Freedom Bound," a support network formerly incarcerated women. LSPC Historical Milestones, 1978-2003, <http://www.prisonerswithchildren.org/news/lspc25mile.htm> (last visited Jan. 9, 2008). Similarly, AIM has programs for children, incarcerated mothers, and caregivers. These programs include, family visitation, after-school programs, teen leadership programs, appreciation lunches, and training and education programs. AIM's Programs, <http://www.aim-mass.org/> (then select "Programs" on the top navigation bar) (last visited Jan. 9, 2008).

women in prison and motherhood. While the public may not have been able to sympathize with the concerns of a criminal, they could sympathize with the concerns of mothers and their children.²⁸ These advocates used the powerful narratives of incarcerated women and their children to push for legislation, including programs and services aimed at enhancing women's capacity to be mothers. This strategy had obvious disadvantages because it required women in conflict with the law to conform to prevailing notions of acceptable motherhood, which are contested in practice and in theory.²⁹ Women in conflict with the law often experience problems and have difficulty acting as ideal mothers given their lack of resources—income, education, employment and housing—and personal challenges such as criminal involvement, addictions and past histories of physical and sexual trauma. The motherhood movement did little to address these issues.

Another group of advocates, formed by people like, Gay Gellhorn,³⁰ Elizabeth Alexander³¹ and Susan Deller Ross³² advocated in separate spheres for women in custody. This area

of advocacy focused primarily on equality and access to services and programs. While these advocates were crucial in helping to establish that women in conflict with the law had the right to the same services as male prisoners, they were not as comfortable arguing that women had particular needs that an equality approach did not adequately address, such as parenthood, victimization and sexuality.

While the "motherhood" and "equality" movements were not opposed to each other, they rarely collaborated. Instead the separate movements choose to amicably plow their own fields and engage in their own projects of reformation and reframing of women in conflict with the law—one as mother, the other as citizen—although those terms are not mutually exclusive.

C. Reclaiming the Discourse on Women In Conflict with the Law

We are in a different place today. The focus of the project is to help women in conflict with the law reclaim their roles as care givers,

28. BARBARA BLOOM & DAVID STEINHART, NAT'L COUNCIL ON CRIME AND DELINQUENCY, WHY PUNISH THE CHILDREN? A REAPPRAISAL OF THE CHILDREN OF INCARCERATED MOTHERS IN AMERICA (1993) (discussing the effect of incarceration of mothers); see also BRENDA G. MCGOWAN & KAREN L. BLUMENTHAL, NAT'L COUNCIL ON CRIME AND DELINQUENCY, WHY PUNISH THE CHILDREN? A STUDY OF CHILDREN OF WOMEN PRISONERS, (1978) (surveying women in U.S. prisons including mothers).

29. See JUDITH A. BEAR, OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE (1999) (discussing framework for a new feminist jurisprudence and also discussing women's roles as mothers and wives); see also BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING (2007) (arguing that contemporary citizenship, the process of becoming, is sexed, privatized, and self-disciplined); LAURI UMANSKY, MOTHERHOOD RECONCEIVED: FEMINISM AND LEGACIES OF THE SIXTIES (1996) (challenging the critics of feminism who maintain the women's movement denigrated mothers by providing an intellectual history of women's liberation in the United States from 1968-the 1980s); Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 56 (1997) (remarking how breastfeeding was once considered housework, thus detaching itself from the intimate maternal tasks).

30. Gay Gellhorn is Professor Emeritus of Law at the University of the District of Columbia (UDC) David A. Clarke School of Law. Ms. Gellhorn served as the law clerk to Justice Thurgood Marshall. As a pro bono attorney for Wilmer, Cutler, & Pickering, Professor Gellhorn represented all minimum security women inmates in federal prisons in an equal protection and Title IX lawsuit. She also directed the HIV/AIDS Law Clinic at UDC for several years. Professor Gell-

horn's biography can be found at University of the District of Columbia David A. Clarke School of Law, <http://www.law.udc.edu/faculty/ggellhorn.html> (last visited Dec. 30, 2007).

31. Elizabeth Alexander is Director of the American Civil Liberties Union's (ACLU) National Prison Project. Ms. ALEXANDER HAS PUBLISHED NUMEROUS ARTICLES ON PRISON LAW AND CRIMINAL JUSTICE REFORM AND HAS LITIGATED NUMEROUS CASES. Ms. Alexander litigated *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.") and *Wilson v. Seiter*, 501 U.S. 294 (1991) (vacating and remanding summary judgment of an inmate's claim of cruel and unusual punishment on the basis that the Sixth Circuit applied the wrong standard in assessing whether there was an Eighth Amendment violation). Both cases alleged that certain conditions of confinement constituted cruel and unusual punishment under the Eighth Amendment. A FREQUENT PUBLIC SPEAKER, MS. ALEXANDER HAS TESTIFIED BEFORE CONGRESS ON THE SUBJECT OF HEALTH CARE WITHIN THE BUREAU OF PRISONS. Bob Witaneck, *ACLU: Nat'l Prison Project Director Named*, Jun. 27, 1996, www.nicic.org/pubs/2005/020417.pdf (last visited Jan. 1, 2008).

32. Susan Deller Ross represented the Office of Civil Rights as the Plaintiff-Intervenor in *Canterino v. Wilson* and headed the Women's Rights Program at Georgetown Law Center. Professor Ross is Director of Georgetown Law Center's Women's International Human Rights Clinic. Professor Deller Ross's biography can be found at Georgetown Law, http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=317 (last visited Jan. 1, 2008).

workers, and citizens. The goal is to strengthen their identities as sexual, productive powerful beings.

The entry of a human rights discourse into this dialogue with its focus on the rights that we all share as human beings has been exciting and helpful. It has provided additional tools for excavating rights and demands that frankly we, in this country, had given up a while ago. In this way, the work of Dorothy Thomas,³³ Widney Brown,³⁴ Wendy Patten³⁵ and Deborah LaBelle³⁶ was seminal. These women advocates looked at the treatment and circumstances of women in custody through the lens of human rights; they were reclaiming for incarcerated women not just the right for equal program-

ming but the for programs and services that met the particular needs of individual women.³⁷

One of the most significant areas of work that has been done over the past decade has been in the area of exposing problems and creating remedies for women in custody who have been sexually victimized.³⁸ I was fortunate to be involved with this particular area of work when I participated in litigation on behalf of a class of women inmates. We were able to establish that sexual abuse and harassment can violate the Eighth Amendment ban on cruel and unusual punishment.³⁹

In many ways, the sexual victimization of women in custody has been an enduring theme in the story of women in custody. In fact, scan-

33. Dorothy Q. Thomas served as founding director of Human Rights Watch Women's Division from 1990-98. Ms. Thomas has authored numerous reports of human rights violations against women in custody in the United States. Centre for the Study of Human Rights, http://www.lse.ac.uk/collections/humanRights/whosWho/Dorothy_Thomas.htm (last visited Jan. 1, 2008). See also COX & THOMAS, CLOSE TO HOME, *supra* note 9, at 98-101 (discussing the efforts of Smith, Labelle, and Barry to help prisoner-victims who suffered as a result of the inadequate United States legal system and widespread abuses).

34. Widney Brown is the Senior Director of International Law, Policy and Campaigns at Amnesty International's International Secretariat. Prior to joining Amnesty International, Ms. Brown worked for nine years at Human Rights Watch as an advocacy director for the Women's Rights program. Amnesty International, <http://www.amnesty.org/en/widney-brown> (last visited Jan. 1 2007). Ms. Brown has published several reports. See, e.g., A. WIDNEY BROWN, HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998), available at <http://www.hrw.org/reports98/women/>.

35. Wendy Patten is a Senior Policy Analyst at the Open Society Institute in Washington, D.C. Open Society Institute, http://www.soros.org/initiatives/washington/about/staff_bios#patten (last visited Jan. 1, 2008). Ms. Patten currently advocates on U.S. human rights and civil liberties issues. *Id.* She has also served as the U.S. Advocacy Director for Human Rights Watch and served as the director of research and programming development at the Central European and Eurasian Law Initiative (CEELI). *Id.*

36. Deborah LaBelle is a Senior Soros Fellow and cooperating attorney with the ACLU who has an impressive body of legal and scholarly work on issues involving women in prison, juveniles, and discrimination against individuals who are lesbian, gay, or transgendered. See *Meet the CAAPS Board of Directors*, CONSENSUS, (Citizens Alliance on Prisons & Pub. Spending, Lansing, Mich.) Sept. 2004 at 5, available at www.capps-mi.org/pdfdocs/Consensus/September,%202004.pdf. Ms. Labelle authored an article alleging that judicial neglect and gender bias combine to create conditions of incarceration that violate our basic precepts of fairness and humane treatment. Deborah LaBelle, *Women, the Law, and Justice System: Neglect, Violence, and Resistance*, in WOMEN AT THE MARGINS: NEGLECT PUNISHMENT, AND RESISTANCE 347 (Jo-

sefina Figueria-McDonough & Rosemary C. Sarri eds, 2002). Ms. LaBelle was a sole practitioner when she litigated *Everson v. Mich. Dep't of Corrs.*, 391 F.3d 737 (6th Cir. 2004). In *Everson*, the Court "conclude[d] that, given the endemic problem of sexual abuse in Michigan's female facilities, [and] the constellation of issues addressed by the [Michigan Dept of Correction's] plan (security, safety, and privacy), . . . the MDOC's plan [to prohibit male guards from working in all-female prisons] is reasonably necessary to the normal operation of its female prisons." *Id.* at 761. Recently, Ms. Labelle won a \$15.5 million judgment and an apology from the jury for what the jury characterized as "torture" of ten female inmates who were sexually abused in Michigan prisons. *Jury Awards \$15.5 Million to Female Inmates Alleging Sexual Abuse*, FOX NEWS, Feb. 2, 2008, <http://www.foxnews.com/story/0,2933,327789,00.html>.

37. See BLOOM ET AL., RESEARCH, PRACTICE AND GUIDING PRINCIPLES, *supra* note 7 (addressing women inmates' need for gender-specific policies, programs, and services through a summary of multidisciplinary research and practitioner-expertise on gender-responsive strategies).

38. See generally U.S. GEN. ACCOUNTING OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF, A REPORT TO THE HONORABLE ELEANOR HOLMES NORTON, HOUSE OF REP. 1 (1999) (finding that though sexual abuse of women inmates occurred in the correctional systems analyzed—Texas, the Federal Bureau of Prisons, California, and the District of Columbia—the full extent of the problem is unknown because of poor recordkeeping, inadequate investigation and inmates' fear of reporting) [hereinafter U.S.G.A.O., SEXUAL MISCONDUCT BY CORRECTIONAL STAFF]; see also Smith, *A Modern Corollary of Slavery*, *supra* note 12, at 590-604; see also Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody, <http://www.wcl.american.edu/nic/responses.cfm> (last visited Jan. 1, 2008) (providing a detailed analysis of each state's laws that deal with sexual misconduct in prisons, as well as those codified at the federal level).

39. *Women Prisoners of the D.C. Dep't of Corrs.*, 877 F. Supp. at 665 ("[T]he lack of privacy within [prison] cells and the refusal of some male guards to announce their presence in the living areas of women prisoners constitute a violation of the Eighth Amendment since they mutually heighten the psychological injury of women prisoners").

dals related to the victimization and impregnation of women in custody initially created the impetus for creating separate reformatories for women staffed by female matrons in the late 19th and early 20th centuries.⁴⁰

In much the same way, the discourse on sexual violence in penal institutions created an openness to change that we never anticipated. In plotting the trajectory, I want to create a timeline of sorts:

-1993—*Women Prisoners* litigation established that a pattern and practice of sexual abuse and harassment of women in custody violates the Eighth Amendment of the Constitution.⁴¹

-1996—Human Rights Watch releases a report entitled *All Too Familiar*⁴² documenting sexual abuse of women in Michigan and Georgia prisons.

-1998/1999—GAO releases reports on women in prison and sexual abuse of women in custody that examined issues affecting women in custody and detailed four jurisdictions' responses to sexual abuse of women in custody.⁴³

-1999—Amnesty International releases a report documenting widespread sexual abuse of women in state prisons and chronicling other abuses of women in custody that violate human rights such as shackling of pregnant women during labor and delivery.⁴⁴

-1999—Representative Conyers introduces the Custodial Sexual Assault Act of 1998 aimed at addressing sexual abuse of women in custody by creating a registry of staff involved in sexual abuse of women.⁴⁵

-1999—United Nations' Special Rapporteur Radhika Coomaraswamy releases her highly critical report examining the treatment of women in custody in U.S. prisons on a range of issues including sexual abuse, programs and services for female prisoner parents.⁴⁶

-2001—Human Rights Watch releases *No Escape—Male Prisoner Rape in U.S. Prisons*,⁴⁷ detailing pervasive patterns of same-sex male prisoner rape in U.S. prisons and suggesting a sys-

40. See generally NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN IN STATE PRISONS, 1800-1935, at xix (1985). Rafter details the account of Molly Forsha, who was convicted of murder in the mid-1870s and gave birth to twins while incarcerated at the Nevada State Prison in Carson City, allegedly as a result of sexual activity with the warden. *Id.* at 98. Rafter also discusses the opening of the Indiana Women's Reformatory by Charles and Rhoda Coffin in 1873. *Id.* at 29-33; Sheryl Pimlott & Rosemary C. Sarri, *The Forgotten Group: Women in Prisons and Jails*, in WOMEN AT THE MARGINS: NEGLECT, PUNISHMENT AND RESISTANCE 55, 63 (Josefina Figueria-McDonough & Rosemary C. Sarri eds., 2002) (citing an incident of sexual and physical abuse and pregnancy at the Auburn New York State Prison in 1865, which led to the opening of a separate women's facility).

41. See *Women Prisoners*, 877 F. Supp. 634.

42. See generally HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR*, *supra* note 9.

43. See U.S.G.A.O., SEXUAL MISCONDUCT BY CORRECTIONAL STAFF, *supra* note 38; see also U.S. GEN. ACCOUNTING OFFICE, WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS, A REPORT TO THE HONORABLE ELEANOR HOLMES NORTON, HOUSE OF REP. 1 (1999) (raising awareness about sexual misconduct in prisons as a national concern).

44. See AMNESTY INT'L, "NOT PART OF MY SENTENCE:" VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 5 (1999) (criticizing the U.S. for not following international standards requiring same-sex supervision of female inmates) [hereinafter "NOT PART OF MY SENTENCE"]. This report cites Article 7 of the International Covenant which provides that every person has a right "not to be subject to

torture or cruel, inhumane or degrading treatment or punishment." *Id.* at 4. See also AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN, <http://www.amnestyusa.org/women/custody/abuseincustody.html> (last visited Jan. 3, 2008) (follow up report to "NOT PART OF MY SENTENCE" highlighting the continuing concerns about sexual assault on women in prison).

45. See Violence Against Women Act of 1999, H.R. 357, 106th Cong. (1999) [hereinafter VAWA II]. Included within VAWA II was the Prevention of Custodial Sexual Assault by Correctional Staff Act ("Custodial Sexual Assault Act") which called for the establishment of a database of correctional employees previously found to be involved in custodial sexual misconduct. *Id.* §§ 341-46. See also Press Release, Rep. John Conyers, Conyers Introduces Omnibus Bill to Stop Violence Against Women and Their Children (May 12, 1999), <http://www.house.gov/conyers/pr051299.htm> (last visited Jan. 3, 2008).

46. See generally U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rts. Fifty-Fifth Session, *Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999) (prepared by Radhika Coomaraswamy).

47. See generally JOANNE MARINER, HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* (2001), available at www.wcl.american.edu/nic/Articles_Publications/NO_ESCAPE_Male_Rape_in_US_Prisons.pdf (documenting the sexual abuse of male inmates by other male inmates in U.S. prisons).

temic approach to preventing, investigating and punishing prison rape.

-2003—The Prison Rape Elimination Act⁴⁸ ("PREA") was introduced and unanimously passed. This Act directed resources to preventing, investigating and prosecuting prison rape and providing services and resources to survivors of prison rape.

-2004—Abu Ghraib prison scandal broke,⁴⁹ exposing sexual torture of prisoners held in custody in Iraq by military police.

These events have led us to a moment where agencies and policymakers have serious questions about the nature of imprisonment in the United States and the feminization of sexual violence. There is no question that PREA passed because it was viewed as less acceptable for men to be raped in prison than women. In fact, the initial drafts of the act only addressed the sexual abuse of men in custody.⁵⁰

PREA's, with its focus on zero tolerance of prison rape, insistence on data collection, and promise of national standards on the prevention, detection and punishment of prison sexual violence, has meant that prison officials, legisla-

tors, and attorneys have had to ask very basic questions:

1. Has the Prison Litigation Reform Act ("PLRA")⁵¹ created a situation where serious problems remain concealed until they are too serious to deal with except through litigation?
2. Should claims of sexual violence be exempt from the exhaustion and physical injury requirements of PLRA?
3. Are fundamental challenges and changes to the institutional culture of prisons the best way to address sexual violence?
4. Are prisoners victims too?
5. Should we revisit the ban on the use of VAWA⁵² funding for persons in custody to address the needs of victimized men and women in custody?⁵³
6. Should we prosecute women staff who abuse female and male inmates to the same degree and with the same vigor that we do with male staff?⁵⁴
7. What is a permissible continuum of sexual behavior in institutional settings?⁵⁵

48. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-09 (2003) [hereinafter PREA]. PREA establishes "a zero tolerance standard" for rape in custodial settings and applies to prisons, jails, immigration detention facilities, police lockups, and juvenile facilities. *Id.* § 15602.

49. Accounts of abuse, rape and torture of detainees, which included the rape by women at Abu Ghraib prison which came to the public's attention in 2004 through mass media coverage, available at <http://www.cnn.com/2006/LAW/10/16/abu.ghraib/index.html>; see also, Lucinda Marshall, *The Misogynist Implications of Abu Ghraib*, in *ONE OF THE GUYS* 52 (Tara McKelvey ed., 2007).

50. See *Prison Rape Reduction Act of 2002: Hearing on S. 2619 Before the S. Comm. on the Judiciary* 107th Cong. 2-3 (2002) (statement of Wendy Patten, U.S. Advocacy Director, Human Rights Watch), available at <http://www.hrw.org/reports/2001/prison/rapebill-statement.pdf> (discussing the organization's report, *NO ESCAPE: MALE RAPE IN U.S. PRISONS*, and proposing several changes to the legislation, none of which included addressing sexual abuse of women prisoners).

51. Prison Litigation Reform Act, 42 U.S.C. § 1997e (2000) (aiming at deterring frivolous prisoner lawsuits and requiring the exhaustion of administrative remedies and physical injuries).

52. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C.) [hereinafter VAWA I], reauthorized in Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1462 (codified

as amended in scattered sections of 42 U.S.C., 22 U.S.C. §§ 7101-7710) [hereinafter The Victims Protection Act]. The Victims Protection Act is divided into three main sections: A) The Trafficking Victims Protection Act of 2000, B) VAWA II, and C) Miscellaneous Provisions. Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 113 n.14 (2002).

53. See Smith, *A Modern Corollary of Slavery*, *supra* note 12, at 592 (discussing VAWA I and VAWA II laws that prohibited the use of funds for any persons in custody, meaning that "the significant number of women in prison with histories of physical and sexual abuse both prior and during imprisonment are ineligible for services funded by VAWA II").

54. See generally Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Violence in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 276-90 (2008) (describing the differential treatment of female staff perpetrators of sexual violence in custody).

55. See Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 225 (2006) [hereinafter *Rethinking Prison Sex*] (discussing the continuum of sexual expression in correctional environments the main concern of which is whether the state has an ability to regulate that expression); see also Brenda V. Smith, *Continuum of Sexual Behavior in Institutional Settings*, developed under NIC Cooperative Agreement 06S20GJJ1 (PowerPoint presentation on file with author) (outlining the continuum of sexual behavior in prisons).

8. Can there be consensual sex between inmates; can there be consensual sex between staff and inmates?⁵⁶

9. Should the loss of sexual autonomy be a necessary corollary of imprisonment?⁵⁷

10. Could conjugal and family visiting programs like those established in other countries help prevent sexual violence in custody?⁵⁸

11. Given that we now know that prisoners engage both voluntarily and involuntarily in high-risk behaviors that affect the communities they return to—should we invest in preventive measures such as condom distribution in prisons?⁵⁹

12. Are credible grievance systems that have assurances of confidentiality and protection from retaliation sufficient to inform prison administrators of problems or is resort to external accountability systems—inspector generals, ombudsmen, oversight committees—the most effective way to intervene in institutional abuse issues?

These are not rhetorical questions. They are questions that will be debated, resolved or tabled in some fashion in the next few years. These are all issues that The National Prison Rape Elimination Commission will consider in crafting “national standards for enhancing the detection, prevention, reduction, and punishment of prison rape.”⁶⁰ While these questions affect all prisoners, they particularly affect women in conflict with the law who are more often

than not eligible to benefit from improvements in the system. As previously discussed, women prisoners overwhelmingly fit into the “non-violent offender” profile, which make them better candidates, in the eyes of the public and policy-makers, for favorable treatment.

IV. CONCLUSION

This is an important moment and the papers that are published in this issue of the Women’s Rights Law Reporter will provide important material for discussions and debate on the project of reclaiming rights and possibilities for women in conflict with the law. Phillip Genty’s reflections on his three decades of work with incarcerated mothers provides a useful counterpoint to my critique of the “motherhood” movement.⁶¹

We should also listen to the voices of and examine important testimonials of former women prisoners and their children. Makeba Lavan’s narrative about her mother’s imprisonment, its impact on her and her resulting work with youth at Sing Sing Prison in New York is a good example of this; she represents the infusion of youth and exciting new advocacy in this area.⁶² Lavan’s perspective is supported by Tanya Krupat’s important work which addresses the impact of parental incarceration on children.⁶³ Krupat argues that incarceration and the separation of children from their parents creates societal invisibility for children of imprisoned parents. This invisibility has both tangible and intangible consequences for the

56. See Smith, *Rethinking Prison Sex*, *supra* note 55, at 201 (noting that there “is an inherent imbalance of power between staff and inmates [where] [c]orrectional staff control every aspect of the prisoner and the prison experience: housing, recreation, discipline, communication with the outside, and even the length of an inmate’s sentence”).

57. See *generally id.* (indicating that one loses control over one’s personhood in prison, including sexual autonomy as part of the punishment).

58. See *id.* at 231 (arguing that conjugal and family visits give greater opportunities for prisoners’ sexual expression).

59. *Id.* at 229 (noting that “the rate of infection for hepatitis and HIV . . . among the prison population is three times that of the general population, and affects female inmates at a higher rate than males”).

60. Prison Rape Elimination Act, 42 U.S.C. § 15606(e)(1) (2006).

61. See Philip M. Genty, Keynote Address at Women’s Rights Law Reporter Symposium Behind Bars: The Impact

of Incarceration on Women and Their Families (Mar. 7, 2007) (discussing the effects of incarceration of women on children). For an annotated version of this speech see Philip M. Genty, *Some Reflections About Three Decades of Working with Incarcerated Mothers*, 29 WOMEN’S RTS. L. REP. 11 (2007).

62. See Makeba Lavan, Address at Women’s Rights Law Reporter Symposium Behind Bars: The Impact of Incarceration on Women and Their Families (March 7, 2007). For an annotated version of this speech see Makeba Lavan, *Children on the Inside: A Youth Perspective on Parental Incarceration*, 29 WOMEN’S RTS. L. REP. 45 (2007).

63. See Tanya Krupat, Address at Women’s Rights Law Reporter Symposium Behind Bars: The Impact of Incarceration on Women and Their Families (March 7, 2007). For an annotated version of this speech see *Invisibility and Children’s Rights: The Consequences of Parental Incarceration*, 29 WOMEN’S RTS. L. REP. 39 (2007).

well-being of children who are affected by parental imprisonment.⁶⁴

Carole Eady's paper charts her experience as an incarcerated mother affected by the Rockefeller Drug Laws and provides an important reflection on the prison experience from the perspective of women who continue to live with the consequences of their imprisonment—long sentences, difficult reentry into society, and loss of familial relationships.⁶⁵ Dr. Kathy Boudin's essay discusses parole and the denial of pos-

sibilities for violent women offenders. Boudin's essay draws on her prison experience and challenges assumptions related to advocacy for mothers, particularly those who were convicted of violent offenses and are serving long sentences.⁶⁶ My hope is that these articles and this symposium issue will begin the important work of assisting women in conflict with the law and help them to reclaim their roles and rights both as women and citizens.

64. See Lashanda Taylor, *Resurrecting Parents of Legal Orphans* (unpublished article, on file with author) (suggesting an alternative to termination of parental rights for parents whose children are in the foster care system beyond fifteen months and with few prospects for adoption).

65. See Carole Eady, Address at Women's Rights Law Reporter Symposium Behind Bars: The Impact of Incarceration on Women and Their Families (March 7, 2007). For an annotated version of this speech see Carole Eady, *One Mother's Experience with the Adoption and Safe Families Act*, 29 WOMEN'S RTS. L. REP. 31 (2007).

66. See Kathy Boudin, Address at Women's Rights Law Reporter Symposium Behind Bars: The Impact of Incarceration on Women and Their Families (March 7, 2007). For an annotated version of this speech see Kathy Boudin, *The Resilience of the Written Off: Women in Prison as Women of Change*, 29 WOMEN'S RTS. L. REP. 15 (2007). Kathy Boudin was in prison for 22 years, sentenced for her role in a 1981 robbery, orchestrated by the Weather Underground. SUSAN BRAUDY, *FAMILY CIRCLE: THE BOUDINS AND THE ARISTOCRACY OF THE LEFT* 252-313 (2004).