SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Health Matrix: The Journal of Law-Medicine

Volume 13 | Issue 2

2003

Cruel but Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States

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NOTE

CRUEL BUT NOT UNUSUAL PUNISHMENT:

THE FAILURE TO PROVIDE ADEQUATE MEDICAL TREATMENT TO FEMALE PRISONERS IN THE UNITED STATES

Kendra Weatherhead

"I told the nurse that my water broke, and the officer took off the handcuffs so that I could put on the hospital gown. I was placed on a monitoring machine with the leg shackles still on. I was taken into the labor room and my leg was shackled to the hospital bed. The officer was stationed just outside the door. I was in labor for almost twelve hours. I asked the officer to disconnect the iron from the bed when I needed to use the bathroom, but the officer made me use the bedpan instead. I was not permitted to move around to help the labor along."[1]

"After complaining about needed treatment in a Sacramento County Jail, [a] 32-year-old Caucasian woman with a heart condition was held in a restraint chair for eight and one half hours in December 1995. She was allegedly forced to urinate on herself after pleading repeatedly to use the bathroom and was cursed at and taunted by guards. She is reported to have suffered cuts to her shoulders and damage to her wrists, feet and ankles from the tight leather straps and metal cuffs."[2]

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[1] Amnesty Int'l, *"Not Part of My Sentence": Violations of the Human Rights of Women in Custody, at* http://www.web.amnesty.org/ai.nsf/index/AMR510011999 (Jan. 3, 1999).

[2] *Id.*

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3]

I. INTRODUCTION

There are approximately 119,010,000 females in the United States.[4] By most recent estimates, 950,000 are under the care, custody, or control of correctional agencies.[5] This indicates that 1 of every 109 women is in the criminal justice system.[6] The rate for female incarceration due to drug-related charges has risen dramatically in the last ten years, and it is drug-related offenses that account for the recent overall surge in this population.[7] Drug offenses make up 37% of the total crimes committed by women, second only to property felonies.[8] Despite the fact that many are incarcerated due to a non-violent offense, female inmates are not protected from unprovoked physical and emotional violence from prison officials.

The women's exposure to abuse from correctional officers and the lack of adequate medical care should be considered cruel and unusual punishment, a violation of the Eighth Amendment. However, because the current standard the courts employ to determine whether medical treatment is adequate inaccurately accounts for the health needs of incarcerated women, many female inmates continue to suffer without a means for legal recourse.

In this paper, I will explore the standard of medical care required by the Eighth Amendment and will suggest ways in which it can be changed to more appropriately protect incarcerated women from abuse and inadequate medical treatment. More specifically, I will begin with a discussion of current Eighth Amendment jurisprudence and the specific standard of medical care the Constitution requires, and I will illustrate how and why women's medical needs are not being met under this standard. Next, I will discuss the Fourteenth Amendment and the Equal Protection clause violations that stem from

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[3] U.S. CONST. amend. VIII.

[4] Lawrence A. Greenfeld & Tracy L. Snell, *U.S. Dep't of Justice, Office of Justice Programs, Special Report On Women Offenders,* NCJ 175688, at 1, 2 (rev. Oct. 3, 2000) [hereinafter *DOJ*].

[5] *Id.* at 1, 6.

[6] *Id.*

[7] *Id. See also* Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U.L. REV. 1471, 1494-95 (2000) (explaining that women are disproportionately incarcerated for drug related crimes); *Developments in the Law – Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1927 (1998).

[8] *DOJ*, *supra* note 4, at 5 (property crimes constitute 44%).

the unequal treatment of female prisoners with respect to medical care. I will also discuss how prisoners can bring Eighth and Fourteenth Amendment claims and some of the current barriers they face in doing so. Then, I will suggest that the medical, correctional and international standards of care for prisoners should serve as the appropriate templates for the necessary quality of medical treatment instituted in the American criminal justice system. Finally, I will conclude with a brief discussion of prison policies that can help achieve a more appropriate level of care.

II. EIGHTH AMENDMENT JURISPRUDENCE

The language of the Eighth Amendment establishes that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[9] The Supreme Court interpreted this language to prohibit: 1) punishments involving wanton infliction of pain;[10] 2) punishments disproportionate to the nature of the crime;[11] and 3) limits on what a state can classify as criminal behavior.[12] Because conditions of imprisonment have been consistently analyzed under the second prong,[13] this paper will focus on how the failure of corrections facilities to provide adequate medical treatment and protection from abuse to incarcerated women constitutes punishment disproportionate to the nature of the crimes they committed. I will argue that current medical care, or the lack thereof, increases the severity of women's sentences and violates the Eighth Amendment. The trends in incarcerated women's lives: violence, substance abuse, and feelings of helplessness, create special needs within the community. But because the standard of care for medical treatment is based on a male model of care, the health care needs of women are often overlooked.

The Eighth Amendment is considered to reflect the American moral character, such that as the moral character of the culture develops, so too should Eighth Amendment jurisprudence change to reflect such developments.[14] In *Trop v. Dulles*, the court held that

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[9] U.S. CONST. amend. VIII.

[10] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (outlining the test for excessiveness with regard to criminal sanctions under the Eighth Amendment).

[11] *Id.*

[12] *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (holding that a conviction and imprisonment of an individual for an illness is considered cruel and unusual punishment).

[13] Joshua Dressler, *Law Outlines: Criminal Law* 2-5 (Casenote Publishing Company, Inc. 1997).

[14] Trop v. Dulles, 356 U.S. 86, 99-104 (1958).

"[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[15] Yet, the current standard of care for the medical treatment of incarcerated women ignores the norms of care expected by the current American public,[16] the international community,[17] and human rights advocacy groups.[18]

To decipher what embodies the current moral standards of a community, the court turns to "objective indicia that reflect the public attitude toward a given sanction."[19] The "objective indicia" the court considers include: 1) the seriousness of the offense; 2) the penalties imposed for other offenses in the same jurisdiction (intra-jurisdictional analysis); and 3) the penalties imposed for the same crime in other jurisdictions (inter-jurisdictional analysis).[20] Recently, the Supreme Court's support of the three-part analysis has come into question. In *Harmelin v. Michigan*, four justices supported continued application of the test, while three others suggested that the second and third prongs should only be applied when there has been a gross disproportionality between the crime committed and the sentence imposed.[21] I will argue for the continued adherence to the three-part test, in addition to broadening the scope of the inter-jurisdictional analysis. I will recommend that the court also consider: 1) the standards of care for prisoners recommended by federal and

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[15] *Id.* at 101.

[16] LOIS PRESSER & PATRICIA VAN VOORHIS, CLASSIFICATION OF WOMEN OFFENDERS: A NATIONAL ASSESSMENT OF CURRENT PRACTICES (2001), *available at* http://www.nicic.org. *Cf.* American Civil Liberties Union, *Optimism, Pessimism, and Jailhouse Redemption: American Attitudes on Crime, Punishment, and Over-incarceration* (1996), *available at* http://www.aclu.org/issues/criminal/overincarceration_survey.pdf (describing public opinion on sentencing offenders to prison and the seeming willingness to use sentencing alternatives or to focus on rehabilitation); Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1 (2000) (support the idea that the public may be willing to choose intermediate sanctions or restorative versus get tough policies).

[17] *See Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR (1948), *available at* http://www.un.org/Overview/rights.html (describing the fundamental rights, including medical care and equal treatment of women); Convention Against Torture and Other Cruel, Inhuman or *Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. DOC. A/39/51 (1984).

[18] Amnesty Int'l, *supra* note 1; HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) [hereinafter HUMAN RIGHTS WATCH]

[19] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[20] Harmelin v. Michigan, 501 U.S. 957, 961 (1991).

[21] *Id.* at 961.

professional prison management organizations and 2) the standards of care for prisoners other countries have instituted.

III. SERIOUSNESS OF THE CRIME

The court will only engage in intra-jurisdictional and inter-jurisdictional analysis if it determines that a crime is "nonserious."[22] The only guidance that has been offered from the court as to what constitutes a serious or non-serious offense is delineated in *Harmelin v. Michigan*.[23] Under *Harmelin*, an actor who commits a violent crime commits a "serious offense."[24]

The majority of crimes that incarcerated women commit are non-violent, drug-related offenses,[25] but with the inception of tougher drug laws in recent decades, these crimes are being penalized more seriously.[26] Currently, punishment for a drug-related offense can be as severe as that mandated for violent crimes.[27] Under stricter mandatory minimum laws, women are serving as much time for drug possession and/or distribution as they would for murder.[28] Drug related offenses are generally considered "non-serious" offenses under the *Harmelin* standard, but the increased incarceration terms enacted under stricter sentencing guidelines create very serious consequences for female inmates.

A. Mandatory Minimum Sentencing Guidelines

Mandatory minimum sentencing laws were created in the 1980s in response to a rising concern about proliferating drug use and an increasing pressure on Congress to punish drug offenders more severely.[29] They were designed to mete out "sure and certain" punishment so that potential offenders would be deterred from

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[22] Joshua Dressler, *Law Outlines: Criminal Law* 2-5 (Casenote Publishing Company, Inc. 1997).

[23] *Harmelin*, 501 U.S. 957, 987 (1991).

[24] *Id.*

[25] *See* Dorothy J. Henderson, *Drug Abuse and Incarcerated Women* 15(6), J. OF SUBSTANCE ABUSE AND TREATMENT, 579, 580 (1998) (stating statistics relating to characteristics of women incarcerated).

[26] *See* Froyd, *supra* note 7, at 1471 (explaining Congress' complete overhaul of federal sentencing for drug-related crimes); *Developments in the Law, supra* note 7.

[27] *Cf.* Froyd, *supra* note 7, at 1487-88 (explaining the increase in sentences for particular drug-related crimes).

[28] *DOJ*, *supra* note 4, at 3-5.

[29] *See* Froyd, *supra* note 7, at 1483-86 ("Congress instituted harsher punishments for drug offenses in the name of retribution, deterrence, and public safety").

committing future crimes.[30] The purpose of introducing such legislation was to create stricter penalties for drug distribution, thereby netting the primary drug traffickers, but the Anti-Drug Abuse Act of 1986[31] and the Omnibus Anti-Drug Abuse Act of 1988[32] also created severe sentences for low-level drug possession charges.[33] This shift in the sentencing laws had a disproportionate impact on women,[34] resulting in the increase of the incarceration rate by 313%, compared to a 182% increase male incarceration rate, in the decade following their enactment.[35]

While the majority of illegal acts women commit are non-serious drug offenses,[36] 30% are violent,[37] and of the crimes women commit which are violent, 62% are committed against family members or intimates.[38] Aggravated assault, the least violent form of such offenses, accounts for 90% of violent crimes women commit.[39] Given the high rate of past physical and sexual abuse from family members and/or intimates in this population, it is likely that the violence committed is in response to the victim's abuse of the perpetrator.[40] Strict adherence to mandatory minimum guidelines has obscured an important link between women's experience of violence in this culture and substance abuse that often occurs because women wish to medicate the effects of such traumatizing experiences.

Congress has accomplished the questionable goal of filling U.S. jails and prisons with low-level drug offenders, yet the drug problem in the United States has not subsided,[41] and the incarcerated

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[30] *See id.* at 1488-89 (explaining the purposes of mandatory minimum sentences for drug offenses).

[31] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1052, 100 Stat. 3207-08 (1986).

[32] Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6371, 102 Stat. 4181, 4370 (1988).

[33] *See* Froyd, *supra* note 7, at 1487-88 (noting the increased likelihood penalties would apply equally to major and low-level participants).

[34] *Developments in the Law, supra* note 7, at 1926-27.

[35] Diana J. Mertens, *Pregnancy Outcomes of Inmates in a Large County Jail Setting,* 18 PUB. HEALTH NURSING 45, 45 (2001).

[36] *DOJ, supra* note 4, at 5.

[37] *Id.*

[38] *Id.* at 3.

[39] *Id.*

[40] *See id.* at 1 (indicating that nearly 60% of women in prison had been physically or sexually abused in the past).

[41] *See* Saundra H. Glover et al., *Addiction Services/Dual Diagnosis: HIV and Mental Illness, a Population-Based Study,* 37 COMMUNITY MENTAL HEALTH J. 469, 470-71 (2001) (discussing the link between substance abuse and HIV); Mary F. Hall, *The "War on Drugs:" A Continuation of the War on the African American Family,* 67 SMITH C. STUD. SOC. WORK 609, 612-13 (1997) (discussing the

population has exploded.[42] Mandatory minimum laws have succeeded in making the non-serious offense of drug use a severely punishable crime.[43]

While many women's crimes are nonviolent drug offenses and therefore would not be considered serious under *Harmelin*, the court should include its consideration of the remaining two prongs of the proportionality test the fact that many women who abuse drugs do not do so because they are motivated by the high stakes that stimulate men to commit the same crimes. Instead, these women seek and use drugs to assuage physical or emotional memories of past or current violence they have experienced or are experiencing in the context of their daily lives.

The strict sentencing guidelines create longer incarceration terms, thereby increasing the women's chances of experiencing a punishment that exceeds that which fits their crime. While no prisoner should experience physical violence during their period of incarceration, the physical violence perpetrated by prison guards against many women and the prison facilities' failure to provide adequate medical treatment, wreak an especially heavy burden on a group of individuals who commit non-violent forms of self-medication to alleviate the consequences of the chronic violence they face.

IV. INTRA-JURISDICTIONAL ANALYSIS: U.S. STANDARDS OF MORALITY

The court will consider most drug offenses non-serious crimes and will then turn to an analysis of the penalties imposed for offenses within the jurisdiction to determine if the sentence is proportional to the act committed.[44] Through this intra-jurisdictional analysis, i.e. comparison of penalties imposed for other offenses in the same jurisdiction for similar offenses, I will demonstrate how the severity of the punishment women in the United States face is disproportionate when compared to the adequacy of medical care they receive in the correctional facilities. I will begin by describing the standard of care the Supreme Court requires and then, I will describe why this standard has not been appropriately applied to women prisoners.

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disproportionate number of African Americans in prison due to increases in prison sentences for drug crimes).

[42] *DOJ*, *supra* note 4, at 6.

[43] *See* Edward J. Tafe, Comment, *Sentencing Drug Offenders in Federal Courts: Disparity and Disharmony*, 28 U.S.F. L. REV. 369, 370, 413 (1994) (providing an example of disproportionate sentencing under these guidelines).

[44] *Dressler*, *supra* n. 13 at 2-5.

A. Current Standard of Care: Disparate Medical Treatment Once Inside Prison

The incarcerated community is one of the few subgroups in American society that has a constitutionally guaranteed right to adequate medical treatment.[45] In *Youngberg v. Romeo*, the Supreme Court held that where the government has limited the ability of a person to protect herself, such as by incarcerating her, it creates a special relationship in which the government owes her the right to medical treatment.[46] The rationale behind this is that because the government has prevented access to care and plays a custodial role during incarceration, it must provide adequate medical treatment.[47] The standard established in *Estelle v. Gamble*[48] is used to determine if a constitutional violation has arisen out of the acts or omissions of prison officials.[49] Alternatively, the standard in *Turner v. Safley*[50] is used to determine if the violation has arisen out of the application of a prison policy. The inadequacy of medical treatment claims are predominantly analyzed under the rubric set out in *Estelle v. Gamble*,[51] and therefore, my analysis will focus on this standard.

1. *Estelle v. Gamble* and the Deliberate Indifference Standard

Under *Estelle v. Gamble*, the prisoner must show that there has been a "deliberate indifference to [her] medical needs."[52] While this standard is most frequently used to demonstrate "the wanton and unnecessary infliction of pain," it can also be used to demonstrate how punishment is disproportional to the nature of the crime when the state or federal government has failed to provide adequate medical treatment.[53]

The definition of "deliberate indifference" varies across jurisdictions but seems to focus on the fact that "knowledge" of an inmate's medical needs is required. The Northern District Court of Illinois considers the following factors in determining whether the

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[45] *See* Estelle v. Gamble, 429 U.S. 97 (1976) (holding that deliberate indifference [i.e. denial of medical care] by prison personnel constituted cruel and unusual punishment).

[46] 457 U.S. 307, 317 (1982).

[47] *See id.*

[48] *Estelle*, 429 U.S. at 97.

[49] *Id.* at 104-06.

[50] Turner v. Safley, 482 U.S. 78, 89 (1987).

[51] 429 U.S. 97 (1976).

[52] *Estelle*, 429 U.S. at 106.

[53] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

corrections facility acted with "deliberate indifference": 1) the severity of the medical problem; 2) the potential for harm if medical care is denied or delayed, where the plaintiff must show a pattern of suffering existed; 3) the actual harm caused by the denial of care; and 4) the prevention of access to medical personnel capable of evaluating the need for treatment.[54] Alternatively, some federal courts have defined "deliberate indifference" as the prevention of access to medical personnel who can evaluate a prisoner's need for treatment and/or 1) the repeated denial of access to care; or 2) delay.[55] The Supreme Court requires plaintiffs to show that prison officials were 1) aware of the individual's serious medical need; and 2) disregarded, ignored, or refused to provide her with treatment for that need.[56]

2. Interpretations of Deliberate Indifference

Using the Supreme Court's definition of "deliberate indifference," the court in *Jordan v. Gardner* held that prison officials were given sufficient notice of the psychological trauma of cross-gender body searches male guards perform on women prisoners when: 1) the staff urged the superintendent of the facility to suspend the policy; and 2) the court order issued to prevent the searches was instituted after the policy banning such searches was violated.[57] The court held that the knowledge of the women's past physical and sexual abuse, coupled with the potential prisoner abuse committed by male guards, was enough to constitute deliberate indifference and held that the searches were unlawful.[58] Where random body searches involved intimate physical touching of female breasts and genitalia by male prison guards, the court recognized the need to avoid psychological trauma as a "serious medical need."[59]

Another interpretation of the "deliberate indifference" standard is found in *Daniels v. Delaware*, where an inmate sued administrative

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[54] *See* Burns v. Head Jailor of LaSalle County Jail, 576 F. Supp. 618, 620 (N.D. Ill. 1984) (holding that jail personnel's untimely delivering of medicine to an inmate was insufficient to provide a basis for "deliberate indifference).

[55] *See* Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (defining deliberate indifference utilized by some federal courts under the *Estelle* test); *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977) (stating that repeat occurrences of denial or delay of access to medical care within a short period of time amount to deliberate indifference).

[56] *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (holding that in order for deliberate indifference to be found a prison official must know of excessive risk to inmate's health or safety and must then disregard this risk).

[57] *See* Jordan v. Gardner, 986 F.2d 1521, 1528-29 (9th Cir. 1993).

[58] *Id.*

[59] *Id.*

officials of the corrections facility because she was raped and became pregnant as the result of an attack by a prison guard.[60] The inmate alleged that the officials failed to protect her from harm and were deliberately indifferent to her medical needs when they allowed a male prison guard to be employed at an all female prison.[61] The court held that the prison officials were immune from suit because the inmate had failed to provide enough evidence of the officials' "knowledge and subsequent disregard of a substantial risk of harm" to the plaintiff's medical needs.[62] Similarly, in *Barney v. Pulsipher*, where two former inmates were sexually assaulted by a jailer, the court held that the failure of prison officials to train the correction officer who raped the plaintiffs did not constitute a deliberate indifference to their medical needs because they did not show that a "pattern of violations existed to put the County on notice that its training program was deficient in this regard."[63]

A limited construction of the "deliberate indifference" standard was also applied in *Hovater v. Robinson*, where a woman was forcibly sodomized by a prison guard. The court determined that the prison superintendent was not aware of the need to prevent male prison guards from having sole custody of female prisoners simply because of the general prevalence of past physical and sexual abuse of the women in the facility.[64] The court also held that the plaintiff did not establish a "deliberate indifference" to her serious medical needs. Nevertheless, the court acknowledged that 85% of the women had been physically or sexually abused and that the prison official had made a habit of requesting the visitation clerk to deliver certain women to his floor, where he was the sole officer on duty.[65]

These cases indicate that in order to demonstrate an Eighth Amendment violation, the courts will require that prison officials have absolute knowledge of the woman's medical needs, as opposed to an awareness of, or a reasonable expectation to perceive, that an inmate's need has not been addressed. Such a high standard is nearly impossible to meet and seems to require female inmates to be in a state of great pain or injury in order to receive medical attention. It

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[60] Daniels v. Delaware, 120 F. Supp. 2d 411 (D. Delaware 2000).

[61] *See id.* at 419 (outlining the inmate's allegations against the State).

[62] *Id.* at 420.

[63] Barney v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998).

[64] *See* Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993) (explaining that the record was devoid of evidence showing "that every male guard [wa]s a risk to . . . a[ny] female inmate whenever the two [we]re left alone").

[65] *See id.* at 1065-66 (concluding that the violations of jail policy did not rise to the level of "deliberate indifference").

also allows abuse by corrections officers until an official willing and able to prohibit such behavior "knows" it is occurring.

Despite the failure of the courts in *Daniels*, *Barney* and *Hovater* to recognize the importance of women's experiences generally and within the prison context, other courts are acknowledging that female inmates may have different needs based on their experiences. In *Torres v. Wisconsin*, the Seventh Circuit upheld the decision of a superintendent to refuse to hire male prison guards for a women's maximum facility prison because the employer had reasonable cause to believe that "giving women prisoners a living environment free from the presence of males in a position of authority was necessary to foster the goal of rehabilitation."[66]

In addition to the *Jordan* and *Torres* courts, other courts have also recognized the unique needs of female inmates. In *Casey v. Lewis*, female inmates filed suit against Arizona prison officials based on allegations of deliberate indifference to serious medical, dental, and mental health care needs.[67] The plaintiffs alleged that their Eighth Amendment rights were violated when security staff had the authority to overrule medical staff orders, when sick inmates had to wait in line to see medical staff and if they left the line, lose their opportunity to receive treatment, and when an unattended to inmate lost her eyesight due to diabetic retinopathy.[68] They also alleged that their rights were violated when there was a failure to provide adequate and preventive care to chronically ill patients, a failure to deliver prescriptions, and a failure to provide infirmaries within the prison.[69] Finally, they alleged that the use of lockdown as a mental health treatment and the discharge of inmates with serious mental illness from psychotherapy was also in violation of their Eighth Amendment rights.[70] The court held that "this treatment of any human being [was] inexcusable and cruel and unusual punishment in violation of the Eight Amendment of the Constitution."[71]

The failure of many courts to recognize a history of physical and sexual abuse as a "serious medical need" among female inmates and the "lack of care" in preventing the exacerbation of this condition, stand as examples of how women's experiences can be deliberately ignored in the justice system. While some courts are willing to

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[66] Torres v. Wis. Dep't of Health and Soc. Services, 859 F.2d 1523, 1529-30 (7th Cir. 1988).

[67] 834 F. Supp. 1477, 1479 (D. Ariz. 1993).

[68] *Id.* at 1545-46.

[69] *Id.* at 1546.

[70] *Id.* at 1548-49.

[71] *Id.* at 1550.

recognize the seriousness of a breach of Eighth Amendment rights, there is a stronger sentiment that female inmates do not deserve to have gender-specific medical treatment nor is there recognition of the increased risk for violence that many if the inmates face while under the care of male prison guards.

In assessing the adequacy of medical treatment provided to inmates in general, the courts more easily find that prison officials have acted with a "deliberate indifference" to the needs of men. For example, the court held in *Wells v. Frazen*,[72] that denial of exercise, a shower, clothing and the use of utensils with which to eat constituted a serious enough deprivation to justify ruling that prison officials failed to provide adequate care even though they were made aware of the prisoners' needs.[73] In *Bienvenu v. Beauregard Parish Police Jury*,[74] the court held that the prison official's intentional subjection of the plaintiff to "a cold, rainy, roach-infested facility . . . furnished . . . with inoperative, scum-encrusted washing and toilet facilities" was sufficient to demonstrate deliberate indifference to a serious medical need.[75]

B. Why Women Are Different

Daniels, *Barney*, *Hovater*, *Wells*, and *Bienvenu* illustrate the inequitable results that arise when a gender-neutral constitutional standard is applied to men and women. While some courts acknowledge factors that make the needs of male and female prisoners different,[76] the current trends of limiting prisoners' civil rights in general, vigorous prosecution drug offenders, and judicial failure to recognize the degree to which women's psychological resources are limited by violence, work together to produce a strong resistance to recognizing the inadequacy of the medical treatment women receive once in prison.

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[72] 777 F.2d 1258 (7th Cir. 1985).

[73] *See id.* at 1264 (noting further that inmate was required to sit near his two-day-old bodily waste).

[74] 705 F.2d 1457 (5th Cir. 1983).

[75] *Id.* at 1460 (relying on *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), which held that "serious deprivation of basic human needs . . . could be cruel and unusual punishment under the contemporary standards . . . recognized in *Gamble*")

[76] *See, e.g.*, Pargo v. Elliot, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (holding "that Iowa women and male inmates . . . are not similarly situated"); Timm v. Gunter, 917 F.2d 1093, 1103 (8th Cir. 1990) (discussing concerns about security); Klinger v. Dep't of Corr., 31 F.3d 727, 731-32 (8th Cir. 1994) (mentioning ways in which female inmates differ from male inmates); Glover v. Johnson, 75 F.3d 264 (1996) (cases that cite factors of why female inmates are not similarly situated to male inmates).

There is no national agency that monitors the treatment of prisoners.[77] However, several national non-governmental and governmental agencies have developed monitoring standards and make them available to facilities that wish to receive accreditation.[78] These standards provide objective guidance as to the duty that prison officials owe to those in their care. Approximately 30% of corrections facilities are currently accredited.[79] The accreditation process involves evaluating the correction facility's policies and procedures against national standards, with a three-year monitoring period following the initial accreditation decision to ensure compliance with the standards.[80] Because the agencies are national and easily accessible by corrections facility staff, breach of the recommended measure should constitute "deliberate indifference."

Despite the explicit guidelines, the care provided to women has consistently fallen below federal and professional standards because it fails to address specific treatment needs in the areas of 1) substance abuse; 2) abuse by corrections officers; 3) HIV/AIDS; and 4) pregnancy. Prison officials' behavior becomes deliberately indifferent when they act contrary to standards set by federal and national professional prison organizations, and federal and mental health standards of care.[81]

1. The Link Between Physical, Sexual, and Substance Abuse

Drug addiction is prevalent in the female prison population, with some reports estimating that up to 80% of incarcerated women face problems with substance abuse. The same studies indicate that in many cases the substance abuse is a consequence of domestic

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[77] Amnesty Int'l, *supra* note 1.

[78] Washington Correctional Association, *Public Correctional Policy on Female Offender Services, at* http://www.bmi.net/wca/female_offend_serv.html (last visited Oct. 15, 2002); American Correctional Health Services Association, *ACHSA Code of Ethics, at* http://www.corrections.com/achsa/ethics.html (last visited Oct. 13, 2002). *See* NATIONAL CRIMINAL JUSTICE ASSOCIATION, MISSION & POLICIES, *at* http://www.ncja.org/policies.html (last visited Oct. 9, 2002) (discussing the N.C.J.A.'s role in improving conditions in facilities at the local, state, and federal levels). *See also* American Correctional Health Services Association, *ACHSA Code of Ethics, at* http://www,corrections.com/achsa/ethics.html (last viewed Oct. 9, 2002) (setting forth principles health professional should follow when treating prisoners).

[79] AMERICAN CORRECTIONAL ASSOCIATION, ACCREDITATION AND STANDARDS, *at* http://www.aca.org/standards/seeking_overview.htm (last visited Oct. 9, 2002).

[80] *See id.* (explaining the entire accreditation process).

[81] See listed correctional organizations, *supra* note 78.

violence.[82] Limited by access to mental health resources in their communities, many women turn to drugs to medicate feelings of shame, anger, and helplessness.[83] Of the women who have been incarcerated for drug trafficking or possession, up to 75% have been physically or sexually abused.[84] The failure of the justice system to recognize this and the other particularized needs of women set the stage for the violation of their constitutional right to medical treatment, the nature of which constitutes cruel and unusual punishment.

In general, physical and/or sexual violence is the leading cause of injuries to women ages 15-44.[85] Women who have been assaulted are more likely to suffer major depression, chronic pelvic pain, general pain, and gastrointestinal disorders[86] and are more likely to abuse drugs.[87] The high level of occurrence of physical and/or sexual abuse and substance abuse in this population gives rise to the inference that the criminal justice system is discriminating against women with certain life experiences.

> Corrections agencies such as the National Criminal Justice Association (NCJA), which represents state and local governments on crime control and public safety issues, strongly recommends treatment programs for prisoners: Treatment can reduce or control criminal behavior or behavior which contributes to criminal behavior. Treatment in this context includes actions addressing substance abuse, anger and impulse control, mental illness, *domestic violence*, cognitive dysfunction, sexual offending, and multiple co-occurring disorders.[88] (emphasis added)

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[82] *See Henderson*, *supra* note 25, at 582 (stating various studies correlating drug abuse with sexual abuse, low self-esteem, gender, ethnicity and mother-daughter relations).

[83] *See id* (stating women drug abusers have been found to have negative feelings towards their mothers, low self-esteem, and a history of sexual abuse).

[84] *DOJ*, *supra* note 4, at 3-5.

[85] Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849 (1997) (citing S. Rep. No. 103-38, at 38 (1993)).

[86] *Id.* at 447, 448.

[87] Mark I. Singer et al., *The Psychosocial Issues of Women Serving Time in Jail* 40 SOC. WORK: THE J. NAT'L ASS'N SOC. WORKERS 103, 103-14 (Jan. 1995).

[88] NATIONAL CRIMINAL JUSTICE ASSOCIATION, USE OF TREATMENT OPTIONS FOR OFFENDERS, *at* http://www.ncja.org/treatmentoptions.html (last visited Oct. 17, 2002).

The NCJA goes on to warn the correctional community that they must be prepared to join forces with professionals from other areas because, "[i]ncarceration alone cannot remedy recidivism; a treatment must be included in order to break the cycle, particularly when [its] costs versus incarceration are considered."[89] The NCJA is a national organization, with more than 1,500 participating members involved in the correctional community, and with the advent of the internet, the site is very accessible to corrections officials.[90]

The American Correctional Association is an even larger and more well-known industry agency that also has recommendations for the standard of care that should be provided to inmates.[91] In particular, they recognize that the female incarcerated population has "unique needs" and recommends that services provided to them should include the delivery of "appropriate programs and services, including medical, dental, and mental health programs, services to pregnant women, substance abuse programs, child and family services . . . ."[92]

The Department of Justice (DOJ), Bureau of Prisons Division also sets corrections facility standards of care, and according to its associate general counsel, it is the predominant authority on how acceptable prisoner care is defined.[93] The DOJ found that when it implemented a substance abuse program, the treatment "reduce[d] the likelihood of future criminal conduct and drug use as well as increasing the employment rate among women."[94] The program includes providing inmates information about substance abuse and then "attempt[ing] to identify, confront, and alter the attitudes, values, and thinking patterns that lead to criminal and drug-using behavior."[95]

Further, the DOJ reports that women have been more successful than men in freeing themselves from drug abuse with the

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[89] *Id.*

[90] *Id.*

[91] American Correctional Health Services Association, *ACHSA Code of Ethics*, *available at* http://www,corrections.com/achsa/ethics.html (last viewed Oct. 21, 2001).

[92] *Id.*

[93] Interview with Craig F. Meyers, Associate General Counsel, U.S. Dept. of Justice, Federal Bureau of Prisons (Nov. 6, 2001).

[94] Bernadette Pelissier et al., *Triad Drug Treatment Evaluation Project*, FED. PROBATION, Dec. 2001, at 3, *available at* http://www.bop.gov/orepg/oretriad.html (last viewed Nov. 5, 2001).

[95] DOJ, *Substance Abuse Treatment Programs in the Federal Bureau of Prisons/Report to Congress As Required by the Violent Crime Control and Law Enforcement Act of 1994, at* http://www.bop.gov/ipapg/ipoover.html (Jan. 1999).

implementation of these programs.[96] Overcoming substance abuse is a critical goal for many incarcerates of both genders, but given the low receptivity among men to such programs, the violence many still perpetrate once released, and the fact that women are often the victims of such violence, resources should be directed where they are being most efficiently utilized until better solutions are found.[97] State prisons and jails should allot more financial resources to developing and implementing drug abuse programs among the female populations. The failure to do so in the face of evidence that such treatment options are necessary in order to adequately address women's medical should constitute deliberate indifference on the part of prison officials.

Corrections facilities have justified their failure to provide adequate medical treatment to female prisoners by citing concerns over the cost of implementing such changes in their facilities. Many lower court decisions have upheld this justification,[98] but the Supreme Court has limited the facilities' duties to ensuring deterrence, rehabilitation, and security. It has not expanded this list to include the protection of financial interests.[99] Notwithstanding the fact that cost is not a sufficiently substantial government interest to justify failing to provide adequate medical care, instituting improved mental and physical health care programs for women has the potential to decrease costs to society: fewer expenses to state funded foster care programs where women are custodial parents of their children and lowering recidivism rates by alleviating the source of the problem.[100]

Beyond punishment, rehabilitation is a goal of the criminal justice system.[101] There are programs available to help achieve this goal successfully, but many facilities have failed to implement them.[102] Such clear and consistent recommendations from corrections facility organizations is sufficient notice to other corrections facilities that

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[96] Pelissier et al., *supra* note 94, at 6-7.

[97] *DOJ*, *supra* note 16, at vii, 14; Department of Justice, *Bureau of Justice Statistics 2000: At a Glance* 7-9, 21-26 (Aug. 2000), *available at* http://www.ojp.usdoj.gov/bjs/abstract/bjsag00.htm.

[98] *See infra* note 171 and accompanying text (regarding Fourteenth Amendment violations).

[99] *Cf.* O'Lone v. Shabazz, 482 U.S. 342, 348 (1987) (citing various duties of correctional facilities while failing to mention the protection of financial interests).

[100] *See infra* note 280 and accompanying text (regarding the justifications for new policies for women).

[101] *Cf.* Pellissier et al., *supra* note 94, at 4 (noting the goals of drug awareness programs are to change the "attitudes, value, and thinking patterns" that precede criminal behavior).

[102] Amnesty Int'l, *supra* note 1.

substance abuse treatment is a priority for incarcerated women, and the failure to provide such services should also constitute a "deliberate indifference" to their medical needs.

2. Abuse by Corrections Officers

Outside of substance abuse, women face other health challenges once they are incarcerated. A survey of recent reports by human rights organizations and government agencies paints a grim picture of abuse perpetrated against women in U.S. correctional facilities. Human Rights Watch, an international human rights organization, graphically illustrated the prevalence and seriousness of abuse suffered by incarcerated women in a 1996 report entitled *All Too Familiar: Sexual Abuse of Women in U.S. Prisons.*[103] The report documented numerous instances of vaginal, anal and oral rape perpetrated by prison guards against female prisoners.[104] Guards used their near-total authority to compel women into sexual acts and to prevent them from filing complaints.[105] If complaints were filed, retaliatory measures such as verbal degradation, verbal harassment, or mandatory frisks, where the women's genitals and breasts were groped, were employed to discourage future complaints.[106] The report surveyed only six jurisdictions: California, Washington DC, Georgia, Illinois, Michigan and New York,[107] but as more studies have been completed, the snapshot taken by this report has been verified as being representative of the way most correction facilities treat their female populations.[108]

A 1997 U.S. Department of Justice investigation found rampant sexual misconduct of correctional officers in Arizona women's prisons.[109] The report detailed rape, sexual touching, fondling and "frequent, prolonged, close-up and prurient viewing during dressing, showering and use of toilet facilities."[110] In 1999, the Federal Bureau of Prisons agreed to a settlement with women incarcerated in the federal detention center in Pleasonton, California, after allegations of guards taking money from male inmates in exchange for allowing

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[103] HUMAN RIGHTS WATCH, *supra* note 18, at 71-78, 119-20, 138-44, 146-49, 186-92, 232-40, 288-96.

[104] *Id.*

[105] *See id* at 90 (providing an example of abuse of authority by prison guards).

[106] *Id.* at 95-97, 155-56, 163-64, 210-11, 259-63, 313-15.

[107] *Id.* at 1.

[108] Amnesty Int'l, *supra* note 1.

[109] *U.S. v. Arizona et al.*, Civil Action No.97-746-PHX-ROS (filed Nov. 1998).

[110] *Id.*

them into female inmate's cells so they could sexually abuse them.[111] Similar reports of abuse were documented in Alabama, Florida, Idaho, Illinois, Maryland, New Hampshire, Ohio, Texas, Virginia, Washington, West Virginia, and Wyoming.[112]

In addition to the DOJ's denouncement of corrections officers' abuse of inmates, the American Corrections Association has condemned such practices, and its standards emphasize the importance of having appropriately trained staff.[113] It mandates the provision of "acceptable conditions of confinement, including appropriately trained staff and sound operating procedures that address [female offenders'] need . . . ."[114]

Once in the criminal justice system, many of the conditions that precipitated the substance abuse are recreated, and they exacerbate many women's already precarious physical and mental health status.[115] The sexual abuse by prison staff that many women suffer creates mental and physical health complications, and beyond those complications, the prison system fails to effectively handle their other health problems, such as HIV/AIDS and pregnancy.

3. HIV/AIDS

In addition to an overwhelming co-occurrence of past sexual or physical abuse and substance abuse, researchers also found a high incidence of HIV/AIDS infection in this population.[116] The link

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[111] Luc White, *Private Settlement Agreement* C96-02905 U.S. District Court of Northern California (March 1998).

[112] Amnesty Int'l, *supra* note 1.

[113] *See* AMERICAN CORRECTIONAL ASSOCIATION, ACA: PAST, PRESENT & FUTURE, *at* http://www.aca.org/pastpresentfuture/principles.htm (last visited Oct. 17, 2002) (discussing the principles upon which the American Correctional Association is based).

[114] *Id.*

[115] HUMAN RIGHTS WATCH, *supra* note 18, at 71-78, 119-20, 138-44, 146-49, 186-92, 232-40, 288-96.

[116] AMERICAN CORRECTIONAL HEALTH, *supra* note 78. *See DOJ*, *supra* note 4, at 8 (indicating that in 1997, 35% of the female inmate population was HIV-positive. Only 22% of the male inmate population was HIV-positive in that same year); PRESSER & VAN VOORHIS, *supra* note 16; Singer et al., *supra* note 87, at 110; Janet L. Mulings et al., *Assessing the Relationship Between Child Sexual Abuse and Marginal Living Conditions on HIV/AIDS-Related Risk Behavior Among Women Prisoners,* 24 CHILD ABUSE & NEGLECT: THE INT'L J., 677-78, 685-86 (2000), Michael J. Sheridan, *Comparison of the Life Experiences and Personal Functioning of Men and Women in Prison,* 77 FAMILIES IN SOCIETY: THE J. CONTEMP. HUM. SERVICES, 423, 423-28 (Sept. 1996) (examining the personal functioning of incarcerated persons). *See also* Kristine Siefert & Sheryl Pimlott, *Improving Pregnancy Outcome During Imprisonment: A Model Residential Care Program,* 46

between physical and sexual abuse and the resulting sense of low self-esteem and stress in these women often leads them to coping mechanisms such as drug use and risky sexual behaviors to escape feelings of low self-worth and anxiousness.[117] Incarcerated women are more than twice as likely to test positive for HIV than incarcerated men, yet few state prisons address this issue appropriately.[118]

According to a recent interview of a woman incarcerated at the California Rehabilitation Center (CRC), women who have tested positive for HIV are taken to a separate site, where they are housed with inmates who are not infected with HIV but who have been convicted of more serious offenses.[119] The fact that they have tested positive for HIV is disclosed to staff and inmates alike.[120] Even though AIDS is not highly contagious, CRC denies women with the disease full access to family visits, and regular access to the recreation yard, and only allows them to leave the HIV unit for infrequent medical visits.[121]

Outside of such stigmatizing psychological insults, the women's physical health concerns are not adequately met. For example, when inmates are too ill to move, they cannot receive medical services or make appointments to see medical personnel, and according to one inmate, "although a nurse was stationed only ten feet away from the unit, prisoners who asked for help outside of sick call were subject to disciplinary action."[122] In *Ramos v. Lamm*, the Tenth Circuit held that "deliberate indifference" to serious medical needs is shown when prison officials have prevented access to medical personnel capable of

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SOC. WORK 125, 127 (2001) (listing HIV/AIDS "[a]mong the health problems that have been documented among drug-dependent women prisoners"); Judith Merenda Wismont, *The Lived Pregnancy Experience of Women in Prison*, 45 J. MIDWIFERY & WOMEN'S HEALTH 292, 295 (2000). *See also* Diane S. Young, *Contributing Factors to Poor Health Among Incarcerated Women: A Conceptual Model*, 11 AFFILIA: J. WOM. & SOC. WORK 440, 447, 455-56 (1996) (describing the poor health of incarcerated women).

[117] Mulings, *supra* note 116, at 681, 685.

[118] Anne S. De Groot et al., *Setting the Standard for Care: HIV Risk Exposures and Clinical Manifestations of HIV in Incarcerated Massachusetts Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 353, 362 (1998).

[119] *See* Shawn Marie Boyne, *Women in Prison with AIDS: An Assault on the Constitution?*, 64 S. CAL. L. REV. 741, 741-43 (1991) (citing an interview with Karen Brody, an inmate at the California Department of Corrections in 1989).

[120] *See id.* at 741-44 (noting that fellow inmates often react with threats of violence towards those infected).

[121] *See id.* at 743-45 (noting an inmate's sentiment that being incarcerated in the CRC with AIDS "was like being in a cage").

[122] *Id.* at 746.

evaluating a prisoner's need for treatment.[123] California, like many other states has clearly violated this standard.

In New Jersey, female inmates who tested positive for AIDS were shackled to their beds for up to six months.[124] In Alabama, an inmate with AIDS almost bled to death when "stitches from routine uterine surgery had torn open, but nurses on three shifts failed to answer her pleas for help."[125] However, other states, such as Ohio and New York, provide infirmaries with amenities suited for those suffering with the illness, and some inmates are placed in a hospital, depending on their condition, suggesting that workable alternatives are possible.[126] Beyond providing for infirmaries, New York also monitors the services it provides its AIDS patients via regular checks of the facilities by the state's Division of Health Services department and provides meeting places for support groups, counseling, and peer education groups.[127]

These programs seem to be adhering to the standard of care described by professional correction's facility organizations policy-setters, such as the DOJ and the ACA.[128] The DOJ, based on the adoption of ACA standards,[129] recommends a program of prevention for infectious diseases through use of identification and assessment measures and health education. The program "emphasize[s] the individual as a cooperative participant in the health care process rather than a passive recipient" and urges that confidentiality regarding HIV status be maintained.[130]

Inmates expect to be deprived of their freedom when they are punished. However, indifference to serious medical needs, such as those associated with HIV/AIDS, should not be allowed to continue, especially when other corrections facilities within the industry mandate otherwise.

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[123] 639 F.2d 559, 578 (10th Cir. 1980).

[124] Amesnty Int'l, *supra* note 1.

[125] *Id.*

[126] *Id.*

[127] Linda Sollish Sikka, *Health Care in New York State Prisons*, 13 IN PUB INTEREST 33, 49, 52 (1993).

[128] American Correctional Association Foundation, *Core Standards for Adult Correctional Institutions* C2-4151, C2-4168 (1996).

[129] *Id.*

[130] Bureau of Prisons, *Infections Disease Management, at* http://www.bop.gov/progstat/6190_02.html (last visited Oct. 13, 2002).

4. Pregnancy

Pregnancy is a physically and emotionally demanding experience, which requires a broad range of services in order to ensure a successful delivery.[131] Approximately 8-10% women who enter prison are pregnant, and recent studies suggest that prisons are providing far from adequate care for incarcerated pregnant women.[132] More specifically, studies found that prison medical services had problems associated with "access, the comprehensiveness of care, and provider sensitivity to the emotional needs and personal desires of the inmates."[133] Still other problems included off-site prenatal care, inadequate prenatal examinations, lack of childbirth preparation classes, lack of emotional support during pregnancy, and an increased rate of cesarean delivery.[134]

Prison policies and treatment by corrections officers exacerbate difficulties faced by pregnant inmates.[135] Among factors such as poor to non-existent prenatal care, effects of drug abuse and complications due to other health conditions, such HIV/AIDS, there are stark examples of callousness to a parent's humanity.[136] For example, in over forty states, babies are taken from their mothers immediately after they are delivered.[137]

A recent account of an inmate in Massachusetts reveals an especially illustrative case of "deliberate indifference" by prison officials to medical needs of pregnant inmates.[138] Karen Allen arrived at the facility pregnant and with severe abdominal pains, and after a month, the pain was so incapacitating that she had to scream from her cell for help.[139] The nurse on duty was going to give her Tylenol but decided against it because "she was 'probably dopesick anyways.'"[140] One month later an "ultrasound showed extensive fluid in her abdominal cavity, indicating a tubular pregnancy."[141] Despite the

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[131] *See* Mertens, *supra* note 35, at 46.

[132] *See id.* at 45-53; Pimlott & Siefert, *supra* note 116 (describing the lackluster incarcerated pregnant women); Wismont, *supra* note 116, at 292-300.

[133] Martens, *supra* note 35, at 46.

[134] Wismont, *supra* note 116, at 293.

[135] *Id.* at 293.

[136] *Id.* at 295.

[137] Amnesty Int'l, *supra* note 1.

[138] *See* Mary Catherine McGurrin, Note, *Pregnant Inmates' Right to Health Care,* 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 163, 187, 188 (1993) (citing Eileen McNamara, *Paying Dearly for the Privatization as a Cost-Saving Measure,* BOSTON GLOBE, June 14, 1992 (Sunday Magazine), at 39 [hereinafter McNamara]).

[139] *See id.* at 188 (citing McNamara at 38).

[140] *See id.* (citing McNamara at 39).

[141] *See id.* (citing McNamara at 39).

seriousness and complexity of such a pregnancy, Karen was not seen again by prison medical staff.[142]

In addition to putting the mother's health at risk, the effects of such poor care are visited on the fetus. Many babies born to incarcerated mothers are more vulnerable to low birth-weight and infant mortality.[143] In many jails and prisons, pregnant women are handcuffed and shackled during delivery, which can lead to maternal stress and a resulting decrease of oxygen flow to the fetus during delivery.[144]

The American Academy of Pediatrics and the American College of Obstetricians and Gynecologists (AAPACOG) recommend regular medical care, monitoring and testing, throughout a woman's pregnancy and emphasize a team approach to health care, which includes involving quality personnel.[145] Pregnancy is a serious medical condition that requires a great deal of monitoring, and the policy promulgated by the AAPACOG was designed to help ensure that pregnant women are provided adequate care.

The ACA states "that obstetrical, gynecological, abortion and family planning services should be provided,"[146] and the Bureau of Prisons mandates that "[t]he Warden shall ensure that each pregnant inmate is provided medical, case management, and counseling services . . . [and] [m]edical staff shall arrange for the childbirth to take place at a hospital outside the institution."[147]

5. Summary

Female offenders bring with them more medical problems than male inmates. In addition, they are usually in the system for a far shorter period than their male counterparts because they are incarcerated for less serious crimes,[148] and "[t]heir health problems are exacerbated by the relatively short-term stay because their

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[142] *See id.*

[143] *See* Mertens, *supra* note 35, at 50-51.

[144] Amnesty Int'l, *supra* note 1.

[145] American Academy of Pediatrics and American College of Obstetricians and Gynecologists, *Guidelines for Prenatal Care* (Frigoletto et al eds., 2d ed., 1988).

[146] *See McGurrin*, *supra* note 138, at 180-81 (citing T.A. RYAN, PREGNANT FEMALE OFFENDERS: PROFILE, PROBLEMS, AND PROGRAMS 13, (1991) (presented at the Fourth National Workshop on Women Offenders, Washington D.C. Aug. 19, 1991).

[147] FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENTS § 6070.05 (1995), *available at* http://www.bop.gov/progstat/6070_05.html (Aug. 9, 1996).

[148] *Cf.* PRESSER & VAN VOORHIS, *supra* note 16, at vii (stating that "most women offenders are less dangerous than male offenders); Sheridan, *supra* note 116, at 426-31 (description of medical impairments faced by female prisoners).

problems are easily ignored."[149] The cycle of violence and drug abuse has led many women into incarceration, and ignorance of their increased need for care is a further insult that adds disproportionately to their sentences.[150]

In order for Eighth Amendment liability to attach, the prison official must have knowledge of a risk of the serious harm to the inmate.[151] In light of the overwhelming evidence of the critical role of past experiences of abuse and continuing substance abuse in future crime prevention, prison officials should have sufficient "knowledge" to implement gender specific programs to address the particular needs of women. James Park has argued that the "knowledge" requirement should be replaced by the duty owed by landowners to invitees. Where landowners have represented their grounds as safe, they are held liable for all known and reasonably discoverable dangers existing on their property.[152] He asserts that because the state creates reliance that punishment will not be "cruel and unusual," prison officials should be liable for the serious harms suffered by a prisoner "caused by the prison official's failure to take reasonable precautions to protect prisoner from risks of serious harm that are discoverable with reasonable care."[153]

Inmates are involuntarily placed in the care of prison officials and as a result, are especially vulnerable to their failures to provide adequate medical treatment. Standards instituted by corrections facility organizations should inform the court of what level of care is required to ensure the safety of the inmates. The justice system and corrections facilities may not feel they owe a particular duty to women, but the agencies that set the standards of care for the corrections industry, and mental and medical health professionals recognize women's needs and do not feel that their sentences should be made worse by inadequate and abusive treatment.[154]

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[149] *See McGurrin*, *supra* note 138, at 188-89 (citing McNamara at 42).

[150] *See* Froyd, *supra* note 7, at 1494-95 (stating that women often "find themselves incarcerated because the men in their lives persuade, force, or trick them into carrying drugs").

[151] *Cf.* Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify"); *Farmer*, 501 U.S. at 837.

[152] James J. Park; *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates From Serious Harm*, 20 QUINNIPIAC L. REV. 407, 414 (2001).

[153] *Id.*

[154] *See* industry organizations, *supra* note 78; *Henderson*, *supra* note 25 at 582 (recommending women specific substance abuse treatment programs while

V. FOURTEENTH AMENDMENT, EQUAL PROTECTION CLAIM

Beyond the Eighth Amendment, the Fourteenth Amendment's Equal Protection clause is another possible constitutional mechanism that incarcerated women can utilize to challenge the failure of corrections staff to provide adequate medical treatment.[155] Traditionally, fewer women have been incarcerated than men,[156] and corrections facilities have successfully argued that they are justified in expending less money to acquire the same resources for women as they have for men because women's facilities are smaller.[157] The argument is that where corrections facilities are facing budgetary constraints, a larger amount of money should be given to the prisons with more prisoners.[158] Therefore, offering the same care to male and female inmates would be an unreasonable burden on prison resources.[159]

In order to bring a gender-based Equal Protection claim, a plaintiff must show that the government policy discriminates on the basis of gender either 1) on its face, or under a 2) facially neutral policy.[160] In addition, the policy must have: (a) a discriminatory impact and (b) the government must have a discriminatory purpose in

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incarcerated); McGurrin, *supra* note 138, at 180 (citing T.A. RYAN, PREGNANT FEMALE OFFENDERS: PROFILE, PROBLEMS, AND PROGRAMS 13 (1991) (presented at the Fourth National Workshop on Women Offenders, Washington D.C. on Aug. 19, 1991); American Public Health Association's Standards for Health Services in Correctional Institutions, *supra* note 78.

[155] *But see* Rosemary M. Kennedy, *The Treatment of Women Prisoners After the VMI Decision: Application of a New "Heightened Scrutiny,"* AM. U.J. GENDER & L., Fall 1997 at 65-66 (noting the Court's reluctance to apply Fourteenth Amendment analysis to prison regulations).

[156] *See, e.g.*, NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN, PRISONS, AND SOCIAL CONTROL, (2d ed. 1990).

[157] Keevan v. Smith, 100 F.3d 644, 649 (8th Cir. 1996) (explaining that women's facilities are smaller "because they account for such a small proportion of the total prison population"). *See* Women Prisoners v. District of Columbia, 93 F.3d 910, 925 (D.C. Cir. 1996) (noting that "[i]t is hardly surprising" that women at smaller facilities received fewer resources than men).

[158] *Id. Cf.* Glover v. Johnson, 35 F. Supp. 2d. 1010, 1018-20, 1022-23 (E.D. Mich. 1999) (holding that though fewer number of programs exist for female inmates when calculated as opportunities available based on population size, female inmates were held to have equal opportunity to job and educational training programs as the male inmates).

[159] *Id.*

[160] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 528, 529 (Richard A. Epstein et al. eds., 1997) (presenting the approach that is taken in equal protection analysis).

creating it despite the fact that men and women are similarly situated.[161]

Generally, women's claims for equal treatment with respect to prison policies have been denied because the court does not feel that they are facially discriminatory, nor that they have a disparate impact. In *Klinger v. Department of Corrections*, inmates filed suit against the Nebraska Center for Women (NCW) for providing substandard vocational, educational, and employment programs to female inmates as compared to male inmates at the Nebraska State Penitentiary (NSP).[162] The court held the plaintiffs failed to show that they were similarly situated when compared to male inmates because: NSP is larger and has more violent criminals with longer sentences and because female inmates are inherently different based on the fact that they are more likely to be primary caregivers and victims of physical or sexual violence.[163] Further, the court held that because they challenged the differential *treatment* of male and female inmates, as opposed to the overtly discriminatory *policy* of segregating the sexes, the plaintiffs did not challenge a facial classification and therefore did not meet the elements necessary to demonstrate an Equal Protection violation.[164] The court also held that the plaintiffs' disparate impact claim was without merit because the plaintiffs did not show that prison officials acted with discriminatory intent.[165]

However, some courts recognize that financial constraints are not a sufficient state interest to justify disparate treatment of male and female inmates. In *Casey v. Lewis*, female inmates at an Arizona prison filed suit against prison officials for failing to provide equal treatment with respect to mental health care services because male prisoners were offered better access to substantively richer mental health programs.[166] Men were provided with programs in computer training, communication training, stress management, anger control and long-term chronic care treatment for mental illness.[167] Women were offered aerobics, board games, movies and "Women Who Love Too Much," a group-treatment course.[168] The court ruled in favor of the plaintiffs and held that the additional costs in hiring extra mental

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[161] *Id.*

[162] *See Klinger*, 31 F.3d 727, 729 (8th Cir. 1994), cert denied, 115 S. Ct. 1177 (1995).

[163] *Id.* at 731-32.

[164] *Id.* at 734.

[165] *Id.*

[166] *Casey*, 834 F. Supp. 1477, 1550-51 (D. Ariz. 1993).

[167] *Id.* at 1551.

[168] *Id.*

health staff was not an "exceedingly persuasive" reason to justify continuing to deny equal treatment to the female inmates.[169]

Despite rulings like *Casey*, many women continue to face inequitable and inadequate medical treatment in prison as compared to men. In addition to the general resistance to prisoner claims, many Equal Protection claims made specifically by women prisoners fail because the court determines that male and female prisoners are not similarly situated with respect to medical needs. Courts have focused on the fact that there are differences between men and women in: 1) population levels of the respective facilities; 2) the average security levels of the prisoners; 3) the types of crimes committed; 4) the average length of the sentence; 5) the fact that women are "more likely to be single parents with primary responsibility for child rearing";[170] 6) that women are more likely than men to be victims of sexual or physical abuse and 7) that male prisoners are "more likely to be violent and predatory."[171] Further, many courts feel that the medical services provided to both genders are roughly equivalent and as noted previously, they give much discretion to corrections facilities to determine the appropriate treatment of inmates.[172]

The court's reasoning demonstrates recognition of the differences between male and female inmates but essentially says that the things that make male and female inmates different are not significant enough to justify providing different types of medical care to female inmates. Equal treatment does not mean providing the same treatment. Simply because women are different, with different needs, the court's rendering them not similarly situated should not in turn give corrections facilities free reign to treat them in a manner which does not adequately meet their essential medical needs. The fact that the court does not consider women's health concerns significantly different enough from men's health concerns should not give rise to the failure of corrections facilities to recognize female inmates' medical needs altogether.

While it is true that abuse occurs against both men and women in the prison setting under facially neutral prison policies, the fact that these policies are neutral allows women's medical needs to go grossly unaddressed. Continuing to assume that providing equity in resources, even if such equity was present, is sufficient to provide care

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[169] *Id.* at 1550, 1551-53.

[170] *Pargo*, 894 F. Supp. at 1261 (S.D. Iowa 1995) (citing Klinger v. Dep't of Corrections, 31 F.3d 727, 731-32).

[171] *Id.* (citing *Klinger*, 31 F.3d at 731-32); *Timm*, 917 F.2d at 1103; *Klinger*, 31 F.3d at 731-32 (8th Cir. 1994), *Glover v. McGinnis*, 117 S. Ct. 67, 136 (1996).

[172] *Id.*

that is adequate to both sexes is an error that results in disproportionate harm to female inmates. Men and women are not similarly situated with respect to need for medical treatment: 1) women are far more likely to have suffered past physical and/or sexual abuse and have attendant injures, both physical and psychological; 2) women are more likely to suffer sexual assault by corrections officers; 3) women are far more likely to have HIV/AIDS; and 4) women can become pregnant.[173]

Despite the fact that women have different medical needs from men, women are similarly situated with respect to the fact that they are incarcerated. This should be sufficient to give them standing to file a claim for the violation of their rights guaranteed under the Equal Protection clause. Once under protection of the clause, the court should examine what would create equal circumstances under which adequate care could be provided to female inmates. The Supreme Court has suggested that government officials can only institute policies which benefit women to: 1) remedy past discrimination or 2) remedy differences in opportunity where gender classifications have been made.[174]

A. Remedying Past Discrimination

In *Califano v. Webster*, the Court upheld a condition for calculating social security benefits under the Social Security Act that advantaged women as compared to men.[175] The Court held that the difference in calculating benefits for women was permissible because it advanced the goal "of redressing our society's longstanding disparate treatment of women,"[176] and because, "it operated directly to compensate women for past economic discrimination."[177]

B. Remedying Differences in Opportunity

In *Sclesinger v. Ballard*, the Supreme Court upheld a navy regulation that allowed women to stay employed for a longer period of time than men, despite the fact that they had not been promoted.

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[173] Amnesty Int'l, *supra* note 1 and *see infra* note 170 and accompanying text (regarding cases that cite factors of why female inmates are not similarly situated to male inmates).

[174] *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (justifying gender based classifications in the navy because of differing opportunities available to the sexes); Califano v. Webster, 430 U.S. 313, 318 (1977) (upholding social security calculations that favors women in determining benefits).

[175] *Califano*, 430 U.S. at 318.

[176] *Id.* at 317.

[177] *Id.* at 318.

The Court held that this policy was constitutional because men had more opportunities for promotion than women: "Congress may quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with fair and equitable career advancement programs."[178]

Califano and *Schlesinger* suggest that even if women were considered similarly situated to men with respect to their medical needs under the Fourteenth Amendment, a non-neutral policy would be justified to remedy corrections facilities' discrimination against women in their failure to provide adequate treatment.[179] Because female inmates have suffered and continue to suffer under discriminatory prison practices, prison officials would not be violating the Equal Protection clause by implementing programs that address medical concerns specific to them.

Since the early nineteenth century, when men and women were housed together, female inmates have been afforded less protection and less access to prison resources than male inmates.[180] In addition to the violence and failure to provide adequate care within the prison, these women have been subjected to a level of harm that Congress has found incapacitates their ability to access the full rights of their citizenship.[181] Addressing the medical concerns that incarcerated women face that result from actual and threatened violence, within and outside of the prison, would be remedying past and current discrimination.

VI. HOW PRISONERS FILE A CONSTITUTIONAL CLAIM

Many inmates, but especially female inmates, have had a difficult time in making the justice system respond to the violation of their

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[178] Schlesinger, 419 U.S. at 508.

[179] *See id.* (suggesting that when men and women are not similarly situated, or when there has been a history of discrimination, Congress may pass laws that treat the sexes differently).

[180] *See* RAFTER,*supra* note 156, at 5-10 (discussing the extreme neglect of female inmates during the slow development of separate prisons for each gender in New York, Ohio, and Tennessee).

[181] *See Crimes of Violence Motivated by Gender: Hearing on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d cong. 7-8 (1993) (providing the statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Def. and Educ. Fund).

constitutional rights. They face discrimination and resistance in the adjudication and even in the filing of their claims.

Prisoners can bring a constitutional cause of action against state corrections facilities for the inadequacy of prison conditions under 1) Section 1983;[182] 2) the Civil Rights of Institutionalized Persons Act;[183] or 3) the Violence Against Women Act;[184] or 4) the Equal Protection Clause of the Fourteenth Amendment.[185] However, the recent trend of the Supreme Court reflects a desire to limit the civil rights of the incarcerated in general and more specifically, the rights of female prisoners.[186]

A. Section 1983

The Civil Rights Act of 1871, more commonly known as Section 1983, creates a private, tort-like cause of action against any person who, "under color of" state or local law has deprived an individual of his or her constitutional rights.[187] It has been used by individuals to prosecute State actions that they believe encroach on their constitutional rights.[188]

The Supreme Court has recently been moving towards narrowing the Section 1983 claim.[189] In *Lewis v. Casey*, the Court held that a constitutional violation was shown only when the failure to provide legal assistance or library access causes actual injury to prisoner's contemplated or existing litigation.[190] Scalia posited that "[p]risons are inherently dangerous institutions, and decisions concerning safety, order and discipline must be, and always have been, left to the sound discretion of prison administrators," seemingly giving prison officials near-unlimited authority to infringe on the constitutional rights of prisoners.[191] This narrowing of the claim leaves little room for women in "inherently dangerous" institutions, where there is little order and next to no safety, to prosecute prison officials who create the dangers they are given the authority to protect against.

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[182] 42 U.S.C. § 1983 (1988).

[183] 42 U.S.C. § 1997 (2000), reprinted in 1980 U.S.S.C.A.N. 801 et seq. [hereinafter CRIPA].

[184] 42 U.S.C. § 13981 (1994).

[185] U.S. CONST. amend. XIV, § 1.

[186] 18 U.S.C. § 3626 (2001); Archer v. Dutcher, 733 F.2d 14 (2d Cir. 1984).

[187] 42 U.S.C. § 1983 (1988). *See also* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Source of Law* 42 STAN. L. REV. 51, 54-55 (1989) (describing a source of prisoner legal action).

[188] Beermann, *supra* note 187, at 51-55.

[189] *Id.* at 72-83.

[190] Lewis v. Casey, 518 U.S. 343 (1995).

[191] *Id.*

Section 1983 was designed to protect prisoners against prison practices that violate their federal and constitutional rights by giving the courts discretion to determine whether such rights had been violated. However, Scalia's pronouncement seems to give this discretion back to the people who are infringing on these rights in the first place. Essentially, the Court has given prison officials a presumptive affirmative defense to denying prisoners access to their rights.

The fact that prisoners have to show a significant amount of evidence to overcome this presumption in order to show that they have suffered actual harm from the denial of their rights, seems to add a very difficult hurdle to overcome in the process of filing a claim.

B. Acts that Limit Prisoner Claims

1. CRIPA

The Civil Rights of Institutionalized Persons Act (CRIPA) was instituted with the hopes of slowing the flow of prisoners' suits brought under Section 1983.[192] The Supreme Court's initial, broad interpretation of Section 1983 dramatically increased the number of claims prisoners filed.[193]

Under CRIPA, the court is allowed discretion to order a 90-day continuance of any Section 1983 action, during which time the inmate is required to exhaust all other administrative remedies provided by the corrections facility.[194] In order to comply with the Act, state facilities must develop an inmate grievance procedure that is approved by the United States Attorney General.[195] However, there is no cause of action under CRIPA if the state fails to develop a grievance procedure, fails to have such a procedure approved by the U.S. Attorney General, or if it fails to adhere to the provision of a procedure it has already adopted.[196] Few states have complied, and

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[192] 42 U.S.C. § 1997; Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 936 (1986).

[193] *See id* at 935 (explaining a factor contributing to the number of claims filed).

[194] 42 U.S.C. § 1997e(a)(1982) (provides: "The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 1997e or 1997c of this title")

[195] 42 U.S.C. § 1997e(b)(1) (2002).

[196] 42 U.S.C. § 1997e(d) (2002).

the result has further weakened prisoners' ability to access legal recourse.[197]

2. PLRA

In a more recent attempt to curb frivolous litigation by prisoners, Congress enacted the Prison Litigation Reform Act (PLRA),[198] which creates procedural barriers for inmates that other plaintiffs do not have to overcome.[199] The incentive for the Act came after a flood of litigation by prisoners and the realization that inmates, who have a lot of time and few cost barriers, would not be deterred from filing suit unless strong disincentives were created.[200] It stipulates more stringent requirements regarding the type of claims that can be filed *in forma pauperis*.[201] Prior to the Act, the filing of an *in forma pauperis* affidavit allowed those who could not afford the costs associated with filing a claim to disregard filing fees and court costs. Under PLRA, regardless of whether indigent prisoners win or lose their cases, they are not excused from paying court fees.[202] In addition, they could lose good behavior credit for filing a frivolous suit, which would extend the length of their incarceration.[203]

The Supreme Court's respect for prison official's discretion in their application (or non-application) of prison policies has the potential to create a hostile climate for prisoners' constitutional claims. This failure to recognize the importance of prisoners' rights cripples the ability of many female inmates to take legal action against those prison officials who perpetrate violence against them, either by failing to recognize their medical needs or by their overt abuse of inmates.

C. Violence Against Women Act: Bias in the Justice System

In addition to the court's recent resistance to inmates' claims, female prisoners also encounter a second layer of resistance: gender bias in the courtroom.[204] In the 1980s, an effort known as the Gender

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[197] *See* Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1271 (1998) (explaining that few states have enacted inmate grievance procedures under CRIPA).

[198] *See* 18 U.S.C. § 3626 (1996) (giving the courts guidelines as to procedures regarding prisoners' appeals).

[199] Herman, *supra* note 197, at 1230.

[200] *Id.* at 1231.

[201] 18 U.S.C. § 3626(a)(1)(A) (1996).

[202] *Id.* at § 3626.

[203] 18 U.S.C. § 3626(a) (1996).

[204] American Bar Association (ABA), *Facts About Women in the Law* 6, 6

Bias Task Force movement was implemented in response to numerous academic studies that demonstrated that women were being treated differently in court proceedings.[205] Especially troubling, there were more than 20 reports which revealed that women coming forward with claims of domestic violence were blamed for their injuries, treated as if they created the problem, or told that their complaints had little importance.[206] The New York Task Force felt that "[c]ultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law."[207] The report went on to say that, "women uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference and hostility.[208]

Since the 80s, Congress responded to the bias that women face in the court system and to the violence that brought them into the justice system with the Violence Against Women Act (VAWA), which, in addition to increasing the federal penalties for rape, creates a federal civil rights cause of action for any violent crime motivated by gender, whether it is public or private.[209] After reviewing numerous studies on the occurrence of violence against women in the United States, the Senate Judiciary Committee reported that "[v]iolence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined."[210]

Under VAWA, a violent crime is any act that would be a federal or state felony, even if the offense has not resulted in any formal charges, prosecution, or conviction.[211] Despite its promise to protect women from violence, the Supreme Court struck down the Act in *United States v. Morrison* because the Commerce Clause and Section 5 of the Fourteenth Amendment did not give Congress the power to enact the provision.[212] Congress' power to create VAWA was rooted in the authority given to it under the Commerce Clause and under

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(1998).

[205] *Id.* (citing Judith Resnick, *Gender in the Courts: The Task Force Reports*, The Woman Advocate (1996) and The American Bar Association, *Gender Fairness Strategies: Maximizing Our Gains* proposal submitted to the State Justice Institute (May 1997)).

[206] *ABA*, *supra* note 204.

[207] *Id.*

[208] *Id.*

[209] *See* Shargel, *supra* note 85, at 1850-51 (noting that VAWA "criminalizes interstate domestic violence").

[210] S. Rep. No. 102-197, at 39 (1991).

[211] Shargel, *supra* note 85, at 1851.

[212] 529 U.S. 598, 619 (2000).

section five of the Fourteenth Amendment.[213] The most controversial aspect of the Act was the Civil Rights remedy, which created a federal civil rights cause of action for victims of violent crimes "motivated by gender."[214] It was held unconstitutional in *Morrison* because it regulated an activity that did not substantially affect interstate commerce and because it had too broad a reach in proscribing private, violent actions.[215]

If the Act had survived the court's constitutional review, it could have given women a much more direct avenue through which to seek legal recourse for the physical abuse they suffer.

Representative Patricia Schroeder explained the importance of the remedy the Act offered at the VAWA hearings: "Gender motivated violence cannot be adequately affected by existing civil rights structures because gender crimes manifest themselves differently than other crimes – they tend to be acts by individuals."[216] In order to have meaning, the Act had to reach violence committed by private individuals.[217]

Despite the already existing legal remedies, Congress felt that the threat of violence had prevented women from education, employment, and from exercising their full citizenship rights under the constitution and that more reaching measures needed to be put in place to protect such rights.[218] Presumably, if women had a way to protect their civil rights that have been infringed by others, they would feel more secure about their ability to prosecute perpetrators of violence. With stronger legal remedies available, fewer women might need to medicate themselves with drugs when the source of their pain has been removed, and as a result, fewer women would be incarcerated and subject to the state's inattention to their medical needs.

VII. INTERNATIONAL TREATIES AND CONVENTIONS

Previously, I discussed the first two prongs of the Eighth Amendment proportionality test in which a court will determine whether a punishment is too severe for the crime committed by

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[213] *Id.* at 607.

[214] *Id.* at 605, 619, 626-27; 42 U.S.C. § 13981(b).

[215] *Morrison*, 529 U.S. at 609-13, 619-24.

[216] *Crimes of Violence Motivated by Gender: Hearing on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 95 (1993) (providing the statement of Rep. Pat Schroeder).

[217] Shargrel, *supra* note 85, at 1882.

[218] S. Rep. No. 102-197, at 39 (1991).

examining the 1) seriousness of the crime and 2) how the other acts are punished in the same jurisdiction. The third prong of the proportionality test is called inter-jurisdictional analysis. Under this arm of the test, a court will look at how the same or similar crimes are punished in other jurisdictions. I will suggest that: 1) the U.S. punishes women more severely than other countries; 2) that international standards can help inform current policy on the care female inmates receive; and 3) that the barriers to adopting such standards have been another area in which women have been unable to seek sufficient relief for the failure to provide adequate medical treatment. Finally, I will turn to possible alternatives to the current prison treatment of women that might satisfy international standards and will suggest reasons why these alternatives are necessary for women.

A large number of industrialized nations have signed conventions and treaties designed to prevent the mistreatment of prisoners generally and the mistreatment of women specifically, yet the United States has demonstrated a strong resistance to adopting these standards.

The 1977 case of *Glover v. Johnson* illustrates the nature of the struggle to get domestic recognition of international standards in American law.[219] *Glover* was a class action suit filed against the State of Michigan by women prisoners whose constitutional rights to equal protection and access to the courts were being denied.[220] Women at a state-run prison facility in Michigan alleged that the state failed to provide the range of treatment programs and prison conditions afforded to male prisoners.[221] The plaintiffs won the suit but the injunctive remedies would not come to fruition until 20 years later because of the outright refusal of prison officials to comply with the court order.[222]

As reports of the conditions within the State prisons came to light, they caught the attention of various human rights organizations and government agencies.[223] The Department of Justice followed this report with an investigation of its own and found that the conditions detailed in the report continued to exist in 1998.[224] The Chief U.S.

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[219] Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979).

[220] *Id.* at 1076.

[221] *Id.*

[222] HUMAN RIGHTS WATCH, *supra* note 18, at 228-30.

[223] *Id.* at 224.

[224] *See* Amnesty Int'l, *supra* note 1 (citing Dept. of Justice report as seen in *The Insider* – a Public Information Service of the Michigan Department of Corrections, 20 Nov. 1998).

Assistant Attorney General, Civil Rights Division, Deval Patrick found the following when he interviewed women in Michigan prisons:

> There is sexual abuse by both male and female guards. Pregnancies have resulted from these activities and the authorities have punished women by revoking their parole. Nearly every inmate interviewed by the Justice Department reported various sexually aggressive acts by officers who corner inmates in cells and during work.[225]

In 1999, Amnesty International shifted its investigation of human rights violations abroad and focused on the crisis in domestic prisons.[226] It launched an exhaustive survey of all U.S. prisons, with a particular focus on women's facilities and compiled its findings in a report entitled "*Not Part of My Sentence*": *Violations of the Human Rights of Women in Custody.*"[227] In addition to confirming the findings made by Human Rights Watch and the Department of Justice, Amnesty found a sharp increase in the population, severe overcrowding, the continued physical and sexual abuse of prisoners by corrections officers, and the shackling of pregnant prisoners during labor.[228]

The *Glover* case and the work of non-government organizations (NGOs) alerted the international community to the abysmal conditions in U.S. prisons and helped to create an awareness of the need to incorporate international treaties and conventions on prisoner treatment into U.S. prison policies.[229]

A. International Standards: Applicable Treaties and Conventions

Currently, there are four treaties and/or conventions that apply to and define the standard of care for women prisoners: 1) the Convention on the Elimination of All Forms of Violence Against Women;[230] 2) the International Covenant on Civil and Political Rights;[231] 3) Convention Against Torture;[232] and 4) United Nations

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[225] *Id.*

[226] *Id.*

[227] *Id.* (citing Human Rights Watch, "*Not Part of My Sentence*": *Violations of the Human Rights of Women in Custody*" (1996)).

[228] *Id.*

[229] *Id.*

[230] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 O.N.T.S. 13.

[231] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 174-76.

[232] Convention Against Torture and Other Cruel, Inhuman or Degrading

Minimum Rules for Treatment of Prisoners.[233] I will briefly describe each and discuss: 1) whether they have been adopted in the United States; 2) the barriers to incorporating international standards into domestic jurisprudence; and 3) suggestions for ways in which international standards should be used to inform United States policy on prisoner care.

The process of adopting international treaties into domestic law involves: 1) signature and 2) ratification.[234] Signature is a process that formally expresses a country's willingness to become a party that is prepared to apply a treaty's provisions.[235] The signature binds the government not to do anything that would defeat the goal and purpose of the treaty while it considers whether it will ratify it.[236] Ratification is the procedure that makes a treaty binding and creates a venue for international scrutiny to determine if the government is upholding and enforcing the treaty's provisions.[237] After ratification, a treaty has the status of a domestic law, unless some other federal statute has superceded it or unless it requires some legislation in order to implement it.[238]

1. Convention on the Elimination of All Forms of Violence Against Women

The Convention on the Elimination of All Forms of Violence Against Women includes provisions particularly pertinent to incarcerated women.[239] Most importantly, it explicitly states that women have the right to not be subjected to gender-based violence, the definition of which includes any "violence that is directed against a woman because she is a woman" or violence that affects women disproportionately.[240]

Over 165 countries have ratified this treaty, but the United States, along with Afghanistan and Iran, has failed to sign the accord.[241]

Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 113. (June 26, 1987).

[233] *United Nations Standard Minimum Rules for Treatment of Prisoners* (Aug. 30, 1955), U.N. Doc A/CONF/6/1, annex, I, A.

[234] Amnesty Int'l, *supra* note 1.

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] Restatement (Third) of Foreign Relations Law of the United States § 302 (1987).

[239] Amnesty Int'l, *supra* note 1.

[240] *Id.*

[241] *See* Kate Snow, *U.S. Senate Urged to Pass Women's Rights Treaty, at* http://www.cnn.com/200/us/03/05/womens.rights (last viewed Sept. 8, 2001).

President Carter signed the treaty in 1979, but it requires two-thirds of the Senate to be ratified, which has as yet to occur.[242] Some senators oppose the treaty because they feel it imposes unfair obligations on the U.S. because it requires the signing country to give effect to the treaty provisions over U.S. laws and policies where the treaty and U.S. laws and policies conflict.[243]

2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) has been signed by over forty nations and protects the right: 1) not to be subjected to torture or cruel, inhumane or degrading treatment or punishment; 2) of any detained person to be treated with humanity and with respect for the inherent dignity of human person; and 3) the right to privacy without arbitrary interference.[244]

The United States ratified the treaty in 1992, but reserved the right to not implement certain provisions due to the fact that there were already constitutional provisions that proscribed the same conduct.[245] The United States did not adopt ICCPR provisions which proscribe the "degrading treatment or punishment" [246] of prisoners because of their similarity to the Eighth Amendment's stipulations against "cruel and unusual punishment." [247] Several countries have opposed the U.S.' failure to adopt the provision and suggest that such a rejection is "incompatible with the object and purpose of the Covenant."[248] Under international law, such a rejection is not considered valid and the entire treaty is still binding against the country.[249]

3. Convention Against Torture

The Convention Against Torture sets a standard for how prisoner complaints should be handled and stipulates that: 1) competent authorities must investigate claims of torture where there are

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[242] *Id.*

[243] *Id.*

[244] International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 172-77.

[245] Amnesty Int'l, *supra* note 1.

[246] *Id.*

[247] U.S. CONST. amend. VIII.

[248] *See* Amnesty International, United States of America; Rights for All: *"Not Part of My Sentence": Violations of the Human Rights of Women in Custody,* http://www.amnesty.org/ai.nsf/Index/AMR510011999 (Jan. 3, 1999) (stating criticism of United States for not implementing Article 7 of the International Covenant on Civil and Political Rights).

[249] *Id.*

reasonable grounds to believe that it occurred; 2) the complaint must be reviewed by an impartial body in a prompt fashion; and 3) for those who prove their complaint, adequate redress should be available in the form of compensation.[250]

The United States ratified the treaty in 1994.[251] However, as with the ICCPR, the United States reserved the right to implement "cruel, inhuman or degrading treatment or punishment"[252] only to the degree such provisions fell within the meaning of the Eighth Amendment's prohibition against "cruel and unusual punishment."[253]

4. United Nations Minimum Rules for Treatment of Prisoners

The United Nations Minimum Rules for Treatment of Prisoners (Standard Rules) also contain specific provisions relating to incarcerated women, which stipulates: 1) no male member of the staff may enter the part of the institution set aside for women unless accompanied by a woman officer; 2) women prisoners should be attended and supervised only by women officers.[254]

Like the Convention Against Torture, the Standard Rules have been ratified by the U.S. but with reservation and/or with a failure to comply with reporting requirements, and as a result neither treaty has been enforced.[255]

The standards encompassed in these four treaties, conventions, and covenants serve as a measure of what the international community finds acceptable treatment of incarcerated women. The inter-jurisdictional review, combined with the intra-jurisdictional analysis suggests that the American criminal justice system is punishing women disproportionately for the non-violent, drug-related crimes they have committed.

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[250] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 11-14, 1465 U.N.T.S. 113, 116 (June 26, 1987).

[251] Amnesty Int'l, *supra* note 1.

[252] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 11-14, 1465 U.N.T.S. 113, 116 (June 26, 1987).

[253] *Id.*; U.S. CONST. amend. VIII.

[254] *United Nations Standard Minimum Rules for Treatment of Prisoners* (Aug. 30, 1955), U.N. Doc A/CONF/6/1, annex, I, A.

[255] Amnesty Int'l, *supra* note 1.

B. Barriers to Incorporating International Standards into Domestic Law & Ways to Use International Standards to Inform U.S. Standards of Prisoner Care

By the failure of the U.S. to comply with reporting requirements and its refusal to adopt particular provisions of human rights treaties, conventions, and covenants, the U.S. has demonstrated its reluctance to allow any international law to directly influence domestic law.[256] Advocates of adopting international standards in law governing human rights have argued against this resistance and suggest that Section 1983 creates a legal mechanism for bringing international law to bear on domestic law.[257]

Section 1983 was designed to create a private cause of action for individuals whose constitutional "rights, privileges, and immunities" had been violated,[258] but the Supreme Court has interpreted that broadly to mean that Section 1983 can be "used to secure *any* federal rights by giving them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause."[259] The Supreme Court has yet to rule on whether international treaties can be incorporated into domestic law through Section 1983 claims, but a recent district court case, *White v. Paulsen*, is representative of the trend of other courts to decline to address the matter.[260] The *White* court did not rule on the issue because it "was being asked to address a matter that is principally entrusted by the federal constitution to Congress or the Executive."[261]

Until Congress, the President, or the Supreme Court decides to provide guidance, this issue will languish in uncertainty, the human rights violations occurring in women's prisons will continue to occur, and individuals with claims will not have any legal recourse. Alternatively, courts should consider the Eighth Amendment as another legal forum through which international standards can be

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[256] Restatement, *supra* note 238.

[257] Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law – A Case Study of Women in United States Prisons*, 13 HAR. HUM. RTS. J. 119-20 (2000).

[258] U.S. CONS. amend. XIV, § 1; Geer, *supra* note 257.

[259] *Geer*, *supra* note 257 at 121 (interpreting *Rhodes v. Chapman*, 441 U.S. 600, 612-13 (1979)).

[260] *See* White v. Paulsen, 997 F. Supp. 1380, 1383, 1385, 1387 (E.D. Wash. 1998).

[261] *See id.* at 1385 (listing several factors that influenced the Court's decision not to address the issue).

applied to domestic law. To determine if a sentence imposes cruel and unusual punishment, the court surveys how proportionality is defined within its own jurisdiction and how it is defined in other jurisdictions. In its insistence on intra-jurisdictional and inter-jurisdictional review, the Eighth Amendment standard places a duty on the courts to look to domestic law and international law to define the appropriate levels of punishment for a non-serious crime.[262]

This notion falls in line with the current trend toward the developing interconnectedness in global markets and for those markets to be governed by unified legal principles. The U.S. has availed itself of contact with the international community, and in doing so, it has influenced and been influenced by foreign governments and their governing principles.

C. Alternative Prison Policies

Using professional corrections organizations and medical association policies and international standards, a broadened level of medical care should be mandated for incarcerated women. The DOJ, the ACA, and the NCJA recommend the incorporation of substance abuse programs that utilize therapeutic strategies from the public health, mental health, medical, and faith communities.[263] Offering community-based alternatives is one approach that could promote this philosophy and has been gaining political momentum in a few states.[264] Women identified as having special needs such as substance abuse problems, HIV/AIDS, and/or pregnancy, could be treated in residential facilities by community professionals who can more easily address their specific needs without being encumbered by correctional facility regulation.[265] Already, public interest organizations have risen to the challenge by garnering funding from federal grants and other grant-providing institutions to finance such programs.[266]

Simple measures suggested by international standards can help alleviate many problems with corrections officer abuse: 1) no male member of the staff may enter the part of the institution set aside for women unless accompanied by a woman officer and 2) female prisoners should be attended and supervised only by female

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[262] Dressler, *supra* note 13.

[264] Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM. J. GENDER & L., 1, 22 (1995).

[265] *See id.* at 21-22 (discussing the benefits of alternative sentencing for female offenders).

[266] *Id.* at 22.

officers.[267] In addition, a grievance policy that is easily accessible to inmates and ensures their confidentiality should also be put in place to alleviate concerns about retaliation.[268]

D. Justifications for New Policies for Women

At the core of the correctional system's unwillingness to provide women with adequate medical treatment is the failure to recognize the validity of women's experiences within our culture. The Senate Judiciary Committee has reported that "[v]iolence against women is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined."[269] Women who are victimized by the threat or reality of violence have a different quality of life, and because of the psychological and physical debilitation that results, they face towering hurdles when they try to move out from under such situations.[270] Despite female offenders' constitutionally guaranteed right to adequate medical treatment, the justice system helps perpetuate violence against women by its failure to account for their experiences in sentencing laws and in its treatment of them once in correctional facility.

1. The Disparity Created by Mandatory Minimum Sentencing Laws

The disparity in sentencing is highlighted by comparing sentencing guidelines for women who commit more serious crimes like murder to those who commit nonviolent drug offenses.[271] Women who commit homicide usually do so in response to perceived or actual physical or sexual assault from perpetrators known to them.[272] The Department of Justice statistics support these findings, reporting that roughly 62% of female violent offenders had a prior relationship with the victim as an intimate, relative or acquaintance.[273]

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[267] *United Nations Standard Minimum Rules for Treatment of Prisoners* (Aug. 30, 1955), U.N. Doc A/CONF/6/1, annex. I, A.

[268] *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 18, at 104-05 (providing a policy example).

[269] Shargrel, *supra* note 85.

[270] *See* J. Barzelatto, *Understanding Sexual and Reproductive Violence: An Overview* 63(Supp. 1) INT'L J. OF GYNECOLOGY & OBSTETRICS, S13, S14-S16 (1998) (arguing that violence to women is related to a global culture of violence). *See also* Singer et al., *supra* note 87, at 103-11; Sheridan, *supra* note 116, at 427, 429-32.

[271] *DOJ*, *supra* note 4, at 10.

[272] *See id.* at 4 (indicating that 60% of the murders committed by women were against an intimate or family member).

[273] *Id.* at 4.

Women who commit such violent acts are often given shorter sentences because the judge is allowed to consider the level of premeditation involved in the act.[274]

In 1996, Michael Sheridan, an Associate Professor at the Virginia Commonwealth University School of Social Work, conducted a study of incarcerated men and women and found that women used drugs more frequently than men. [275] He also found that women used them more often than men to "block out painful feelings/events" and to "escape reality"[276] – reasons for drug use which studies suggest reflect a "self-medicating function."[277] In delving into the disparity in substance abuse between the genders, he found that significantly more women than men reported being victims of sexual abuse as children (53% of women versus 14.7% of men)[278] and that significantly more women than men were abused and/or neglected by family members or current intimates.[279]

The court's failure to allow flexibility in the sentencing of minor drug offenses is the cultural acceptance of violence against women. The failure to see female drug abuse as a mechanism to cope with violence and resulting loss of self-esteem creates conditions for a failure to provide needed medical treatment. The failure to account for women's experiences results in more incarcerated women who are in prison for longer periods of time. This lengthening in prison time results in their increased exposure to abuse and inadequate medical care. While individuals who violate the law should be punished for doing so, the punishment should not exceed the crime they committed. The sentencing guidelines rob the courts of flexibility and the ability to exercise the discretion needed to adequately punish and rehabilitate female drug offenders.

Possession and use of illicit drugs is a crime. However, the punishment for committing such crimes should be reduced when mitigating factors such as the history of violent physical and/or sexual abuse and the attendant health complications that flow from it are considered. Punishment of women should account for such abuses, especially in the sentencing of non-violent crimes. Beyond such considerations, punishment should not be exacerbated by prison conditions.

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[274] *Developments in the Law*, *supra* note 7, at 1926.

[275] Sheridan, *supra* note 116, at 425-27.

[276] *Id* at 430.

[277] *Id* (citing Hawkins & Catalano, 1985; Ireland & Widom, 1994; Khantzian, 1989; Neisen & Sandall, 1990).

[278] *Id.* at 427, 430.

[279] *Id.* at 430.

2. Community-Based Programs

To alleviate some of the disproportionality that results from harsher sentencing laws, corrections facilities should consider alternatives to incarceration for female prisoners. In *A Strategy for Advocacy on Behalf of Women Offenders*, Stefanie Fleisher Seldin discusses numerous, compelling reasons why alternatives for female offenders should be instituted before they are implemented for male offenders. These reasons include: 1) women are far less likely to be incarcerated for violent crimes,[280] and therefore, pose little threat to safety in the implementation of such policies; 2) community programs are better suited to meet women offenders' disproportionate need for drug treatment, contact with children, and job training;[281] 3) it is more expensive to incarcerate women than men under the current regime because women are more often the custodial parents, whose children need foster care (frequently state-funded) in their absence;[282] and 4) such programs have a proven deterrent effect against recidivism in women.[283]

Community-based programs have the promise of allowing women to maintain a connection with their children, while at the same time helping them to learn how to develop new coping mechanisms in home-like environments, which more accurately mirror the challenges that will face them on the "outside." Even for women who do not have children, community-based programs afford a greater opportunity for protection and supervision without recreating an abusive environment where they do not feel like they are secure in their own environments and where "[t]he economy of scale problem that prevents women's prisons from fielding as many programs as men's prisons can be alleviated through more reliance on community resources."[284] However, in order for such changes to adequately address women's medical concerns and create true improvements in the quality of care provided, corrections facilities must see "women . . . as women."[285] Prison officials cannot continue to ignore the medical needs that are endemic to women alone and claim that they are adequately meeting standards requisite to avoid Eighth Amendment violations in their treatment of female inmates.

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[280] Seldin, *supra* note 264, at 23.
[281] *Id.*
[282] *Id.* at 23-24.
[283] *Id.* at 24.
[284] RAFTER, *supra* note 156, at 205.
[285] *Id.* at 207 (citation omitted).

VIII. CONCLUSION

Florence Knell, an inmate in a Florida jail, wrote numerous letters to the judge who sentenced her, detailing a lack of "adequate" treatment and abuse by prison staff. Many times she was left naked in her cell and observed by prison guards. After no response from the judge, she, like a fellow inmate one month later, hung herself.[286] That same year in Massachusetts, Elizabeth Bouchard described her prison experience to a local radio station:

> I was . . . stripped of . . . clothing, placed in a room with nothing but a plastic mattress on the floor . . . I was hemorrhaging but because of my status not allowed to have tampons or underwear. Being on eyeball status with male officers . . . [humiliated me] so I put the mattress up against the window. When I did that . . . the door was forced open, I was physically restrained in four point restraints – arms, legs spread-eagled, tied to the floor, naked, helmet on head, men and women in [the] room.[287]

Punishment should not be cruel and unusual, but, unfortunately, inhumane acts in prisons are cruel and not unusual.

The standard of care that many corrections facilities have instituted for female offenders has fallen far below those recommended by federal and professional corrections organizations and health professionals, the international community, and even the American public. In order for the Eighth Amendment to reflect the moral character of the American culture, it is time to start instituting health care standards representative of national penological and human rights organizations and the international treaties and conventions the United States has ratified.

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[286] Amnesty Int'l, *supra* note 1.
[287] *Id.*