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## #MeToo in Prison

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## #METOO IN PRISON

Jenny-Brooke Condon\*

*Abstract:* For American women and nonbinary people held in women’s prisons, sexual violence by state actors is, and has always been, part of imprisonment. For centuries within American women’s prisons, state actors have assaulted, traumatized, and subordinated the vulnerable people held there. Twenty years after passage of the Prison Rape Elimination Act (PREA), women who are incarcerated still face shocking levels of sexual abuse, harassment, and violence notwithstanding the law and policies that purport to address this harm. These conditions often persist despite officer firings, criminal prosecutions, and civil liability, and remain prevalent even during a #MeToo era that beckons greater intolerance for sexual harassment and abuse outside of prison. Just as #MeToo helped expose the systemic gender injustice that sustains abuse in the workplace and other areas of public life, the intractability of the sexual abuse crisis for incarcerated women demands recognition of the inequality and power imbalance at its root.

PREA and reform discourse treats this harm, however, as an unwanted byproduct of an otherwise constitutional system of criminal justice. And the treatment of people in women’s prisons remains largely an afterthought in the response to the broader carceral sexual violence crisis. Those responses treat prison sexual abuse as a “conditions” problem capable of being remedied, no matter how persistent and endemic. This Article rejects that prevailing account and describes the ways in which women’s prisons create and exploit gender subordination resulting in more sexual violence and gender-based harm.

As traced in this Article, Edna Mahan Prison in New Jersey serves as a dramatic example of the sordid history of women’s prisons in the United States. At one time, the facility operated as women-led radical prison without bars and locks. But once it operated like a traditional prison, sexual abuse plagued the facility for decades. New Jersey’s Governor announced plans to finally shutter the prison in 2020 after a sexual abuse crisis dominated headlines—the final blow to the progressive vision of its former reform-minded supervisor and namesake.

Women’s experiences are often ignored in conversations about mass incarceration even though women are the fastest-growing segment of the incarcerated population and experience the highest rates of prison sexual violence as a group. The harm inflicted in women’s prisons differs from the crisis affecting men in that incarcerated women experience sexual abuse nearly exclusively at the hands of male correctional officers and staff. It thus mirrors the gender subordinating nature of sexual abuse and violence in the world outside of prisons even while it also thrives on the power dynamics constructed by prisons. This Article foregrounds those often overlooked concerns and identifies lessons from #MeToo that are necessary to end these sites of gender-based harm.

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## INTRODUCTION

For American women, sexual violence by state actors is, and always has been, part of imprisonment.<sup>1</sup> In 1833, a New York prison Chaplin opined that imprisonment for men was difficult, but “to be a *female* convict, for any protracted period, would be worse than death.”<sup>2</sup> Incarcerated women at that time faced the constant threat of sexual abuse, which, in part, later fueled the push for separate women’s facilities.<sup>3</sup> Nearly two hundred years later, however, and with separate

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1. NICOLE HAHN RAFTER, *PARTIAL JUSTICE: WOMEN, PRISONS AND SOCIAL CONTROL* xxx (2d ed. 1990) (women imprisoned in the middle of the seventeenth century were vulnerable “to forced prostitution and rape”); *see also infra* section I.A.

2. Nicole Hahn Rafter, *Prisons for Women, 1790–1980*, 5 *CRIME & JUST.* 129, 135 (1983) (emphasis omitted) (quoting N.Y. AUBURN STATE PRISON, ANNUAL REPORT OF THE AUBURN STATE PRISON, N.Y. SEN. DOC. NO. 20 17 (1833)). In 1996, Human Rights Watch opined that “being a woman prisoner in U.S. state prisons can be a terrifying experience.” HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 1* (1996) [hereinafter *ALL TOO FAMILIAR*].

3. RAFTER, *supra* note 1, at 9, 57, 59 (explaining how this dynamic led to creation of women’s prisons in Tennessee, New York, Ohio, Virginia, and North Carolina).

women’s facilities now housing more people than ever before,<sup>4</sup> the threat of sexual abuse has not dissipated.<sup>5</sup> This means that more women than ever before are at risk of sexual harm at the hands of state actors—all within government-created institutions that are structured in ways that inevitably facilitate and conceal such harm.<sup>6</sup>

In recent decades, the incarceration of women has expanded twice as rapidly as it has for men.<sup>7</sup> The more incarceration women experience, the more at risk they are of sexual violence.<sup>8</sup> The State disproportionately inflicts these harms upon poor women of color; Black women are incarcerated at nearly twice the rate of white women whereas Latinx women are incarcerated at 1.3 times the rate of white women.<sup>9</sup> Women of color thus make up the vast majority of women who experience prison sexual violence.<sup>10</sup> The State also disproportionately inflicts this harm upon LGBTQ people, who are grossly overrepresented in women’s and youth prisons.<sup>11</sup>

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4. Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> [<https://perma.cc/RDS3-MVH4>].

5. *See infra* section I.B.

6. *See infra* section IV.A.

7. Kajstura, *supra* note 4.

8. *See* ALLEN J. BECK, PAIGE M. HARRISON, MARCUS BERZOFKY, RACHEL CASPAR & CHRISTOPHER KREBS, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09 6 (2010), <https://bjs.ojp.gov/content/pub/pdf/svpjri0809.pdf> [<https://perma.cc/Z7EZ-P6R7>]; *see also* David W. Frank, *Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 BERKELEY J. GENDER L. & JUST. 1, 10 (2014) (noting that the risk of carceral sexual violence for women “generally increases in accordance with the length of prison sentences and level of confinement”).

9. In 2021, the imprisonment rate for Black women was 1.6 times the rate of imprisonment for white women, even though Black women make up 6.3% of the general population. SENT’G PROJECT, INCARCERATED WOMEN AND GIRLS 2 (2023) [hereinafter INCARCERATED WOMEN AND GIRLS], <https://www.sentencingproject.org/app/uploads/2023/04/Incarcerated-Women-and-Girls.pdf> [<https://perma.cc/W5FG-UZUT>]; *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/SEX255221> [<https://perma.cc/Y3QX-6L3D>]. The same is true of Black and Indigenous girls who are three to four times more likely respectively to be incarcerated than white girls and “comprise more than half of children who are incarcerated for running away from home.” I. India Thusi, *Girls, Assaulted*, 116 NW. L. REV. 911, 921 (2022) (citing SENT’G PROJECT, INCARCERATED WOMEN AND GIRLS 5 (Nov. 2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls> [<https://perma.cc/X3MD-FZXH>]).

10. INCARCERATED WOMEN AND GIRLS, *supra* note 9, at 2.

11. Ilan H. Meyer, Andrew R. Flores, Lara Stemple, Adam P. Romero, Bianca D.M. Wilson & Jody L. Herman, *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. PUB. HEALTH 267, 267–73 (2017); ACLU & NAT’L CTR. FOR LESBIAN RTS., KNOW YOUR RIGHTS: LAWS, COURT DECISIONS, AND ADVOCACY TIPS TO

State actors regularly subject women, girls, and nonbinary people to rape, assault, and sexually degrading treatment.<sup>12</sup> This harm, of course, violates the law. But prison sexual abuse is also perpetrated against women through practices that the legal system sanctions. This includes nonconsensual strip searches, invasive surveillance of women's naked bodies, and has, at times, included unnecessary, brutal vaginal exams, which in places like New York's now-shuttered, notorious women's jail occurred for decades despite recurring protests.<sup>13</sup>

Sexual abuse at women's prisons persists across the country with strikingly similar patterns.<sup>14</sup> For example, in April of 2020, the U.S. Department of Justice (DOJ) Civil Rights Division completed a two-year investigation of sexual abuse at Edna Mahan Correctional Facility for Women ("Edna Mahan Prison") in New Jersey.<sup>15</sup> The DOJ's report chronicled a recent chapter in a trauma-filled history: correctional officers' rape, groping, and spying on women while they changed,

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PROTECT TRANSGENDER PRISONERS 4 (2014) [hereinafter TRANSGENDER PRISONERS], [https://www.nclrights.org/wp-content/uploads/2014/12/KnowYourRights\\_GuidetoProtectTransgenderPrisoners.pdf](https://www.nclrights.org/wp-content/uploads/2014/12/KnowYourRights_GuidetoProtectTransgenderPrisoners.pdf) [https://perma.cc/76TZ-NJEV] (noting that "[i]n one study of transgender women housed in California's men's prisons, 59% reported being sexually assaulted"); JUST DET. INT'L, TARGETS FOR ABUSE: TRANSGENDER INMATES AND PRISONER RAPE (2013) [hereinafter TARGETS FOR ABUSE], <https://justdetention.org/wp-content/uploads/2015/10/FS-Targets-For-Abuse-Transgender-Inmates-And-Prisoner-Rape.pdf> [https://perma.cc/7ZNB-MME9].

12. See *infra* sections II.A–B; see also Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. REV. 45, 55 (2007) [hereinafter Shayo Buchanan, *Impunity*] (describing typical forms of abuse women suffer in prison).

13. Thusi, *supra* note 9, at 921; see also Shayo Buchanan, *Impunity*, *supra* note 12, at 911 (conceptualizing repeated and routine "invasive, nonconsensual searches" of girls who are incarcerated as sexual assault and asserting constitutional arguments for challenging them); HUGH RYAN, THE WOMEN'S HOUSE OF DETENTION 82 (2022) (recounting the long history of excruciating, dangerous, and unnecessary vaginal exams at a New York City women's jail and evidence that the searches *never* revealed contraband or narcotics).

14. See, e.g., Romy Ellenbogen, *No Consequences After Florida Officers Admit to Sexually Abusing Inmates, Lawsuit Says*, TAMPA BAY TIMES (Sept. 17, 2020), <https://www.tampabay.com/news/florida/2020/09/17/no-consequences-after-florida-officers-admit-to-sexually-abusing-inmates-lawsuit-says/> [https://perma.cc/4VQF-AVUT] (describing a lawsuit by fifteen women who alleged that Federal Bureau of Prisons "officers repeatedly sexually assaulted and abused" them at a women's prison in Florida); Steven Rex Brown, *NYC Correctional Officer Sentenced to 3 Years for Sexual Abuse of Inmates*, N.Y. DAILY NEWS (Dec. 8, 2020), <https://www.nydailynews.com/new-york/ny-mcc-correctional-officer-sentenced-20201208-6sgabfi6jreb5kk4thav5p5bhi-story.html> [https://perma.cc/PU6K-U63H] (noting that an officer at the Metropolitan Correctional Center in Manhattan was sentenced to more than three years in prison for sexually abusing seven women over a six year period beginning in 2012).

15. U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN (UNION TOWNSHIP, NEW JERSEY) (2020), <https://www.justice.gov/opa/press-release/file/1268391/download> [https://perma.cc/H3HR-CDEQ] [hereinafter EDNA MAHAN CORRECTIONAL FACILITY].

showered, and used the bathroom.<sup>16</sup>

The DOJ's summary of abuse could easily be confused for other disturbing reports from around the country. Take the Julia Tutwiler Prison for Women in Alabama, which the DOJ investigated in 2014.<sup>17</sup> The DOJ found that the prison had "a history of unabated staff-on-prisoner sexual abuse and harassment" and that the "women at Tutwiler universally fear for their safety."<sup>18</sup> At the country's largest women's prison in Florida and the largest federal prison for women in Dublin, California, the story is the same.<sup>19</sup> In 2021, the warden at Dublin was fired and arrested for sexual abuse including forcing women held there to strip and be photographed naked on his government-issued cellphone.<sup>20</sup> According to the reporters who helped uncover the abuse, the prison's "toxic culture" led the facility to be dubbed "the 'rape club' by many who know it."<sup>21</sup>

These problems are the modern precursors of a long and disturbing public record documenting the treatment of incarcerated women and non-binary people. Inevitably, when one scrutinizes a women's prison with a current sexual abuse crisis, the problem is likely to stretch back deep into the past. Lawsuits, firings, and accusations of sexual abuse involving multiple officers typically span many years and often

16. *Id.* at 6, 22.

17. Chandra Bozelko, *Sexual Violence in Women's Prisons Reaches "Constitutional Proportions."* *Will Lawmakers Step In?*, MS. MAG. (Apr. 23, 2020), <https://msmagazine.com/2020/04/23/sexual-violence-in-womens-prisons-reaches-constitutional-proportions-will-lawmakers-step-in/> [<https://perma.cc/Q7R9-G9TY>].

18. Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't. of Just., Civ. Rts. Div., to Robert Bentley, Governor, Ala. State Capitol 1 (Jan. 17, 2014). The DOJ described how women at the prison "live in a sexualized environment with repeated and open sexual behavior, including: abusive sexual contact between staff and prisoners;" "profane and unprofessional sexualized language and harassment;" and "deliberate cross-gender viewing of prisoners showering" and using the bathroom. *Id.*

19. See C.J. Ciaramella, *Justice Department Finds Rampant Sexual Assaults and Constitutional Violations in Country's Largest Women's Prison*, REASON MAG. (Dec. 22, 2020), <https://reason.com/2020/12/22/justice-department-finds-rampant-sexual-assaults-and-constitutional-violations-in-countrys-largest-womens-prison/> [<https://perma.cc/E6MS-YU2G>]; Michael R. Sisak & Michael Balsamo, *Abuse-Clouded Prison Gets Attention, But Will Things Change?*, ASSOCIATED PRESS (May 5, 2022) [hereinafter Sisak & Balsamo, *Will Things Change?*], <https://apnews.com/article/business-prisons-california-sexual-abuse-only-on-ap-3a4db9ab478bfd545ef3c7e08cd273b> [<https://perma.cc/Q8Y3-USJA>].

20. Sisak & Balsamo, *Will Things Change?*, *supra* note 19.

21. Michael Balsamo & Michael R. Sisak, *Advocates Push for Release of Women's Prison Abuse Victims*, ASSOCIATED PRESS (May 10, 2022) [hereinafter Sisak & Balsamo, *Advocates Push for Release*], <https://apnews.com/article/prisons-california-sexual-abuse-lisa-monaco-26b6b80bd1cccc739d8a225bf4b02835> [<https://perma.cc/GF5L-DNSP>]; Sisak & Balsamo, *Will Things Change?*, *supra* note 19.

decades.<sup>22</sup>

Meanwhile, reports of sexual assaults at local and county jails, where pretrial detainees are held, are increasing dramatically, particularly since the 2003 Prison Rape Elimination Act (PREA)<sup>23</sup> went into effect.<sup>24</sup> Women are the fastest growing segment of the incarcerated population overall, an increase that has mostly occurred within local jails.<sup>25</sup>

Legal responses to this abuse—including PREA and litigation—have failed to stop it.<sup>26</sup> At many facilities, abuse persists notwithstanding successful civil litigation by survivors, staffing changes, federal consent decrees, and the prosecution of abusive officers.<sup>27</sup> Indeed, a sexual abuse crisis recently unfolded at New Jersey’s women’s prison, even after auditors deemed the facility PREA compliant.<sup>28</sup> Many view the prosecution of perpetrators as the gold standard of accountability even though it is widely considered elusive.<sup>29</sup> The persistence of abuse at Edna Mahan Prison and elsewhere shows that prosecutions alone cannot stop it.<sup>30</sup>

This entrenchment beyond the law echoes the problem of sexual harassment and violence experienced by non-incarcerated women in the “free world.”<sup>31</sup> Men in prison most often experience sexual abuse at the

22. The filing of criminal charges against four officers at the federal prison in Dublin occurred after the removal of dozens of officers in the 2010s following allegations of sexual misconduct. Sisak & Balsamo, *Will Things Change?*, *supra* note 19. The crisis at Edna Mahan Prison also persisted in spite of both officer firings and prosecutions. *See infra* section II.A.

23. Prison Rape Elimination Act of 2003, Pub. L. 108-79, § 2, 117 Stat. 972 (2003).

24. *See* C.J. Ciaramella, *She Tried to Report Sexual Harassment in Jail. After Her Suicide, the Guard Was Convicted of Assaulting Four Other Women*, REASON MAG. (Oct. 29, 2021), <https://reason.com/2021/10/29/she-tried-to-report-sexual-harassment-in-jail-after-her-suicide-the-guard-was-convicted-of-assaulting-four-other-women/> [<https://perma.cc/M7BA-LCSE>].

25. INCARCERATED WOMEN AND GIRLS, *supra* note 9, at 1.

26. *See infra* section III.A.

27. *See infra* section I.B.

28. S.P. Sullivan, *Locked Up, Fighting Back*, NJ.COM [hereinafter Sullivan, *Locked Up*] [https://www.nj.com/news/page/locked\\_up.html](https://www.nj.com/news/page/locked_up.html) [<https://perma.cc/7722-9GTF>].

29. *See generally* Beth A. Colgan, *Public Health and Safety Consequences of Denying Access to Justice for Victims of Prison Staff Sexual Misconduct*, 18 UCLA WOMEN’S L.J. 195, 202 (2012) (“Staff sexual abuse is rarely prosecuted.”).

30. *See infra* section I.A.

31. For example, just as LGBTQ women face high risks of sexual violence when incarcerated, they face high threats of violence outside of prison. *See* Press Release, Rachel Dowd, Media Contact, UCLA Sch. of L. Williams Inst., *Nearly Half of All LBQ Women Have Been Physically or Sexually Assaulted* (Mar. 30, 2021), <https://williamsinstitute.law.ucla.edu/press/lbq-women-press-release/> [<https://perma.cc/7WK7-2QY9>] (noting that nearly half of all LBQ women have been physically or sexually assaulted). The challenges to accountability are similar in and out of prison. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 7 (2017) (describing “formally embedded deep skepticism of sexual assault

hands of other incarcerated men.<sup>32</sup> For women, however, the perpetrators are nearly always male guards and staff.<sup>33</sup>

Though this gender dynamic mirrors the sexual abuse and harassment epidemic outside of prison,<sup>34</sup> the abuse women experience in prison is also a function of their disempowered status as prisoners, which renders them even more vulnerable to sexual harm.<sup>35</sup> Gender is part of the extreme power imbalance between perpetrators and victims in women's prisons, but abusers' power is also constructed by the State. Sexual abuse is embedded within the experience of incarceration<sup>36</sup> and sustained through sexualized power structures.<sup>37</sup>

Both insights—the gendered nature of sexual abuse experienced by incarcerated women<sup>38</sup> and the State's role in creating vulnerable would-be victims—is rarely analyzed.<sup>39</sup> PREA ignores the sexualized power dynamics that operate in prison.<sup>40</sup> And PREA's framers appear to have

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allegations” long imposed through legal requirements in rape law).

32. Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF CRIM. L. REV. 861, 868 n.29 (2001) (“[W]hereas most sexual assaults on women prisoners are perpetrated by male guards and staff, most sexual assaults on male prisoners are committed by fellow prisoners.”).

33. INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS 233 (Robin Levi & Ayelet Waldman eds., 2017) [hereinafter INSIDE THIS PLACE] (citing BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2007 7 (2007), <https://bjs.ojp.gov/content/pub/pdf/svsfpri07.pdf> [<https://perma.cc/K8GY-EMPS>] (“[S]taff sexual misconduct against women was overwhelmingly perpetrated by male staff.”)).

34. M.A. Bortner, *Controlled and Excluded: Reproduction and Motherhood Among Poor and Imprisoned Women*, in WOMEN AT THE MARGINS: NEGLECT, PUNISHMENT, AND RESISTANCE 253, 256 (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002) (suggesting that “pervasiveness of previous sexual abuse” of women prior to their incarceration shows “that there are multiple kinds of ‘prisons’ in society and some incarcerated women have left one form for another”).

35. See *infra* section III.A.

36. Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE (Oct. 1, 2003, 2:07 PM), <https://slate.com/news-and-politics/2003/10/why-no-one-really-cares-about-prison-violence.html> [<https://perma.cc/3SS9-LBE5>] (“The truth is that the United States has essentially accepted violence—and particularly brutal sexual violence—as an inevitable consequence of incarcerating criminals.”).

37. See Miller, *supra* note 32, at 867–68.

38. See, e.g., INSIDE THIS PLACE, *supra* note 33, at 17 (“While abuse in male prisons is well-documented, women in prison suffer in relative anonymity.”); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 60–61 (2003) (noting that women have largely “been left out of the public discussions about the expansion of the U.S. prison system” even though “gender structures” punishment in the United States and the overall prison system).

39. See Shayo Buchanan, *Impunity*, *supra* note 12, at 50; DAVIS, *supra* note 38, at 60–61; Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 350 (1998).

40. See generally Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006). In



*never* seriously considered the racialized gender inequality at root in officers' abuse of women.<sup>41</sup>

The failure to acknowledge and dismantle the gender subordination endemic to women's prisons has occurred even while the nation has engaged in a partial reckoning over the sexual harassment and abuse of women in other spheres over the last five years.<sup>42</sup> Outside of prison walls, in the workplace, professional sports, higher education, and other areas of public life, #MeToo<sup>43</sup> has helped impose consequences where law, training, and lip service to repudiation have often failed to hold abusers accountable.<sup>44</sup> Perhaps even more dramatically, #MeToo has helped make visible the scale of sexual harassment and abuse that woman collectively experience.<sup>45</sup>

Even with these shifts, #MeToo's flaws have limited its transformative potential.<sup>46</sup> It has not delivered accountability or redress

an article focused on incarcerated men, Ristroph notes "[m]asculine norms are continually assaulted and reasserted, and the corporal and inegalitarian aspects of incarceration intersect to create a realm of sexualized power relationships." *Id.* at 161.

41. See *infra* section III.A.

42. Jodi Kantor & Megan Twohey, *How to Measure the Impact of #MeToo?*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/interactive/2022/10/03/us/me-too-five-years.html> (last visited Apr. 9, 2023); see also Susan Faludi, *The Patriarchs Are Falling. The Patriarchy Is Stronger Than Ever.*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/opinion/sunday/patriarchy-feminism-metoo.html> (last visited Apr. 9, 2023); Jan Ransom, 'Nobody Believed Me': How Rape Cases Get Dropped, N.Y. TIMES (July 18, 2021), <https://www.nytimes.com/2021/07/18/nyregion/manhattan-da-rape-cases-dropped.html> (last visited Apr. 9, 2023) ("[L]ittle has changed about the way the criminal justice system grapples with rape accusations" in spite of greater awareness of the prevalence of sexual assault).

43. In 2017, a cascade of women employed the twitter hashtag #MeToo to voice their common experience of surviving sexual abuse and harassment, prompting a broader social reckoning. See Nadia Khomami, *#MeToo: How a Hashtag Became a Rallying Cry Against Sexual Harassment*, GUARDIAN (Oct. 20, 2017, 1:13 PM), <https://www.theguardian.com/world/2017/oct/20/women-worldwide-use-hashtag-metoo-against-sexual-harassment> [https://perma.cc/D2RS-BASS]. The developing movement, however, largely failed to acknowledge that a Black woman activist, Tarana Burke, created the phrase "me too" as an organizing message about sexual violence nearly ten years prior. Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored.*, WASH. POST (Nov. 9, 2017, 8:04 PM), [https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/?utm\\_term=.358786061779](https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/?utm_term=.358786061779) (last visited May 4, 2023).

44. Kantor & Twohey, *supra* note 42 (arguing that beyond individual cases "#MeToo at the systemic level, shows that the past five years have been very consequential").

45. Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 37 (2019) ("The #MeToo movement has exposed that sexual harassment and assault remain commonplace and that traditional legal procedures have failed for survivors.")

46. See Lesley Wexler, Jennifer K. Robbenolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 106 (2019) (criticizing #MeToo's "[d]isproportionate focus on heterosexual, cis, white women and the consequent marginalization of those not falling

to all victims, particularly those who are not white, famous, powerful, or victimized by well-known public figures.<sup>47</sup> As others have persuasively shown, the #MeToo movement has largely failed to prioritize the experiences of marginalized women of color,<sup>48</sup> who also make up the vast majority of incarcerated people in women’s prisons.

A clear-eyed understanding of #MeToo’s failings must extend to its absence at sites of some of the most concentrated gender-based sexual abuse in American society: women’s prisons. Yet #MeToo’s demonstrated transformative power warrants asking whether it offers lessons for addressing the intractability of the prison sexual abuse crisis.<sup>49</sup> This Article identifies a critical insight of the #MeToo era that must be applied to women’s prisons. As a power-building strategy to respond to women’s subordination, #MeToo demonstrates that sexual abuse in America’s women’s prisons is a problem of power and racialized gender inequality and not simply a prison “conditions” problem.<sup>50</sup> Ending it thus requires more than reform efforts addressed to the conditions of prisons, particularly those that uphold the traditional prison model’s disempowerment of women or recommit to surveillance. #MeToo shows that ending sexual violence in women’s prisons requires a dramatic shift in power to the people subjected to this harm.

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into this narrow category”).

47. See generally BERNICE YEUNG, *IN A DAY’S WORK, THE FIGHT TO END SEXUAL VIOLENCE AGAINST AMERICA’S MOST VULNERABLE WORKERS* (2018) (describing sexual abuse and exploitation of poor, immigrant women working in low wage jobs as farm workers, janitors, and domestic workers).

48. Angela Onwachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 *YALE L.J. F.* 105, 111 (2018); Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 *B.C. L. REV.* 1797 (2021); Burke, *supra* note 43.

49. Outside of academic discourse, some have questioned the need for a #MeToo movement for incarcerated people. See, e.g., Natasha Lenard, *Will the Prison Rape Epidemic Ever Have Its Weinstein Moment?*, *INTERCEPT* (Nov. 21, 2017, 4:08 PM), <https://theintercept.com/2017/11/21/prison-rape-sexual-assault-violence/> [<https://perma.cc/DH4F-WNZJ>] (arguing that “the renewed and urgent public interest in redressing sexual violence offers no replicable template” for “rape and sexual assault survivors” who experience such abuse in prison); Jerry Metcalf, *When Prisoners Say #MeToo*, *MARSHALL PROJECT* (Sept. 20, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/09/20/when-prisoners-say-metoo> [<https://perma.cc/9NAF-YWRG>] (“Like many of those from the #MeToo movement, we prisoners have for years remained quiet about the abuses we’ve suffered.”).

50. See Amber Baylor, *Centering Women in Prisoners’ Rights Litigation*, 25 *MICH. J. GENDER & L.* 109, 116 (2018) (calling for a “gender-inclusive approach to legal critiques” of prisons focused on the “experiences—and resistance—of women affected by criminal justice systems”); Emily Thuma, *Lessons in Self-Defense: Gender Violence, Racial Criminalization, and Anticarceral Feminism*, 43 *WOMEN’S STUD. Q.* 52, 64 (2015) (noting the “chasm between a feminist antiviolence movement that largely sidelined imprisoned women and a prison movement overwhelmingly focused on men’s institutions”).

This Article identifies strategies of #MeToo in prison—from rejecting incarceration at the front end, to empowering people who are imprisoned, to disqualifying the State from carrying through with incarceration for people who survive carceral sexual abuse and violence. Compassionate release, parole, and commutation of sentences for people who survive carceral sexual abuse and violence should be put to use as strategies of #MeToo in prison. These and other #MeToo-informed strategies are ultimately tools of prison abolition.

Part I examines the history of women’s prisons and the sexual exploitation and racialized gender subordination that have long defined them.<sup>51</sup> Part II explains how nearly two hundred years after the creation of the first separate custodial units for incarcerated women, the threat and reality of sexual abuse experienced by women largely has not changed. Part III documents and diagnoses the failure of law and reform efforts to respond to this systemic harm. Part IV explores the lessons and limits of #MeToo. Part V prescribes the tools of #MeToo in prison and why these are strategies of abolition that should move us closer toward the end of women’s prisons.

## I. THE MAKING OF AMERICA’S WOMEN’S PRISONS

Gender subordination is endemic to women’s prisons and has been from their start. Women’s prisons are often thought of as a subset of prisons simply designated by sex-specific assignments. In reality, however, women’s prisons are a distinct entity and problem created by the State where gender-subordination, one way or another, has always been at their core.<sup>52</sup> As the 2009 PREA Commission Report acknowledged, “[i]ncarcerated women have always been vulnerable to sexual coercion and abuse.”<sup>53</sup> During the nineteenth century, physical

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51. I use the word “prison” in this Article broadly for convenience to also mean jails and other custodial and correctional institutions. The concerns are the same for immigration detention facilities, where sexual abuse is also present. *See generally* Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447 (2013).

52. Tamar Lerer, *Hawai’i Girls Court: Juveniles, Gender, and Justice*, 18 BERKELEY J. CRIM. L. 84, 119 (2013) (“Since the beginning of the imprisonment of women, however, female prisoners and patterns of female offending were viewed differently than those of male prisoners. These differences resonate with the dynamics apparent in today’s correctional institutions.”).

53. NAT’L PRISON RAPE ELIMINATION COMM’N, 2009 PREA COMMISSION REPORT 36 (2009) [hereinafter PREA COMMISSION REPORT] (first citing Angela Browne & Erika Lichter, *Imprisonment in the United States*, in 1 ENCYCLOPEDIA OF WOMEN AND GENDER: SEX SIMILARITIES AND DIFFERENCES AND THE IMPACT OF SOCIETY ON GENDER (J. Worell ed., 2001); and then citing VERNETTA D. YOUNG & REBECCA REVIERE, *WOMEN BEHIND BARS: GENDER & RACE IN U.S. PRISONS* (2005)); RAFTER, *supra* note 1.

and sexual abuse of women held in penitentiaries was common.<sup>54</sup> Prisons at the time were horrifying places with abysmal conditions for all. Still, the sexual abuse women experienced when incarcerated in our nation's early prisons underlined their subordination and vulnerability more generally in society—just like today.<sup>55</sup>

#### A. *Sex Segregation and Gender-Based Harm*

In early America, men and women punished for criminal behavior were held together in all-purpose deplorable institutions that also held juveniles and people with mental illness.<sup>56</sup> As the penitentiary model of prisons began to emerge in later centuries, the few women convicted of serious crimes were often held in mixed-sex facilities, typically in makeshift spaces away from the men who grossly outnumbered them.<sup>57</sup> Even with women hidden away in separate, isolated areas of institutions where they were often ignored, women faced the constant threat of sexual abuse and violence from both male prisoners and guards.<sup>58</sup>

The full extent of sexual abuse encountered by women who were imprisoned in early America may not be fully captured in the historical record,<sup>59</sup> but the shocking incidents that were recorded give a glimpse of

54. Jessica L. Adler, *Inhumane System of Incarceration in U.S. Poses Special Danger to Women: New Jersey Is Closing a Women's Prison, But It Won't Get at the Root of the Problem*, WASH. POST (June 16, 2021), <https://www.washingtonpost.com/outlook/2021/06/16/uss-inhumane-system-incarceration-poses-special-danger-women> [<https://perma.cc/3FMP-VPNY>] (noting that recent abuse reported at Edna Mahan Prison “actually echo[es] centuries of accounts of abuse and neglect endured by women in U.S. prisons, as well as more recent reports of mistreatment”).

55. ESTELLE B. FREEDMAN, *THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830–1930* 1 (2000) (stating that when women are incarcerated they “represent[] an extreme case of sexual powerlessness”).

56. See Sheryl Pimlott & Rosemary C. Sarri, *The Forgotten Group: Women in Prisons and Jails*, in *WOMEN AT THE MARGINS: NEGLECT, PUNISHMENT, AND RESISTANCE* 55, 62 (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002) (noting that most states in the seventeenth century held all men, women, and children in “almshouses” or “congregate custodial facilities in which conditions were inhumane and horrible”).

57. RAFTER, *supra* note 1, at xiv; Pimlott & Sarri, *supra* note 56, at 62 (“[L]arge custodial penitentiaries developed later, where women were confined along with men, except in separate rooms or units. In some states, however, the women were held in the same units as men, resulting in frequent abuse of the women. These facilities were established to promote discipline and reformation; instead, punishment and abuse, especially of women, occurred regularly.”).

58. RAFTER, *supra* note 1, at 10 (“Less discipline meant less supervision, and hence less protection from one another and male officers.”); Pimlott & Sarri, *supra* note 56, at 63 (noting that women confined at Auburn Prison in New York in 1825 were held in “a separate attic above the prison kitchen where they worked” and that although women were “usually ignored or neglected” by the prison staff, guards and inmates still frequently abused them).

59. Rafter, *supra* note 2, at 130 (describing how women's experience of incarceration was largely “ignored by historians, sociologists, and specialists in criminal justice” until the 1970s).

incarcerated women's horrific treatment. For example, as recounted by the PREA Commission in 2009, "in the mid-1800s, the Indiana State Prison ran a 'prostitution service' for male guards using female prisoners."<sup>60</sup> Investigations in 1866 revealed that women were forced under threat of "the lash" to submit to the sexual demands of male guards.<sup>61</sup> These conditions, and similar abuse and exploitation elsewhere, helped fuel efforts to create new, independent women's prisons in Indiana and other states.<sup>62</sup>

In North Carolina and Virginia, for example, advocates urged the creation of separate women's facilities, citing in part women's risk of sexual abuse.<sup>63</sup> In the early nineteenth century, physical abuse and an incarcerated woman's pregnancy at the state prison in Auburn, New York led to the opening of a separate women's facility, the Mount Pleasant Female Prison.<sup>64</sup>

These moves toward separate women's facilities were not entirely driven by efforts to protect women. Moreover, Black women were largely exempted from this treatment.<sup>65</sup> Prison leaders often blamed women for their own victimization by guards and were eager to get rid of wards they viewed as problematic.<sup>66</sup> Many prison leaders at the time identified women as the source of "sexual trouble."<sup>67</sup> The head of Virginia's prisons, for example, urged the creation of a separate women's prison by arguing that women's presence in mixed-sex facilities "causes moral perversion, sexual diversion and degeneracy."<sup>68</sup>

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60. PREA COMMISSION REPORT, *supra* note 53, at 36 (citing ESTELLE B. FREEDMAN, *THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830-1930* 16 (1981)); *see also* RAFTER, *supra* note 1, at 30.

61. RAFTER, *supra* note 1, at 30.

62. The scandal at Jefferson State Prison in Indiana led to the creation of a new women's reformatory, which by law required all officers to be women. *See id.* at 31.

63. *Id.* at 57.

64. *See* Pimlott & Sarri, *supra* note 56, at 63. According to Nicole Rafter, Mount Pleasant was formed after "one Rachel Welch, impregnated while in prison and severely flogged when she was about five months pregnant, later died." Rafter, *supra* note 2, at 135.

65. *See infra* section I.D.

66. RAFTER, *supra* note 1, at 12; *id.* at 21 ("Probably lonelier and certainly more vulnerable to sexual exploitation, easier to ignore because so few in number, and viewed with distaste by prison officials, women in custodial units were treated as the dregs of the state prisoner population.").

67. *Id.* at 12 ("The proximity of women was thought to drive men to the unhealthy practice of masturbation; the presence of women led to scandals when officers were discovered fostering prostitution or fathering children.").

68. *Id.* at 57 (quoting VA. DEP'T OF CORR., ANNUAL REPORT OF THE BOARD OF DIRECTORS OF THE VIRGINIA PENITENTIARY: BOX 390 5 (1923)). Blaming women for their own carceral sexual harm is not merely an antiquated problem of the past. For example, when incarcerated women "become pregnant without having had contact with outside parties [they] are often sent to solitary

By the end of the nineteenth century, “nearly every state operated a custodial unit for women.”<sup>69</sup> Some mirrored the high walls, cells, and punitive rules of men’s penitentiaries while others operated as more progressive women’s reformatories: typically, “unwalled . . . small residential buildings scattered over large tracts of rural acreage.”<sup>70</sup> Women were undoubtedly at greater risk of sexual abuse if they were held in penitentiary-style prisons, as many Black women were,<sup>71</sup> because they were supervised by men who posed a direct threat of “forced prostitution and rape.”<sup>72</sup>

But as explained next, even women who experienced the short-lived, progressive, reformatory model of corrections were not immune from gender subordination. The white middle-class reformers who led the reformatory movement actually served to radically expand the “policing and incarceration of other women.”<sup>73</sup> During this period, as always, poor women, women of color, and transmasculine women were the disproportionate object of such policing and incarceration.<sup>74</sup>

#### B. *Patriarchy, Progressivism, and the Reformatory Model*

During the late nineteenth and early twentieth centuries, for some women—the young, low-income, mostly white women who were the focus of social reformers’ attention—incarceration did not always carry with it the overwhelming threat of sexual abuse at the hands of the State.<sup>75</sup> During this period, in many parts of the country white women were shepherded into safer and less violent women’s reformatories

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confinement as punishment for having had sexual contact.” Sandy de Sauvage & Kelly Head, *Correctional Facilities*, 17 *GEO. J. GENDER & L.* 175, 186 (2016). Moreover, when a Bureau of Prisons (BOP) task force visited the federal women’s prison at Dublin in response to the allegations of sexual abuse, many women perceived that “they were being punished to keep prison workers from leering at them.” Sisak & Balsamo, *Will Things Change?*, *supra* note 19. As reported by the Associated Press, after the BOP investigated, “[b]lankets, issued to keep inmates warm in drafty cells, were confiscated. Robes purchased from the prison commissary were banned. Inmates were told to wear bras, cover their bodies and avoid tight pants.” *Id.*

69. RAFTER, *supra* note 1, at xxvii.

70. *Id.* at xxvi.

71. Pimlott & Sarri, *supra* note 56, at 63–64 (describing the “two-track system for women offenders based on race [that] was created in the twentieth century” by which Black “women were committed to custodial facilities, while white women were sent to reformatories”).

72. RAFTER, *supra* note 1, at xxx.

73. RYAN, *supra* note 13, at 30–31.

74. *Id.* at 25, 28.

75. FREEDMAN, *supra* note 55; RYAN, *supra* note 13, at 33.

where they received education, empathy, and training in domesticity.<sup>76</sup> In the first thirty-five years of the twentieth century more than a dozen states opened women's reformatories before this movement "exhausted itself."<sup>77</sup>

But there were significant tradeoffs for this more humane and progressive model. Women subjected to this form of incarceration were held for longer periods that exceeded the typical penalties for the minor offenses for which they were largely punished.<sup>78</sup> Those who designed the reformatory system, mostly middle and upper-class white women who viewed themselves as social reformers, wanted more time to redeem these so-called "fallen" women.<sup>79</sup>

Additionally, many women and gender-nonconforming people were held at these institutions simply for transgressing social expectations of proper femininity.<sup>80</sup> This led to broader criminalization of women's conduct and greater numbers of women incarcerated.<sup>81</sup> As Nicole Rafter notes, historical accounts of this progressive period of prison reform often focus on efforts to pursue alternatives to traditional incarceration, ignoring the fact that women were incarcerated during this period "at a faster rate than in any period until the 1970s."<sup>82</sup>

Cheerful accounts of the women's reformatory movement also discount the extent to which the poor women held at such facilities faced conscription to State-enforced gender norms.<sup>83</sup> While concerns for incarcerated women's welfare in part influenced the creation of separate

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76. RYAN, *supra* note 13, at 33 (describing reformatories as "social feminists' answer to women's prisons: large, rural campuses where young women (mostly first-time offenders, and mostly white, initially) could be taught the value of true womanhood").

77. RAFTER, *supra* note 1, at xxix.

78. *Id.* at 38 (noting that because the women who drove the women's reformatory movement wanted more time to rehabilitate their charges, women convicted of minor offenses were "liable to far longer imprisonment than before the reformatories were founded, and that no similar extension of state control occurred in the case of men convicted of petty crimes").

79. *Id.* at xxvi-xxvii, 24; *see also id.* at 24 ("In the process of attempting to rescue and reform fallen women, those who founded women's reformatories established another mode of differential treatment, distinct from but no less oppressive than that of the custodial tradition.").

80. RYAN, *supra* note 13, at 33.

81. RAFTER, *supra* note 1, at 23-24 (noting that because reformatories were based "on a restrictive concept of 'true womanhood,' [they] imposed on inmates a limiting definition of femininity and required them to conform to a stricter sexual morality than that expected of men").

82. *Id.* at xiii ("The huge investment of reformers' energies and state funds in the creation of penal institutions for females—during a time when women's already low rates for serious crimes underwent no apparent increase—suggests the very opposite of a search for alternatives to institutionalization.").

83. Lerer, *supra* note 52, at 120.

women's reformatories, concerns about equality or women's rights certainly did not drive these efforts.<sup>84</sup> The quest to protect female purity and compel proper female behavior largely propelled creation of separate women's institutions.<sup>85</sup>

As Rafter explains, "[t]he middle-class women who formulated and implemented this program were reacting to the move of working-class women into the industrial labor force and away from traditional standards for female sexual propriety."<sup>86</sup> This led to the incarceration of "working-class women for minor sexual misbehaviors" and set the model for use of the "criminal justice system [as] a mechanism for punishing women who did not conform to bourgeois definitions of femininity."<sup>87</sup>

Estelle B. Freedman has similarly documented how legislatures, as early as the seventeenth century, crafted public order offenses for violating norms of chastity or decency.<sup>88</sup> The State enforced these laws exclusively against women, such that poor women were criminally punished for conduct for which men were not policed.<sup>89</sup>

Still, women's reformatories were in many ways radical and revolutionary in how they operated.<sup>90</sup> New Jersey's prison for women, addressed below, is a particularly illuminating example of an enlightened vision even while it was still tethered to problems of race, class, and gender-subordination.

Reformatories like New Jersey's, though popular for a period, eventually shuttered or morphed into typical prisons.<sup>91</sup> Some of the later forays into reformatory institutions in Rhode Island and in the South were never far removed from the harshness and design of custodial prisons to begin with, prompting Rafter to note that "[t]hus to study the successful development of the reformatory movement is to observe its

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84. FREEDMAN, *supra* note 55, at 47 (noting that the "heart of the program" of social feminist reformers who helped lead the drive for women's reformatories "was the principle of innate sexual difference, not sexual equality").

85. *See generally* RYAN, *supra* note 13, at 33.

86. RAFTER, *supra* note 1, at xxxii.

87. *Id.*

88. FREEDMAN, *supra* note 55, at 13.

89. *Id.*; RAFTER, *supra* note 1, at iv.

90. RAFTER, *supra* note 1, at 23.

91. RYAN, *supra* note 13, at 35 (describing that in 1932, Bedford Hills reformatory was transformed into a prison for women and is now New York's largest maximum security prison, a sign that "the reformatory movement, in New York, was dead" and that the "power of social feminists and the Progressive movement" had waned).



simultaneous decline.”<sup>92</sup>

Where more humane reformatories did operate, these progressive visions eventually folded under the pressure of states’ increasing drive to incarcerate more women.<sup>93</sup> States, it turned out, did not have the will to fund the rehabilitation that these facilities promised.<sup>94</sup> Once women’s facilities reverted to the prison model staffed with male officers, the sexual abuse that was part of the earliest forms of women’s incarceration once again defined imprisonment for subsequent generations of women.

### C. *Forgotten Radical Vision: Edna Mahan Prison for Women*

New Jersey’s history of incarcerating women encapsulates the broader persistence of sexual violence in women’s prisons and offers a case study of the United States’ failure to commit to alternative visions of humane and empowering treatment. The New Jersey Reformatory for Women, or colloquially, Clinton Farms, opened in 1913 on a “farm of 346 acres among the rolling hills” of rural Hunterdon County, New Jersey.<sup>95</sup> Today, the prison is known as the Edna Mahan Correctional Facility for women, named for the maverick prison superintendent who ran the prison from 1928 to 1968.<sup>96</sup>

During Mahan’s forty-year tenure, the prison operated under conditions that today would appear a distinctly radical form of prison: a rehabilitative, “open institution” without “bars, walls, guards, or locks.”<sup>97</sup> As superintendent, Mahan prioritized rehabilitation and operated the facility as a therapeutic campus, which repudiated the use

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92. RAFTER, *supra* note 1, at 55. Once women’s reformatories began to decline and states returned to a more punitive prison model for women, Mahan’s institution in New Jersey stayed the course for forty more years. *Id.* at 79 n.72; Mary Q. Hawkes, *Edna Mahan: Sustaining the Reformatory Tradition*, 9 *WOMEN & CRIM. JUST.* 1, 12 (1998).

93. See RAFTER, *supra* note 1, at 20. For example, New York’s Mount Pleasant Prison for women, which was an early precursor of the reformatory movement, was overcrowded and close to double its capacity by 1965. *Id.* Unwilling to accommodate more women in this separate institution, the State closed the facility and directed women to county penitentiaries. *Id.*

94. *Id.* at xxix. Rafter notes that the women’s reformatory movement was mostly over by 1935. With the “Great Depression, states were no longer willing to maintain expensive institutions for the rehabilitation of petty offenders. With the demise of the reformatory movement came the end of the reformatory itself as a special type of penal institution.” *Id.*

95. Edna Mahan, *To What Extent Can Open Institutions Take the Place of the Traditional Prison?*, in *PROCEEDINGS OF THE TWELFTH INT’L PENAL AND PENITENTIARY CONGRESS, THE HAGUE*, Aug. 14–19, 1950, IV, *GEN. AND NAT’L REPORTS OF SECTION II* 99, 101; Hawkes, *supra* note 92, at 10.

96. Hawkes, *supra* note 92, at 11.

97. Mahan, *supra* note 95, at 99.

of force and restraint as a means of thwarting women from escaping.<sup>98</sup> The people held there lived under an honor system,<sup>99</sup> “a system of self-government whereby inmates policed themselves and decided punishments for rule infractions.”<sup>100</sup> Once celebrated as a model of progressive and creative corrections policy, the prison was held up in the 1950s as “one of the two or three best correctional institutions for either men or women in the United States.”<sup>101</sup>

In 1950, in a report presented to the Twelfth International Penal and Penitentiary Congress at The Hague, Mahan boasted that at the New Jersey Reformatory for Women, “offenders convicted of every crime and misdemeanor from murder to neglect of children” lived in an open setting that aimed to create an “atmosphere of hope, cheerfulness, selfconfidence [sic], self respect[,] community consciousness and a spirit of mutual trust between inmates and staff.”<sup>102</sup> Mahan thought this version of corrections was not simply appropriate for women’s facilities but could “almost entirely replace the traditional prison.”<sup>103</sup>

Mahan’s rehabilitative philosophy also endeavored to empower the people imprisoned. As she put it, “[w]hen offenders know they are respected as individuals they are more likely to respect themselves; when they are given responsibility and freedom of choice they are able to exercise judgment.”<sup>104</sup> To show respect and build responsibility, Mahan implemented an extensive student government system, a robust vocational training program, and assigned women “positions of great responsibility” in the management of the facility.<sup>105</sup> She prized the diversity of the staff, noting that though it was nearly all women-led, “[m]any races and creeds are represented” which “fosters an atmosphere of understanding and tolerance.”<sup>106</sup> She noted that so long as there was

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98. *Id.* at 110; *see also* Hawkes, *supra* note 92, at 11.

99. *See* Mahan, *supra* note 95, at 99–100 (noting eighty infants lived with women at the open campus during this time).

100. RAFTER, *supra* note 1, at 79.

101. COMM. TO EXAMINE & INVESTIGATE THE PRISON & PAROLE SYS. OF N.J., REPORT TO HIS EXCELLENCY ALFRED E. DRISCOLL, GOVERNOR OF THE STATE OF NEW JERSEY 7 (1952); *id.* (noting this rating by “informed penologists”).

102. Mahan, *supra* note 95, at 99.

103. *Id.*

104. *Id.* at 111.

105. *Id.* at 106–07.

106. *Id.* It appears that at least by 1950 the prison was integrated and did not cater exclusively to young, white women like the early reformatories. *See also id.* at 101 (quoting from the booklet drafted by women held at the prison to welcome new people admitted to the prison which noted that “[e]ach cottage group has women whose ages range from 16 to 60 and up, both colored and white”).

no overcrowding and enough qualified supervisors, the “escape problem is not serious.”<sup>107</sup>

Any description of a prison from the standpoint of a prison administrator is likely to read differently than the experience of a person who has lost their liberty.<sup>108</sup> Still, the 1950s version of the facility that is now known as Edna Mahan Prison is shockingly different than the prison women experience today. As a prison administrator, Edna Mahan’s views on rehabilitation and public safety<sup>109</sup> were radical at the time, but they were respected, as was she, by the community of leading corrections professionals.<sup>110</sup>

Indeed, during her tenure, Mahan was one of only a few women recognized nationally for her leadership in the corrections profession.<sup>111</sup> She served on the Board of Directors of the American Correctional Association for more than a decade and on its Executive Committee for six years.<sup>112</sup> She worked closely with men in the association who shared her reform-oriented ideals.<sup>113</sup> But Edna Mahan’s alternative vision of incarceration without gates and locks never materialized beyond her own time-limited experiment.

Mahan died in 1968, just as the nation was moving further toward more punitive and warehouse-like institutions that obscured the treatment of the people held there.<sup>114</sup> During the second half of the nineteenth century, the United States’ prison population exploded.<sup>115</sup>

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107. *Id.* at 110.

108. Still, it is worth noting that some women held at the institution wrote to superintendent Mahan early in her tenure to thank her for her leadership and vision. See Hawkes, *supra* note 92, at 8 (quoting a thank you letter from women held at the facility to Mahan that acknowledged “the many changes and new privileges granted” during Mahan’s first year as superintendent and offering “deep appreciation” for her “personal interest in their welfare”).

109. She summarized:

Open institutions may replace the traditional prison in any culture to the extent that society accepts the need to rehabilitate the individual offender and rejects the concept of punishment and public example. People’s fears, hostilities and prejudices determine the measure of the punishment. When modern psychological and psychiatric interpretations of the underlying motives for human behavior prevail, all of the correctional forces within the community will be coordinated to serve the needs of the individual offender and thus give better protection to society.

Mahan, *supra* note 95, at 112–13.

110. Hawkes, *supra* note 92, at 2.

111. SUSAN EHRlich MARTIN & NANCY C. JURIK, DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS 164 (2007) (noting that in 1963, Edna Mahan was the first woman to receive the American Correctional Association’s achievement award).

112. Hawkes, *supra* note 92, at 16.

113. *Id.*

114. *Id.*; Adler, *supra* note 54; RAFTER, *supra* note 1, at 79.

115. Norval Morris, *The Contemporary Prison: 1965–Present*, in THE OXFORD HISTORY OF THE

Particularly from the 1980s forward, a system of mass incarceration took shape with the reality that more people than ever before would be exposed to carceral sexual violence.<sup>116</sup>

Through Edna Mahan's leadership, force of personality, and commitment, the New Jersey Reformatory for Women lasted longer than most other women's reformatories in the country and still serves as an example of a successful experiment in the humane treatment of women.<sup>117</sup> Even assuming that it repeated the gender-subordinating philosophy of other women's reformatories at some point during its history, its women-led structure and empowerment of the women held there does not appear to have exposed women to high levels of sexual abuse.<sup>118</sup>

Ultimately, however, even the effective features of places like Edna Mahan Prison were sacrificed in the name of more punitive and abusive models of prisons ubiquitous in America today. Today, the facility is synonymous with sexual abuse and exploitation.<sup>119</sup>

After its progressive era ended, Edna Mahan Prison operated like a traditional prison, which has meant regular sexual exploitation of the women held there.<sup>120</sup> In response to ongoing abuse scandals spurred by investigative reporting and brave survivors speaking up, the DOJ

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PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 227, 236 (Norval Morris & David J. Rothman eds., 1995) ("From 1970 to 1980 the population of the prisons in the United States doubled; from 1981 to 1995 it more than doubled again, so that a crisis of crowding overwhelmed the prison systems, both federal and state.").

116. Discussions of mass incarceration rarely link these two phenomena. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1289 (2004) (noting that the reality of "sexual violence as a component of punishment within prisons" is largely "neglected in the literature on the impact of imprisonment").

117. Hawkes, *supra* note 92, at 12, 18; RAFTER, *supra* note 1, at 238 n.72 (noting that "Clinton was unusual in that its decline in the 1920s was reversed" when the "[i]maginative and adventuresome" Edna Mahan became superintendent in 1928 and served "for the next forty years" (citing Mary Ann Stillman Quarles, *Organizational Analysis of the New Jersey Reformatory for Women in Relation to Stated Principles of Corrections, 1913–1963* (1996) (Ph.D. dissertation, Boston University))).

118. This was not the case elsewhere. Some people held at women's reformatories, even during their heyday, were not immune to the abuse and cruelty endemic to prisons at the time. At Bedford Hills Reformatory for Women in New York, for example, women held there during the early twentieth century endured torture and other inhumane treatment. RYAN, *supra* note 13, at 33–34 (describing torture committed at Bedford Hills in the 1910s, which prompted an investigation by the Governor).

119. Brenda V. Smith, *Promise Amid Peril: PREA's Efforts to Regulate an End to Prison Rape*, 57 AM. CRIM. L. REV. 1599, 1606 (2020) [hereinafter Smith, *PREA's Efforts*] (describing repeated sexual abuse scandals at Edna Mahan Prison as reflected in lawsuits filed in 2005 and 2018 by multiple women who claimed routine sexual abuse while in custody).

120. See *infra* section II.B.

announced an investigation of the facility on April 26, 2018.<sup>121</sup> Following release of the DOJ's damning report, in June 2021, New Jersey Governor Phil Murphy announced he would close the prison and accepted the resignation of the Department of Corrections Commissioner.<sup>122</sup>

One might think that the sordid history of Edna Mahan Prison might finally end, given that the State has said it will move women to new locations once the prison closes several years from now.<sup>123</sup> Shutting the prison alone, however, will not stop the cycle of abuse where it is rooted in structures endemic to women's prisons, which have sustained the sexual abuse of women in New Jersey and elsewhere for decades.<sup>124</sup>

#### D. *Incarceration, Slavery, and White Supremacy*

Race and racism played a defining role in the way the American penal system for women developed, and it continues to shape it today.<sup>125</sup> Unlike the poor white women deemed fallen but redeemable, Black women, older women, and women convicted of felonies were held in custodial prisons, denied access to the more humane reformatory style institutions.<sup>126</sup> The so-called "reformers" of the time, as well as the judges who sentenced women to reformatories, largely did not consider Black women to be promising subjects for reform.<sup>127</sup> Thus, although

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121. EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 2.

122. Tracey Tully, *Women's Prison Plagued by Sexual Violence Will Close, Governor Says*, N.Y. TIMES (June 7, 2021), <https://www.nytimes.com/2021/06/07/nyregion/womens-prison-edna-mahan-closing-nj.html> (last visited Apr. 9, 2023).

123. *Id.* ("The shutdown is expected to take years, and it is unclear where the 384 women housed at the prison in western New Jersey would go.")

124. Adler, *supra* note 54 ("While the closure of Edna Mahan may stop cruelty at one facility, it is an incomplete solution to a deeper and widespread problem: The United States' jarringly inhumane system of incarceration poses unique dangers to women."); Press Release, Bonnie Kerness, Director of the Am. Friends Serv. Comm. Prison Watch Program, *Advocates Respond to NJ Prison Closure with Demands for Systematic Change* (June 10, 2021), <https://afsc.org/newsroom/advocates-respond-nj-prison-closure-demands-systemic-change> [https://perma.cc/DVD2-L96H] (arguing that an "endemic culture of racism, misogyny, and violence within Department of Corrections staff... led to these brutal assaults... [and] [t]ransferring the women elsewhere does not guarantee their safety").

125. Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 58 UCLA L. REV. 1418, 1427 (2012); Pimlott & Sarri, *supra* note 56, at 63 (describing disparate treatment of women offenders based upon race where only white women received the more rehabilitation focused approach of reformatories, whereas Black women were relegated to traditional prisons).

126. RAFTER, *supra* note 1, at xxviii.

127. *Id.* at 36–37; *id.* at xxviii (reformers targeted white "vagrants, unwed mothers, prostitutes, and other 'fallen' women who seemed more promising material for their attempts to uplift and

women's prisons are often credited with altruistic and humanitarian roots, that account dismisses both the gender subordination and racial caste system that drove the creation of these facilities.<sup>128</sup>

Black women's experiences of the prison system were uniquely shaped by the intersecting forces of slavery, white supremacy, and patriarchy.<sup>129</sup> As scholars Tabitha L. LeFlouria and Sarah Haley have unsparingly documented, after the Civil War in the South, incarceration replaced slavery to preserve white supremacist social control over Black people.<sup>130</sup> Just as with slavery, jailors raped and tortured Black women with impunity.<sup>131</sup>

In the South, Black women also endured the horrors of the convict labor system,<sup>132</sup> with some arrested to ensure a steady supply of domestic laborers after the Civil War.<sup>133</sup> States charged many free Black women with tenuous or non-existent crimes and forced them to work alongside men on work gangs and on penal farms,<sup>134</sup> where they faced rape and forced prostitution.<sup>135</sup>

In the North, patriarchal policies that criminalized girls' and women's sexual behavior, like imprisoning them for consensual sexual behavior for which men were not punished, were disproportionately directed at Black women and girls.<sup>136</sup> Black women were then punished more

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retrain”).

128. FREEDMAN, *supra* note 55, at 13; RAFTER, *supra* note 1, at 55.

129. Adler, *supra* note 54.

130. See generally SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 58–118 (2016); TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 61–102 (2015); DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 31–84 (1996); see also DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 5–6 (2008); RAFTER, *supra* note 1, at 64.

131. Talitha L. LeFlouria, “*Under the Sting of the Lash*”: Gendered Violence, Terror, and Resistance in the South’s Convict Camps, 100 J. AFR. AM. HIST. 366 (2015); HALEY, *supra* note 130, at 58.

132. LEFLOURIA, *supra* note 130, at 24; RAFTER, *supra* note 1, at 9; see generally HALEY, *supra* note 130.

133. HALEY, *supra* note 130, at 67–68.

134. LEFLOURIA, *supra* note 130, at 24; HALEY, *supra* note 130, at 29–31; RAFTER, *supra* note 1, at 9.

135. RAFTER, *supra* note 1, at 9.

136. See Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1386 (2013) (arguing that “race-based stereotypes about black womanhood and sexuality had disastrous consequences for black girls sent to reform institutions” and noting that at one such institution in New York, Black girls and white girls “who befriended them endured the most atrocious emotional, physical, and sexual abuses”); Cheryl D. Hicks, “*In Danger of Becoming Morally Depraved*”: Single Black Women, Working-Class Black Families, and New York State’s Wayward Minor Laws,

severely and subjected to more violence once incarcerated. As historian Hugh Ryan puts it, Black women were viewed “as more masculine, more sexual, more violent, and in general, less feminine and deserving of care than their white counterparts.”<sup>137</sup> This racist ideology, which can be traced back to slavery,<sup>138</sup> helped fuel the over-policing and over-punishment of Black women,<sup>139</sup> furthering their disproportionate incarceration.

As legal scholar I. India Thusi has powerfully argued in a recent article, *Girls Assaulted*, Black and Brown girls have also been over-criminalized and suffered greatly due to these racist and patriarchal forces.<sup>140</sup> She argues that many girls end up incarcerated where they are subjected to the regular, sustained sexual assault of forced searches of their naked bodies by the State,<sup>141</sup> on account of behaviors stemming from “survival tactics.”<sup>142</sup>

Thus, the intersecting forces of slavery, white supremacy, and patriarchy helped build America’s women’s prisons and determine which people would continually fill them. As addressed next, the common link of sexual exploitation and racialized gender subordination that have long defined women’s prisons are the conditions that shape such institutions today.

## II. THE WOMEN’S PRISON TODAY

For American women and nonbinary people held in women’s prisons, sexual violence by state actors remains intrinsic to incarceration.<sup>143</sup> Twenty years after passage of PREA, state actors continue to assault,

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1917–1928, 151 U. PA. L. REV. 2077, 2082 (2003).

137. RYAN, *supra* note 13, at 83.

138. See, e.g., DAVIS, *supra* note 38, at 62 (arguing that after the abolition of slavery the “intersection of criminality and sexuality continues to be racialized”); Dorothy Roberts, *Race, in THE 1619 PROJECT: A NEW ORIGIN STORY* 45, 54 (Nikole Hannah-Jones et al. eds., 2021) (“[T]he ideas that denied Black women’s bodily autonomy for nearly 250 years still held great force.”).

139. ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 14 (2017) (“The slave trade, ‘plantation justice,’ and the evolution of slave patrols produced brutal violence against women of African descent, as well as continuing police violence and violation of Black women through the Reconstruction, Jim Crow, and civil rights eras to the present.”); RYAN, *supra* note 13, at 82.

140. Thusi, *supra* note 9, at 926 (discussing girls being punished for adopting “coping strategies” in response to emotional and sexual vulnerabilities and problems in their family life).

141. *Id.* at 932–33.

142. *Id.* at 926.

143. See *infra* section II.A.

traumatize, and subordinate people incarcerated in women's prisons.<sup>144</sup> The shocking levels of sexual abuse, harassment, and violence continues notwithstanding the law and policies that purport to address this harm.<sup>145</sup> The next section summarizes the pattern of the abuse and violence and the common, prominent role of male correctional officers and staff in perpetrating it.<sup>146</sup>

#### A. *The Pattern*

The current version of Edna Mahan Correctional Facility for women provides a snapshot of the sexual abuse crisis plaguing women's prisons across the United States.<sup>147</sup>

In 2022, the DOJ released a report documenting "severe and prevalent" sexual abuse by correctional officers throughout the facility.<sup>148</sup> The report detailed in "varied and disturbing" detail the multiple ways that officers at the prison wielded power over women with respect to their bodies, needs, and dignity.<sup>149</sup> The DOJ found that officers violated women's privacy and dignity by often watching women as they showered, undressed, and used the restrooms.<sup>150</sup> Officers exerted constant physical control over women, regularly groping them, exposing their bodies during searches in the presence of other prisoners and officers, and subjecting them to unnecessarily close contact and rubbing.<sup>151</sup> They also "graphically comment[ed] on prisoners' physical appearance or remark[ed] about their perceived sexual inclinations and histories."<sup>152</sup> According to the DOJ, officers at Edna Mahan Prison

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144. *See infra* section II.A.

145. *INSIDE THIS PLACE*, *supra* note 33.

146. *See* Deborah LaBelle, *Women, the Law, and the Justice System: Neglect, Violence, and Resistance*, in *WOMEN AT THE MARGINS: NEGLECT, PUNISHMENT, AND RESISTANCE* 347, 358 (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002) ("Starting in the early to mid-1980s, many correctional facilities in the United States began to deviate from the practice of same-sex supervision of prisoners. The consequences of placing a vulnerable group of women, whose typical history includes sexual abuse, under the complete authority of ill-trained male guards was entirely predictable.").

147. Stefanie Grossano, Taylor Jones, Priscilla Liu, Katie McMurray, Megan Siwek & Daniel Wohl, *FROM CYCLES OF HARM TO CYCLES OF OPPORTUNITY: JUSTICE FOR EDNA MAHAN CORRECTIONAL FACILITY AND THE STATE OF NEW JERSEY* (2022), <https://trotter.hks.harvard.edu/wp-content/uploads/2022/06/MLD-375-Final-Report-WWNGU-1.pdf> [<https://perma.cc/S6JR-UHTV>].

148. *EDNA MAHAN CORRECTIONAL FACILITY*, *supra* note 15, at 5.

149. *Id.* at 6.

150. *Id.* at 7.

151. *Id.*

152. *Id.*



regularly called people held at the prison sexually derogatory terms such as “bitches,” “hoes,” “dyke[s],” “stripper[s],” and “whores.”<sup>153</sup>

This abuse occurred even with decades of attention trained on the facility after revelations of sexual abuse at the prison. The State fired officers and lodged criminal charges, while survivors filed multiple lawsuits seeking accountability.<sup>154</sup> Investigations,<sup>155</sup> indictments, convictions,<sup>156</sup> and attempted legislative reforms<sup>157</sup> all followed. But all failed to prevent the violence and abuse documented by the DOJ in 2020.<sup>158</sup>

For example, between 1994 and 1998, the State fired at least three guards at Edna Mahan Prison and prosecutors pursued charges against one for sexual abuse and misconduct.<sup>159</sup> Two women filed suit claiming that a different prison guard repeatedly sexually assaulted them between 1997 and 1999.<sup>160</sup> In the decade that followed, at least sixteen women

153. *Id.*

154. *See, e.g.,* *Heggenmiller v. Edna Mahan Corr. Inst. for Women*, 128 F. App’x 240, 251 (3d Cir. 2005) (holding that prison officials’ awareness that corrections officers had committed multiple prior instances of sexual misconduct did not render them deliberately indifferent to plaintiffs’ risk of sexual assaults by guards); Complaint at \*2–3, *Brown v. State of N.J. Dep’t of Corr.*, No. MER-L-000503-18 (Mercer Cty. Ct. Mar. 12, 2018) (alleging sexual abuse by Edna Mahan staff). The *Brown* case later settled. *See* Derek Gilna, *New Jersey DOC Settles Sexual Abuse Suit, But More Cases Are Pending*, PRISON LEGAL NEWS (Apr. 2, 2019), <https://www.prisonlegalnews.org/news/2019/apr/2/new-jersey-doc-settles-sexual-abuse-suit-more-cases-are-pending/> [<https://perma.cc/UXT5-YK43>].

155. Nick Muscavage, *Edna Mahan Inmates Testify About Sexual Assault Allegations Before State Senate*, MY CENT. JERSEY (Feb. 22, 2018) [hereinafter Muscavage, *State Senate*], <https://www.mycentraljersey.com/story/news/politics/new-jersey/2018/02/22/edna-mahan-inmates-testify-sexual-assault-allegations-before-state-senate/364409002/> [<https://perma.cc/GB4M-9GM2>].

156. *Heggenmiller*, 128 F. App’x at 249 (Fuentes, J., dissenting) (noting that five prior sexual assaults in question “resulted in discharge and/or criminal convictions”); Sullivan, *Locked Up*, *supra* note 28 (noting that in 2017, four Edna Mahan officers “were indicted on charges of sexual abuse and official misconduct” while a “fifth was recently sentenced to three years in prison for official misconduct”); Giovanna Fabiano, *Ex-Guard Facing Assault Charges in Court*, COURIER NEWS (Sept. 19, 2003), <https://www.proquest.com/docview/378128871?parentSessionId=U1vBewa8K0%2BtZGtrcG4Y9s15mS%2Bq7TJyY%2BkAizkRT0%3D> (last visited Apr. 11, 2023).

157. *See, e.g.,* S.J. Res. 79, 2020 Leg. 219th Sess. (N.J. 2020) (creating a “commission to study sexual assault, misconduct, and harassment by staff against inmates in State correctional facilities” in response to the Edna Mahan Prison).

158. Newspaper headlines described the results of investigations in 2021 as “shocking” notwithstanding this history. Blake Nelson & Joe Atmonavage, *N.J. Women’s Prison Was in Chaos. The Shocking Takeaways from Damning Edna Mahan Report*, NJ.COM (June 7, 2021), <https://www.nj.com/news/2021/06/nj-womens-prison-was-in-chaos-the-shocking-takeaways-from-damning-edna-mahan-report.html> [<https://perma.cc/A6BW-RT4Q>].

159. *Heggenmiller*, 128 F. App’x at 251; Fabiano, *supra* note 156.

160. *Heggenmiller*, 128 F. App’x at 242.

reported that another correctional officer beat and sexually abused them between 2008 and 2010.<sup>161</sup> That officer was fired in 2010.<sup>162</sup>

In 2016, the State fired five more employees for sexual abuse of eight women.<sup>163</sup> In 2017 and 2018, two more officers pled guilty to sexual misconduct.<sup>164</sup> In 2018, a jury found a senior officer guilty of five counts of sexual assault and abuse.<sup>165</sup> That same year another officer pled guilty to three counts of second-degree official misconduct while a third was convicted and sentenced to sixteen years in prison for sexual assault.<sup>166</sup> In January 2019, another officer pled guilty after admitting to sexually abusing two inmates over several years.<sup>167</sup>

This one facility's long history, only briefly recounted here, highlights—in a way rarely perceptible—the unremitting nature of sexual abuse at women's prisons. It occurred at Edna Mahan Prison notwithstanding public attention and news reporting. It occurred for decades, notwithstanding prosecutions and the firing of officers. It occurred notwithstanding PREA. Indeed, it seems that as one abusive officer was removed or prosecuted, another willing abuser took his place.

Similar histories are mirrored at prisons and jails throughout the nation.<sup>168</sup> For example, in 2020, fifteen women at the Federal Correctional Complex in Coleman, Florida—the nation's largest federal prison—filed suit claiming widespread sexual abuse of the people held

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161. Sullivan, *Locked Up*, *supra* note 28.

162. *Id.* (noting the N.J. Department of Corrections took steps to fire an Edna Mahan Prison officer “in August 2010 for conduct unbecoming of an officer and ‘undue familiarity,’ a vague, outdated term that experts say whitewashes serious allegations of sex abuse and keeps the public—and the officers’ potential future employers—in the dark”).

163. Muscavage, *State Senate*, *supra* note 155.

164. S.P. Sullivan, *Former Officer at N.J. Women's Prison Gets 3 Years Over Sex Abuse Claims*, NJ.COM (May 1, 2017, 10:28 PM), [https://www.nj.com/news/2017/05/former\\_officer\\_at\\_nj\\_womens\\_prison\\_gets\\_3\\_years\\_ov.html](https://www.nj.com/news/2017/05/former_officer_at_nj_womens_prison_gets_3_years_ov.html) [<https://perma.cc/ZJ7U-AFJF>]; Muscavage, *State Senate*, *supra* note 155.

165. See S.J. Res. 79, 2020 Leg. 219th Sess. (N.J. 2020).

166. Nick Muscavage, *Former Edna Mahan Corrections Officer Pleads Guilty to Official Misconduct Related to Sexual Abuse*, MY CENT. JERSEY (July 12, 2018, 3:45 PM) [hereinafter Muscavage, *Pleads Guilty*], <https://www.mycentraljersey.com/story/news/crime/2018/07/12/edna-mahan-corrections-officer-guilty-sexual-abuse-ahnwar-dixon/780086002/> [<https://perma.cc/2JB6-RQ6T>]; Nick Muscavage, *NJ Seeks to Investigate Sexual Abuse of Inmates: Incidents at Edna Mahan Facility Spark Action in State Assembly*, COURIER NEWS, Dec. 18, 2019, at A7, 2019 WLNR 37860432.

167. Muscavage, *Pleads Guilty*, *supra* note 166.

168. See Bozelko, *supra* note 17. Journalist Chandra Bozelko observed that reading the DOJ investigation reports for Edna Mahan Prison and the Julia Tutwiler Prison for Women in Alabama the two “could be the same place.” *Id.*

there.<sup>169</sup> Although multiple correctional officers admitted to sexual abuse and misconduct, none were prosecuted, in contrast to New Jersey.<sup>170</sup>

In December of 2020, a correctional officer who worked for years at the Manhattan Correctional Center was sentenced to prison after he sexually abused multiple women.<sup>171</sup> In July of the following year, a federal correctional officer pled guilty to sexual abuse.<sup>172</sup>

The number of women exposed to this abuse is growing at a staggering rate: 525% in the last four decades.<sup>173</sup> Though men still account for the vast majority of people imprisoned in the United States, according to The Sentencing Project, “the rate of growth for female imprisonment has been twice as high as that of men since 1980.”<sup>174</sup> Women make up roughly only ten percent of the total prison population,<sup>175</sup> but “[b]etween 1980 and 2021, the number of incarcerated women increased by more than 525%, rising from a total of 26,326 in 1980 to 168,449 in 2021.”<sup>176</sup> Women are the fastest growing segment of the incarcerated population overall, an increase that has mostly occurred within local jails.<sup>177</sup>

The increased threat of sexual abuse that naturally follows greater numbers of incarcerated women will continue to disproportionately harm poor women of color. As noted, Black women are incarcerated at twice the rate of white women and thus make up the vast majority of women who experience prison sexual violence.<sup>178</sup> The harm will also be

169. Ellenbogen, *supra* note 14.

170. *Id.* Several were permitted to retire and still received benefits. *Id.*

171. Brown, *supra* note 14.

172. See Press Release, U.S. Dep’t of Just., Former Bureau of Prisons Corrections Officer Pleads Guilty to Sexually Abusing an Inmate and Witness Tampering, (July 20, 2021), <https://www.justice.gov/opa/pr/former-bureau-prisons-corrections-officer-pleads-guilty-sexually-abusing-inmate-and-witness> [https://perma.cc/4HWN-J42T].

173. See INCARCERATED WOMEN AND GIRLS, *supra* note 9, at 1.

174. *Id.*

175. *Women and Gender, PRISON POL’Y INITIATIVE*, <https://www.prisonpolicy.org/women.html#:~:text=There%20are%20231%2C000%20women%20locked,to%20grow%20faster%20than%20men’s> [https://perma.cc/PQ2R-TZYX].

176. INCARCERATED WOMEN AND GIRLS, *supra* note 9, at 1.

177. Kajstura, *supra* note 4.

178. See INCARCERATED WOMEN AND GIRLS, *supra* note 9, at 2 (noting that “[i]n 2021, the imprisonment rate for Black women [ ] was 1.6 times the rate of imprisonment for white women” and Latinx women were incarcerated “at 1.3 times the rate of white women”). Black women make up only 6.3% of the total population in the United States, and Hispanic/Latinx women make up 9.3%. See *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/SEX255221> [https://perma.cc/Y3QX-6L3D].

disproportionately experienced by LGBTQ people,<sup>179</sup> who are overrepresented in women's and youth prisons.<sup>180</sup> Far greater numbers of women identify as sexual minorities as compared to men prior to their incarceration; LGBTQ women make up 42.1% of the prison population and 35.7% of the jail population while those numbers are 9.3% and 6.2% for men who identify as LGBTQ prior to their incarceration.<sup>181</sup> In 2016, a study by the Center for American Progress found similarly disproportionate rates of incarceration for girls and non-binary youth with 40% of girls held in youth prisons identifying as LGBTQ, nearly double the rate of boys.<sup>182</sup>

The increased exposure to sexual violence by these vulnerable groups was foreseeable.<sup>183</sup> Indeed, nearly twenty years ago some predicted that growing numbers of women would be subjected to prison sexual abuse based simply upon the increased number of potential victims.<sup>184</sup> Those predictions occurred around the same time that momentum developed for PREA.<sup>185</sup> But that landmark prison sexual violence legislation still focused largely on the victimization of men.<sup>186</sup>

### B. Repeat Offenders: Male Guards

The sexual abuse crisis currently embroiling so many women's prisons in America is striking in that it defies one of the early premises for the existence of separate women's prison—preventing sexual abuse and exploitation. That project has failed. Indeed, in many places little has changed. This warrants consideration of a constant throughout the history of women's prisons outside of the women-led reformatory

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179. Meyer et al., *supra* note 11, at 267–73; TRANSGENDER PRISONERS, *supra* note 11; TARGETS FOR ABUSE, *supra* note 11.

180. Meyer et al., *supra* note 11, at 267–73.

181. *Id.* at 267.

182. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN JUVENILE AND CRIMINAL JUSTICE SYSTEMS FAIL LGBTQ YOUTH 1 (2016), <https://www.lgbtmap.org/policy-and-issue-analysis/criminal-justice-youth> [<https://perma.cc/M6MB-DAZX>].

183. See LaBelle, *supra* note 146, at 168.

184. That is, as more women enter prisons and jails, the number of potential victims increases. See Steven A. Holmes, *With More Women in Prison, Sexual Abuse by Guards Becomes Greater Concern*, N.Y. TIMES (Dec. 27, 1996), <https://www.nytimes.com/1996/12/27/us/with-more-women-in-prison-sexual-abuse-by-guards-becomes-greater-concern.html> (last visited Apr. 11, 2023).

185. See Smith, *PREA's Efforts*, *supra* note 119, at 1600–01 (noting that interest in PREA legislation followed the 2001 report by Human Rights Watch documenting the pervasiveness of prison rape).

186. See *id.* at 1600–02.

model: the power of male guards.

Consider the fact that Indiana created its first women's prison in the late 1800s because, as noted above, an investigation into its mixed-sex state prison found that prison staff "ran a 'prostitution service' for male guards using female prisoners" under threat of violence.<sup>187</sup> One hundred and thirty years later, in 1996, three women held at California's largest federal prison in Dublin, California, sued the Bureau of Prisons alleging similar treatment.<sup>188</sup> The lawsuit alleged that the women were "'sold like sex slaves' by correctional officers who placed them in a male unit, unlocked their cells and allowed male inmates to rape them."<sup>189</sup> The Bureau of Prisons settled the lawsuit and no one was ever arrested.<sup>190</sup>

When Indiana opened its women's prison in the nineteenth century, it sought to prevent sexual violence against women by legislating that staff addressed to internal administration of the new prison would be women.<sup>191</sup> Indiana's statutory requirement also reflected the experience in practice at most women's reformatories of the time,<sup>192</sup> a custom that died with that movement and the turn toward penitentiary-styled women's prisons.<sup>193</sup>

### 1. *Where Male Guards Predominate*

Today's women's prisons are filled with male correctional officers and staff. Male guards are permitted to work at all federal and state prisons for women, and in federal prisons the overwhelming number—seventy percent—of guards are men.<sup>194</sup>

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187. PREA COMMISSION REPORT, *supra* note 53, at 36–37 (citing FREEDMAN, *supra* note 60, at 16); RAFTER, *supra* note 1, at 30.

188. Sisak & Balsamo, *Will Things Change?*, *supra* note 19.

189. *Id.*

190. *Id.*

191. RAFTER, *supra* note 1, at 31 (stating this requirement was by law "unless the superintendent were married, in which case her husband might also be an administrator").

192. *Id.* at 40 ("The experience of incarceration in a reformatory was doubtless far more benign than that of being imprisoned in a custodial institution. An all female staff greatly reduced the fear of sexual coercion.").

193. LaBelle, *supra* note 146, at 359 (describing interviews from nearly twenty years ago regarding how women sexually abused in prison cannot escape their abusers and are often dependent upon them "to fulfill basic needs;" that grievance and investigations are often ineffectual; and that female prisoners are "more likely to suffer retaliation for reporting than to have any real resolution occur").

194. Amnesty Int'l, *Women in Prison: A Fact Sheet* [hereinafter *Women in Prison*], [http://www.prisonpolicy.org/scans/women\\_prison.pdf](http://www.prisonpolicy.org/scans/women_prison.pdf) [<https://perma.cc/3MM4-VU8M>]; see also de Sauvage & Head, *supra* note 68, at 186.

This inevitably places the people held at women's prisons at risk of sexual abuse inflicted by officers of the state. This observation is not merely a stereotype about men's capacity or inclination for sexual abuse.<sup>195</sup> It is a reality both borne out by statistics and a feature of the State-created power dynamics that shape prisons and enable such harm to be inflicted upon women.<sup>196</sup>

As one study recounted, “[t]he 2009–2011 statistical report for prison rape revealed that in state and federal prisons, where women constitute [7%] of sentenced inmates, [33%] of victims of staff-on-inmate sexual victimization were women, while [46%] of the staff perpetrators were male guards.”<sup>197</sup> The risks to women in local jails is worse. The study showed that during the same period women constituted only 13% of all people held at these facilities, but “[67%] of victims of staff-on-inmate sexual victimization were women while [80%] of the staff perpetrators were male guards.”<sup>198</sup>

Allowing male guards to wield authority over the people held in women's prisons is largely accepted by the legal system.<sup>199</sup> Few, if any, scholars have urged elimination of male guards from women's prisons altogether. While courts and policymakers have placed some limits on cross-gender searches of people who are incarcerated,<sup>200</sup> few have questioned whether men should ever guard captive women. As Deborah LaBelle has put it, this has “allowed male staff, indeed required male staff, to view women nude in close proximity and watch women performing basic bodily hygiene functions on a routine day-to-day basis.”<sup>201</sup> The daily impact of these staffing arrangements on

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195. See Miller, *supra* note 32, at 871 (criticizing use of “gendered stereotypes of men as sexually aggressive” to “limit the assignment of male guards within the housing units of women's prisons” instead of “facilitating a culture change within prisons that requires male guards to conduct themselves professionally, and in the process, to respect the basic human dignity of women prisoners”).

196. LaBelle, *supra* note 146, at 359.

197. de Sauvage & Head, *supra* note 68, at 186 (citing ALLEN J. BECK, RAMONA R. RANTALA & JESSICA REXROAT, BUREAU OF JUST. STATS., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES 2009–2011 1, 12 (2014), <http://www.bjs.gov/content/pub/pdf/svraca0911.pdf> [<https://perma.cc/WM33-S4JS>]).

198. *Id.* at 180 n.43 (citing BECK ET AL., *supra* note 197, at 12).

199. LaBelle, *supra* note 146, at 360 (“Reacting, in some instances, to challenges from female employees to their exclusion from supervision opportunities in male prisons, *Griffin v. Michigan Department of Corrections*, 654 F. Supp. 690 (E.D. Mich. 1982), and in other circumstances to staffing needs for the increasing numbers of female prisoners, cross-gender supervision became the norm in the United States.”).

200. Miller, *supra* note 32, at 871–73 (discussing as an example *Forts v. Ward*, 434 F. Supp. 946 (S.D.N.Y. 1977)).

201. LaBelle, *supra* note 146, at 360.

incarcerated women and gender non-conforming people should not be surprising.

Although only some institutions allowed male officers to perform the strip searches of women prisoners, the majority of institutions required male officers to perform routine clothed body searches of women, resulting in female prisoners being subjected on a day-to-day, hour-to-hour basis to male authority figures touching their breasts and genitalia.<sup>202</sup>

LaBelle was describing the status quo years before PREA's implementation. Yet, twenty years later, these predictable harms and degradations remain the norm.<sup>203</sup>

## 2. *No Privacy Without Power*

Scholarly discussion of the role of male guards in women's prisons has tended to focus on whether the privacy rights of women who are incarcerated should be privileged over correctional officers' rights to be free of gender-based discrimination in the workplace.<sup>204</sup> Deficiencies in privacy protection have long been cited as a driver of sexual abuse in prisons and have generated calls for expanded privacy protection.<sup>205</sup> But courts accept as a premise of incarceration that privacy is sacrificed as part of the criminal penalty<sup>206</sup>—or, at the very least, that diminished privacy is an unavoidable component of prison security that prisoners

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202. *Id.*

203. See Bozelko, *supra* note 17 (noting that the allegations at Edna Mahan Prison mirror those at several other prisons for women).

204. See, e.g., Lisa Krim, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN'S L.J. 85, 88 (1995) (arguing for "a gender-specific standard of what constitutes cruel and unusual punishment" when assessing "challenges to prison conditions that involve searches or other policies that implicate the sexuality of the inmates and the abuse of power by guards"); Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 766 (2005) [hereinafter Shayo Buchanan, *Beyond Modesty*] (critiquing how incarcerated people's privacy rights are often subordinated to correctional officers' employment rights).

205. See Miller, *supra* note 32, at 867 ("Undeniably, incarcerated women need the protection of privacy to police appropriate and inappropriate governmental intrusions upon their bodies at the hands of male guards. There is a strong correlation between cross-gender searches and custodial sexual misconduct among male guards."); Martin A. Geer, *Protection of Female Prisoners: Dissolving Standards of Decency*, 2 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 175 (2002) ("Policies that permit unsupervised male guards to search and monitor in female prisoner housing units have been identified as a primary cause of the high degree of incidences of abuse in U.S. prisons."); see also Krim, *supra* note 204, at 109 ("Policies such as cross-gender, clothed-body searches give male guards the power and opportunity to demand sex.").

206. See *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (Easterbrook, J., concurring) ("[Prisoners'] privacy interests are extinguished by the judgments placing them in custody.").

bear by necessity.<sup>207</sup> Once women's reformatories died out, women's prisons, like all prisons, were constructed around the perceived imperative of continual surveillance.<sup>208</sup> Courts defer to this penal surveillance and security imperative with very little circumspection. They rarely question its role in women's prisons where people who have suffered high levels of previous sexual abuse prior to incarceration are punished for largely non-violent drug offenses and property crimes.<sup>209</sup>

In two decisions, the Supreme Court solidified its wholesale deference to prison officials' professed need to infringe privacy in the interest of security.<sup>210</sup> First, in *Turner v. Safley*,<sup>211</sup> the Court accepted infringements of incarcerated person's constitutional rights as constitutionally permissible, so long as they were "reasonably related" to a legitimate penological purpose.<sup>212</sup> This effectively privileged the conclusions of correctional authorities as nearly binding. Ever since, the Constitution has played a diminished role in protecting prisoner privacy, resulting in a parallel weakening of Eighth Amendment protections against prison conditions.<sup>213</sup>

Second, in *Hudson v. Palmer*,<sup>214</sup> the Supreme Court eviscerated the potential for any Fourth Amendment privacy protection for incarcerated persons within their cells, holding that prisoners have no "subjective expectation of privacy." The Court found privacy protections irreconcilable "with the concept of incarceration and the needs and objectives of penal institutions."<sup>215</sup> According to the Court, those penal needs and objectives were the "close and continual surveillance of inmates and their cells required to ensure institutional security and internal order."<sup>216</sup> The Court said nothing about protecting incarcerated people's dignity or promoting their rehabilitation as part of the "concept" of incarceration.

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207. *Hudson v. Palmer*, 468 U.S. 517, 527–28 (1984).

208. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing the philosophy of penitentiaries).

209. Kajstura, *supra* note 4 (noting more than half of all women are incarcerated for drug and property crimes, but arguing that reform conversations should not start and stop with "non-violent drug and property offenses"); *INSIDE THIS PLACE*, *supra* note 33, at 17–18 (citing Bureau of Justice statistics); *ALL TOO FAMILIAR*, *supra* note 2.

210. See *Hudson*, 468 U.S. at 526–27; *Turner v. Safley*, 482 U.S. 78, 84–88 (1987).

211. 482 U.S. 78 (1987).

212. *Id.* at 87 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

213. Geer, *supra* note 205, at 195.

214. 468 U.S. 517 (1984).

215. *Id.* at 526.

216. *Id.* at 527–28.



There is tension between the law's valuing of privacy, which is extolled as a source of dignity and power,<sup>217</sup> and its diminished role in the correctional setting.<sup>218</sup> Discourse to dismantle prison sexual violence and coercion unsurprisingly invokes privacy in two different directions—expansion and invasion.

Many scholars urge greater privacy protections for people who are incarcerated as a means of countering sexual abuse and exploitation.<sup>219</sup> But these scholars also recognize that privacy alone is not an effective means of eliminating sexual violence without attention to the underlying power structures dictating who receives privacy's protection.<sup>220</sup>

On the other hand, in the direction of privacy invasion, PREA and other reform efforts may diminish prisoner privacy even further.<sup>221</sup> PREA invites greater surveillance of prisoners through video and visual monitoring.<sup>222</sup> But these greater privacy infringements may do little to actually protect people who are incarcerated.<sup>223</sup> Given that male guards

217. See *Winston v. Lee*, 470 U.S. 753, 760 (1985) (“[T]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.” (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966))).

218. See Shayo Buchanan, *Beyond Modesty*, *supra* note 204, at 812 (“[T]he Fourth Amendment privacy doctrine has offered virtually no protection to prisoners seeking protection against custodial sexual abuse.”); Ristroph, *supra* note 40, at 150 (describing prisoners’ loss of “all privacy rights, including any semblance of sexual privacy, as [their] bod[ies] [are] monitored, restrained, and regulated”).

219. See, e.g., Shayo Buchanan, *Beyond Modesty*, *supra* note 204, at 755 (arguing for an approach to Fourth Amendment privacy protection that places “the risk of sexual abuse—at the center of the analysis”).

220. See Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER, SOC. POL’Y & L. 1 (1998) (critiquing how gender stereotypes dictate protection from cross-gender searches); Rosa Ehrenreich, *Privacy and Power*, 89 GEO. L.J. 2047, 2058 (2001) (“Power constructs privacy and, to maintain itself, power also destroys privacy.”). Ehrenreich argues that “the privacy rubric has the potential to obscure certain kinds of consequential harms that are felt differentially by people in different social and economic groups” and suggests that issues “we routinely think of and speak of as ‘privacy issues’ . . . might be better described and analyzed as issues of *power*.” *Id.* at 2049 (emphasis in original); see also Miller, *supra* note 32, at 882 (“[T]he privacy analysis of feminist jurisprudence reflected a white, middle-class bias that left unexplored the complex ways in which women of color, including incarcerated women, experience privacy.”).

221. SpearIt, *Gender Violence in Prison & Hyper-Masculinities in the ‘Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL’Y 89, 140 (2011) (“Among the common calls are use of clear glass for cell construction, elimination of ‘blind spots’ in prisons, and fewer prisoners/more oversight.”).

222. Michele C. Nielsen, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons*, 64 UCLA L. REV. 230, 266 (2017); *id.* at 263 (noting that PREA emphasizes increased surveillance of prisoners and “[o]ne inherent flaw in this model, as revealed by the PREA statistics, is that correctional officers are often themselves the abusers”).

223. See *id.*; Frank, *supra* note 8.

at Edna Mahan Prison abused women even while the prison was deemed PREA-compliant,<sup>224</sup> one might assume that the women there lost more privacy with little benefit of protection.

Privacy thus has a limited role in protecting incarcerated persons' dignity, autonomy, and bodily integrity in the absence of interventions that go to the heart of the structural power dynamics and inequality that fuel the sexual abuse of women who are incarcerated. Because greater privacy in the abstract means nothing without power,<sup>225</sup> generating power must be the focus of any effective effort to eliminate the sexual abuse of incarcerated women.<sup>226</sup> Without increasing the power of incarcerated persons over their lives and safety, reform efforts will likely continue to fail. With this grounding of the problem, the next section takes up the inadequacy of legal reforms adopted in response.

### III. BEYOND REFORM

The law treats the above-described history and enduring harm of sexual violence against women who are incarcerated as an unfortunate byproduct of an otherwise constitutional system of criminal justice. Under this view, sexual violence against incarcerated women is a “conditions” problem capable of being remedied, no matter how persistent and endemic. This prevailing account of women’s prisons as institutions capable of constitutionally adequate treatment, where unsanctioned and unconstitutional action only sometimes occurs, has been repeatedly exposed as false.

Women’s prisons sprang into existence under conditions demonstrating that state confinement for women meant inherent vulnerability to sexual abuse.<sup>227</sup> While some reformers certainly may have sought to protect women when they urged the creation of separate women’s reformatories, in many parts of the country the development of women’s prisons was premised upon a patriarchal view of incarcerated women as sexual deviants and temptresses who inevitably introduced sex into correctional facilities.<sup>228</sup> Moreover, gender subordination still

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224. Sullivan, *Locked Up*, *supra* note 28 (noting that Edna Mahan Prison was deemed PREA compliant and “received high marks in a 2016” PREA audit, even though the same year “five of the six prison employees fired in the entire state over sex abuse claims came from the women’s facility”).

225. Ehrenreich, *supra* note 220.

226. Miller, *supra* note 32, at 867 (“The power disparity that exists between men and women in society is magnified within the rigidly hierarchical and closed prison apparatus.”).

227. *See supra* section I.A.

228. *See supra* notes 66–68 and accompanying text.

predominated even under short-lived progressive models for separate women's reformatories.<sup>229</sup> Sexual abuse and gender subordination have been intrinsic to women's prisons throughout their history. The enduring gender bias of legal reform efforts like PREA have only further exposed women's prisons as institutions beyond reform.

As originally proposed in 2002, PREA did not address the sexual abuse of incarcerated women and did not focus on correctional officers as perpetrators.<sup>230</sup> Rather, the legislation emerged as a bipartisan response to concerns about the sexual abuse of incarcerated men at the hands of other incarcerated men.<sup>231</sup> This, of course, did not respond to the experiences of incarcerated women who, unlike their male counterparts, overwhelmingly suffer abuse at the hands of male correctional officers and staff.<sup>232</sup>

But experts understood the gender-based dimension of the prison sexual abuse experienced by women even prior to PREA. In the lead-up to the legislation, organizations like the National Institute of Corrections (NIC) studied the sexual abuse of incarcerated women and the role of prison staff in committing it.<sup>233</sup> In the late 1990s, NIC advocated for legislation specifically addressing violence against incarcerated women.<sup>234</sup> But as Brenda Smith has recounted, in spite of work by human rights organizations documenting this violence, "there was little

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229. See *supra* notes 80–88 and accompanying text.

230. Smith, *PREA's Efforts*, *supra* note 119, at 1601.

231. *Id.* (noting that in addition to the legislation's bipartisan sponsors, PREA was spurred by "conservative-leaning groups concerned about the victimization of vulnerable white men in custody").

232. See M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 CRIM. L. BULL. 428, 431–32 (2010). Women who work as correctional officers can and do perpetrate sexual abuse of women in prisons too. When they participate in the gendered power structures that facilitate abuse against incarcerated women, female correctional officers are empowered to harm other women. This is not unlike the reality that police violence disproportionately directed against racial minorities is sometimes perpetuated by officers who are racial minorities themselves. See JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 109 (2017) (describing this dynamic). Legal scholar Teresa Miller has observed that cross-gender search doctrines are heteronormative, failing to grasp "how sexuality complicates the privacy analysis in cross-gender search cases." Miller, *supra* note 32, at 874. This, Miller notes, "under-protects" lesbian, bisexual, and transgender women. *Id.* While this critique is important, it does not change the fact that most sexual abuse and harassment of women in prisons is cross-gender in nature and committed by guards—a defining feature of the problem underacknowledged in PREA's preventive strategies.

233. Smith, *PREA's Efforts*, *supra* note 119, at 1601 n.17 (noting that NIC worked with American University to "provide training on staff sexual misconduct and related legal issues such as cross-gender supervision, legal liability for sexual abuse in custody, and investigations of sexual abuse in custody").

234. *Id.* at 1602.

traction in Congress” for legislation aimed at addressing it.<sup>235</sup> In fact, proposed legislation to create a registry of officers and staff who sexually abused people in custody never received enough support to stimulate broader consideration.<sup>236</sup> Indeed, Congress struck that proposal, the Custodial Sexual Abuse Act of 1998, from the Violence Against Women Act (VAWA) reauthorization bill.<sup>237</sup> No member of Congress has ever again introduced it.<sup>238</sup>

When Congress later considered PREA in the early 2000s, its supporters again did not prioritize concerns about women’s safety. Focused on male prison rape, PREA’s sponsors did not invite NIC to contribute to the legislative proposals despite its groundwork researching sexual abuse of incarcerated women.<sup>239</sup> Not surprisingly, the first iteration of the proposed legislation did not address women at all.<sup>240</sup>

To some extent, the implementation of PREA reached incarcerated women,<sup>241</sup> but this did not cure the treatment of women as an afterthought.<sup>242</sup> Specifically, the legislation failed to adequately grapple with the power dynamics that fuel the sexual abuse and exploitation of incarcerated women and did little to focus on the root causes of gender inequality and oppression that manifest as sexual violence, whether in or out of prison.<sup>243</sup>

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235. Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 CRIM. L. BRIEF 10 (2008) [hereinafter Smith, *Implementation and Unresolved Issues*].

236. *Id.*

237. *Id.*

238. *Id.*

239. As Smith notes, “the initial version of PREA only sought to address male prison rape” and at “the initial congressional hearing, most of the survivors were male.” *Id.* Even once the second iteration of PREA “included staff sexual misconduct against inmates, [it still] continued to focus heavily on male-on-male inmate rape.” *Id.*

240. H.R. 1765, 108th Cong. (2003); H.R. 1707, 108th Cong. (2003). The first version of the legislation, which was called the Prison Rape Reduction Act in the House, only addressed prison rape and not other forms of sexual assault. H.R. 1765. It identified young people and people with mental illness as vulnerable to such harm, but never named women as likely victims of sexual abuse. *Id.* § 2(3)–(4). Moreover, Congress’s legislative findings contemplated prison staff as responders to prison rape, not as perpetrators themselves. *See id.* § 2(5) (“[P]rison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults.”). The word “women” never appears in the House or Senate version of the proposed legislation. H.R. 1765; S. 1435, 108th Cong. (2003).

241. Smith, *PREA’s Efforts*, *supra* note 119, at 1601–02 (“The NIC would subsequently push for the inclusion of women in custody in the legislation’s execution.”).

242. Frank, *supra* note 8, at 13 (noting that PREA did not “contain any significant new initiatives to end the sexual victimization of incarcerated women. In fact, the administrative rules implementing PREA candidly acknowledge it may have no measurable effect whatsoever”).

243. Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L.J. 69, 71 (2015) (“[A]s many women-of-color feminists and critical theorists have established, freedom from sexual violence

To “eliminate” prison rape, PREA created a national commission to study the causes and consequences of prison sexual abuse and allocated substantial funding to the states for training, data collection, and equipment—including increased video surveillance.<sup>244</sup> The 2009 report later issued by the Commission acknowledged that most prior research focused on “abuse by other prisoners, rather than by staff, and on the risks for men and boys rather than for women and girls.”<sup>245</sup> It belatedly recognized that prison sexual abuse includes violence against women and children by corrections staff.<sup>246</sup>

Despite these critical acknowledgements, the report’s findings and recommendations nevertheless treated the sexual abuse of men at the hands of other incarcerated people as largely one and the same as the abuse experienced by women.<sup>247</sup> The Commission seemed to believe that the same remedial efforts and resources would address both problems—efforts like improvements in reporting, investigation, punishment, and treatment of trauma.<sup>248</sup>

When the report addressed populations at particular risk of abuse, it rightly cited LGBTQ people and described special populations as people on community supervision, children, and people in immigration detention.<sup>249</sup> Shockingly, it still provided no separate analysis of the vulnerability or needs of women. In fact, the report focused nearly exclusively on encouraging limitations on cross-gender supervision as interventions needed to mitigate correctional sexual violence against women.<sup>250</sup> It did little to acknowledge, and offered no real measures to respond to, the fact that women’s prisons permit men to work there as officers and the vast majority of correctional officers and staff are

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requires redistribution of wealth and power, and an end to gender, racial, class, sexuality, nationality, and disability-based subordination.”).

244. 42 U.S.C. § 15606(d)(2)(H) (directing the National Prison Rape Commission to study “the feasibility and cost of conducting surveillance, undercover activities, or both, to reduce the incidence of prison rape”); Ristroph, *supra* note 40, at 146 (noting PREA makes increased surveillance in prisons a “central” part of its reform agenda).

245. PREA COMMISSION REPORT, *supra* note 53, at 7.

246. *Id.* at 5. The Commission also accurately described the particular vulnerability of LGBTQ people in prison. *Id.* at 7.

247. Indeed, none of the Commission’s findings included interventions aimed at the specific issue of corrections officer abuse and improving women’s vulnerable status.

248. PREA COMMISSION REPORT, *supra* note 53, at 99–124.

249. *Id.* at 139–88.

250. For example, the report acknowledged the role male supervision of women played in widespread abuse in various Michigan prisons in the 1990s but did not address the scope or pattern of abuse throughout the nation. *Id.* at 6. As far as interventions, the report merely noted that “[c]ross-gender supervision is an area in which the Commission has set clear standards.” *Id.*

men.<sup>251</sup>

In 2012, the Department of Justice (DOJ) issued standards implementing PREA and requiring state and local officials to train officers, increase sexual abuse reporting avenues, expand mental and medical care for incarcerated persons, limit cross-gender searches, and comply with ongoing audits of facilities' compliance with the new standards.<sup>252</sup> While many of these requirements are positive developments, PREA was—and remains—nearly wholly unresponsive to the epidemic of carceral sexual abuse as it impacts women.

Moreover, as advocates and scholars have long noted, PREA has other problems. Without a private right of action to impose liability, PREA has no teeth.<sup>253</sup> Additionally, the consequences for states that fail to meet its standards are insubstantial.<sup>254</sup> Further, the Prison Litigation Reform Act (PLRA),<sup>255</sup> which limits prisoners' ability to obtain legal redress and accountability for harm that does not cause physical injury, undercuts PREA's effectiveness.<sup>256</sup> This bar limits recovery for sexual misconduct and degrading treatment short of physical violence that causes injury even though these other forms of mistreatment mark many women's carceral experience and create

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251. de Sauvage & Head, *supra* note 68, at 186.

252. National Standards to Prevent, Detect, and Respond to Prison Rape, 28 C.F.R. §§ 115.5–115.501 (2019).

253. See, e.g., Lena Palacios, *The Prison Rape Elimination Act and the Limits of Liberal Reform*, UNIV. OF MINN. GENDER POL'Y REP. (Feb. 17, 2017), <https://genderpolicyreport.umn.edu/the-prison-rape-elimination-act-and-the-limits-of-liberal-reform/> [<https://perma.cc/9L3S-AGGG>] (claiming PREA “falls far short of what is needed to protect all prisoners, especially women, people of color, transgender individuals, and disabled people”).

254. See Ristroph, *supra* note 40, at 175 (noting one should not “exaggerate the likely effects of the PREA” as it “is a mostly hortatory statute”); Giovanna Shay, *PREA's Peril*, 7 NE. U. L.J. 21, 22 (2015) (arguing that risk to states of lost federal funding for failing to implement PREA's standards offered weak incentives for implementation); David Kaiser & Lovisa Stannow, *Prison Rape: Obama's Program to Stop It*, N.Y. REV. OF BOOKS (Oct. 11, 2012), <https://www.nybooks.com/articles/2012/10/11/prison-rape-obamas-program-stop-it/> (last visited May 3, 2023) (warning threatened loss of federal funding was too weak a measure to secure PREA compliance).

255. Pub. L. No. 104-134 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

256. See, e.g., Margo Shlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 149 (2008) (arguing that the PLRA undermines “Congress's goal of eliminating sexual abuse in U.S. prisons, jails, and detention centers” (quoting Letter from the Nat'l Prison Rape Elimination Comm'n. to Congressman Robert C. (“Bobby”) Scott and Congressman Randy Forbes, Chair and Ranking Minority Members, Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary (Jan. 24, 2008)).

conditions that lead to physical abuse.<sup>257</sup> Finally, by failing to focus on the root causes of sexual violence, such as the unnecessary policing and incarceration of women of color and neglecting resources to invest in people and communities, PREA offers little hope to women vulnerable to this gender-based violence.<sup>258</sup>

In some ways, PREA is a limited step forward.<sup>259</sup> Within some states and correctional institutions, PREA is likely helping to professionalize the investigation of sexual assault, creating a stronger norm against sexual violence<sup>260</sup> and encouraging more reporting of sexual abuse than ever before.<sup>261</sup>

There is still, however, substantial reason to doubt whether such reporting is preventing abuse. Incarcerated women face momentous believability hurdles that magnify those that apply to all women accusers,<sup>262</sup> notwithstanding incarcerated women's heightened risks of retaliation given officers' near-total control over their daily lives.<sup>263</sup> Evidence suggests that any increase in reporting is not achieving greater accountability or prevention. Indeed, accused officers still rarely face repercussions.<sup>264</sup> And even when they do, as the experiences at Edna Mahan Prison, Dublin, and other facilities demonstrate, this often does

257. See *supra* section II.A.

258. See Jerita L. DeBraub, *Prison Rape: Have We Done Enough? A Deep Look into the Adequacy of the Prison Rape Elimination Act*, 50 HOW. L.J. 203, 204 (2006) (arguing PREA is riddled with weaknesses “because it focuses primarily on the symptoms of prison rape and does not sufficiently eliminate the causes”).

259. Legal scholar Brenda V. Smith, who served on the PREA Commission, has emphasized PREA's positive impacts, which she explained “drastically changed the landscape of corrections.” Smith, *PREA's Efforts*, *supra* note 119, at 1599–1600.

260. See INSIDE THIS PLACE, *supra* note 33, at 19 (crediting some states’ “enlightened prison practices” with low rates of sexual abuse and violence).

261. Alysia Santo, *Prison Rape Allegations Are on the Rise*, MARSHALL PROJECT (July 25, 2018, 8:00 AM), <https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise> [<https://perma.cc/VH6U-D2SK>] (noting a 180% increase in reporting of sexual abuse in prison between 2011, the year before PREA's federal standards went into effect, and 2016); RAMONA R. RANTALA, BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–2015 4–5 (2018), <https://bjs.ojp.gov/content/pub/pdf/svraca1215.pdf> [<https://perma.cc/C56J-762Y>] (noting that in 2015 prison administrators reported nearly “triple the number” of allegations of sexual victimization than three years earlier in 2011, prior to PREA's implementation).

262. Santo, *supra* note 261.

263. See Deborah M. Whitley & Paula L. Dressel, *The Controllers and the Controlled, in WOMEN AT THE MARGINS: NEGLECT, PUNISHMENT, AND RESISTANCE* 118 (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002) (citation omitted) (describing how male corrections officers “ensure their absolute authority and dominance over” women who are incarcerated).

264. *Id.* (noting that allegations of sexual misconduct skyrocketed between 2012 and 2018 but prisons' substantiation or crediting of allegations increased only slightly).

not lead to lasting change.

Evidence from the Bureau of Justice Statistics suggests that women who are incarcerated are still subjected to “epidemic” levels of sexual abuse constituting a “human rights crisis.”<sup>265</sup> The stories of survivors revealed through litigation and news reports demonstrate that gender-based inequality and oppression remain on full display in far too many institutions.<sup>266</sup> In these institutions, PREA has made little difference.

In fact, PREA auditors concluded that the leaders of Edna Mahan Prison adopted all measures required by PREA’s implementing regulations.<sup>267</sup> During the period that much of Edna Mahan Prison’s recent sexual violence occurred, the facility was deemed PREA compliant.<sup>268</sup> New Jersey has also regularly fired and prosecuted offenders going back to the 1990s.<sup>269</sup> But new officers at the prison simply filled the shoes of their terminated or prosecuted colleagues and continued the pattern.<sup>270</sup> At Edna Mahan Prison, implementation of

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265. INSIDE THIS PLACE, *supra* note 33, at 263; LAURA M. MARUSCHAK & EMILY D. BUEHLER, BUREAU OF JUST. STAT., SURVEY OF SEXUAL VICTIMIZATION IN ADULT CORRECTIONAL FACILITIES, 2012–2018 – STATISTICAL TABLES 8 (2021) (noting more than 10,000 reported instances alleged staff sexual misconduct and sexual harassment in 2018), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ssvacf1218st.pdf> [<https://perma.cc/QS42-JW8X>].

266. See Bozelko, *supra* note 17; INSIDE THIS PLACE, *supra* note 33.

267. Sullivan, *Locked Up*, *supra* note 28 (noting that Edna Mahan Prison was deemed PREA compliant and “received high marks in a 2016” PREA audit, even though the same year “five of the six prison employees fired in the entire state over sex abuse claims came from the women’s facility”); BUREAU OF JUST. ASSISTANCE, PREA AUDIT: AUDITOR’S SUMMARY REPORT ADULT PRISONS & JAILS, EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN (2014), <https://dSPACE.njstatelib.org/bitstream/handle/10929/68860/p9592014c.pdf?sequence=1&isAllowed=y> [<https://perma.cc/PRH7-HLWW>].

268. Sullivan, *Locked Up*, *supra* note 28.

269. See *Heggenmiller v. Edna Mahan Corr. Inst.*, 128 F. App’x. 240, 244, 249 (noting that six incidents of sexual assault occurred at Edna Mahan Prison between 1994 and 1998, at least five guards were fired for sexual misconduct, and some of these incidents resulted in criminal convictions). In 2017, four correctional officers were indicted in connection with sexual abuse and assault at Edna Mahan. EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 24. In 2018, a senior corrections officer at Edna Mahan was convicted and sentenced to sixteen years in prison for sexual assaults. S.P. Sullivan, *N.J. Women’s Prison Officer Gets 16-Year Sentence for Sexually Assaulting Inmates*, NJ.COM (July 26, 2018, 8:57 PM), [https://www.nj.com/news/2018/07/womens\\_prison\\_officer\\_gets\\_16-year\\_sentence\\_for\\_se.html](https://www.nj.com/news/2018/07/womens_prison_officer_gets_16-year_sentence_for_se.html) [<https://perma.cc/GL32-MQPW>]. Three other officers pled guilty to misconduct related to charges that they abused Edna Mahan prisoners. *Id.* But the State failed to prosecute some of the offenders much earlier and many of the charges filed in 2017 reflected decades-long problems. See *Sexual Abuse at New Jersey’s Women-Only Prison Goes Back Decades*, WNYC (Jan. 31, 2017), <https://www.wnyc.org/story/sexual-abuse-new-jerseys-women-only-prison-goes-back-decades/> [<https://perma.cc/2Y8W-AYFA>] (noting that one guard fired over allegations of abuse in 2010 was never charged with a crime).

270. See *supra* notes 154–167 and accompanying text.



PREA has failed to eradicate what the DOJ called a “‘culture of acceptance’ of sexual abuse . . . which has enabled abuse to persist despite years of notice and efforts towards change at the State level.”<sup>271</sup>

Following PREA’s enactment, sexual victimization of women in prisons and jails remains widespread but women continue to “suffer in relative anonymity.”<sup>272</sup> To date, leaders have failed to target the crisis as a problem of gender inequality and subordination.<sup>273</sup> Moreover, many continue to place their faith in reforming the conditions of women’s prisons rather than rejecting them as institutions built upon endemic harm.<sup>274</sup>

For example, in April 2022, Representatives Karen Bass, Jackie Speier, and Nancy Mace proposed legislation, the Women in Criminal Justice Reform Act, which seeks in part to increase efforts to retain female officers and ensure incarcerated women receive adequate medical care.<sup>275</sup> The law would also allow “temporary release of inmates for medical services such as care from a sexual assault nurse examiner and training for federal prison workers in trauma-informed screening and care.”<sup>276</sup>

While these are all necessary responses to harm after it occurs, the legislation takes for granted that women in prison need the medical interventions of a “sexual assault nurse” because they will be sexually assaulted.<sup>277</sup> This perpetuates the age-old expectation that, for women, incarceration means sexual abuse and exploitation without doing anything to end such harm.

Moreover, just as PREA’s sole gender-specific intervention centers on cross-gender searches and supervision, the Women in Criminal Justice Reform Act merely encourages increased efforts at employing female officers.<sup>278</sup> These non-mandatory provisions cannot overcome the fact that nearly seventy percent of correctional

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271. EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 27.

272. INSIDE THIS PLACE, *supra* note 33, at 17.

273. Cathy McDaniels-Wilson & Judson L. Jeffries, *Women Behind Bars: An Illuminating Portrait*, 2011 J. INST. JUST. INT’L STUD. 129, 129 (2011) (“Mass incarceration, as a major social ill has garnered significant attention among academics, however the surge in the number of women prisoners in the U.S., has been given comparatively short shrift by the literature, which tends to focus on male inmates.”).

274. *See* Sisak & Balsamo, *Will Things Change?*, *supra* note 19.

275. *Id.*; H.R. 7394, 117th Cong. (2022).

276. Sisak & Balsamo, *Will Things Change?*, *supra* note 19.

277. *See* H.R. 7394.

278. *Id.*

officers in federal women's prisons are currently men.<sup>279</sup> Because the reforms would not dramatically change the nature of officers' jobs or their presence around incarcerated women, perhaps the legislation's authors were weary that total bans prohibiting men from working in women's prisons would violate equal protection and Title VII.<sup>280</sup> Reforms that accept a driver of harm and merely encourage fewer instances of it, however well-intentioned, will not "eliminate" the problem of rape, even though PREA, at least in its name, purports to try to do so.<sup>281</sup>

#### IV. TOWARD A TRANSFORMATIVE RECALIBRATION OF POWER

The crisis in America's women's prisons persists despite officer firings, criminal prosecutions, and civil liability, and even during a #MeToo era that promises greater intolerance for sexual harassment and abuse outside of prison. In the workplace, professional sports, higher education, and other areas of public life, the aggregated power of collective voices and the impact of public exposure have imposed consequences upon abusers with long-impervious power.<sup>282</sup> This has resulted in job loss, destroyed reputations, and for some, criminal penalties. Perhaps more importantly, outside of prison walls, #MeToo has shined a light on the monumental scale of sexual harassment and abuse that woman collectively experience.<sup>283</sup>

#MeToo, in short, has made an impact.<sup>284</sup> Though this impact may be qualified and in need of wider and more inclusive reach,<sup>285</sup> #MeToo's proven possibilities warrant extension of its transferrable lessons to prisons. The following section first identifies the gender inequality and subordination that makes a #MeToo-type transformation so sorely

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279. See *Women in Prison*, *supra* note 194.

280. de Sauvage & Head, *supra* note 68, at 186–90 (summarizing cases upholding limited restrictions on cross-gender prison assignments).

281. As Dorothy Roberts has argued, "reforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation. Indeed, reforming prisons results in more prisons." Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 43 (2019).

282. Clarke, *supra* note 45, at 38.

283. *Id.*

284. Kantor & Twohey, *supra* note 42.

285. See *supra* notes 47–48 and accompanying text (describing how #MeToo has largely not delivered accountability or redress other than for famous and privileged victims and has largely failed to prioritize the experiences of marginalized women of color).

needed in prison. It then identifies key insights from the #MeToo era that should be applied to the carceral sexual abuse crisis impacting women. Finally, it acknowledges that long before #MeToo, incarcerated women have challenged and exposed brutality in prison through acts of resistance and empowerment. The lessons from their experiences are the foundation for a #MeToo movement in prison.

*A. Targeting Race and Gender Inequality at the Root*

The disconnect between the structures that make #MeToo necessary for women in prison and its complete absence within prisons' walls is one of the most fundamental contradictions and weaknesses of the movement, as currently framed. The dynamics of sexual abuse and inequality that led to the #MeToo reckoning—gender inequality, disparate power, vulnerability, fear of retaliation, unspoken tolerance, not being believed—are intensified for women in prisons.<sup>286</sup> People in prison remain at officers' mercy for every life-sustaining need and comfort.<sup>287</sup> This relationship exploits race, gender, power, and control.<sup>288</sup> For women, the consequences of reporting or resisting prison sexual abuse can mean physical harm, loss of food or privileges, or not being able to see or contact one's children.<sup>289</sup>

Moreover, the extremely high levels of prior sexual victimization experienced by incarcerated women is part of the fabric of the broader sexual abuse epidemic that envelopes women's lives in and out of prison.<sup>290</sup> Researchers have noted an “overwhelming prevalence” of

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286. Jessica Feerman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL'Y 249, 275 (2004) (“As long as prisoners continue to be disempowered and their voices largely silenced, they will be vulnerable to continued abuse.”).

287. LaBelle, *supra* note 146, at 359.

288. The exploitation of power at the root of carceral sexual abuse of women was aptly described by Deborah M. Whitley and Paula L. Dressel:

The specific behaviors that male corrections officers execute in controlling female inmates ensure their absolute authority and dominance over prisoners. The various forms of male dominance and racialized privilege that exist outside of prison have a greater likelihood of being exhibited in a setting where the women have no power or allies. Sexism and racism are constant themes in these relationships. Too often violence is used as an enforcement mechanism for containment and for the maintenance of power relations based on race and gender; violence in the service of enforcing power structures is legitimated. Corrections officers are in a position to define and conceptualize what types of stigma are and are not sanctioned. Further, women prisoners, by virtue of carrying the stigma of being prisoners, are not often viewed as victims by prison officials.

Whitley & Dressel, *supra* note 263, at 118 (citations omitted).

289. INSIDE THIS PLACE, *supra* note 33. For example, officers at Edna Mahan Prison asserted their power over women by withholding basic privileges and routinely exchanging sex for food, medication, and contraband. EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 6.

290. VICTORIA LAW, RESISTANCE BEHIND BARS: THE STRUGGLES OF INCARCERATED WOMEN

sexual abuse histories within the population of incarcerated women, with some figures suggesting that nearly two thirds of all women who are incarcerated have experienced sexual and physical abuse in their lives.<sup>291</sup>

As Victoria Law has explained, prior sexual abuse renders women more vulnerable to abuse once incarcerated “because they arrive in prison already conditioned to respond to coercion and threats by acquiescing to protect themselves from further violence.”<sup>292</sup> This exploitation and compounding of gender subordination is a missing story in the current #MeToo era.

The lack of wider regard for incarcerated women’s #MeToo experiences reflects patterns of racialized gender-subordination in wider society and has a carceral dimension too; incarcerated women’s sexual abuse and exploitation is conventionally treated as a prison conditions problem, allowing “the distance and isolation created by stigma and prison walls” to render incarcerated women’s “realities invisible.”<sup>293</sup> This has a systemic subordinating impact upon incarcerated women that perpetuates gender oppression within prisons and jails and outward into broader society too.<sup>294</sup>

Specifically, the regular verbal harassment and degradation that women in prison experience, even separate from physical assault, sends a message to incarcerated women that they occupy an inferior place in a hierarchy and lack agency and power.<sup>295</sup> When male officers watch women use the restroom or shower, expose women to intrusive cross-gender physical searches, and demand sex as a condition of receiving goods or privileges under the threat of punishment,<sup>296</sup> they exert total control over incarcerated person’s lives. This instills fear and promotes feelings of powerlessness, exacerbating inequality and further

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60 (2012) (“[A]t least 40–57% of women enter prison with extensive histories of previous abuse.”).

291. INSIDE THIS PLACE, *supra* note 33, at 18 (citing Bureau of Justice statistics); see ALL TOO FAMILIAR, *supra* note 2.

292. LAW, *supra* note 290, at 61.

293. Josefina Figueira-McDonough & Rosemary C. Sarri, *Increasing Inequality: The Ascendancy of Neoliberalism and Institutional Exclusion of Poor Women*, in WOMEN AT THE MARGINS: NEGLECT, PUNISHMENT, AND RESISTANCE 5 (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002).

294. See Whitley & Dressel, *supra* note 263, at 108–09; *id.* at 119 (describing how “exposure to violence and abuse from prison guards,” in addition to guards’ near total control of women’s lives, marginalizes women and diminishes their self-sufficiency upon release).

295. Shayo Buchanan, *Impunity*, *supra* note 12, at 55 (describing sexual abuse of incarcerated women as typically including “verbal harassment, improper visual surveillance, improper touching, and/or consensual sex”).

296. *Id.*; see also EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 6.

oppressing women and nonbinary people on the basis of their gender.<sup>297</sup>

Subordination on the basis of gender, as Catharine MacKinnon has described it, “cumulatively and systematically shap[es] access to human dignity, respect, resources, physical security, credibility, membership in community, speech, and power.”<sup>298</sup> #MeToo has helped make perceptible to more people how gender-based abuse degrades and disempowers women. Recognizing #MeToo in prisons would better foster the understanding that, for many people held at women’s prisons, racialized, gender-based harm is a constant and routinized part of incarceration, while human dignity, respect, basic resources, and security are all already in short supply.<sup>299</sup>

Gender subordination is also a factor in determining which women end up in prison. High levels of prior sexual abuse not only make women more vulnerable to abuse while imprisoned,<sup>300</sup> but also contribute to the circumstances that lead to incarceration in the first instance. Research suggests that “criminal offending and subsequent incarceration is one of the aftereffects of female sexual abuse history.”<sup>301</sup>

In constitutional terms, the gender-based inequality reproduced and reflected within women’s prisons is caste-based treatment that is uniquely the concern of the Constitution’s guarantee of equal

297. Figueira-McDonough & Sarri, *supra* note 293, at 19 (“Not only do guards who abuse these women feel that the women have lost their right to privacy and dignity and can be used as they please, but also the women interviewed feel totally powerlessness [sic], while the silence of other guards and wardens proves them right.”).

298. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1298 (1991).

299. See Figueira-McDonough & Sarri, *supra* note 293; Whitley & Dressel, *supra* note 263.

300. See generally LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023); Thusi, *supra* note 9, at 951 n.258 (citing Jude McCulloch & Amanda George, *Naked Power: Strip Searching in Women’s Prisons*, in THE VIOLENCE OF INCARCERATION 107, 113 (Phil Scraton & Jude McCulloch eds., 2009)) (acknowledging in an Australian study “the extensive body of research documentation confirming that the majority of female prisoners have themselves been victims of sexual abuse and violence in their childhood years and/or adult relationships”).

301. McDaniels-Wilson & Jeffries, *supra* note 273, at 132; GOODMARK, *supra* note 300. Incarcerated women have long emphasized these links. In 1985, women held at the maximum-security Bedford Hills Corrections Facility in New York and antiviolenace advocates organized “the first public hearing on battered women and the criminal justice system” and through women’s testimony illuminated the role of “gender violence as a pathway to women’s imprisonment.” ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, ABOLITION. FEMINISM. NOW. 100 (2022) (citing COMM. ON DOMESTIC VIOLENCE & INCARCERATED WOMEN, BATTERED WOMEN AND CRIMINAL JUSTICE: A REPORT OF THE COMMITTEE ON DOMESTIC VIOLENCE AND INCARCERATED WOMEN (1987), <https://www.ojp.gov/pdffiles1/Digitization/107516NCJRS.pdf> [<https://perma.cc/EJ65-88RD>]).

protection.<sup>302</sup> As the Supreme Court has stated in extrapolating the demands of equal protection, states are not permitted to “impos[e] special disabilities upon groups disfavored by virtue of circumstances beyond their control” that suggest “the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”<sup>303</sup> Because gender subordination is central to the creation, implementation, and sex abuse that defines women’s prisons, these institutions and the harm that they impose should no longer be accepted as places that generally comply with constitutional commitments, but only occasionally impose unconstitutional “conditions.” There is no “exceedingly persuasive justification” for exposing women to the harm visited upon them in prison because of their gender.<sup>304</sup>

Yet far from seeing this pattern and epidemic as a priority area for redress within the #MeToo era, a common assessment asserted in response to staff sexual abuse in women’s prisons is that such facilities are plagued by “a culture of acceptance.”<sup>305</sup> Indeed, the DOJ cited Edna Mahan’s “culture” eight times in its 2020 report<sup>306</sup> and released a report in 2008 called “Strategies to Prevent Prison Rape by Changing the Correctional Culture.”<sup>307</sup>

To be sure, years of institutional reform, litigation against prisons and jails nationwide, and efforts to further professionalize the practice of

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302. See *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

303. *Id.*

304. See *United States v. Virginia*, 518 U.S. 515, 524 (1996) (setting this standard for evaluating gender-based discrimination under the Fourteenth Amendment’s Equal Protection Clause).

305. See EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 27; Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107, 109–10 (2010) (describing how misogyny and homophobia within “prison culture” drives the sexual abuse of prisoners); *Public Outcry and Demands for Justice Grow After Women Speak Out Against Abuse at NJ Prison*, AM. FRIENDS SERV. COMM. (last updated Apr. 15, 2021), <https://afsc.org/news/public-outcry-and-demands-justice-grow-after-women-speak-out-against-abuse-nj-prison> [<https://perma.cc/72VN-EQ2E>] (reform must finally “change the culture that not only permits such abuse but accepts it” (quoting American Friends Service Committee’s Prison Watch Program director Bonnie Kerness)). I have made this observation about cultural change as well and acknowledge its limitations. See Jenny-Brooke Condon, *Opinion, Time’s Up. Murphy Must Accept Responsibility for Sexual Abuse at N.J.’s Women’s Prison*, NJ.COM (Apr. 21, 2020, 1:52 PM), <https://www.nj.com/opinion/2020/04/times-up-murphy-must-accept-responsibility-for-sexual-abuse-at-njs-womens-prison-opinion.html> [<https://perma.cc/Z529-D7RX>].

306. EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 1, 5, 24, 26–27; see also *id.* at 5 (noting that one state court observed in 2018 that “this ‘pervasive culture’ has enabled Edna Mahan staff to abuse their authority by ‘preying on vulnerable women . . . for sexual gratification’” (quoting *New Jersey v. Mays*, Judgment of Conviction & Order for Commitment, HNT-16-00671, CRM2018560286 (Sept. 17, 2018))).

307. NAT’L INST. OF JUST., DEP’T OF JUST., STRATEGIES TO PREVENT PRISON RAPE BY CHANGING THE CORRECTIONAL CULTURE (2008).

corrections have demonstrated that some change within prisons can be achieved with a sustained and comprehensive commitment to remaking norms, or, as it is often described, “cultural” change.<sup>308</sup> But even if systemic reforms can be partly achieved in this way, patterns of abuse are rarely eradicated. That is so because diagnoses of abusive institutional “culture” inadequately capture the broader systemic inequality and gender subordination that form the enabling architecture of abusive prisons for women.

Understanding the sexual abuse of people incarcerated in women’s prisons as a feature of prison “culture” shrinks the problem to a localized condition created by institutional actors without regard to the broader social forces, gender hierarchy, and systemic inequality that are replicated—and exacerbated—within correctional settings. While prisons surely have certain “cultures,”<sup>309</sup> including cultures of resistance,<sup>310</sup> diagnoses of sexual violence in women’s prisons as byproducts of a generic prison culture miss the more universal structural forces upon which prison sexual violence is perpetuated: chiefly, gender inequality, patriarchy, racism, and poverty.<sup>311</sup> And the choice to conceptualize prison sexual violence simply as a prison-conditions problem means that the potential solutions to that problem will likely be framed (and thus, limited by) the tools typically invoked to regulate and run prisons. This is already evident in PREA’s choice of designating more prosecutorial power and custodial surveillance as antidotes to prison rape.<sup>312</sup> #MeToo offers important countervailing interventions because it targets “cultures of acceptance” as forms of gender oppression and counteracts them by empowering survivors.

Critical feminist scholarship has long been wary of cultural

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308. See, e.g., Shay, *supra* note 254, at 22 (criticizing PREA’s promotion of “a corrections industry of training and ‘best practices’” without attention to root causes of sexual abuse); see also Condon, *supra* note 305 (“True reform and durable cultural change often only occur once an institution engaged in the transformative process of reform is capable of critical self-assessment based on standards it has internalized and values.”).

309. See Ristroph, *supra* note 40, at 149–50 (describing prisoners’ own accounts of “‘prison subculture’ which ‘fuses sexual and social roles and assigns all prisoners accordingly’”) (quoting Stephen Donaldson, *A Million Jockers, Punks, and Queens*, in *PRISON MASCULINITIES* 118 (Don Sabo, Terry A. Kupers & Willie London eds., 2001)).

310. ANGELA DAVIS, *ANGELA DAVIS: AN AUTOBIOGRAPHY* 52 (1988) (describing how prisoners develop internal cultures “in order to shield themselves from the open or covert terror designed to break their spirits . . . [T]his culture is one of resistance, but a resistance of desperation”).

311. DAVIS ET AL., *supra* note 301, at 59.

312. See 42 U.S.C. § 15606(d)(2)(H); Ristroph, *supra* note 40, at 176 (“To the extent that the Act does contemplate actual solutions to prison rape, it proposes that we police this form of sexual violence in the ways we police most crime: more punishment and more surveillance.”).

explanations for gender-based violence that ignore structural forces.<sup>313</sup> Legal scholar Leti Volpp, for example, has described the danger of excessively focusing within liberal human rights discourse and literature on the “sex-subordinating cultural practices” of developing countries.<sup>314</sup> She argues that although “culture is often represented as the product of timeless ritual insular to particular communities,”<sup>315</sup> globally, it is structural forces—including inequality, patriarchy resulting from emerging religious fundamentalism, colonialism, racism, and other forces—“that deny women economic and political agency”<sup>316</sup> and “profoundly shape culture.”<sup>317</sup>

Volpp’s argument responds to the cultural essentialism that has long burdened largely Western critiques of other countries’ human rights violations—critiques that often fail to turn a critical gaze inward at Western countries’ gender-based inequality.<sup>318</sup> But her point has salience for how we think about sexual violence inflicted upon people in women’s prisons. That is, when we conceptualize the sexual abuse of women as the product of a disordered “culture” within prisons—a culture that many people are unfamiliar with or do not care about<sup>319</sup>—then we fail to grapple with how inequality, racism, and patriarchy within our broader society inevitably reproduce those conditions.

We now have a copious body of evidence that confirms the gender-based nature of the harm and abuse endemic to women’s prisons.<sup>320</sup> The gender subordination that fuels the sexual abuse and exploitation of women in prison replicates the power dynamics and gender inequality that fuel violence against women in broader society.<sup>321</sup> But PREA and

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313. See, e.g., Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1204 (2001) (criticizing “excessive focus” by Western feminist scholars upon “minority and Third World sex-subordinating cultural practices” for ignoring the structural forces that determine cultural practice).

314. *Id.*

315. *Id.* at 1206.

316. *Id.* at 1205.

317. *Id.* at 1206.

318. See, e.g., Uma Narayan, *Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism*, 13 HYPATIA 86 (1998) (summarizing the feminist critique).

319. David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010) (describing how prisons are largely hidden from public view and few constituencies exist that care about the unpopular and disempowered people held there).

320. INSIDE THIS PLACE, *supra* note 33, at 18–19 (“Not once in creating this volume did we come across a woman who described being sexually abused by another prisoner.”).

321. RAFTER, *supra* note 1, at xi–xii (arguing that “prisons function to control gender as well as crime” and that women in prison have historically been ignored by policymakers, sociologists, and the broader public, in part because “prisons themselves are gendered institutions[] that reflect[]and



other reform efforts largely treat abuse as a creature of the prison system alone. As a group of feminist prison abolition scholars recently put it, “focusing on women’s experiences of punishment . . . help[s] clarify the relationships between state violence and intimate violence and to elucidate how prisons reproduce forms of violence that proliferate in the ‘free world.’”<sup>322</sup> As described next, the lessons and strategies of #MeToo outside of prison are relevant to the gender-based oppression occurring inside of prisons.

### B. *The Lessons and Strategies of #MeToo*

#MeToo’s transformative power offers lessons for the ongoing sexual abuse crisis facing incarcerated people in America’s women’s prisons. As a strategy to respond to women’s subordination, the movement creates meaningful remedies and responses to sexual abuse outside the limitations and patriarchy embedded in the legal and carceral systems. As Jessica Clarke has argued, #MeToo is not a “rights-claiming system in which survivors make demands for justice” but rather a generative extra-legal process that imposes consequences for violations of social norms.<sup>323</sup>

#MeToo’s strategic aims and consequences differ from the criminal system’s primary theories of punishment, namely: retribution, deterrence, rehabilitation, and incapacitation.<sup>324</sup> The consequences of #MeToo may overlap at times with some of the criminal punishment system’s goals, but #MeToo furthers different normative values and goals, which I characterize as empowerment, disqualification, and deconstruction. These functions of #MeToo are further explained below.

#### 1. *Empowerment*

At its most basic level, #MeToo has served as a form of collective testimony—a narrative that has helped shift previously immovable expectations about society’s tolerance for sexual abuse of women.<sup>325</sup>

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reinforc[e] beliefs about sexual difference”).

322. DAVIS ET. AL., *supra* note 301, at 44.

323. Clarke, *supra* note 45, at 42.

324. See, e.g., Brittany L. Deitch, *Life Without Parole as Death Without Dignity*, 72 ALA. L. REV. 327, 338 (2020) (identifying these classic theories of punishment while noting more recent variations in the literature).

325. Scholars have argued that narrative can often be more powerful and influential than law in changing norms and behavior and have ascribed this vision to #MeToo. See, e.g., Shelley Cavalieri, *On Amplification: Extralegal Acts of Feminist Resistance in the #MeToo Era*, 2019 WIS. L. REV. 1489, 1504 (2019) (noting that feminist scholars and activists have long questioned “the value of

#MeToo’s impact lies in the deeply personal, yet universal nature of shared narratives that prompt immediate recognition for survivors.<sup>326</sup> But the effect of this process is not merely commiseration or empathy. #MeToo builds power.

Specifically, the act of publicly revealing one’s experience—and having others amplify it—shifts power toward survivors by overcoming long-existing structures that silence victims and conceal their experiences.<sup>327</sup> As Shelly Cavalieri observes, “[i]nstead of focusing on limitations and weakness as the defining characteristics of women’s public lives, amplification reminds us that women have resources they can use to destabilize patriarchal structures.”<sup>328</sup>

In this sense, #MeToo does not simply enhance or aggregate survivors’ power—it discounts and takes away power from those who were long insulated by it.<sup>329</sup> #MeToo has shown that recalibrating power is key to unlocking greater gender-based justice.<sup>330</sup>

## 2. *Disqualification*

#MeToo also functions as a tool of accountability when the aggregated power of collective voices and the impact of public exposure topples abusers who have held long-impervious power. This is sometimes pejoratively described as “cancellation.”<sup>331</sup> The practical

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law as a tool of social change”); Margaret E. Johnson, *Feminist Judgments & #MeToo*, 94 NOTRE DAME L. REV. ONLINE 51, 51 (2018) (describing how #MeToo displaced “previously assumed or accepted narratives told by powerful people”); Catharine A. MacKinnon, Opinion, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (last visited May 5, 2023) (“The #MeToo movement is accomplishing what sexual harassment law to date has not.”).

326. Johnson, *supra* note 325.

327. Cavalieri, *supra* note 325, at 1525; *see id.* at 1526 (describing MeToo “as an extralegal strategy” of amplification that “resonates with contemporary feminists” because it “subverts women’s disempowerment”).

328. *Id.* at 1526.

329. Deborah L. Rhode, *#MeToo: Why Now, What Next?* 69 DUKE L.J. 377, 425 (2019) (“As researchers have long noted, and #MeToo revelations confirmed, those with unchecked discretionary authority are more likely to abuse it. Power often enhances individuals’ sense of entitlement and insulation from accountability.”); Rebecca Traister, *Why the Harvey Weinstein Sexual-Harassment Allegations Didn’t Come Out Until Now*, CUT (Oct. 5, 2017), <https://www.thecut.com/2017/10/why-the-weinstein-sexual-harassment-allegations-came-out-> [<https://perma.cc/2UTJ-743E>].

330. Johnson, *supra* note 325, at 51.

331. *See, e.g.*, Fred Bauer, *Cancel Culture Impoverishes Both the Heart and the Intellect*, NAT’L REV. (Sept. 25, 2019), <https://www.nationalreview.com/2019/09/cancel-culture-impoverishes-heart-and-intellect/> (last visited Apr. 13, 2023) (denouncing “cancel culture” as “a way for the woke to flex their burgeoning muscles as they suppress and splinter dissenters”).

effects of being “cancelled” are job loss, destroyed reputations, and for some, criminal penalties.<sup>332</sup> No matter these ancillary effects, the main result is a collective determination that “sexual misconduct disqualifies a person from holding a position of power.”<sup>333</sup> The important outcome is thus the removal of people from positions where they can harm and subordinate others again.<sup>334</sup>

Disqualification responds to the failure of formal legal mechanisms to achieve safety and accountability for survivors.<sup>335</sup> When viewed through the lens of restorative justice, which forgoes retribution in favor of offenders’ integration in the process of making amends and healing, the importance of disqualification is threat-negation and non-repetition.<sup>336</sup> As an extra-legal consequence, disqualification rejects the unfair harm and burdens inflicted by formal accountability mechanisms upon those who seek to avail themselves of remedies through the legal system.<sup>337</sup>

At bottom, this function of #MeToo has changed the status quo power dynamics that typically expose survivors to the threat of ongoing sexual abuse and intimidation.<sup>338</sup> As Deborah Rhodes put it, “[s]afety came with numbers.”<sup>339</sup>

### 3. *Deconstruction*

Beyond imposing consequences on individual abusers, #MeToo can destabilize patriarchal and racist systems that perpetuate

332. Clarke, *supra* note 45, at 79–81 (recounting “lost opportunities and career consequences” faced by alleged high-profile abusers during the #MeToo era, but noting that not all men accused of wrongdoing have faced “either automatic or terminal” consequences).

333. Clarke, *supra* note 45, at 41–42.

334. Scholars have noted the countervailing concerns about a system of informal collective justice. See Wexler et al., *supra* note 46, at 54 (surfacing concerns that “naming and shaming campaign[s] d[o] not solve ongoing proximity and safety concerns” and that “the naming, shaming, and firing cycle could crowd out less visible efforts focused on structural changes”); Rhode, *supra* note 329, at 413 (noting “most Americans, including most women, are appropriately worried about the prospect” of rushed judgments and the potential “lack of procedural safeguards in some instances of public shaming”).

335. Clarke, *supra* note 45, at 42 (noting that “[l]egal processes have been largely ineffective in removing high-profile perpetrators,” in part because sexual offenses under the criminal law are narrowly defined and difficult to prove).

336. See Wexler et al., *supra* note 46, at 71–84.

337. Rhode, *supra* note 329, at 387 (describing how victims of sexual harassment “are often victimized twice: once by the abuse and again by the process of proving it” and arguing that “relatively small settlements or judgments are inadequate to compensate for the vilification, humiliation, and informal blacklisting that plagues even nominally successful claimants”).

338. Clarke, *supra* note 45, at 46; Cavalieri, *supra* note 325, at 1526.

339. Rhode, *supra* note 329, at 398.

subordination.<sup>340</sup> The change it can effect is not simply about creating accountability for individual misconduct and harm, but also reckoning with the broader institutions and actors that turn a blind eye to serial abuse, enable gender-based subordination, and perpetuate inequality.<sup>341</sup>

The imposition of accountability and consequences upon supervisors or enablers is only one demonstration of #MeToo's ability to deconstruct patriarchal institutions.<sup>342</sup> This also occurs when #MeToo functions to usher in new approaches to leadership and to install more women leaders.<sup>343</sup>

Of course, these #MeToo consequences acknowledge that systemic abuse of women nearly always occurs through the silent acquiescence of bystanders and institutional actors.<sup>344</sup> But more fundamentally, it recognizes that a transformation of the entire system supporting and facilitating gender oppression is necessary to ensure that one abuser is not merely replaced with another. In short, these #MeToo strategies recognize that sexual harassment and abuse is not merely a reflection of a particular workplace, university, or industry's disordered "culture"—but also that such harms are the function of gender subordination and the norms and policies that support it.<sup>345</sup>

340. Cavalieri, *supra* note 325, at 1549 (concluding that amplification strategies presage "a new world in which people who have historically occupied the margins seize a form of collective power to work together towards the eradication of discrimination").

341. Lindy West, Opinion, *We Got Rid of Some Bad Men. Now Let's Get Rid of Bad Movies*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/opinion/sunday/we-got-rid-of-some-bad-men-now-lets-get-rid-of-bad-movies.html> (last visited Apr. 12, 2023) ("Unseating a couple (or a score, or even a generation) of powerful abusers is a start, but it's not an end, unless we also radically change the power structure that selects their replacements and the shared values that remain even when the movement wanes.").

342. One example is the public pressure leading the President of Michigan State University to resign for empowering or turning a blind eye to Larry Nasser's widespread abuse of athletes. *See also* Mathew Haag & Marc Tracy, *Michigan State President Lou Anna Simon Resigns Amid Nassar Fallout*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/olympics/michigan-state-president-resigns-lou-anna-simon.html> (last visited Apr. 12, 2023). She later faced criminal charges for lying about her knowledge. Mitch Smith, *Ex-Michigan State President to Get \$2.4 Million in Retirement Deal*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/michigan-state-president-retirement-deal.html> (last visited Apr. 12, 2023).

343. *Open Letter from Time's Up*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html> (last visited Apr. 12, 2023) (calling for a "significant increase of women in positions of leadership and power across industries" and "equal representation, opportunities, benefits and pay for all women workers"); Rhode, *supra* note 329, at 402–03 (noting that since #MeToo, more women than ever before are "filling many powerful positions vacated by abusive men").

344. Rhode, *supra* note 329, at 390 ("The more powerful the abuser, the more willing organizations have been to forgive and forget.").

345. *Id.* at 410 ("Today's movement is focusing attention on the underlying causes of inequality

### C. *Before #MeToo*

When analyzing these mechanisms of accountability as applied to women's prisons, it is important to emphasize that long before #MeToo, incarcerated people have challenged and exposed brutality and poor conditions in prison as an essential tool of resistance and empowerment.<sup>346</sup> Women in particular have long fought against gender subordination and abuse.<sup>347</sup> Prison reform movements led by incarcerated women of color in the 1970s pressed for dramatic transformations of power to respond to a wide range of abuses in prisons.<sup>348</sup> As Juanita Díaz-Cotto documents, they did so by forming “informal and formal prisoner groups, participat[ing] in rebellions, work strikes and hunger strikes, fil[ing] petitions and class action suits, wr[iting] for prisoner rights newsletters, publish[ing] their autobiographies, physically resist[ing] the attacks by their keepers, and escap[ing].”<sup>349</sup> Women, non-binary, and gender-nonconforming people have consistently challenged both poor conditions and prison rules that seek to force them to conform to gender norms.<sup>350</sup>

For example, the Bedford Hills Correctional Facility for Women, once considered by some the gold standard for women's reformatories, devolved in the 1920s under the pressure and neglect of overcrowding.<sup>351</sup> The people held there rebelled with organized and

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and abuse and the structural changes necessary to address it.”).

346. RYAN, *supra* note 13, at 172–73 (“In 1952 alone, there were seventeen major prison riots in America.”).

347. See JUANITA DÍAZ-COTTO, GENDER, ETHNICITY, AND THE STATE: LATINA AND LATINO PRISON POLITICS xiv (1996) (“[T]here have always been groups of women who have organized within prison walls to try to change conditions.”).

348. *Id.* at 271–391 (examining reform movements led in part by Latinx women at Bedford Hills Correctional facility in New York); Baylor, *supra* note 50, at 111, 117 (noting the resistance of women impacted by the criminal legal system who “capitaliz[ed] on connections between growing anti-carceral, feminist, LGBT rights, and Black and Brown power networks” in the 1970s and achieved “protections for prisoners across the country”).

349. DÍAZ-COTTO, *supra* note 347, at 5.

350. RYAN, *supra* note 13, at 186–87 (quoting Robert McCarthy & Jack Smee, *Call Sing Sing Guards in Women's Pen Riot*, N.Y. DAILY NEWS (June 9, 1958)) (providing an example of women in prison organizing over frustrations and demanding, among other things, rescission of an order banning women from wearing slacks); see also Hannah Walker, *From a Whisper to a Rebellion: Examining Space, Race, Sexuality, and Resistance Within the Confines of the Bedford Hills Correctional Facility* (2017) (M.A. thesis, Sarah Lawrence College), [https://digitalcommons.sl.c.edu/cgi/viewcontent.cgi?article=1032&context=womenshistory\\_etd](https://digitalcommons.sl.c.edu/cgi/viewcontent.cgi?article=1032&context=womenshistory_etd) [<https://perma.cc/9556-CGWH>] (noting that though the Westfield prison protest “was ultimately unsuccessful[,] . . . women were beginning to utilize the strength of coalition building, coupled with persistent pressure, to generate change”).

351. RAFTER, *supra* note 1, at 80.

fearless methods.<sup>352</sup> At the Women’s House of Detention in New York City, women, many of them queer, brought attention to their plight by so-called “riots” in 1954, 1958, 1969, 1970, and 1971 before the prison permanently closed.<sup>353</sup>

These efforts continue a long history of Black women and other women of color of fighting sexual violence and subordination. As the Combahee River Collective has suggested, citing Angela Davis, “Black women have always embodied, if only in their physical manifestation, an adversary stance to white male rule and have actively resisted its inroads upon them and their communities in both dramatic and subtle ways.”<sup>354</sup>

Acknowledging this resistance is critical to any discussion of strategic opportunities to challenge abuse and gender oppression in women’s prisons. Impacted women have led the way themselves for years. The rest of society finally needs to listen.

## V. #METOO AS A TOOL OF PRISON ABOLITION

The #MeToo era has shown that transforming the power dynamics that drive sexual violence and exploitation of women is key to rejecting and ending such harm. The movement spotlighted how power works to make sexual abuse and harassment possible and how this same abuse of power discourages women from reporting abuse, punishes them when they do, and grants impunity to offenders.<sup>355</sup> #MeToo, no matter how conceptualized, is, at its core, a recalibration of power.<sup>356</sup> Sexual abuse and violence in women’s prisons should not be exempt from the necessary project of dislocating power, even where the premise of prisons is fundamentally incompatible with this essential component of change.

Strategies aimed at shifting power between correctional officers and incarcerated individuals may appear radical, naïve, or even threatening

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352. *Id.*

353. RYAN, *supra* note 13, at 172–73. As organizing for queer rights began in Greenwich Village in the late 1950s, queer women who were incarcerated were also staging riots within the jail to press for their humane treatment. *Id.* at 172–73, 215.

354. Combahee River Collective, (1977) *The Combahee River Collective Statement*, BLACKPAST (Nov. 16, 2012), <https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977/> [https://perma.cc/F8SN-M3Z3] (citing Angela Davis, *Reflections on the Black Woman’s Role in the Community of Slaves*, 13 MASS. REV. 81 (1972)).

355. *See supra* section IV.B.

356. *See* MacKinnon, *supra* note 325 (describing the movement as “shifting gender hierarchy’s tectonic plates”).

to public safety.<sup>357</sup> Such fears, however, ignore that women are more likely than men to be incarcerated for non-violent drug or property crimes.<sup>358</sup> And, of course, prisons themselves are sites of real danger and crime, multiplying survivors of criminal sexual violence.<sup>359</sup> Prison reform discourse is unaccustomed to arguments about empowering persons the State deliberately disempowers.<sup>360</sup>

While prisons replicate the power dynamics of race and gender inequality that fuel violence against women in broader society, incarceration in and of itself also renders women vulnerable to gender-based abuse and subordination.<sup>361</sup> Prisons are constructed around extreme power imbalances between staff and the people imprisoned and thus enable and create conditions in which racialized, gender-based harm occurs.<sup>362</sup>

Indeed, prisons are designed to disempower people<sup>363</sup> and “house a uniquely powerless population.”<sup>364</sup> The State punishes by diminishing prisoners’ rights and autonomy and attempting to extinguish their agency. It incapacitates through restraint and deprives people of political

357. Our system of criminal punishment powerfully settles societal expectations of who is a threat and who needs guarding even when correctional officers pose profound harm to women. Marina Bell has described how an abolitionist lens subverts conventional habits of thinking “allow[ing] us to get out from under the constraints of how these concepts are understood within the framework of our current system, in which incarceration is thought of as an acceptable way to deal with social problems.” Marina Bell, *Abolition: A New Paradigm for Reform*, 46 J.L. & SOC. INQUIRY 32, 34 (2021).

358. See INCARCERATED WOMEN AND GIRLS, *supra* note 9, at 4.

359. *See id.*

360. DAVIS ET AL., *supra* note 301, at 58–59.

361. Shayo Buchanan, *Impunity*, *supra* note 12, at 55 (“[C]ontemporary prison law underscores the degraded status of women in prison by creating a space in which exposure to guards’ sexual violence ‘is effectively sanctioned as a routine aspect’ of women’s incarceration.” (quoting Davis, *supra* note 39, at 350)).

362. *See* Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 GEO. MASON U. C.R. L.J. 291, 291 (2000) (“In prison, surveillance is power and power is sexualized. Sex and surveillance, therefore, are profoundly linked.”); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About Criminal Justice Reform*, 128 YALE L.J. F. 848 (2019) (arguing that the criminal punishment system works exactly as intended: subordinating the interests of marginalized groups).

363. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 904 (2009) (“[T]he very architecture of incarceration gives prison officials, in a practical sense, enormous power over the incarcerated.”); Dana Paikowsky, Note, *Jails as Polling Places: Living up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829, 845 (2019) (“In a very foundational sense, jails and prisons were designed to deprive those they incarcerate—primarily low-income, Black, and Latino people—of their personal agency and power.”).

364. Fathi, *supra* note 319, at 1453 (“Prisoners are overwhelmingly poor and lacking in formal education; many are functionally illiterate.”).

power.<sup>365</sup> Constitutional jurisprudence supports this architecture of disempowerment, affirming the diminishment of incarcerated people’s privacy rights,<sup>366</sup> freedom of expression,<sup>367</sup> and, of course, liberty.

Moreover, the racialized and gendered power inequities that enable sexual abuse in society are even more profound when abuse is inflicted on poor, vulnerable women who are incarcerated.<sup>368</sup> People held in women’s prisons are made dependent upon the State for their safety, medical care, and basic needs.<sup>369</sup> They lose nearly all semblance of privacy and ability to control their daily lives.<sup>370</sup> Given this State-created, disempowered status, it is not surprising that when women who are incarcerated report sexual abuse, they are likely to face severe retaliatory harm such as loss of privileges, punishments, and threats to their safety.<sup>371</sup> Incarceration therefore unquestionably drives inequality and sexual abuse: it produces a steady stream of marginalized people who are especially vulnerable to sexual abuse at the hands of officers acting under State authority.<sup>372</sup> People forced into this situation often no longer have access to the help of others, a path to flee harm’s way, or the ability to complain safely.

This disempowered status also imposes upon people in prison a diminished capacity to speak out and tell their stories. Correctional officers, prison administrators, and courts routinely dismiss incarcerated people’s complaints as unreliable or untrustworthy by virtue of their

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365. *Id.* at 1453 (noting that in most states people in prison are “deprived of even that most basic instrument of political self-defense—the vote”).

366. *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) (holding that an incarcerated person did not have a reasonable expectation of privacy in his cell that warranted Fourth Amendment protection).

367. *See, e.g.*, *Adderley v. Florida*, 385 U.S. 39 (1966) (upholding restrictions on prisoners’ protest speech); *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119 (1977) (rejecting First Amendment rights of prisoners to join labor unions).

368. *See* Whitley & Dressel, *supra* note 263, at 118.

369. *Id.*

370. *Id.* at 119.

371. *See* INSIDE THIS PLACE, *supra* note 33. For example, the DOJ documented that sexual abuse complaints at Edna Mahan Prison often led to the punishment of accusers. *See* EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 8.

372. *See* Shay, *supra* note 254, at 22 (arguing PREA fails to address “the root cause of abuse, over-incarceration”). Dolovich explains that the “state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection.” Dolovich, *supra* note 363, at 881. Because the State has disempowered the incarcerated person in this way, it has “an affirmative obligation to protect prisoners from serious physical and psychological harm” that extends to “provid[ing] for prisoners’ basic human needs.” *Id.* at 891.



status a someone who is in prison.<sup>373</sup> This, of course, amplifies the extant believability hurdles that all women face when they experience sexual harm, especially for women of color.<sup>374</sup> Indeed, as attorneys working to challenge prison conditions know well, imprisoned people face an informal presumption by prison administrators, their lawyers, and sometimes the courts and the public that they lie and that their claims of mistreatment are fabricated.<sup>375</sup> All these features of the gender subordination generated by prisons create the perfect conditions for exploitation and victimization. It creates ready marks, unlikely to be believed when they complain. The strategies of #MeToo should be brought to bear to counteract this.

*Empowerment.* As Edna Mahan's radical vision of a prison without bars and locks shows,<sup>376</sup> women have more power and resistance to victimization when their dignity and agency over their lives is recognized. While incarceration will always be the antithesis of empowerment, so long as there are institutions that operate as prisons, they should be remade as places that build and respect women's power—particularly over their bodies and safety.

Women who are incarcerated should have leadership roles within women-led institutions<sup>377</sup> and should have a say in the supports they need to move their lives forward positively, including whether they prefer housing without male guards. If the State does not have the resources to provide housing in facilities with only women corrections officers, then incarceration should no longer be considered a viable option at sentencing and alternatives should be explored.

States should take steps to amplify the complaints of sexual abuse at

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373. See Feierman, *supra* note 286, at 250 (noting “the presumption that prisoners’ voices are illegitimate or unworthy of attention”).

374. See Tuerkheimer, *supra* note 31, at 31.

375. For an example of this dynamic, see *Goebert v. Lee County*, 510 F.3d 1312, 1328 (11th Cir. 2007), a case finding an Eighth Amendment violation where a jail official refused a request for medical attention by a pregnant woman who was leaking amniotic fluids where the officer “automatically disbelieved any medical complaint by an inmate.” The supervisor testified that he rejected the veracity of medical complaints by inmates because “inmates had lied before.” *Id.*; see also M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1215–16 (2020) (describing how prisoners face the general assumption that they “are untrustworthy” as evidenced by “rules permitting impeachment of witnesses with prior convictions for certain crimes” and critiques of “‘frivolous’ prisoner civil rights suits . . . [based upon] the widespread view that prisoners’ reports of their experiences are exaggerated, untrue, or simply unintelligible” (quoting Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 937–38 (1990))).

376. See *supra* section I.C.

377. See Mahan, *supra* note 95, at 106–07.

women's prisons, even outside of the formal investigations that PREA prioritizes. Much like corporations that survey departing employees,<sup>378</sup> facilities should conduct anonymous exit surveys with women who are released from incarceration and who may be in a better position to safely share information about officers' conduct without fear of retaliation. Aggregated information should be made public.

*Disqualification.* #MeToo's ultimate consequence—disqualification of abusers from holding positions of authority—should be applied to women's prisons. Where an institution has failed to protect women from sexual violence, it should forfeit any claimed authority to safely, justly, and constitutionally incarcerate people.

For women already subjected to incarceration, disqualification should be effected through the granting of early compassionate release,<sup>379</sup> parole, and sentence commutation. The U.S. Sentencing Commission, for example, has proposed a similar approach in amended guidance pertaining to the First Step Act's expansion of compassionate release for "extraordinary and compelling" reasons to reduce the sentences of people serving federal sentences.<sup>380</sup> The proposed amendment to the Sentencing Commission guideline, which the Commission adopted on April 5, 2023, states that an "extraordinary and compelling" reason justifying a reduction in sentence shall include the fact that a

defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of . . . sexual abuse involving a "sexual act," . . . that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant.<sup>381</sup>

This proposed relief is a limited but positive example of disqualification in action. Compassionate release only applies to people held in federal prisons, so it does not reach the vast majority of women who are incarcerated in state prisons and local jails.<sup>382</sup> But even if the

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378. Rhode, *supra* note 329, at 424–25 ("Employers should also do more to prevent harassing behavior by conducting anonymous workplace-climate surveys and exit interviews with departing employees.").

379. 18 U.S.C. § 3582(c)(1)(A)(i) (allowing for a reduction in sentence or compassionate release when "extraordinary and compelling reasons warrant such a reduction").

380. Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180, 7184 (proposed Feb. 2, 2023).

381. U.S. SENT'G COMM., AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY) (Apr. 5, 2023).

382. Kajstura, *supra* note 4 (noting that 16,000 women were held in federal prisons while nearly 200,000 women were held in state prisons and local jails).

measure could serve as model for state parole or commutation proceedings, the Sentencing Commission's proposal provides no relief for rampant sexual harassment and degrading treatment below the level of assault.<sup>383</sup> The DOJ's description of horrors at places like Edna Mahan Prison makes clear that much sexual abuse and harassment occurs routinely at women's prisons that may not qualify as assault.<sup>384</sup> This treatment traumatizes, injures, and subordinates on the basis of gender, even without a physical assault, by cumulatively and systematically denying dignity, respect, physical security, and power.<sup>385</sup>

Still, the use of compassionate release as a disqualification response to the prison sexual abuse crisis is an extremely important start. It subverts the convention that incarceration must occur at all costs. In this way, it not only echoes #MeToo consequences; it is also abolitionist in its outlook.<sup>386</sup>

*Deconstruction.* The broader institutions and actors that are implicated in women's prisons can deconstruct sexual abuse and gender subordination by asserting a meaningful role in limiting the number of people held at or sent to abusive prisons. Judges considering compassionate release, parole, or commutation requests that raise concerns about an institution's history of sexual abuse and violence have an opportunity. They should recognize that their decisions will ultimately play a role in either dismantling or upholding systems of sexual oppression by sanctioning the exposure of a would-be victim to the risk of abuse or violence. Judges could—and should—be unwilling to sentence people to places shown to be unsafe where women are exposed to sexual violence.<sup>387</sup>

Prosecutors should also embrace this #MeToo ideal in the first instance, and defense attorneys should make such claims to avoid the incarceration of their clients. Lawyers should raise evidence and claims

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383. See Proposed Priorities for Amendment Cycle, 87 Fed. Reg. 60438, 60439 (Oct. 5, 2022).

384. EDNA MAHAN CORRECTIONAL FACILITY, *supra* note 15, at 5–7 (finding that officers violated women's privacy and dignity by often watching women as they showered, undressed, and used the restrooms, exposing their bodies during searches in the presence of other prisoners and officers, and “graphically comment[ed] on prisoners’ physical appearance or remark[ed] about their perceived sexual inclinations and histories”).

385. MacKinnon, *supra* note 298, at 1298.

386. Davis et al., *supra* note 301, at 34 (describing how an abolitionist lens can mean freedom from the constraints of conventional criminal justice thinking).

387. This argument is consistent with recent critiques of lawmakers’ and judges’ failure to acknowledge in sentencing decisions the cruelty of the experience of imprisonment and how this willful blindness drives mass incarceration. See Hanan, *supra* note 375, at 1193 (“What prison is like for incarcerated people is relevant to sentencing policy and practice.”).

of an institution's record of abuse so that decision-makers can assess the history and play a role in deconstructing women's prisons as sites of gender-based violence.

Calling upon these institutional actors to reject their role in perpetuating sexual abuse in women's prison may seem a stretch, but it is no different than the response generated by those with power after #MeToo. As Catharine MacKinnon has noted, women speaking up about abuse was not what was momentous about #MeToo, as women have been speaking out "forever."<sup>388</sup> "It is the response to [women] that has changed" with "[p]owerful individuals and entities . . . taking sexual abuse seriously for once and acting against it as never before."<sup>389</sup> There is no reason to think that prosecutors and judges are incapable of acting against sexual abuse like never before, particularly when defense counsel can force them to confront the evidence or go on the record as discounting it.

Some may discount the role of #MeToo in prison given that it has largely existed as a movement for the rich, white, and powerful. But these strategies, though informed by #MeToo, are ultimately tools of prison abolition.<sup>390</sup> As reforms to America's exploding prison system have failed to curb its horrors, the goal of prison abolition has become increasingly more influential.<sup>391</sup> Although "prison abolition" is a term open to expansive meanings,<sup>392</sup> it reflects a forward-looking vision of a world where social problems and systemic subordination are addressed in ways other than criminalization. Although calls for prison abolition have provided a new consciousness of a path beyond reform, Professor Dorothy E. Roberts has observed that "[a]bolitionist theorizing and activism have largely occurred separately from lawyers and the legal academy."<sup>393</sup> This is true as to the lack of arguments for abolishing women's prisons as sites of gender-based violence whether in the academy,<sup>394</sup> or in popular discourse.

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388. MacKinnon, *supra* note 325.

389. *Id.*

390. See MARIAME KABA, WE DO THIS 'TIL WE FREE US 105–10 (2020).

391. DAVIS ET AL., *supra* note 301, at 58–62.

392. Roberts, *supra* note 281, at 6–7 (2019) (acknowledging prison abolition's elusive meaning and that some activists describe it as "a theory of change" or "a long-term political vision," among other views).

393. *Id.* at 8 (noting that scholars have largely forgone "abolitionist interpretation of the Constitution in their vision of a transformed society without prisons").

394. There are notable exceptions. See, e.g., Thusi, *supra* note 9, at 920 (providing "an abolitionist argument against girls' incarceration that is rooted in the Constitution"); Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to*

#MeToo strategies can help align the broader societal interest in ending sexual abuse of women with the broader goals of prison abolition. Some may argue that #MeToo's extralegal impact is ill-suited to prisons. To be sure, potential market impacts provide ready mechanisms of accountability when abuse allegations are leveled at a person with responsibility within a business entity.<sup>395</sup> Politicians also face potential costs for not imposing consequences on, and severing ties with, people accused of #MeToo wrongdoing.<sup>396</sup> Elected officials' misconduct can call into question a party's political prospects.<sup>397</sup> Misconduct by an actor, media figure, or leader within a corporation can threaten the brand of the entire business enterprise.<sup>398</sup> One might hope that decisionmakers impose consequences upon abusers because they believe in workplaces free of gender-based harm, but a more realistic view might appreciate that these broader interests drive change and accountability. While the experiences of incarcerated women do not readily provoke the same market and political impacts, there are parallel ramifications that should not be dismissed so easily.

For example, the crisis at Edna Mahan Prison—exposed through brave survivors speaking up, relentless news reporting, and sustained public attention—imposed political pressure on the elected officials

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*Russell Robinson's "Masculinity As Prison"*, 3 CALIF. L. REV. CIR. 182, 184 (2012) (arguing "reforms like the creation of a special unit in the Los Angeles County Jail for gay and trans prisoners will consistently fail to address violence and will, in fact, become new sites for enforcing racialized gender and sexuality norms to the detriment of the most criminalized populations"); Frank, *supra* note 8, at 6 (arguing that women's prisons should be abolished because "the U.S. is unable to prevent widespread sexual violations of incarcerated women"); Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J. F. 772, 773 (2019) (drawing upon personal experience "as an incarcerated mother and as a friend, colleague, and advocate" to argue for an "end to the incarceration of women and girls").

395. Kantor & Twohey, *supra* note 42 (noting statements of Chai Feldblum, former EEOC Commissioner, that sexual harassment is "a real liability for businesses"); Mads Borelli-Kjaer, Laurids Moehl Schack & Ulf Nielsson, *#Metoo: Sexual Harassment and Company Value*, 67 J. CORP. FIN. 1, 1 (2021) (assessing the average effect of sexual harassment scandals on corporations market value and finding impacts are "significantly negative and robust").

396. Braktkton Booker, *The Politics of #Metoo Are Evolving*, POLITICO (Aug. 17, 2021, 1:02 PM), <https://www.politico.com/newsletters/the-recast/2021/08/17/cuomo-scandal-me-too-movement-politics-evolving-494010> [<https://perma.cc/3BL5-XZAM>].

397. *Id.*

398. In other words, #MeToo is bad for business because sexual harassment is bad for business. See *The Real Cost of Workplace Sexual Harassment to Businesses*, CONVERSATION (Sept. 9, 2019, 12:37 PM), <https://theconversation.com/the-real-cost-of-workplace-sexual-harassment-to-businesses-122107> [<https://perma.cc/R67D-UN9Z>] ("Sexual harassment causes tremendous damage to employees who experience it, leading to higher employee turnover, lower employee productivity, increased absenteeism and increased sick leave costs for companies.").

responsible.<sup>399</sup> Indeed, the fact that Governor Phil Murphy in New Jersey eventually announced he would close the prison and accepted the resignation of his Department of Corrections Commissioner<sup>400</sup> shows that #MeToo accountability mechanisms are not entirely inapplicable to the carceral sexual abuse crisis.

At the same time, these changes did not happen at the first exposure of the problem. It followed decades of abuse, women relentlessly speaking up, a federal investigation, and even criminal and civil accountability.<sup>401</sup> Perhaps shuttering the prison as the culmination of these decades-long problems is similar to many institutions that eventually succumb to some form of accountability after #MeToo disclosures. But whether these changes will continue to do anything to protect women in New Jersey and elsewhere remains uncertain.<sup>402</sup>

The decision to close Edna Mahan Prison helped remove it from the headlines. But unless the State makes a dramatic shift from its past, people may simply end up at other correctional facilities that merely replicate the power dynamics and threats of sexual abuse long present at Edna Mahan Prison.<sup>403</sup> These same risks are present for the people held at prisons in Dublin, California; Wetumpka, Alabama; and Coleman, Florida—facilities plagued by sexual abuse without any indication they will be closed.<sup>404</sup>

Relatedly, amplification and narrative strategies that have proved effective in white-collar workplaces are harder, logistically, to achieve in the correctional setting. Not only do women who are incarcerated lack ready access to media and publicity, members of the non-incarcerated community who hear their stories may fail to see commonality and universality in incarcerated women's experiences—let alone care.<sup>405</sup> This deficiency is problematic, given that the sense of common cause and shared experience is a large part of #MeToo's power.<sup>406</sup>

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399. Tully, *supra* note 122.

400. *Id.*

401. *See supra* section II.B.

402. *See* Grossano et al., *supra* note 147 (identifying changes to break the cycles of abuse at Edna Mahan Prison).

403. *See id.*

404. *See supra* section II.A.

405. Figueira-McDonough & Sarri, *supra* note 293, at 5 (describing how welfare and carceral systems construct “a holistic definition of [poor and incarcerated] women as deviant, in fact attributing to them an ‘other’ identity which blocks empathy from the rest of society”); Hanan, *supra* note 375, at 1243 (“[D]isbelief, disinterest, and contempt for prisoners present obstacles to understanding prison’s cruelties . . .”).

406. Cavalieri, *supra* note 325. This dynamic is also evident in the sexual abuse and harassment

This challenge, though real, is all the more reason for elevating #MeToo in prison, instead of leaving concerns about what happens there to the realm of prison reform discourse. #MeToo in prison counteracts strong currents of thinking that sideline the abuse that happens in prisons as separate from the racial and gender subordination that structures society.

Moreover, #MeToo has shown that having a greater pool of information about patterns of abuse can lead to greater understanding about how power is abused and weaponized. In the case of women's prisons, one could be skeptical that greater exposure of sexual abuse will lead to better understanding given that the crisis persists despite extensive public information about it.<sup>407</sup> The failure of reforms and lack of public protests in response to the epidemic of carceral sexual abuse could suggest that women's prisons are #MeToo-free zones where society passively accepts such abuse as inevitable.<sup>408</sup> There are strong reasons to reject that defeatist view.

#MeToo's power is its repudiation of the idea that tolerance for sexual abuse remains immovable. Indeed, #MeToo demonstrates that acceptance of gender-based harm is not inevitable and that people have power to deploy to counteract it. This is the transformative shift—not conditions reforms or post-harm interventions—most needed in response to women's prisons. Decisionmakers, including legislators, lawyers, judges, and scholars, should heed these lessons of #MeToo and apply them to women's prisons, cognizant of our collective role in upholding the abuse and violence that historically have defined them.

In the end, #MeToo is not a static moment in time that singularly or permanently shaped norms of justice and equality.<sup>409</sup> It continues to evolve. Realizing #MeToo in prison, much like the broader goal of prison abolition which it furthers, is a vision of the future—a future free of carceral sexual abuse and gender-based harm. The strategies of #MeToo in prison outlined in this Article are concrete, even if incremental, steps toward realizing that goal.

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of women working as farm workers and in other vulnerable positions, who like people who are incarcerated, have gained little benefit from the #MeToo movement. *See* Yeung, *supra* note 47. Low wage workers, often vulnerable due to poverty, race, and/or immigration status, do not garner the media exposure and influence which has served as a central feature of #MeToo's extralegal impact. *See id.*; *see also* Clarke, *supra* note 45 (describing role of public media exposure as part of #MeToo's ad hoc adjudication).

407. *See supra* section I.B.2.

408. *See* Lenard, *supra* note 49; Metcalf, *supra* note 49.

409. Kantor & Twohey, *supra* note 42 (noting that “malleability . . . has given #MeToo power and influence” and its goals continue to evolve).

## CONCLUSION

Reform will not eliminate sexual violence against people held in women's prisons when the very premise of prisons is to take away incarcerated people's power. As #MeToo demonstrates, ending sexual abuse and harm requires meaningful shifts of power from abusers to the people impacted.

In urging a radical vision for prisons, Edna Mahan understood the importance of empowering those whom the State deliberately disempowers. She emphasized the importance of incarcerated women's responsibility, freedom of choice, and stake in facility management.<sup>410</sup> Though the era of progressive institutions she advocated proved ephemeral and flawed, Edna Mahan's insights are still worthy of attention.

As New Jersey faces decisions about what will follow the closing of its notorious women's prison, and other states wracked by carceral sexual abuse crises contemplate the future of their women's prisons, one thing should be clear: building or transforming more prisons will not eliminate sexual abuse and violence against the people held there. The insights of Edna Mahan and the #MeToo movement both point in the same direction: as the embodiment of racialized, gender oppression, women's prisons must end.

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410. Mahan, *supra* note 95, at 106–07, 111.



