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THE CAGED CANARY
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ABSTRACT

The United States has experienced an explosion in the number of people in prison, an explosion that cannot be attributed to changes in the crime rate, but rather reflects changes in public policy, particularly sentencing policy regarding drug crimes. These changes have had a devastating impact on African-American communities. The changes have also adversely affected the social, economic, and political culture of the nation as a whole. The rate of increase in incarceration for women prisoners has been disproportionately high, although women are generally imprisoned for non-violent crimes and have lower recidivism rates than men. Once in prison, women are particularly at risk of harm from failure to treat their medical problems. The author cites many examples from her experience litigating medical care issues for women prisoners of harm caused by the lack of necessary medical care.

* * *

To understand the problems that women prisoners face, we must first understand the United States' love affair with incarceration. Between 1970 and 2005, the number of people imprisoned in this country rose by 700%,¹ and that tremendous increase cannot be correlated with crime rates.² The United States has the highest rates of imprisonment in the world as a result of deliberate policy choices.³ The United States now imprisons over twenty-three percent of all the world's prisoners.⁴ If the men, women, and children in our prisons and jails were in their own city, it would be the fourth largest city in the United States.⁵

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1. PUBLIC SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011, at ii (2007), available at <http://www.pewpublicsafety.org/research.aspx> (follow Public Safety, Public Spending; Forecasting America's Prison Population 2007-2011 hyperlink).

2. See *id.* at iv-v.

3. CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME AND DELINQUENCY, U.S. RATES OF INCARCERATION: A GLOBAL PERSPECTIVE 1 (2006).

4. *Id.*

5. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. 217675,

What caused this explosive growth in the prison business? Significantly, we cannot blame increased crime rates,⁶ and proponents of incarceration cannot make the case that these increased rates of imprisonment solve the problem of crime.⁷ In the last decade, while crime rates fell and incarceration rates rose, the states with the largest increases in incarceration experienced smaller declines in crime, on average, than the states with smaller increases in incarceration rates.⁸

Many thoughtful researchers have pointed out that the timing of the prison boom is itself suspicious and have argued that the hidden impulse behind the war on crime and the war on drugs was a reaction to the 1960s and the civil rights movement in particular.⁹ We should not discard this argument lightly; it is consistent with the political use made of the poster child for the war on crime, Willie Horton.¹⁰

Willie Horton was a convicted murderer charged with raping a woman and stabbing her husband after being released from prison on furlough in Massachusetts.¹¹ There were racial undertones to the case because Horton was black and his victims were white.¹² Former President George H. W. Bush used Horton's photograph in television advertisements that were a major factor in his victory against Democratic candidate Michael Dukakis, the former Governor of Massachusetts.¹³ All over the country, candidates of both parties saw firsthand the effectiveness of calling their opponents soft on crime and engaged in a bidding war to see who could impose the most draconian punishments for criminal acts.¹⁴ California's three-strikes

PRISON & JAIL INMATES AT MIDYEAR 2006 BULLETIN 1 (June 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (noting that total population of incarcerated persons is 2,245,189) [hereinafter PRISON & JAIL INMATES AT MIDYEAR 2006]; Press Release, U.S. Census Bureau, Census Bureau Announces Most Populous Cities (June 28, 2007), available at <http://www.census.gov/Press-Release/www/2007/cb07-91table1.pdf>.

6. RYAN S. KING, MARC MAUER & MALCOLM C. YOUNG, THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 3-4 (2005), available at http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc_iandc_complex.pdf.

7. *Id.* at 4. Only one quarter of the drop in violent crime in the 1990s can be attributed to increased incarceration. *Id.*

8. *Id.* at 3.

9. See, e.g., MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 2-3 (2005).

10. Robin Toner, *Prison Furloughs in Massachusetts Threaten Dukakis Record on Crime*, N.Y. TIMES, July 5, 1988, at B6.

11. *Id.*

12. *Id.*

13. John M. Broder, *Republicans Pack Punch, Democrats Take It (For Now)*, N.Y. TIMES, Sept. 12, 2004, §4, at 3.

14. Susan F. Rasky, *Senate Begins Debate on Anti-Crime Bill*, N.Y. TIMES, May 22, 1990, at A16.

law exemplifies the result of these various ploys:¹⁵ in the law's first two years, it led to twice as many life sentences for marijuana offenses as it did for murders, kidnaps, and rapes combined.¹⁶

Increases in penalties for drug crimes led the way in the war on crime. As a result of the War on Drugs, there has been more than a twelve-fold increase in the number of inmates in state prisons for drug offenses since 1980;¹⁷ a majority of federal prisoners are incarcerated for drug crimes.¹⁸

Most of the prisoners captured in the War on Drugs are black and Hispanic.¹⁹ Blacks and whites use illegal drugs at about the same rate, with about 9.8% of blacks and 8.5% of whites aged twelve years and older using drugs.²⁰ As the criminal justice system processes those charged with drug offenses, however, the picture changes. Although thirty-seven percent of those arrested for illegal drug use are black,²¹ fifty-five percent of those convicted of a drug crime are black.²² An astounding seventy-four percent of those receiving sentences to prison or jail are black.²³ If middle-class white users of drugs were treated the same way black users are treated, I predict that the War on Drugs would end within six months. David Cole has made a similar point in the context of the criminal justice system as a whole:

one need only imagine the public response if the current racial disparities in criminal justice were reversed. Imagine what kind of pressure legislatures would feel, for example, if one in three young *white* men were in prison or on probation or parole. Imagine what the politics of the death penalty would look like if prosecutors sought the death penalty 70 [seventy] percent of the time when whites killed blacks, but only 19 [nineteen] percent of the time

15. CAL. PENAL CODE §1170.12 (West 2007).

16. Carey Goldberg, *California Judges Ease 3-Strike Law*, N.Y. TIMES, June 21, 1996, at A1.

17. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 9 (2007), available at http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_25year_quagmire.pdf.

18. The Sentencing Project, Drug Policy, <http://sentencingproject.org/IssueAreaHome.aspx?IssueID=5> (last visited Jan. 8, 2008).

19. DRUG POLICY ALLIANCE, CRIME & PUNISHMENT: THE U.S. CRIMINAL JUSTICE SYSTEM & PUNITIVE DRUG LAWS 2, http://www.drugpolicy.org/docUploads/fact_sheet_crime_punishment.pdf (last visited Jan. 7, 2008).

20. SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2006 NAT'L SURVEY ON DRUG USE AND HEALTH: NAT'L FINDINGS 26 (2007), available at http://oas.samhsa.gov/nsduh/2k6nsduh/2k6_Results.pdf.

21. Martin Donohoe, *Incarceration Nation: Health and Welfare in the Prison System in the United States*, 11 MEDSCAPE GEN. MED. 1, 3 (2006).

22. DRUG POLICY ALLIANCE, *supra* note 19, at 2.

23. *Id.*

when blacks killed whites. Or imagine what our juvenile justice policies would be like if white youth charged with drug offenses were four times as likely as black youth to be tried as adults, and twice as likely to be placed outside the home. One thing is certain: the nation would not accept such a situation as "inevitable."²⁴

The overuse of incarceration as a form of social control has a devastating effect on this country's social fabric.²⁵ It is a catastrophe for the social and economic life of minority communities by depriving families of breadwinners, jeopardizing future employment prospects, and separating more than one million children from a parent.²⁶ It also undermines the political strength of minority communities.²⁷ Hundreds of thousands of African Americans were disenfranchised in Florida at the time of the 2000 election.²⁸ Given the closeness of that election and known voting patterns,²⁹ some have argued that Al Gore would have become president rather than George W. Bush but for those lost black voters.³⁰

The effects of over-incarceration in decreasing the voting power of minority communities has yet another facet. Prisoners are counted in the census where they are imprisoned, even though they cannot vote.³¹ Since prisons are commonly sited in rural and largely white districts,³² the prison populations increase those districts' voting power. In several states, if prisoners were counted in their home districts, congressional districts would have to be redrawn to give more political clout to urban areas and minority populations.³³ Further, the

24. DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 151 (1999).

25. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African-American Communities*, 56 *STAN. L. REV.* 1271, 1281-82, 1285 (2004).

26. See THE SENTENCING PROJECT, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM: MOTHERS IN PRISON*, http://www.sentencingproject.org/tmp/File/women_mothersinprison.pdf (last visited Jan. 7, 2008) (noting that more than 1.5 million children have a parent in prison).

27. Roberts, *supra* note 25, at 1298-99.

28. See JAMIE FELLNER & MARC MAUER, *HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 7-8 (1998).

29. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 *AM. SOC. REV.* 777, 780-81, 792 (2002).

30. See Donohoe, *supra* note 21, at 7.

31. Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 *PAGE L. REV.* 587, 588 (2003-2004).

32. Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 211, 212 (Marc Mauer & Meda Chesney-Lind eds., 2002).

33. Lotke & Wagner, *supra* note 31, at 594-99 (discussing specific examples of the

for-profit private prisons and for-profit companies that contract to provide medical services have invested heavily in lobbying activities, spending \$1.12 million in contributions to 830 candidates in the 2000 elections alone.³⁴ The correctional officers' unions in states like California and New York are also a major force in state politics, putting their lobbying dollars and electoral clout behind policies to keep more prisons open.³⁵

Another reason why everyone should care about our runaway over-incarceration is that many states spend roughly the same amount of their budgets on criminal justice as they spend on health and hospitals.³⁶ Some states spend nearly as much locking up prisoners as they spend on higher education.³⁷ We could change these numbers, and better protect public safety, by offering treatment alternatives to incarceration for many offenders, particularly those convicted of drug crimes.³⁸ Treatment as an alternative to prison is cheaper,³⁹ and more effective in preventing crime,⁴⁰ than locking people up.

These considerations bring me, at last, to the subject of women prisoners. Women prisoners serve as the canary in the mineshaft with regard to the evils of our policies of over-incarceration. The effects of imprisoning mothers are particularly harmful to our social fabric.⁴¹ At their time of imprisonment, over three-fifths of incarcerated fathers were not living with any of their children.⁴² A majority of incarcerated mothers, however, lived with some or all of their children when they were sent to prison.⁴³ As a result, the incarceration of mothers is more likely to cause children to enter the foster care system.⁴⁴

impact of prisons on the apportionment of legislative districts).

34. Donohoe, *supra* note 21, at 4.

35. Editorial, *A Battle Over Prisons*, N.Y. TIMES, Feb. 12, 2007, at A20; Inst. of Governmental Studies, Univ. of Cal., California Correctional Peace Officers Association, <http://igs.berkeley.edu/library/htCaliforniaPrisonUnion.htm> (last visited Jan. 7, 2008).

36. Fox Butterfield, *With Longer Sentences, Cost of Fighting Crime Is Higher*, N.Y. TIMES, May 3, 2004, at A18.

37. James Sterngold, *Prisons' Budget to Trump Colleges*, S.F. CHRON., May 21, 2007, at A1.

38. MAUER & KING, *supra* note 17, at 17-18.

39. See, e.g., Donohoe, *supra* note 21, at 3 (noting that Arizona saved \$2.6 million in one year after it began providing treatment instead of incarceration for non-violent drug offenses).

40. MAUER & KING, *supra* note 17, at 17.

41. AMERICAN CIVIL LIBERTIES UNION, CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 50-52 (2005), available at http://www.aclu.org/images/asset_upload_file393_23513.pdf.

42. Denise Johnston & Michael Carlin, *When Incarcerated Parents Lose Contact with Their Children*, 6 CENTER FOR CHILD. OF INCARCERATED PARENTS J. 2 (2001), available at <http://www.e-ccip.org/journal.html>.

43. *Id.* at 1-2.

44. *Id.* at 2.

Further, although the rate of growth in incarceration has been significantly greater for women than for men,⁴⁵ the public safety justification for imprisoning women is much weaker.⁴⁶ For example, in Illinois in the 1990s the incarceration rates for women increased 173%, but the rates for women arrested for murder and manslaughter fell thirty-five percent.⁴⁷ Two out of three women are incarcerated for non-violent crimes,⁴⁸ a much higher percentage than that of men.⁴⁹ Significantly, women also have lower rates of recidivism.⁵⁰ Finally, black women are nearly four times as likely as white women to go to prison.⁵¹ This statistic reflects the unequal impact of the entire criminal justice system on black women.

Among the most serious problems that women prisoners face once they are locked up is the denial of necessary medical care.⁵² When I started litigating prison cases back in the 1970s, I was often surprised that the shockingly deficient medical care I uncovered did not cause more deaths than it did.⁵³ I concluded that my male clients generally escaped the worst outcomes from their miserable care because they were young, healthy men. In the 1990s, however, when I litigated a class action challenge to the health care provided to thousands of women in California's prisons, I learned that women are not as lucky as men in that regard.⁵⁴

45. American Civil Liberties Union, *Women in Prison: An Overview*, <http://www.aclu.org/womensrights/violence/25829res20060612.html> (last visited Jan. 7, 2008) ("The number of women serving sentences of more than a year grew by 757% between 1977 and 2004 — nearly twice the 388 percent increase in the male prison population.")

46. See THE SENTENCING PROJECT, *NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH 2* (2006), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf (noting that the increase in female prisoners is because of drug charges as opposed to violent crimes).

47. American Civil Liberties Union, *supra* note 45.

48. THE SENTENCING PROJECT, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM: INVOLVEMENT IN CRIME*, http://www.sentencingproject.org/tmp/File/Women%20in%20CJ/women_involvementincrime.pdf (last visited Jan. 7, 2008).

49. Brief of National Council on Crime and Delinquency et al. as Amici Curiae Supporting Respondents at 27, *Overton v. Bazetta*, 539 U.S. 126 (2003) (No. 02-94), 2003 WL 469489.

50. *Id.* at 28.

51. PRISON & JAIL INMATES MIDYEAR 2006, *supra* note 5, at 9 (stating that black women have an overall incarceration rate that is 3.8 times higher than the rate for white women).

52. Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, 16 CRIM. JUST. MAG., Spring 2001, at 1.

53. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PUBL'N NO. 216340, *MEDICAL CAUSES OF DEATH IN STATE PRISONS 2001-2004*, at 1 (Jan. 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mcdsp04.pdf> (stating that 12,129 state prisoner deaths were reported between 2001 and 2004 and eighty-nine percent of these were attributed to medical conditions).

54. I served as lead counsel in a class action challenge to medical care at the two largest women's prisons in California: the California Institution for Women and the

First, women have routine gynecological needs that are just not equivalent to men's needs. Five percent of women come to prison pregnant.⁵⁵ In virtually every case that I have handled involving health care claims of women, I have found women who lost pregnancies or newborns due to the prison's atrocious neglect. In a New Orleans jail, I found a woman who told the staff that she was in labor. She was told that she was faking and was forced to give birth on a toilet.⁵⁶ Not surprisingly, the baby died.⁵⁷ At the Central California Women's Facility, I found a woman who was denied care when she began to experience abnormal bleeding and suffered a miscarriage. Typical of the higher-ups' routine practice of burying staff failures, the central office did a token investigation, and concluded that the staff had done nothing wrong.⁵⁸ In the Baltimore City Detention Center, where I am currently litigating medical care issues, I have investigated several miscarriages. In one, staff told a woman suffering a miscarriage that she was not pregnant, delaying her hospitalization until after she lost consciousness.⁵⁹ When she came back from the hospital, she was housed in the maternity dorm, which by itself was emotionally painful for her.⁶⁰ I concluded that a nurse had given the medication prescribed to shrink this woman's uterus to another woman in the dormitory, who then miscarried.⁶¹ In all of these instances the women

Central California Women's Facility. See Amended Complaint, *Shumate v. Wilson*, No. Civ. S-95-619 WBS JSM (E.D. Cal. May 25, 1995) [hereinafter *Shumate Complaint*]. *Shumate* was settled in 1997, and the settlement agreement became the basis for a challenge to the California Department of Corrections' provision of health care in *Plata v. Schwarzenegger*, a state-wide class action on behalf of California prisoners. *Plata v. Schwarzenegger*, No. C01-1351 THE, 2007 WL 2318898 at *1 (N.D. Cal. Aug. 13, 2007) (granting receiver's request to be exempted from certain contractual requirements of state law necessary to bring about medical care in California prison system that complies with the Constitution). See also Civil Rights Clearinghouse, Case Profile, *Plata v. Schwarzenegger*, <http://clearinghouse.wustl.edu/detail.php?id=589> (last visited Jan. 7, 2008) (discussing history of *Plata*).

55. LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, PUBL'N NO. 210696, MEDICAL PROBLEMS OF JAIL INMATES 1 (2006) available at www.ojp.usdoj.gov/bjs/pub/pdf/mpji.pdf.

56. With regard to the incident of the woman who was refused medical treatment and then gave birth on a toilet and lost her newborn, I am relying on my own memory of events.

57. Following an evidentiary hearing, the parties agreed to a comprehensive settlement that provided for a number of medical improvements, including a requirement that pregnant women receive prenatal care according to protocols developed by an obstetrician. Notice of the Agreed Entry on Medical Care at 11, *Hamilton v. Morial*, No. 69-2443 (E.D. La. Nov. 30, 1990).

58. *Shumate Complaint*, *supra* note 54, at 6.

59. Declaration of Aurelia Stanton, detainee at the Baltimore City Detention Center ¶ 6 (Aug. 3, 2005) (on file with author).

60. *Id.* at ¶ 9.

61. *Id.* at ¶ 10-12; Declaration of Samantha Webb, detainee at the Baltimore City Detention Center ¶ 4-6 (Aug. 3, 2005) (on file with the author).

were treated without minimal respect, insulted by staff and told that they were lying or that the problems were their own fault.⁶² The prison did not offer these women any counseling to help them with their pain.⁶³

Of course it is not just pregnant women who need proper gynecological care.⁶⁴ All women need routine gynecological examinations and pap smears.⁶⁵ Women past puberty have known needs for breast checks and mammograms both when they have symptoms and on a periodic schedule.⁶⁶ Women in prison, however, rarely receive this necessary care;⁶⁷ lack of routine gynecological care, combined with the lack of access to care for symptomatic women, condemns numerous women to death.⁶⁸ Thus, in California, I found women who had not received pap smears on a regular basis and who had died because, even when they finally received some medical attention, medical staff failed to follow up on abnormal smears and ultrasounds.

Sherrie Chapman, one of these California prisoners, began complaining about painful breast lumps in 1985.⁶⁹ She repeatedly filed prison grievances seeking diagnostic work.⁷⁰ After she had a suspicious mammogram, the prison doctor still refused to order follow-up tests.⁷¹ Ms. Chapman then became a named plaintiff in *Shumate v. Wilson*.⁷² She was finally given a biopsy that discovered cancer after the case was filed.⁷³ When she returned to the prison after undergoing a mastectomy, she was denied pain medication because the nurse told her

62. Declaration of Stanton, *supra* note 59, at ¶ 4; Declaration of Webb, *supra* note 61, at ¶ 3.

63. See Declaration of Stanton, *supra* note 59, at ¶ 13 (discussing her lack of counseling); Declaration of Webb, *supra* note 61, ¶ 2-3 (stating she asked about counseling and was told she had to wait).

64. Prison and jail officials also disregard the health and safety of pregnant prisoners and detainees who do not wish to carry the pregnancy to term. All too frequently such women confront policies and practices that deny or dangerously delay the ability of pregnant women to obtain safe and timely access to abortion. See, e.g., *Roe v. Crawford*, 439 F. Supp. 2d 942 (W.D. Mo. 2006) (enjoining Department of Corrections policy prohibiting transport of prisoners for abortion); *Doe v. Arpaio*, 159 P.3d 1258 (Ariz. Ct. App. 2007) (enjoining policy refusing to transport jail detainee for abortion in the absence of a court order).

65. AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP'T OF HEALTH & HUMAN SERVS., WOMEN: STAY HEALTHY AT ANY AGE (2007), available at <http://www.ahrq.gov/ppip/healthywom.htm>.

66. *Id.*

67. See Shumate Complaint, *supra* note 54, at 28.

68. Silja Talvi, *Criminal Procedure*, MOTHER JONES ONLINE, Aug. 17, 1999, available at http://www.motherjones.com/news/feature/1999/08/talvi_health.html.

69. *Id.* at 3.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

that she was faking her pain.⁷⁴ Subsequently, she discovered painful lumps in her remaining breast, and there was another delay in diagnosis before her second breast was removed.⁷⁵ She again had to complain for months before a uterine problem was diagnosed as metastasized cancer in 1997.⁷⁶ Prior to her death, she was denied compassionate release by the Department of Corrections.⁷⁷ I could tell similar stories about each of the prisons and jails where I have litigated women's health issues.

At the same time, it is not just women prisoners' unique health care needs that get them killed; women prisoners have the full range of other chronic health care issues.⁷⁸ In fact in many, if not most, cases prisoners are more likely to suffer from chronic diseases than the general population of the same age.⁷⁹ The National Commission on Correctional Health Care Report, completed pursuant to a Congressional mandate, indicated that the rate of HIV infection in prisons is more than five times the rate in the general population.⁸⁰ The rate of Hepatitis C among prisoners and detainees is estimated at about nine to ten times the rate of the general population.⁸¹ In systems for which we have data, the prevalence rates for women prisoners are even higher than those of men.⁸² There are also much higher rates of mental illness among prisoners;⁸³ in fact our prisons confine far more of the seriously mentally ill in this country than do all the mental hospitals in the United States.⁸⁴

Unfortunately, this concentrated population of persons with serious medical needs too often finds those needs unmet, even though this is a major public health opportunity.⁸⁵ My office, the National Prison Project of the American Civil Liberties Union Foundation, investigated the effects of these neglected needs at the Taycheedah Correctional Institution, Wisconsin's largest prison for women. In 2000, Michele Greer, a twenty-nine-year-old prisoner with asthma, collapsed after desperately and repeatedly requesting treatment.⁸⁶

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 5.

78. NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS, at xi (2002).

79. *Id.*

80. *Id.*

81. *Id.* at 18.

82. Donohoe, *supra* note 21, at 5.

83. NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, *supra* note 78, at 24.

84. Donohoe, *supra* note 21, at 3 (stating prisons house three times as many mentally ill men and women as hospitals).

85. NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, *supra* note 78, at xii.

86. Complaint at 13, *Flynn v. Doyle*, No. 06-C-537 (E.D. Wis. Mar. 14, 2007), 2007

She died on the dining room floor at Taycheedah.⁸⁷ After her death, the *Milwaukee Journal & Sentinel* published a series of stories about the health care crisis in Wisconsin prisons.⁸⁸ The labor union representing nurses in the prison system called a state-wide protest demanding better care.⁸⁹ The National Institute of Corrections commissioned the National Commission on Correctional Health Care to prepare a report on health care in the Wisconsin Department of Corrections.⁹⁰ The report, completed in 2002, found severe understaffing, an absence of organized administrative leadership, severely deficient mental health care, poor access to health care, and failures to allow prisoners to obtain specialty care.⁹¹

Four years after the report was released, these problems and others had not been addressed at Taycheedah. "Medical staffing levels here . . . remained virtually unchanged" even though the population had increased,⁹² "result[ing] in a . . . huge backlog of requests for medical services" and leaving Taycheedah nurses to perform tasks that are ordinarily done by doctors.⁹³ Correctional officers deliver medications to the women and frequently make errors.⁹⁴ The women must go through the custody staff to get medication renewals, which means that custody staff are in the position of controlling a woman's access to the medication she needs.⁹⁵ This frequently results in interruptions of necessary medications.⁹⁶

As a result of staff shortages, women who ask to see a medical provider often do not see one for months.⁹⁷ For one woman, these delays meant that she went two years with open, pus-filled sores on her head before the cause was found: a dangerous infection with drug-resistant staphylococcus bacteria, called MRSA (methicillin-resistant staphylococcus aureus).⁹⁸ In fact, the woman was not successfully treated up to the time she left Taycheedah.⁹⁹ Because MRSA is highly infectious and is known to spread in the crowded conditions

WL 805788 [hereinafter Flynn Complaint].

87. *Id.*

88. *Id.*

89. Jessica McBride, *Taycheedah Nurses Protest Health Care; During Union-Backed Rally, Fifteen Workers Demand Better Services for Inmates*, MILWAUKEE J. & SENTINEL, Apr. 14, 2000, at 1B.

90. Flynn Complaint, *supra* note 86, at 13.

91. *Id.* at 13-14.

92. *Id.* at 19-20.

93. *Id.* at 19.

94. *Id.* at 20-21.

95. *Id.* at 21.

96. *Id.* at 22.

97. *Id.* at 20.

98. *Id.* at 23-24.

99. *Id.* at 24.

of prisons and jails, many other prisoners were potentially exposed to a disease that can cause abscesses, pneumonia, blood poisoning, meningitis, bone infections, and death.¹⁰⁰ “[S]cores of women [there] are currently infected.”¹⁰¹

Consistent with what we have found at other prisons, gynecological care at Taycheedah is severely deficient. Necessary care, like pap smears and mammograms, is delayed or absent.¹⁰² Women are kept in leg shackles during most of labor, and the leg shackles are put back on immediately after childbirth.¹⁰³

Another major problem is the lack of mental health care. Taycheedah has the highest ratio of mental illness of any of the adult prisons in the Wisconsin system.¹⁰⁴ In fact, sixty-eight percent of the Taycheedah population is diagnosed with mental illness needs that require the care of a psychiatrist or psychologist.¹⁰⁵ Most women prisoners at Taycheedah were convicted of non-violent offenses and have a history of childhood physical or sexual abuse, or domestic battering.¹⁰⁶ There is no staff psychiatrist;¹⁰⁷ instead, the prison relies on temporary, part-time psychiatrists, so there is no continuity of psychiatric treatment.¹⁰⁸ Essentially all psychiatric treatment consists solely of medication, and those medications are not appropriately monitored.¹⁰⁹

Although there are serious problems in the mental health treatment provided to male prisoners in Wisconsin, women have it even worse.¹¹⁰ Male prisoners who need in-patient treatment have their own facility which provides individualized therapy for the seriously mentally ill.¹¹¹ It is staffed primarily by treatment personnel.¹¹² Women face a completely different situation. In theory, they can be civilly committed to a mental hospital.¹¹³ As a practical matter, that almost never happens.¹¹⁴ If it did happen, unlike the situation for

100. *Id.*

101. *Id.*

102. *Id.* at 28.

103. *Id.*

104. *Id.* at 29.

105. *Id.* at 30.

106. *Id.* at 36.

107. *Id.* at 32.

108. *Id.* at 32.

109. *Id.* at 32-33.

110. *Id.* at 36.

111. *Id.* at 36-37.

112. *Id.* at 37.

113. *Id.* (stating women may be placed in the state mental health facility in Winnebago).

114. *Id.* (stating placement at the Winnebago facility is rare because the commitment process is “cumbersome, time-consuming and costly”).

male prisoners, it would mean that the woman could potentially lose her freedom for a period much longer than her criminal sentence.¹¹⁵ The other possibility for seriously mentally ill women is not a treatment facility, but something that in practice operates as a segregation unit.¹¹⁶ Instead of a doctor assigning women to this unit, most are sent there by the warden.¹¹⁷ The unit lacks twenty-four hour medical or mental health staff.¹¹⁸ Prisoners sent to this unit spend most of their time in their cells.¹¹⁹ The sickest prisoners are kept essentially in isolation with virtually no out-of-cell time; the best-treated prisoners still spend nineteen hours a day locked in their cells.¹²⁰ There is no organized treatment program to help the women return to the general population of the prison.¹²¹

The extreme isolation imposed by this unit, and the absence of treatment, actually exacerbate mental illness.¹²² In fact, the rate of suicide in segregation units in Wisconsin is "ten times the rate in general population units."¹²³ Women simply continue to deteriorate in this unit, and often act out more.¹²⁴ One eighteen-year-old prisoner sent to an isolation unit begged the staff for help.¹²⁵ After five days, she strangled herself with her bedding.¹²⁶ Although a staff member observed her choking, he waited to unlock her door until a total of five staff members were on the scene, and she died in her cell.¹²⁷

It is also interesting that the disparity in treatment of the needs of mentally ill men and women in the prison system is echoed by the disparities in treatment of Wisconsin juveniles.¹²⁸ Delinquent boys in the state have access to a program where they can receive specialized in-patient mental health care, but there is no similar treatment option for delinquent girls with mental health needs.¹²⁹

As a result of these failures, in May 2006 my office filed suit in federal court against Taycheedah, arguing that the lack of necessary

115. *Id.*

116. *Id.* at 33.

117. *Id.* at 34.

118. *Id.* at 33.

119. *Id.* at 34.

120. *Id.*

121. *Id.* at 38.

122. See HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 149 (2003).

123. Flynn Complaint, *supra* note 86, at 36.

124. *Id.* at 34.

125. *Id.* at 35.

126. *Id.*

127. *Id.* at 35.

128. *Id.* at 39.

129. *Id.* at 37.

medical and mental health care constituted cruel and unusual punishment barred by the Eighth Amendment of the Constitution.¹³⁰ We also argued that the failure to provide mental health care to women equivalent to that provided to men in the prison system violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution.¹³¹ While we are optimistic about the outcome of this case, one of the things I find troubling is that Wisconsin has a Department of Corrections with a comparatively good reputation in the field. Unfortunately, conditions at Taycheedah are far too typical of the medical and mental health problems faced by women prisoners across this country.

Too many women, as well as men, continue to be given prison sentences that become death sentences because of the lack of necessary medical and mental health care. We can, and must, do better. Until we do so, women prisoners will remain the caged canary, the most at risk of gratuitous harm from our ill-considered incarceration policies.

130. *See Flynn v. Doyle*, No. 06-C-537 (E.D. Wis. Mar. 14, 2007), 2007 WL 805788.

131. *Flynn Complaint*, *supra* note 86, at 1-2.