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WOMEN IN PRISON: INTERNATIONAL PROBLEMS AND HUMAN RIGHTS BASED APPROACHES TO REFORM

JENNI GAINSBOROUGH*

ABSTRACT

The growth in prison populations is a world-wide phenomenon, and within the overall growth rate, many countries are seeing a disproportionate rate of increase among women. Despite differences in culture and resources, women everywhere face similar problems in prison systems, which have been designed primarily by and for men. These include sexual abuse, lack of appropriate medical care, loss of children and breakdown of families. The United States leads the world in both the overall size of its prison population and its rate of incarceration. Advocates for reform are increasingly turning to international human rights laws, standards and norms to provide the framework for addressing many of the problems facing women prisoners.

* * *

Prison systems are primarily designed and run by men for the incarceration of men.¹ In every country of the world, women are a small minority of those incarcerated.² As a result, they find themselves held in facilities and under conditions that, at best, have been poorly adapted for them from the male model³ or, at worst, are the same as those for men.⁴ Yet women have very different needs from men: they have specific health needs for gynecological and obstetric care;⁵ they are more likely to have been the primary caretakers for

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1. Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, Austria, Apr. 10-17, 2000, *Offenders and Victims: Accountability and Fairness in the Justice Process, Women in the Criminal Justice System*, ¶ 11, U.N. Doc. A/CONF.187/12 (Mar. 2, 2000) [hereinafter *Offenders and Victims*].

2. ROY WALMSLEY, WORLD FEMALE IMPRISONMENT LIST: WOMEN AND GIRLS IN PENAL INSTITUTIONS, INCLUDING PRE-TRIAL DETAINEES/REMAND PRISONERS (2006), available at http://www.unodc.org/pdf/india/womens_corner/women_prison_list_2006.pdf [hereinafter WORLD FEMALE IMPRISONMENT LIST].

3. M.L. Lyke, 'System Broken' for Females in Jail in World Designed for Men, Too Few Services Available, SEATTLE POST INTELLIGENCER, Mar. 6, 2003, at A14.

4. *Id.*

5. *Id.*

children before their incarceration,⁶ and many give birth while in prison;⁷ they are particularly vulnerable to sexual and physical abuse⁸ and have often been the victims of abuse before coming to prison;⁹ they are more likely to suffer from mental and emotional problems;¹⁰ they are more likely to be ostracized than men in the same situation when they try to return to their families and communities.¹¹

Although women remain a small percentage of the total number in prison, their numbers are growing,¹² and there is increasing concern among penal reformers about the problems and how to work to improve their situation.¹³ It is estimated that over half-a-million women and girls are held in penal institutions around the world,¹⁴ the largest population being in the United States (203,100 as of June 2006).¹⁵ The figures provided by the International Centre for Prison Studies, current as of April 2006, show the next largest women prison populations to be in China (71,280),¹⁶ the Russian Federation (55,400)¹⁷ and Thailand (28,450).¹⁸ In the United States, as in every other country, the percentage of women in prison is much smaller than that of men, though both the number and the percentage are growing in most countries of the world.¹⁹

In making international comparisons, it is important to remember that the percentages of women reflect, among other factors, the very

6. PRISON REFORM TRUST, BROMLEY BRIEFINGS: PRISON FACTFILE 16 (2007), available at <http://www.prisonreformtrust.org.uk/uploads/documents/factfile1807lo.pdf> [hereinafter BROMLEY BRIEFINGS].

7. Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, at A1.

8. NATASHA A. FROST, JUDITH GREENE & KEVIN PRANIS, INST. ON WOMEN & CRIM. JUST., *HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977-2004*, at 22 (2006), available at <http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf>.

9. *Id.*

10. BROMLEY BRIEFINGS, *supra* note 6, at 14.

11. *Offenders and Victims*, *supra* note 1, at 4.

12. FROST ET AL., *supra* note 8, at 7.

13. *Id.* at 7-8; see also PENAL REFORM INT'L, INDEX ON GOOD PRACTICES IN REDUCING PRE-TRIAL DETENTION 23(2005), available at <http://www.penalreform.org/publications/man-2005-pretrial-detention-en.pdf>.

14. WORLD FEMALE IMPRISONMENT LIST, *supra* note 2, at 1.

15. WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. 217675, PRISON AND JAIL INMATES AT MIDYEAR 2006 BULLETIN 9 (June 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>. This number is higher if girls in juvenile penal institutions are included. See HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUST., JUVENILES OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 206 (2006) available at <http://ojdp.ncjrs.org/ojstatbb/nr2006/downloads/NR2006.pdf> (last visited Jan. 18, 2008).

16. WORLD FEMALE IMPRISONMENT LIST, *supra* note 2, at 1.

17. *Id.*

18. *Id.*

19. *Id.*; see also FROST ET AL., *supra* note 8, at 9.

different baselines for overall imprisonment around the world. The total world prison population is around 9.25 million.²⁰ The United States has the greatest number of prisoners of any country in the world²¹ — a total of 2,245,189 in federal and state prisons and jails at mid-year 2006²² — as well as the highest proportion of its population incarcerated — 763 per 100,000 of population.²³ By comparison, Canada has an incarceration rate of 107 per 100,000,²⁴ Australia 126 per 100,000,²⁵ and England and Wales 148 per 100,000.²⁶

In the United States,²⁷ women prisoners represent about 9.1% of the total prison and jail population,²⁸ which is on the high end of the world range (the median rate is 4.3%),²⁹ though not the highest.³⁰ However, the total number of prisoners in the United States, along with its high rate of incarceration, means that the 9.1% translates to an overall incarceration rate for women (including prisons and jails) of 134 per 100,000 U.S. residents³¹ — far higher than the overall (male and female) incarceration rates for most countries.³²

From mid-year 2005 until mid-year 2006, “the percent increase in female prisoners under the jurisdiction of State or Federal authorities [in the United States] was almost twice that of male prisoners.”³³ The female prison population increased 4.6%, while the male prison

20. ROY WALMSLEY, WORLD PRISON POPULATION LIST 1 (2006), available at <http://www.umds.ac.uk/depsta/rel/icps/world-prison-pop-seventh.pdf> [hereinafter WORLD PRISON POPULATION LIST]. Some countries, however, may hold political prisoners that are not included in this official count. *Id.*

21. *Id.*

22. SABOL ET AL., *supra* note 15, at 1.

23. *Id.* at 5, 13 (combining the populations incarcerated — 256 per 100,000 for U.S. jails and 497 per 100,000 for U.S. prisons).

24. WORLD PRISON POPULATION LIST, *supra* note 20, at 3.

25. *Id.* at 6.

26. *Id.*

27. *Id.* Unlike most countries, the United States differentiates between state and federal prisons that hold sentenced prisoners and jails that hold people pre-trial and those serving shorter sentences. See DARON HALL, AM. CORRECTIONAL ASS'N, JAILS VS. PRISONS (2006), http://www.aca.org/fileupload/177/prasannak/1_1_1_Commentary_web.pdf. In making international comparisons, it is important to look at the total of those held in prisons and in jails. In addition, as of 2003, the United States held about 96,655 children, of whom about 15% were girls, in juvenile facilities not included in the totals given here. See SNYDER & SICKMUND, *supra* note 15, at 197, 206.

28. SABOL ET AL., *supra* note 15, at 5-6 (calculating the percentage of women in prisons and jails from the number of inmates as of June 30, 2006).

29. WORLD FEMALE IMPRISONMENT LIST, *supra* note 2, at 1.

30. *Id.* Twelve systems have higher percentages than the United States: Aruba, Bermuda, China (Hong Kong and Macau), Ecuador, Kuwait, Laos, Myanmar, the Netherlands, Qatar, Singapore, Thailand, and Vietnam. *Id.*

31. SABOL ET AL., *supra* note 15, at 9.

32. See WORLD PRISON POPULATION LIST, *supra* note 20, at 2-5.

33. SABOL ET AL., *supra* note 15, at 5.

population increased 2.7%.³⁴ This increase is in line with an overall increase between 2000 and 2006, when the population of female inmates grew 3.3% on average, compared to a 2.0% increase among the population of male inmates.³⁵

The number of women in prison throughout the world is growing both because the overall rate of incarceration is growing,³⁶ and because many of the trends that have led to the overall increase have had a particular impact on women.³⁷ Imprisonment is increasingly the main recourse of the criminal justice system and criminal justice policy worldwide.³⁸ High numbers of prisoners are held in pre-trial detention, often under terms that contravene even local regulations governing the appropriate duration of such detention.³⁹ A clear indicator of this crisis can be seen in the prisons of the developing world. Across Africa, there is a striking mismatch between conflict, violence, and criminal activity and those who find themselves in the continent's prisons.⁴⁰ While imprisonment rates are not markedly inconsistent with those elsewhere in the world,⁴¹ they tell only a small part of the story. They fail to reflect that "[i]n some countries 80% of the prison population" have not been tried or convicted of any crime.⁴²

In parts of Africa, South Asia, Latin America, and the Caribbean, the pre-trial population accounts for at least one half of the total prison population,⁴³ whereas in countries such as the Democratic Republic of Congo, an estimated 70-80% of all detainees in the country's prisons are pre-trial.⁴⁴ While awaiting trial, many serve time that far exceeds any sentence they might have received if they

34. *Id.*

35. *Id.*

36. Human Rights Council Chairperson-Rapporteur, Working Group on Arbitrary Detention, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* ¶ 60, U.N. Doc. A/HRC/4/40 (Jan. 9, 2007).

37. FROST ET AL., *supra* note 8, at 21.

38. Brian Tkachuk & Roy Walmsley, *World Prison Populations: Facts, Trends, and Solutions* 3 (United Nations Programme Network Institutes Technical Assistance Workshop Background Paper), available at <http://www.heuni.fi/uploads/6mq2zlwaaw3ut.pdf>.

39. See PENAL REFORM INT'L, *supra* note 13, at 24 (noting African inmates have exceeded their constitutional remand period and are due for unconditional bail).

40. See *generally id.*

41. The median rate of persons in detention in Western Africa is 37 per 100,000, while the rate for Southern Africa is 267. See WORLD PRISON POPULATION LIST, *supra* note 20, at 1.

42. PENAL REFORM INT'L, *supra* note 13, at 3.

43. PENAL REFORM INT'L, PRISON OVERCROWDING, <http://www.penalreform.org/prison-overcrowding.html> (last visited Jan. 18, 2008).

44. Bureau of Democracy, Human Rights & Labor, Country Reports on Human Rights Practices — 2006: Democratic Republic of the Congo, <http://www.state.gov/g/drl/rls/hrrpt/2006/78728/htm> (last visited Jan. 18, 2008).

had been brought before a court of law within a reasonable time.⁴⁵ Women can be at a particular disadvantage when applying for bail, as in many places they do not have money or hold property in their own names.⁴⁶

Rising prison populations are not confined to the developing world. They are a growing problem in many countries such as the United States, Britain, and Wales where the national crime rates have actually declined.⁴⁷ The prison populations of England and Wales rose by 50% in the early 1990s,⁴⁸ and yet the number of criminal offenses fell by 5% over the same period.⁴⁹ This demonstrates the increasingly punitive approach being taken, including an over-reliance on incarceration in sentencing policy and practice.⁵⁰ Punishments are becoming harsher,⁵¹ recipients start younger, and sentences continue well into old age.⁵² Political actors are using crime and the fear of crime for partisan ends rather than in support of reform.⁵³ Punishment has become a mantra, slogans have taken the place of research-based policy decisions about the best way to achieve public safety (such as “lock them up and throw away the key”⁵⁴ and “do the adult crime, do the adult time”⁵⁵) and individuals and communities have been increasingly damaged by the resulting prison boom.⁵⁶

Extension of the criminal justice system is replacing social measures and policy, denying people the opportunities to change and improve their circumstances, and ultimately deepening their social exclusion. Young people and children in trouble are demonized and given harsh punishments, rather than care and education to prevent

45. See *id.* (inferring that pre-trial detention can endure for months or even years before a prisoner meets with a judge, lawyer or social worker).

46. Kathryn McConnell, *Women's Lack of Property Rights Linked to Abuse, Experts Say: Cite Abuse as Leading Cause of Women's HIV Infection in Poor Countries*, USINFO, Dec. 7, 2006, <http://news.corporate.findlaw.com/wash/s/20061207/20061207090840.html> (last visited Jan. 18, 2008).

47. TRICIA DODD, SIAN NICHOLAS, DAVID POVEY & ALISON WALKER, *CRIME IN ENGLAND AND WALES 2003/2004*, at 7 (2004), available at <http://www.homeoffice.gov.uk/rds/pdfs04/hosb1004.pdf>.

48. Tkachuk & Walmsley, *supra* note 38, at 4.

49. DODD ET AL., *supra* note 47.

50. Tkachuk & Walmsley, *supra* note 38, at 3-4.

51. *Id.* at 4.

52. Nancy Bartley, *Lawmaker Rethinking Hard Line on Sentencing of Young Offenders*, SEATTLE TIMES, Apr. 14, 2005, at A1.

53. Mike Males, *Youth Today, Do Adult Crime, Do More than Adult Time*, YOUTHTODAY, Apr. 2003, <http://home.earthlink.net/~mmales/yt-juvct.htm> (last visited Jan. 18, 2008).

54. Adam Geller, *Juveniles Do Hard Time for Harsh Crime*, ASSOC. PRESS, Dec. 8, 2007, available at <http://www.wtopnews.com/?nid=104&sid=1306811>.

55. Males, *supra* note 53.

56. See generally Bureau of Democracy, Human Rights, & Labor, *supra* note 44.

offending.⁵⁷ In the United States, the imprisonment of the young urban poor,⁵⁸ disproportionately people of color,⁵⁹ is now recognized as a social policy intervention — the school to prison pipeline.⁶⁰ In England, a recent investigation into the country's prisons established that 41% of prisoners held in prison health care centers should have been provided state health service accommodation outside the criminal justice system for their mental health needs.⁶¹

People with mental health problems, learning difficulties, and drug and alcohol dependencies are over-represented in prisons worldwide.⁶² Lack of social support and legal protection, unequal access to justice and entrenched discrimination have perpetuated a situation in which society's 'other' comprised of the poor, indigenous persons, ethnic, sexual, and religious minorities, street children, and other vulnerable groups are highly and disproportionately susceptible to arrest leading to imprisonment.⁶³

In short, penal functions have been given priority over social functions in dealing with socio-economic problems to the detriment of the poor. This phenomenon, often referred to as the "criminalization of poverty,"⁶⁴ entails on one hand, the expansion of national corrections regimes and, on the other, a contraction of education and health care functions and resources.⁶⁵ The expansion of the use of prisons is also facilitated and encouraged by the growth of the for-profit prison industry begun in the United States⁶⁶ and now spreading increasingly to the rest of the world.⁶⁷

The growth of fears of terrorism and transnational crime has also contributed to growth in the prison systems and to harsher conditions.⁶⁸ Declining respect for the rule of law and human rights in

57. See, e.g., NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf (last visited Jan. 18, 2008).

58. *Id.* at 1.

59. *Id.*

60. *Id.*

61. Press Release, British Medical Ass'n, Prison Healthcare Sliding Towards Crisis, Warns BMA, (Feb. 8, 2007), available at <http://www.bma.org.uk/pressrel.nsf/wluSGOY-6Y7GQY?OpenDocument&vw=wfmmms>.

62. FROST ET AL., *supra* note 8, at 21-22.

63. *Id.*

64. Kim Brooks, *Finding Answers: The Kimberly Rogers Inquest*, JurisFemme (Nat'l Ass'n of Women & the Law, Ottawa, Can.), Fall 2002, at 1, available at http://www.nawl.ca/ns/en/jf_fall02_en.html.

65. John Gramlich, *States Seek Alternative to More Prisons*, STATELINE.ORG, June 18, 2007, www.stateline.org/live/details/story?contentId=217204 (last visited Jan. 18, 2008).

66. JOHN D. DONAHUE, PRISONS FOR PROFIT: PUBLIC JUSTICE, PRIVATE INTERESTS 3-5 (1988), available at <http://www.epinet.org/studies/prisons-1988.pdf>.

67. *Id.* at 3.

68. *Protection of Human Rights and Fundamental Freedoms While Countering*

established democracies is resulting in a serious reduction in standards in those societies,⁶⁹ giving a green light to states with a record of systematic human rights violations that such action taken in the name of national security will be widely tolerated.⁷⁰ This has led in particular to harsher treatment of immigrants and to ethnic minorities.⁷¹

The overall trend appears to be the increasing use of harsher criminal policies that impact most severely the communities and individuals least able to protect their own rights. Already denied protection of the rule of law, such groups appear to be at considerable risk of further marginalization caused by blanket security and criminal justice policies.

While these developments have ensnared men and women in the ever-expanding prison industry, it has particularly damaging effects on women.⁷² More women are being sent to prison, although most have committed petty non-violent offences.⁷³ Women are generally convicted of property, sex, or drug crimes — crimes of economic necessity resulting from poverty — that are increasingly punished by custodial sentences.⁷⁴ The “War on Drugs,” which is now an international effort pushed by the United States, through its foreign policy and its influence within the U.N. Office on Drugs and Crime, has caught many women in the crossfire.⁷⁵ Driven by poverty and by economic and cultural dependence on men involved in drug dealing, many women become entrapped in drug trafficking networks and suffer harsh consequences.⁷⁶ Because of their poverty, they are often unable to pay fines or bail even if those options are available.⁷⁷ Drug trade involvement as “mules,” carrying drugs across state lines (whether willingly or unwillingly, knowingly or unknowingly,) leads to additional problems for women who may end up imprisoned far

Terrorism: Study of the United Nations High Commissioner for Human Rights, Human Rights Questions: Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, ¶¶ 23, 26, 27, U.N. Doc. A/59/428 (Oct. 8, 2004).

69. *Id.* at 9-10.

70. *Id.*

71. *Id.*

72. See generally THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM: BRIEFING SHEETS (May 2007), available at http://www.sentencingproject.org/Admin%5CDocuments%5CNews%5Cwomenincj_total.pdf [hereinafter WOMEN IN THE CRIMINAL JUSTICE SYSTEM].

73. *Id.* at 4 (stating one in three female offenders in state prisons is incarcerated for a violent offense).

74. *Id.*

75. *Id.*

76. FROST ET AL., *supra* note 8, at 22.

77. *Id.* at 22-25.

from home where they may be part of a racial or ethnic minority,⁷⁸ at worst subject to additional discrimination and abuse, and at best, facing problems with understanding local language and culture.⁷⁹

The impact of the War on Drugs is especially obvious in the U.S. prison system. "From 1986 to 1996, despite the fact that the rate at which women used drugs actually declined substantially, the number of women incarcerated in state facilities for drug offenses increased by 888%, compared to a rise of 129% for non-drug offenses."⁸⁰ As of 2005, 29% of women in prison were incarcerated for drug offenses, as compared to 19% of men.⁸¹ The punishment for women convicted of drug crime does not end when they leave prison.⁸²

For example, as a result of the federal welfare legislation of 1996, there is now a lifetime ban on the receipt of welfare benefits for anyone convicted of a drug felony, unless a state chooses to opt out of this provision. As of 2006, 15 states were fully enforcing the provision, which means that drug offenders will have an even more difficult transition back into the community than exoffenders generally. This has a particularly pronounced impact for women and mothers, who, along with their children, are the primary recipients of this type of aid.⁸³

In all prison systems, ethnic and racial minorities are over-represented.⁸⁴ In the United States in mid-2006, when the Department of Justice conducted its most recently published census, white women comprised 47% of the female prison population,⁸⁵ given the much larger percentage of white women in the overall U.S. population, this translates to a lower incarceration rate for white women (94 per 100,000 white women) than black women (358 per 100,000 black women) and Hispanic women (152 per 100,000 Hispanic women).⁸⁶

78. *Id.*

79. *Id.*

80. WOMEN IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 72, at 4.

81. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. 215092, PRISONERS IN 2005 BULLETIN 19 (Jan. 18, 2007), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>. Note that these percentages only reflect prison statistics, and do not include the many women serving drug time in jails.

82. WOMEN IN CRIMINAL JUSTICE SYSTEM, *supra* note 72 (detailing the social stigma of being incarcerated).

83. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 14 (2007), *available at* http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_25yearquagmire.pdf.

84. SABOL ET AL., *supra* note 15, at 9.

85. *Id.*

86. *Id.*

"The overall incarceration rate for black women was 3.8 times the rate for white women.⁸⁷ Hispanic women were 1.6 times more likely than white women to be incarcerated.⁸⁸ Across age groups, black women were incarcerated between 2.8 and 4.3 times the rate of white women."⁸⁹

While there are differences between nations in the number of women they incarcerate, there are many similarities in the problems faced by women prisoners throughout the world. These include problems in their lives prior to imprisonment, the conditions they face in prison, and the particular issues they face as they attempt to reintegrate into their communities after imprisonment.⁹⁰ Whatever the country or continent, the women found in prison are predominantly those at the most impoverished end of the social spectrum⁹¹ who have led a life of social exclusion and abuse;⁹² they are young,⁹³ lacking legal employment⁹⁴ and have low education levels;⁹⁵ many have histories of alcohol and drug abuse⁹⁶ and mental health problems;⁹⁷ a high proportion have experienced violence or sexual abuse,⁹⁸ and many are mothers with dependent children.⁹⁹

As the numbers of women in prison grows, there is increased concern among human rights organizations, women's rights groups, and penal reformers about the problems women face and the wider impact on families and communities.¹⁰⁰ Given the international problems women prisoners face, it is natural to look to international laws, standards and norms for solutions. The international human rights instruments and mechanisms¹⁰¹ provide extensive guidance — both

87. *Id.*

88. *Id.*

89. *Id.*

90. *See generally* FROST ET AL., *supra* note 8, at 21-22.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. VIVIEN STERN, *A SIN AGAINST THE FUTURE: IMPRISONMENT IN THE WORLD* 138 (1998).

99. *Id.* at 141.

100. WOMEN IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 72, at 3.

101. *See, e.g.*, U.N. Charter; African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 59 (1982) [hereinafter African [Banjul] Charter]; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S., 1144 U.N.T.S. 123 [hereinafter Organization of American States Convention]; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, 213 U.N.T.S. 221 (1950) [hereinafter Council of Europe Convention]; Universal Declaration of Human Rights,

aspirational and practical — for improving the conditions in which incarcerated women are forced to live.¹⁰² For most of the world,¹⁰³ and increasingly in the United States,¹⁰⁴ the human rights framework is an automatic starting point for addressing the appropriate treatment for people in prison.¹⁰⁵

Human rights, by definition, belong to everyone, based on their humanity without regard to conduct or status.¹⁰⁶ The key human rights documents are very clear in their statement of the intrinsic "dignity and worth of the human person"¹⁰⁷ and make no exception for those who have broken the law or otherwise violated the social contract. The significance of these rights to people deprived of their liberty is also clearly spelled out in the Universal Declaration of Human Rights.¹⁰⁸ Article 5 states: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."¹⁰⁹ Further, the International Covenant on Civil and Political Rights, Article 10, states, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."¹¹⁰ Similar wording is included in the European Convention on Human Rights,¹¹¹ the African Charter on Human and Peoples' Rights¹¹² and the Inter-American Convention on Human Rights.¹¹³ The Convention on the Rights of the Child¹¹⁴ also includes language specific to detained children.¹¹⁵ Vivien Stern expresses it,

Detained people are included because human rights extend to all human beings. It is a basic tenet of international human rights law that nothing can put a human being beyond the reach of certain

G.A. Res. 217A U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights].

102. STERN, *supra* note 98, at 142-43.

103. *Id.* at 237.

104. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (referring to the assertion, "[a]ll men are created equal").

105. *Id.*; STERN, *supra* note 98, at 237.

106. STERN, *supra* note 98, at 141.

107. U.N. Charter, Introductory Note.

108. Universal Declaration of Human Rights, *supra* note 101.

109. *Id.* at art. 5.

110. International Covenant on Civil and Political Rights, art. 10, ¶ 1, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter Covenant on Civil and Political Rights].

111. Council of Europe Convention, *supra* note 101.

112. African [Banjul] Charter, *supra* note 101.

113. Organization of American States Convention, *supra* note 101.

114. United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter Convention on the Rights of the Child].

115. *Id.* at art. 40, ¶ 1.

human rights protections. Some people may be less deserving than others. Some may lose many of their rights through having been imprisoned through proper and legal procedures. But the basic rights to life, health, fairness and justice, humane treatment, dignity and protection from ill-treatment or torture remain. There is a minimum standard for the way a state treats people, whoever they are. No one should fall below it.¹¹⁶

The covenants and conventions that followed from the Declaration of Human Rights elaborated on these rights and gave them the specificity to create the legal framework that defines how states should treat their citizens — their language too often has particular relevance to incarcerated people. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹¹⁷ also is clearly relevant to detained people,¹¹⁸ and the Convention on the Rights of the Child¹¹⁹ imposes specific requirements for the treatment of children in conflict with the law.¹²⁰

The assertion of an inalienable right to human dignity is a common element of many of the key human rights instruments¹²¹ and surely it is a notion of great relevance to any consideration of the treatment of prisoners. The Prison Inspectorate for England and Ireland has four tests which it uses to judge if a prison under inspection is “healthy,” and one of those key expectations underlying one of these tests is the extent to which prisoners are treated with respect for their human dignity.¹²² Not surprisingly, the specific tests by which such expectations are judged lay great emphasis on the particular needs of women,¹²³ specifically on supporting them through pregnancy¹²⁴ and working with them to ensure that the arrangements made for their children are the best possible,¹²⁵ as well as ensuring that the mother, and if possible, both parents are fully involved in all the decision-making.¹²⁶ Because women are a minority in prison systems,

116. STERN, *supra* note 98, at 192.

117. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention Against Torture].

118. *Id.* at pt I., art. 6, ¶ 3.

119. Convention on the Rights of the Child, *supra* note 114.

120. *See, e.g., id.* at art. 40, ¶ 1.

121. *Id.* at art. 37; Convention Against Torture, *supra* note 117, at pmb1.

122. HER MAJESTY'S INSPECTORATE OF PRISONS, EXPECTATIONS: CRITERIA FOR ASSESSING THE CONDITIONS IN PRISONS AND THE TREATMENT OF PRISONERS, 2006, at 1, 31, available at <http://inspectorates.homeoffice.gov.uk/hmiprisons/docs/expectations06.pdf>.

123. *See, e.g., id.* at 41, 45.

124. *Id.* at 63-68.

125. *Id.* at 63.

126. *Id.* at 64.

and because those systems are generally designed by and for men, women are inherently unequal, and their specific needs are given short shrift in many instances.¹²⁷ The Universal Declaration of Human Rights, Article 2;¹²⁸ the International Covenant on Civil and Political Rights (ICCPR) Article 3;¹²⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹³⁰ all speak to the right to equal treatment.

But there is more to the human rights framework than the inspirational and aspirational language that the treaties and their optional protocols¹³¹ give us. For much of the world, international, regional and national human rights laws provide binding legal rights and are the basis of litigation around prison condition issues.¹³² The legal requirements imposed on the United States by international human rights treaties are the subject of considerable debate.¹³³ In some instances, the United States has signed but not ratified treaties.¹³⁴ In others, it has ratified them but reserved the right not to implement certain key provisions.¹³⁵ The United States also argues

127. See *Offenders and Victims*, *supra* note 1, at 4.

128. Universal Declaration of Human Rights, *supra* note 101, art. 2.

129. Covenant on Civil and Political Rights, *supra* note 110, at pt. II, art. 3.

130. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., 107th plen. mtg., U.N. Doc. A/Res/34/180 (Dec. 18, 1979) [hereinafter *Discrimination Against Women*]. CEDAW is another of the treaties that the U.S. has signed but not ratified. See Office of the United Nations High Commissioners for Human Rights, Ratifications and Reservations: Convention on the Elimination of All Forms of Discrimination Against Women, www2.ohchr.org/english/law/cedaw.htm (last visited Jan. 18, 2008). CEDAW was adopted in 1979 by the U.N. General Assembly. The Convention defines discrimination against women as "... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." *Discrimination Against Women*, at pt. I, art. 1.

131. Treaty is "a generic term embracing all instruments binding at international law concluded between international entities, regardless of their formal designation." United Nations Treaty Collection: Treaty Reference Guide, available at <http://untreaty.un.org/English/guide.asp> (last visited Jan. 18, 2008) [hereinafter *United Nations Treaty Collection*]. Optional Protocols create additional rights and obligations for a treaty and are subject to independent ratification. *Id.*

132. STERN, *supra* note 98, at 237 (noting the European Commission for Human Rights has proved influential in improving prisoners' treatments in the United Kingdom).

133. Curtis Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 309 (2007).

134. See, e.g., Office of the U.N. High Commissioner for Human Rights, <http://www2.ohchr.org/english/law/cedaw.htm> (last modified Apr. 19, 2007); Bradley, *supra* note 133, at 309.

135. Reservations are declarations made by a state "to exclude or alter the legal effect of certain provisions of the treaty in their application to that state." See United Nations Treaty Collection, *supra* note 131. They enable a state to accept a treaty as a whole while

that such treaties are not applicable unless Congress passes enabling legislation.¹³⁶ They are not self-executing,¹³⁷ and thus do not provide a private right of action.¹³⁸ The focus of this paper is not on the use of international treaties in U.S. litigation but rather on the tools that the international human rights framework provides to support advocacy and policy development. It should be noted, however, that the idea of using human rights law in court is not as controversial as it might have seemed a few years ago.¹³⁹ Growing interest in the issue can be seen at every level, from Supreme Court Justices¹⁴⁰ to public interest law groups,¹⁴¹ as well as individual practitioners.¹⁴²

In recent years, the Supreme Court opinions and dissents in cases on issues as various as affirmative action,¹⁴³ consensual sexual activity¹⁴⁴ and the death penalty¹⁴⁵ have invoked legal principles from outside U.S. domestic law.¹⁴⁶ Perhaps more remarkable, when the Missouri Supreme Court reviewed *Simmons v. Roper*,¹⁴⁷ before it went to the United States Supreme Court, they referenced Article 37(a) of the United Nations Convention on the Rights of the Child as prohibiting death penalty for juveniles and noted that "several other international treaties and agreements expressly prohibit the practice."¹⁴⁸

Within the United States, we have traditionally turned to the courts and to a civil rights framework to protect the vulnerable within our prisons. However, recent developments in the United States — the more conservative nature of the Supreme Court,¹⁴⁹ the restrictions

rejecting certain provisions with which it does not want to comply. *Id.* "Reservations must not be incompatible with the object and the purpose of the treaty" and a treaty may prohibit reservations. *Id.*

136. Probono.net, U.S. Human Rights Treaty Obligations, <http://www.ushumanrights.org/online.net/u.s.humanrightstreatyobli781.cfm> (last visited Jan. 18, 2008).

137. *Id.*

138. *Id.*

139. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 554 (2005); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003).

140. See, e.g., *Roper*, 543 U.S. at 554; *Lawrence*, 539 U.S. at 560; *Grutter*, 539 U.S. at 344.

141. Brief of Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights as Amici Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

142. *Id.*

143. *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

144. *Lawrence*, 539 U.S. at 576.

145. *Roper*, 543 U.S. at 575.

146. See generally *id.*; *Lawrence*, 539 U.S. 558 (2003); *Grutter*, 539 U.S. 306 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002).

147. 112 S.W.3d 397 (Mo. 2003).

148. *Id.* at 411.

149. Nina Totenberg, *Supreme Court More Conservative, Fragmented*, NAT'L PUBLIC RADIO, July 4, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5531678>.

placed on prison litigants by the Prison Litigation Reform Act,¹⁵⁰ and the deeply political “get tough on crime” posturing, which has worked to dehumanize prisoners regardless of their past personal and criminal history¹⁵¹ — has led many reformers to look for a new paradigm. As a result, there is a growing interest in the United States in the significance of human rights as a tool for prison reform.¹⁵² Among many examples, the U.S. Human Rights Network¹⁵³ has brought together social justice reformers to share information and experience and to encourage links with human rights advocates around the world;¹⁵⁴ the American Civil Liberties Union,¹⁵⁵ long a prime defender of prisoners’ rights in federal court, now has an International Human Rights Program;¹⁵⁶ Amnesty International in the United States has developed an office devoted to the issue of human rights at home;¹⁵⁷ and law schools including American University Washington College of Law¹⁵⁸ and Columbia University¹⁵⁹ have extended their traditional international human rights programs to forge links with advocates in the United States working on human rights issues.¹⁶⁰

These advocates, along with others in the rest of the world, find a variety of tools within the human rights framework to support their work. The U.N. treaty bodies (committees),¹⁶¹ set up to monitor the

150. STERN, *supra* note 98, at 283.

151. Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOC. INQUIRY 701, 703 (2007).

152. James Cavallaro & Mohammad-Mahmoud Ould Mohamedou, *Public Enemy Number Two?: Rising Crime and Human Rights Advocacy in Transitional Societies*, 18 HARV. HUM. RTS. J. 139, 140-44 (2005).

153. U.S. Human Rights Network, About the U.S. Human Rights Network, http://www.ushrnetwork.org/about_us (last visited Jan. 18, 2008).

154. *Id.*

155. American Civil Liberties Union, ACLU Human Rights Program, <http://www.aclu.org/intlhumanrights/index.html> (last visited Jan. 18, 2008).

156. *Id.*

157. Amnesty International U.S.A., Domestic Human Rights, http://www.amnestyusa.org/Our_Issues/Domestic_Human_Rights/page.do?id=1011100&n1=3&n2=850 (last visited Jan. 18, 2008).

158. Washington College of Law, International Human Rights Law Clinic, <http://www.wcl.american.edu/clinical/inter.cfm> (last visited Jan. 18, 2008).

159. John Kelley, *Law Begins New Human Rights Effort*, COLUM. U. REC., Jan. 30, 1998, available at <http://www.columbia.edu/cu/record/23/13/15.html>.

160. See Kelley, *supra* note 159; Washington College of Law, *supra* note 158.

161. For example, the Human Rights Committee oversees the International Covenant on Civil and Political Rights, the Committee Against Torture oversees the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Committee on the Elimination of Racial Discrimination oversees the Convention on the Elimination of All Forms of Racial Discrimination. Human Rights Treaty Bodies: Monitoring the Core International Human Rights Treaties, <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited Jan. 18, 2008). All these treaties have been ratified by the U.S. with reservations. Probono.net, *supra* note 136.

states adherence to the treaties they sign and ratify,¹⁶² receive periodic reports from governments describing the steps undertaken domestically to conform to the commitments they have undertaken.¹⁶³ The committees encourage non-governmental organizations (NGOs) to submit "shadow reports" addressing omissions, deficiencies, or inaccuracies in the official government reports.¹⁶⁴ These "shadow reports" provide information that is often vital to assisting U.N. experts in their assessment of a government's compliance with international human rights treaties.¹⁶⁵ In fact, the official U.N. guidelines for the reporting process anticipate the involvement and consultation of civil society groups during the drafting of the government's report.¹⁶⁶ However, the U.S. government generally has refrained from this type of consultation,¹⁶⁷ which makes the shadow reporting process even more important here.

During the last two years, the U.S. government has submitted reports to the United Nations on its compliance with the three major human rights treaties it has ratified: the International Covenant on Civil and Political Rights (ICCPR),¹⁶⁸ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁶⁹ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹⁷⁰ Human rights activists of the United States have taken full advantage of the filing of all of these reports within a relatively short period of time to raise public

162. The adoption of a treaty is a two-step process. A state first signs a treaty, which does not bind it legally, but does express a willingness to proceed to ratification. See UNICEF, Introduction to the Convention of the Rights of the Child: Definition of Key Terms, <http://www.unicef.org/crc/files/Definitions.pdf> (last visited Jan. 18, 2008). Signing also creates an obligation to refrain from acts that would defeat the object and the purpose of the treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, S. Treaty Doc. No. 92-12, 1155 U.N.T.S. 331. Ratification is a binding agreement signifying that the treaty has received domestic approval (in the United States, with advice and consent of Senate) and that necessary domestic legislation will be passed to give effect to the law. United Nations Treaty Collection, *supra* note 131.

163. See United Nations Treaty Collection, *supra* note 131.

164. U.S. Human Rights Network, Why Do 'Shadow' Reporting?, available at http://nijn.org/media/resources/public/resource_492.doc.

165. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES, FACT SHEET NO. 30, available at http://www.ohchr.org/english/bodies/docs/OHCHR_FactSheet30.pdf.

166. U.S. Human Rights Network, *supra* note 164.

167. *Id.*

168. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Reports of States Parties Due in 2003, United States of America*, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

169. Probono.net, *supra* note 136.

170. *Id.*

awareness of U.S. human rights obligations and to build a constituency for holding the government accountable under these obligations.¹⁷¹ This has included writing shadow reports,¹⁷² holding training sessions around the country on the significance of these reporting opportunities,¹⁷³ and bringing advocates to Geneva to talk, formally and informally, with members of the treaty bodies when they hold hearings and cross examine representatives of the U.S. government on the official U.S. reports.¹⁷⁴

All these reporting processes have provided opportunities to raise issues concerning the treatment of women prisoners in the United States. For example, at a briefing to the Committee Against Torture,¹⁷⁵ representatives of U.S. NGOs raised the abusive practice of shackling women during pregnancy and labor in many U.S. correctional systems.¹⁷⁶ One of the Committee members¹⁷⁷ was particularly concerned about this and raised the issue with the U.S. government representatives during the hearing¹⁷⁸ and, following the hearing, the final report from the Committee again called the United States to account for this practice.¹⁷⁹

The U.N. also offers other avenues for bringing domestic problems to an international audience, and that attention can sometimes shame governments into behaving better and making improvements.¹⁸⁰ U.N. mechanisms can bring expert attention and advice to those who want to solve problems. One of the avenues which traditionally offered an opportunity to bring international attention and allowed NGOs to lobby for international support was the U.N. Commission on Human Rights (UNCHR).¹⁸¹ The Commission has now been disbanded and replaced by the Human Rights Council.¹⁸² The United States is not a

171. U.S. Human Rights Network, *supra* note 164.

172. *Id.*

173. *Id.*

174. *Id.*

175. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: A BRIEFING FOR THE UN COMMITTEE AGAINST TORTURE 27 (2002), http://www.amnesty.org/en/alfresco_asset/e93f8e54-b61f-11dc-91ef-e7bbfd81dfbe/amr510562000en.pdf.

176. *Id.*

177. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 33, *Conclusions and Recommendations of the Committee Against Torture, United States of America*, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

178. *Id.*

179. *Id.*

180. *See generally* HUMAN RIGHTS COUNCIL, MANUAL OF THE UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES OR SPECIAL PROCEDURES ASSUMED BY HUMAN RIGHTS COUNCIL (2006), available at http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_English_23jan.pdf [hereinafter *Manual of Special Procedures*].

181. STERN, *supra* note 98, at 246.

182. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

member of the Council, having chosen not to run for membership.¹⁸³ At the moment, the Council is still establishing its policies and procedures.¹⁸⁴ It will periodically review the human rights record of all U.N. member states and report on them.¹⁸⁵ It is expected to maintain one of the most successful tools of the Human Rights Commission¹⁸⁶ — the Special Procedures.¹⁸⁷ The Special Procedures are the human rights experts — working groups, independent experts and special rapporteurs¹⁸⁸ — who examine, monitor, advise, and publicly report on human rights situations in specific countries or territories,¹⁸⁹ or on major phenomena of human rights violations worldwide known as “thematic mandates.”¹⁹⁰ For example, the special rapporteurs with thematic responsibilities include the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁹¹ and the Special Rapporteur on Violence Against Women Its Causes and Consequences,¹⁹² both of whom have investigated and reported on prison conditions.¹⁹³ Visits from Special Rapporteurs also give domestic NGOs an opportunity to bring attention to the issues being investigated in their country. These experts can conduct studies, undertake country fact-finding missions, provide technical advice, and respond to and engage governments about individual complaints.¹⁹⁴

The U.N. in Geneva, where the U.N. High Commissioner for Human Rights, the various human rights treaty bodies, and the Human Rights Council are based, is generally thought of as a repository of human rights. However, the U.N. Office on Drugs and Crime (UNODC) in Vienna is the home of many of the standards that formulate and promote internationally-recognized principles in areas of criminal justice, such as the independence of the judiciary, the protection of victims, alternatives to imprisonment, treatment of prisoners and law enforcement use of force.¹⁹⁵ U.N. standards in these

183. U.N. Human Rights Council, Membership of the Human Rights Council, <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm> (last visited Jan. 18, 2008) (indicating the United States has not yet joined as a member).

184. G.A. Res 60/251, ¶ 11.

185. *Id.* ¶ 5(e).

186. *Id.* ¶ 6.

187. *Id.*

188. Manual of Special Procedures, *supra* note 180, at 4.

189. *Id.*

190. *Id.*

191. *Id.* at 24.

192. *Id.*

193. See Convention Against Torture, *supra* note 117, at arts. 2, 4, 12.

194. *Id.*

195. See generally UNITED NATIONS OFFICE ON DRUGS AND CRIME, CRIMINAL JUSTICE ASSESSMENT TOOLKIT (2006), available at http://www.unodc.org/pdf/criminal_justice/INTERNATIONAL_COOP.pdf.

areas are developed by the U.N. Commission on Crime Prevention and Criminal Justice¹⁹⁶ and then approved by the U.N. General Assembly meeting in New York.¹⁹⁷ The standards that are particularly relevant for monitoring the treatment of women and girls in prison include:¹⁹⁸

- U.N. Standard Minimum Rules for the Treatment of Prisoners;¹⁹⁹
- U.N. Standard Minimum Rules for the Administration of Juvenile Justice;²⁰⁰
- U.N. Rules for the Protection of Juveniles Deprived of their Liberty;²⁰¹
- U.N. Minimum Rules for Non-Custodial Measures;²⁰²
- Code of Conduct for Law Enforcement Officials.²⁰³

The Standard Minimum Rules for the Treatment of Prisoners is a key document for anyone concerned with bringing conditions for women prisoners in line with international norms.²⁰⁴ Among the important principles it articulates:

- Men and women should be kept in separate institutions or in an entirely separate area of the premises allocated to women,²⁰⁵

196. United Nations Office on Drugs and Crime, The Commission on Crime Prevention and Criminal Justice, <http://www.unodc.org/unodc/en/commissions/CCPCJ/index.html> (last visited Jan. 18, 2008).

197. *Id.*

198. The full list of standards is available on the UNODC web page at <http://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html>. See UNITED NATIONS OFFICE ON DRUGS & CRIME, COMPENDIUM OF THE UNITED NATIONS STANDARDS AND NORMS IN CRIME PREVENTION AND CRIMINAL JUSTICE (2006) [hereinafter COMPENDIUM OF STANDARDS AND NORMS].

199. *Id.* at 3-23.

200. *Id.* at 51-77.

201. *Id.* at 87-104.

202. *Id.* at 117-28.

203. *Id.* at 343-48.

204. *Id.* at 3. The U.N. Standard Minimum Rules were passed by the U.N. General Assembly in 1957 and are an international standard, but are not part of international law. *Id.* at 26. In 1995, Penal Reform International published *Making Standards Work: An International Handbook on Good Prison Practice* that interpreted and provided additional guidance on adherence to the Standard Minimum Rules. PENAL REFORM INT'L, MAKING STANDARDS WORK: AN INTERNATIONAL HANDBOOK ON GOOD PRISON PRACTICE 7 (2d ed. 2001) [hereinafter MAKING STANDARDS WORK]. It also explained their value and meaning regarding the implementation of prison policy. *Id.* *Making Standards Work* was accepted as an official U.N. document. See U.N. Office on Drugs and Crime Releases CD-Roms on Crime Congress Documentation, U.N. INFO. SERVS., BKK/CP/24 (Apr. 24, 2005). The latest edition was published in 2001. It is available on PRI's website in English, French, Spanish, Russian and Farsi at <http://www.penalreform.org/making-standards-work-en.html>.

205. COMPENDIUM OF STANDARDS AND NORMS, *supra* note 198, at 5; see also MAKING

- "No male member of staff shall enter the part of the institution set aside for women unless accompanied by a woman officer";²⁰⁶
- "Women prisoners shall be attended and supervised only by women officers";²⁰⁷
- "There shall be special accommodation for all necessary pre-natal and post-natal care and treatment";²⁰⁸
- "Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers."²⁰⁹

These last two points speak to an issue of great concern throughout the world. The percentage of women in U.S. state prisons who are mothers to children under 18 years of age is about 55%, according to the latest statistics from the U.S. Department of Justice.²¹⁰ Problems become even more complex when a woman in prison is pregnant and gives birth while in custody. It has been estimated that about 6% of women entering jail in the United States are pregnant.²¹¹ Between 1997-1998, more than 2200 women imprisoned were pregnant, and more than 1300 babies were born in prison.²¹² These numbers may reasonably be assumed to be higher in countries with a higher birth rate. Even in the United States, with its high numbers of women prisoners, these percentages mean large numbers of women. For example, in California, a state with a large number of prisoners,²¹³ it is estimated that on any given day, more than 100 women are

STANDARDS WORK, *supra* note 204, at 131.

206. COMPENDIUM OF STANDARDS AND NORMS, *supra* note 198, at 15; *see also* MAKING STANDARDS WORK, *supra* note 204, at 160.

207. COMPENDIUM OF STANDARDS AND NORMS, *supra* note 198, at 15; *see also* MAKING STANDARDS WORK, *supra* note 204, at 161.

208. COMPENDIUM OF STANDARDS AND NORMS, *supra* note 198, at 7; *see also* MAKING STANDARDS WORK, *supra* note 204, at 95.

209. COMPENDIUM OF STANDARDS AND NORMS, *supra* note 198, at 8; *see also* MAKING STANDARDS WORK, *supra* note 204, at 95.

210. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. 182335, INCARCERATED PARENTS & THEIR CHILDREN 1 (Aug. 2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

211. Nat'l Comm'n on Correctional Health Care, Women's Health Care in Correctional Settings, <http://www.ncchc.org/resources/statements/womenshealth2005.html> (last visited Jan. 18, 2008) (citing a 2000 Bureau of Justice Statistics finding that in 1997, about 5% of women entering prison were pregnant).

212. Amnesty Int'l, *Pregnant and Imprisoned in the United States*, 27 BIRTH 266 (Dec. 2000), *available at* <http://www.blackwell-synergy.com/doi/pdf/10.1046/j.1523-536x.2000.00266.x>.

213. NBC News Special Report: *Prison Babies* (KNBC television broadcast Apr. 21, 2006).

pregnant.²¹⁴ Valley State Prison for Women in Chowchilla holds the most pregnant inmates.²¹⁵ On average, this prison witnesses twenty-eight births every month.²¹⁶

Women who are pregnant in prison or jail have particular health and nutrition needs as well as requirements for dress, exercise, and education about pregnancy and childbirth. While the resources to meet these requirements could be made available in prisons in wealthier countries (though with appalling frequency they are not), in poorer countries where healthcare and general conditions are bad, the predicament of pregnant women can be dire.

One of the worst aspects of treatment of women during pregnancy and childbirth documented in the United States is the use of restraints, including belly and leg chains, on women who are pregnant and in labor.²¹⁷ Amnesty International reported on this in great detail in their report *"Not Part of My Sentence": Violations of the Human Rights of Women in Custody*,²¹⁸ published in 1999, and updated in 2001, in a report, entitled, the *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women*.²¹⁹ The original report generated considerable outrage over the fact that women in labor were being shackled while giving birth with male officers standing guard over them.²²⁰ The later report noted some improvements in official policies regarding this issue, but noted that four state departments of corrections (Connecticut, Louisiana, Minnesota, and Oklahoma) still had written policies requiring that prisoners be restrained during medical procedures that made no distinction for women in labor.²²¹ Ten states had policies or practices which might require the restraint of women during labor,²²² and three had written policies allowing women to be restrained during labor but not during delivery.²²³ Only fifteen states had policies or practices stipulating that no restraints were to be used on prisoners during labor and birth.²²⁴ It is clear, however, that the use of shackles on pregnant

214. *Id.*

215. *Id.*

216. *Id.*

217. AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND THE SHACKLING OF PREGNANT WOMEN: A STATE SURVEY OF POLICIES AND PRACTICES IN THE U.S. 8 (2001), available at <http://www.amnestyusa.org/women/custody/abuseincustody.html> [hereinafter ABUSE OF WOMEN IN CUSTODY].

218. AMNESTY INT'L, NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999) [hereinafter NOT PART OF MY SENTENCE].

219. ABUSE OF WOMEN IN CUSTODY, *supra* note 217.

220. *Id.*

221. See NOT PART OF MY SENTENCE, *supra* note 218, at 7-8.

222. *Id.*

223. *Id.*

224. *Id.* (indicating the fifteen states: Florida, Georgia, Hawaii, Iowa, Kansas, New

women is completely inconsistent with accepted international standards and norms.

The U.N. Standard Minimum Rules for the Treatment of Prisoners²²⁵ require “special accommodation for all necessary pre-natal and post-natal care and treatment.”²²⁶ They also state that, wherever possible, “children should be born in a hospital outside of the institute.”²²⁷ A birth certificate should not mention the fact that a child was born in prison.²²⁸ The stigma that women who have been in prison are faced with on return to their communities should not be perpetuated through their children.

The Standard Minimum Rules also deal with the issue of post-natal arrangements for the baby.²²⁹ They require that nursing infants be “allowed to remain in the institution with their mothers.”²³⁰ Further, facilities must have a “nursery staffed by qualified persons where the infants shall be placed when they are not in the care of their mothers.”²³¹

The issue of the best way to provide for babies born to mothers in prison is widely discussed,²³² and there are deep divisions over the ideal solution (apart from the obvious one that new mothers should not be in prison except in the most extraordinary circumstances).²³³

The issue that arises when a mother either has a young baby at the time of her incarceration or gives birth while imprisoned is how to decide what is in the best interests of the child.²³⁴ In some countries, the baby remains with the mother but no special accommodations are made;²³⁵ in others, including most systems within the United States, the baby stays with the mother for a few days, and then she is required to make arrangements for someone outside the prison — such as family members or state-supervised foster care — to take care of the child for her.²³⁶ Increasingly, and in the view of many experts, the optimal system would allow babies to remain with their mothers while receiving special accommodations where the mothers and babies can

Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Washington, Wisconsin, and Wyoming).

225. COMPENDIUM OF STANDARDS AND NORMS, *supra* note 198.

226. *Id.* at 7.

227. *Id.*

228. *Id.*

229. *Id.* at 8.

230. *Id.*

231. *Id.*

232. *See* ABUSE OF WOMEN IN CUSTODY, *supra* note 217.

233. *Id.*

234. *Id.* at 25.

235. *Id.* at 26.

236. *See* MUMOLA, *supra* note 210, at 1, 3, 4, 11.

be together outside of the normal prison cell environment.²³⁷ This would create a better chance to develop emotional bonds, establish and continue breast feeding, and learn from specialized staff how to take good care of their babies at least for several months if not longer.²³⁸

The counter argument to this model focuses on the abnormal environment of a prison as a place which is bound to have a negative effect on a child's development.²³⁹ For that reason, a child should not be allowed to remain in prison with his or her mother much beyond the age of a few months.²⁴⁰ If the child is not going to stay with his mother, the prison authorities have to ensure that good alternative arrangements are made.²⁴¹

The problems that are peculiar to a woman's status as the primary caretaker of her family and children are also addressed by many of the Conventions.²⁴² The notion of family, the human right to be part of a family, and the right to have that status protected is a core principle expressed in the Universal Declaration of Human Rights: "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."²⁴³ Further, "[m]otherhood and childhood are entitled to special care and assistance."²⁴⁴ The importance of taking care of children is also clear in the International Convention on Civil and Political Rights: "[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor."²⁴⁵ The Convention on the Rights of the Child²⁴⁶ particularly emphasizes this principle: "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration"²⁴⁷ and "[s]tates Parties undertake to ensure the child such protection and care as is necessary for his or her well-being."²⁴⁸

237. See ABUSE OF WOMEN IN CUSTODY, *supra* note 217, at 25-26.

238. *Id.*

239. MARLENE ALEJOS, QUAKER UNITED NATIONS OFFICE, BABIES AND SMALL CHILDREN RESIDING IN PRISON 9, 24, 46 (2005), available at <http://www.quno.org/geneva/pdf/200503Babies-Small-Children-in-Prisons-English.pdf>.

240. *Id.* at 22, 37, 46.

241. *Id.* at 22, 37.

242. *Id.* at 4.

243. Universal Declaration of Human Rights, *supra* note 101, at art. 16, ¶ 3.

244. *Id.* at art. 25, ¶ 2.

245. Covenant on Civil and Political Rights, *supra* note 110, at pt. III, art. 24.

246. See generally Convention on the Rights of the Child, *supra* note 114. The United States has signed the Convention on the Rights of the Child (CRC) but has not ratified it. Human Rights Watch, World Report 2001: United States, <http://www.hrw.org/wr2k1/usa/index.html> (last visited Jan. 30, 2008). The United States and Somalia are the only two members of the United Nations not to have ratified the CRC. *Id.* Somalia has been unable to, as it has not had a functioning government for many years. *Id.*

247. Convention on the Rights of the Child, *supra* note 114, at art. 3, ¶ 1.

248. *Id.* at art. 3, ¶ 2.

The Quaker United Nations Office is currently engaged in a long-term project on women in prison and the children of imprisoned mothers.²⁴⁹ It has started collecting data on different practices and promoting the establishment and acceptance of international norms.²⁵⁰ They have already developed a number of very useful publications, including the results of a world-wide survey on the issue of babies and small children in prison.²⁵¹ The survey offers very detailed analysis of a number of systems and looks at the different ways they deal with the issue of mothers (and in some cases, fathers) of young children.²⁵² Their analysis is based on the extent to which policy and procedures are informed by and conform to human rights standards and norms.²⁵³ For example, in looking at rules regarding the presence of children in prisons with an incarcerated parent, they look at the practice in a number of countries with respect to the requirements of the Convention on the Rights of the Child.²⁵⁴ Among the varying policies they document:

In *Australia*, a 'mother' or 'primary care-giver,' who is responsible for the custody or care of a child or children, sentenced and remand prisoners, can request authorization from the Superintendent of the prison to have her/his child with her/him in the prison. Children are allowed to reside in prison with their mother generally until the age of 12 months. Children up to school age may stay overnight and, in exceptional circumstances, older children too. A 'mother' or 'primary care-giver' may also apply for permission for overnight stays or additional day visits by his/her child. It is clear in the policy that a father can be recognized as primary care-giver, and therefore can request authorization for a child to reside with him, or get authorization for day visits. As concerns a child residing in prison, the primary considerations for the authorization of a child staying in prison are the welfare and custody status of the child and the availability of a designated nursery area in the prison.

In *Canada*, 'mothers' can participate in the Mother-Child Programme and have their children living in the institution either on a full-time basis or on a part-time basis (weekends, holidays, school vacations). The definition of 'mother' given in the directive extends also to 'legal guardian,' meaning that fathers, as well as

249. ALEJOS, *supra* note 239, at 4.

250. *Id.*

251. *Id.* at 30-45.

252. *Id.*

253. *Id.*

254. *Id.*

step-mothers or any other male or female person responsible for the custody of a child, could apply. Only minimum or medium security prisoners are eligible to participate The upper age limit of the child for full-time residency is four years and for part-time residency is twelve years The Deputy Commissioner may approve alternate age limits on an exceptional basis.

In *France*, only 'mothers' (in principle, with the agreement of the father) can decide to keep their child with them in prison. The guiding principles stated in the relevant circular recall the rules of common law for the protection of children, the competence of social and sanitary mechanisms to undertake actions for the benefit of families and children, as well as the respect of the 'parental authority' of 'parents.' The age limit for children to stay in prison is in principle 18 months (Criminal Procedure Code art. D.). However, some justified exceptions can be authorized by the Regional Director of the Prisons Services at the request of the mother and upon the recommendation of a Consultative Commission to be conformed for this purpose. No reference is made in the policy with regard to the number of children of the same mother that can stay with her.²⁵⁵

In a study of a small group of women in the provincial corrections system in Canada, the Centre for Children and Families in the Justice System noted that the forty-five women they interviewed were mothers to a total of ninety children.²⁵⁶ The study noted that:

- "the average age of the children was eight";²⁵⁷
- "half of the children were age six or under";²⁵⁸
- "[78%] of the children had siblings";²⁵⁹
- "[o]f these, half were separated from their siblings while their mother was in prison";²⁶⁰
- "[a]bout half of the children lived under an open child protection file and many (43%) had no contact with their biological fathers";²⁶¹

255. *Id.* at 34-35.

256. See ALISON CUNNINGHAM & LINDA BAKER, CTR. FOR CHILDREN & FAMILIES IN THE JUSTICE SYS., *INVISIBLE VICTIMS: THE CHILDREN OF WOMEN IN PRISON 3* (2004), available at http://www.voicesforchildren.ca/documents/Voices_Report-Invisible_Victims.pdf.

257. *Id.* at 3.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

- “83% of women with custody of minor children said they had no time at all to make arrangements for a substitute caregiver when first admitted to custody”;²⁶²
- “almost one third of the women[] surveyed were not sure children were safe with current caregivers.”²⁶³

For women in the United States, concerns about who has custody of their children while they are locked up have increased since the passage of the Adoption and Safe Families Act of 1997.²⁶⁴ This legislation, designed to move children more quickly into permanent adoption,²⁶⁵ has had the effect of expediting the permanent separation of children from incarcerated parents. Under the law, states are required to terminate the parental rights to children who have been in foster care for fifteen of the last twenty-two months,²⁶⁶ subject to limited exceptions.²⁶⁷ Given that the median sentence imposed by state courts for non-violent felony drug offenses is thirty-one months,²⁶⁸ children who have been in foster care while their mothers who are incarcerated may be permanently removed from their mothers’ custody under the federal law. Like so many other areas of the criminal justice system in the United States, this has had a significantly greater impact on families of color — black children are more than nine times more likely than white children to have a parent in prison.²⁶⁹

The disproportionate racial impact that can be seen at many points in the criminal justice system in the United States, as in many other countries,²⁷⁰ are subject to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).²⁷¹ The United States has both signed and ratified the ICERD.²⁷² It is particularly useful in that it not only prohibit actions by the state or

262. *Id.* at 9.

263. *Id.*

264. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

265. See KAREN SPAR & MATTHEW SHUMAN, CONG. RESEARCH SERV., CHILD WELFARE: IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT, RL30759 (2004).

266. See Adoption and Safe Families Act of 1997 § 103(a)(3).

267. See *id.*

268. See Bureau of Justice Statistics, U.S. Dep’t of Justice, Criminal Sentencing Statistics, <http://www.ojp.usdoj.gov/bjs/sent.htm> (last visited Jan. 18, 2008).

269. See PATRICIA E. ALLARD & LYNN D. LU, BRENNAN CTR. FOR JUSTICE, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE & THEIR INCARCERATED PARENTS 4 (2006).

270. See OHCHR.org, International Convention on the Elimination of All Forms of Racial Discrimination, <http://www2.ohchr.org/english/bodies/ratification/2.htm> (last visited Jan. 18, 2008) (depicting the countries that have ratified and are thus subject to ICERD).

271. See generally International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/2106 (Dec. 20, 1965) [hereinafter ICERD].

272. See THE PRAXIS PROJECT, USING THE ICERD TO ADVANCE HUMAN RIGHTS AT HOME 1 (2001), available at http://www.thepraxisproject.org/tools/Using_the_ICERD_2.pdf.

individuals that have deliberate discriminatory intent, but it also prohibits anything that is discriminatory in effect, whether intentional or not.²⁷³ ICERD calls upon each party to the convention to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."²⁷⁴

Now, with the tenth anniversary of the Adoption and Safe Families Act, Congress is being asked to relax the timeline for termination of parental rights mandated by the Act and to consider alternatives like subsidized legal guardianship to keep families together.²⁷⁵ However, as the number of incarcerated women continues to grow²⁷⁶ — as well as the number of single mothers²⁷⁷ — these problems of custody and how to define a solution that is in the best interests of children will also grow.

The placement of prisons also presents problems in trying to keep families in touch. In state systems, prisons are frequently placed in rural areas far removed from the urban centers where most women lived prior to incarceration.²⁷⁸ The situation is even worse as states are increasing the use of private prisons.²⁷⁹ Private prison companies have no interest in keeping families in touch. They are only concerned with making a profit by keeping their beds full every night. Meanwhile, states continue to want to lock up more people than they have space for in public facilities²⁸⁰ and are reluctant to take on capital building projects that are expensive, and therefore unpopular with voters.²⁸¹ As a result, more people are being sent out-of-state to serve their prison sentences.²⁸² In perhaps the most egregious example of this practice, women from Hawaii have been sent to

273. See ICERD, *supra* note 271, at art. 1, ¶ 1.

274. *Id.* at art. 2, ¶ 1(c).

275. See generally the Kinship Caregiver Support Act of 2007, H.R. 2188, 110th Cong. (2007) for one such alternative.

276. See FROST ET AL., *supra* note 8, at 7.

277. See Press Release, U.S. Census Bureau, Facts for Features: Mother's Day: May 13, 2007 (Mar. 14, 2007), available at <http://www.census.gov/Press-Release/www/2007/cb07ff-07.pdf>.

278. See Susan F. Sharp & M. Elaine Eriksen, *Imprisoned Mothers and Their Children*, in WOMEN IN PRISON 119, 131-134 (2003). See generally Tracy Huling, *Building a Prison Economy in Rural America*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197 (2002).

279. See SABOL ET AL., *supra* note 15, at 1.

280. See, e.g., Solomon Moore, *States Export Their Inmates as Prisons Fill*, N.Y. TIMES, July 31, 2007, at A1.

281. See *id.*

282. *Id.*

mainland prisons in Texas, Kentucky and Oklahoma.²⁸³ Clearly with such long distances involved, visits from children are nearly impossible, and even phone calls are prohibitively expensive.²⁸⁴

One consequence of the small proportion of overall prisoners that women represent is that prisons and prison systems are generally designed and organized by and for men.²⁸⁵ Usually, this means that procedures and programs are designed for the needs of the majority male population and adapted (or not) to the needs of women.²⁸⁶ Some prison systems (as in the United States) have a small number of prisons used exclusively for women prisoners.²⁸⁷ While this model is preferable in many ways, it often results in women being sent long distances from their families and communities.²⁸⁸ This makes visiting very difficult, a situation that is particularly hard on mothers wanting to keep in contact with their young children who are dependent on others to bring them on long, and often expensive, journeys.²⁸⁹

An alternative is that women may be held in small units, which are annexed from larger prisons for male prisoners.²⁹⁰ This most likely results in an increased risk to the safety of the women, often increased security which limits their out-of-cell time, and an increased likelihood that the policies, procedures and programs within the prison will have been designed for men.²⁹¹ Even where the women are held in separate facilities, it is not unusual for their education and vocational training options to be limited with jobs being those that have typically been viewed as women's work (such as dress making or hair-dressing)²⁹² rather than those (such as car mechanic or computer

283. See generally Silja J.A. Talvi, *No Room in Prison? Ship Em Off*, In These Times, May 2006, at 2.

284. See, e.g., HENRY FERNANDEZ, CTR. FOR AM. PROGRESS, PHONING HOME: HIGH COSTS HINDER PRISONER REHABILITATION (Apr. 2007), available at http://www.americanprogress.org/issues/2007/04/phoning_home.html (noting prisoners are almost always required to make collect calls, and, in many instances, corrections departments and private prison companies have signed contracts with telecommunications companies that result in far higher rates being charged to the families of prisoners than are paid by others in the free world).

285. See VERNETTA D. YOUNG & REBECCA RIVIERE, *WOMEN BEHIND BARS: GENDER AND RACE IN U.S. PRISONS* 44-54 (2006).

286. See *id.* at 45 (citing Amy Craddock, *Classification Systems*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* (1996)).

287. *Id.* at 44.

288. *Id.* at 47-54.

289. See Sharp & Eriksen, *supra* note 278, at 130.

290. YOUNG & RIVIERE, *supra* note 285, at 54.

291. See *Offenders and Victims*, *supra* note 1, at 4.

292. At a presentation on women in prison at the Eleventh U.N. Congress on Crime Prevention and Criminal Justice in Bangkok, Thailand in April 2005, the head of the prison system in Thailand presented a film of women in Thai prisons whose vocational training is in making clothes and then modeling them, so that they can get jobs as models when they leave prison. No statistics were provided on the number of women who make a successful transition into this highly competitive industry.

technician) which would provide a much better opportunity for making money in the free world.²⁹³ Because of their smaller numbers,²⁹⁴ women are more likely to be held in facilities that contain a mixture of classifications (reflecting the seriousness of their crime, perceived dangerousness, or likelihood of escape attempts)²⁹⁵ which may result in their being held under more control than necessary, while for the larger number of male prisoners, there will be a variety of prisons allowing the men to be sent to the one most appropriate for them.

While conditions may be harshest in the greatly under-resourced prisons of the developing world, women incarcerated in wealthier countries do not escape abuse. Even in Canada, whose correctional system is generally considered to be among the best, problems at the Kingston Prison for Women²⁹⁶ led to an investigation by then Justice, now U.N. High Commissioner for Human Rights, Louise Arbour, who noted in her report:

Women also have served their sentences in harsher conditions than men because of their small numbers. They have suffered greater family dislocation than men, because there are so few options for the imprisonment of women. They have been over-classified or, in any event, they have been detained in a facility that does not correspond to their classification. For the same reasons, they have offered fewer programs than men, particularly in the case of women detained under protective custody arrangements. . . . They have had no significant vocational training opportunities . . . few opportunities for transfer, and very little access to a true minimum security institution

Most significantly, women offenders as a group have a unique history of physical and sexual abuse. Considerably more attention has been devoted to efforts to rehabilitate male sexual offenders than to assist women offenders whose own sexual abuse has never been addressed.²⁹⁷

293. See, e.g., *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994); *Women Prisoners of the D.C. Dept. of Corr. v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994), *vacated in part and remanded* by 320 U.S. App. D.C. 247, 93 F.3d 910 (D.C. Cir. 1996); SUPER. CT. OF CAL., 2004-2005 SANTA CLARA COUNTY CIV. GRAND JURY REPORT: GENDER GAP IN VOCATIONAL TRAINING AT ELMWOOD (2005), *available at* <http://scscourt.org/jury/Gjreports/2005/GenderGapVocationalTrainingElmwood.pdf>.

294. WILLIAM J. SABOL, HEATHER COUTURE & PAIGEM. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PUBL'N NO. 219416, PRISONERS IN 2006 BULLETIN 1 (Dec. 2007), *available at* <http://www.csdp.org/research/p06.pdf> (112,498 as opposed to 1,458,363 male prisoners under jurisdiction of state or Federal correctional authorities by gender, year-end 2006) [hereinafter PRISONERS IN 2006 BULLETIN].

295. *Id.* at 45, 46.

296. LOUISE ARBOUR, COMMISSION OF INQUIRY INTO CERTAIN EVENTS AT THE PRISON FOR WOMEN IN KINGSTON (1996).

297. *Id.* at 199.

Of grave concern in all countries is the sexual abuse of women in prison at the hands of guards or other prisoners.²⁹⁸ They are particularly vulnerable to abuse and are likely to be particularly traumatized by it because so many of them have been abused before coming into the system.²⁹⁹ The problems of abuse have been well-documented in the United States over the last decade or more. In addition to the previously mentioned Amnesty International reports, which looked at sexual abuse, as well as the shackling of women, Human Rights Watch released a report in 1996,³⁰⁰ examining six jurisdictions: California, the District of Columbia, Georgia, Illinois, Michigan, and New York.³⁰¹ The report, which was sharply critical of the practices in each of these places, made recommendations for changes in the areas of training, legislation, and policy.³⁰² Around the same time, the special rapporteur for violence against women, Radhika Coomaraswamey, visited a number of prisons in the United States from May 31 to June 18, 1998, and issued a report that was harshly critical of the treatment of women in U.S. prisons, and expressed particular concern about staff sexual misconduct and cross-gender supervision.³⁰³ The timing of the report was particularly significant as it coincided with litigation taking place in Michigan over the sexual abuse of women in the state's prisons and an investigation by the Department of Justice of conditions there.³⁰⁴ The Special Rapporteur was initially granted permission to visit the Michigan prisons, but at the last minute, then-governor John Engler changed his mind and would not allow her

298. See, e.g., ALLEN J. BECK, PAIGE M. HARRISON & DEVON B. ADAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. 218914, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES: 2006 SPECIAL REPORT 6 (Aug. 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vrca06.pdf>.

299. See FROST ET AL., *supra* note 8, at 21-22, 26.

300. See WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), available at <http://www.hrw.org/reports/1996/Us1.htm>.

301. See *id.*

302. See Brenda V. Smith, *Sexual Abuse Against Women in Prison*, 16 CRIMINAL JUSTICE 30, 32 (Spring 2001), available at <http://www.spr.org/pdf/sexual%20Abuse%20Against%20Women.pdf>.

303. See generally U.N. Econ. & Soc. Council, Commission on Human Rights, *Integration of the Human Rights of Women and Gender Perspective Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Addendum: Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999) (prepared by Radhika Coomaraswamy) [hereinafter *Report of the Special Rapporteur*].

304. See Norman Sinclair, Melvin Claxton & Ronald J. Hansen, *Prisoner Complaints Unheeded: Over Time, State Lawmakers Limit Inmates' Right to Sue, Kill Fact-Finding Office*, DETROIT NEWS, May 24, 2005, at 1A, available at <http://detnews.com/2005/specialreport/0505/24/A01-191652.htm>.

access.³⁰⁵ Among the individual cases that the Rapporteur included in her final report:

11. Twenty-six-year-old K. came from a predominantly upper-middle-class white family in Virginia. She went to college and fell in love with a young man in the community against the wishes of her parents. She was impressed by his clothes, cars and commanding presence and the attention he paid to her. He was extremely abusive, at times beating her with his hands, a belt and a brush. According to court psychologists she was suffering from classic battered women syndrome. She was young and naive and was resigned to the fact that her new boyfriend was involved in the cocaine trade. At times she carried weapons and money for him, but never cocaine. When her boyfriend realized that he was being investigated, he took K. and went to Atlanta and then to Seattle. From Seattle he sent her home, asking her to leave him. He was later found shot dead in his Seattle apartment. When she went home, she was indicted, and though she was a non-violent and a first-time offender, because of the mandatory sentencing guidelines in Virginia she was sentenced to 24 years in prison. She was pregnant at the time and held in a county jail. When she went into labour she was shackled while being transported to the public hospital and shackled after the baby was born. She spent two days with the baby, after which he was taken away from her. He now lives with her parents. Her life revolves around his visits to the penitentiary.

12. The video cameras of the Michigan Department of Corrections captured this scene: T., a young prisoner in her twenties, attempted to commit suicide. For this act she was put in administrative segregation (i.e. solitary confinement) for 20 days. During that time, she was put in four-point restraints: her hands and feet were shackled to the bed. She was naked for much of the time and was allowed to shower only once a week. Male corrections officers walked up and down and frequently peered into her room. At one point, she pleaded that the light be turned off so that she could sleep. She continued her pleading until the corrections officers warned her that she would be tear-gassed if she continued to protest. She continued nevertheless and a corrections officer held a tear-gas canister to her face and sprayed her. The guards fled because the tear gas was affecting them. She was stunned for a short while and then called for a towel to wipe her face. A compassionate female corrections officer brought her a towel.

305. *Id.*

13. V. is a 32-year-old from Long Beach, California. She was placed in the Dublin penitentiary for dealing in drugs by telephone. She was given an 8½-year sentence. Two months after she entered the facility, she was put in administrative segregation for pushing a unit manager. As a result, she was targeted. Soon after she was put in administrative segregation, she and five other women were taken by the captain and put in cells in the wing for male prisoners. The women's cell doors were kept open and male prisoners came in and raped the women. One woman was badly sodomized. V. alleges that the corrections officers were paid \$50 by the offending male prisoners. After she was raped the first time, V. stayed up for 21 consecutive nights, sitting against her door so that it would not open easily. She was later moved to the Danbury prison in Connecticut, far away from her family. She joined the other women and brought a lawsuit against the Dublin prison authorities, which resulted in an out-of-court settlement. V. is deeply traumatized. She finds it very difficult to sleep at night, and the sound of the keys that male corrections officers carry makes her shake with fear. She does not eat in the canteen because she finds that the pat searches conducted by male corrections officers extremely disturbing. Fortunately, there is a mental health officer at Danbury who is working with V. to help her overcome her trauma.³⁰⁶

Brenda Smith, an academic and litigator with great experience concerning the problems faced by women in prison summarized the issues raised by the reports and noted that both organizations, Amnesty and Human Rights Watch, reached essentially the same conclusions³⁰⁷ and called for:

(1) [S]ame-sex supervision of female inmates; (2) more explicit policies and laws prohibiting sexual abuse of inmates; (3) stronger mechanisms for investigating and prosecuting sexual abuse of prisoners; (4) appropriate supportive services and redress for sexual abuse; and (5) greater protection from retaliation for inmates who reported sexual misconduct.³⁰⁸

Smith also notes that in 1999, the federal government conducted its own study concerning sexual misconduct of correctional staff.³⁰⁹ In that study, the Government Accounting Office (GAO) assessed three of the largest correctional systems, the Federal Bureau of Prisons, the

306. *Report of the Special Rapporteur, supra* note 303, at 5.

307. Smith, *supra* note 302, at 33.

308. *Id.* at 32 (citations omitted).

309. *Id.* at 33.

Texas State Prison system, and the California State Prison system.³¹⁰ The report also examined the District of Columbia, which at that time ran its own prison system (subsequently the federal prison system was given jurisdiction over the District of Columbia's prisoners).³¹¹ The GAO report, while finding that sexual misconduct occurs in prison, experienced methodological difficulties with their research, making it difficult to track the full extent of sexual abuse incidents.³¹² Even more importantly, the report found:

[T]he systemic absence of such data or reports makes it difficult for lawmakers, correctional system managers, relevant federal and state officials, inmate advocacy groups, academicians, and others to effectively address staff sexual misconduct issues. The report found that the absence of such information impeded efforts in a number of key areas: (1) monitoring the incidence of the sexual misconduct; (2) keeping track of employees accused and found to be involved in staff sexual misconduct; (3) monitoring the enforcement of state law and corrections policies and procedures; and (4) identifying corrective actions to address misconduct.³¹³

The core principal of human rights — the requirement that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”³¹⁴ — is particularly relevant to the sexual humiliation often faced by women. This can be exemplified by the strip searches by male guards and the presence of male guards in female housing units.³¹⁵ The U.N. Standard Minimum Rules for the Treatment of Prisoners are quite clear that “[w]omen prisoners shall be attended and supervised only by women officers.”³¹⁶ The United States Supreme Court, however, has ruled that standard to be unconstitutional under Title VII of the Civil Rights Act of 1964, the equal employment opportunity statute.³¹⁷ The practice, thus, continues despite the distress it can cause and the increased opportunities it provides for sexual abuse and humiliation.³¹⁸

310. *Id.*

311. *Id.*

312. *Id.* These problems included: the reluctance of women prisoners to report sexual misconduct by staff and the lack of systemic data investigation and analysis of reported allegations. *Id.*

313. *Id.*

314. Covenant on Civil and Political Rights, *supra* note 110, at art. 10, ¶ 1.

315. See *Report of the Special Rapporteur*, *supra* note 303, at 5.

316. Standard Minimum Rules for the Treatment of Prisoners, Econ. & Soc. Council Res. 663C (XXIV), ¶ 53, U.N. Doc. A/CONF/611, ANNEX I (Aug. 30, 1955).

317. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

318. See, e.g., Smith, *supra* note 302.

of a population that has already experienced abuse at a high rate.³¹⁹ One of the only areas in which progress has been made in the United States is the increased understanding that sexual relationships in a prison context cannot be consensual in any meaningful sense because of the great imbalance of power between guard and guarded. As a result, most states now have laws that criminalize all sexual relationships between guards and prisoners.³²⁰

The existence of international laws and standards regarding the appropriate treatment of women in prison are evidence that these problems are manifest in prison systems worldwide. Nonetheless, most of the examples cited here are from the United States. We have the largest number of women prisoners,³²¹ and we also widely research and document the numbers, the lives, and the conditions of confinement of these women.³²² But the main purpose of emphasizing conditions for women here is because the United States is a wealthy country with great resources and a strong belief in individual rights, justice and gender equality. We might be expected to have prisons that surpass the rest of the world in providing conditions that are humane and respect human dignity, but we clearly fail to do that. We surpass the rest of the world only in the number of people we lock up.

We have largely ignored the international consensus on incorporating human-rights based standards and norms into our policies and practices, often through misunderstanding about the human rights framework and a lack of awareness about what it has to offer. Prisons remain hidden from society with no national standards, no national system of inspection, and no required national system of accreditation.³²³ The Convention Against Torture (CAT),³²⁴ which the United States has signed and ratified,³²⁵ now has an Optional Protocol (OPCAT)³²⁶ that provides a mechanism for international and national inspection of all places of detention.³²⁷ It would be a great example

319. See FROST ET AL., *supra* note 8, at 21-22, 26.

320. See Amnesty Int'l USA, Stop Violence Against Women: Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women, http://www.amnestyusa.org/Abuse_of_Women_in_Custody/Key_Findings_Legislative_Protection/page.do?id=1108297&n1=3&n2=39&n3=720 (last visited Jan. 18, 2008).

321. See WORLD PRISON POPULATION LIST, *supra* note 20.

322. See, e.g., sources cited *supra* notes 276 and 303.

323. See sources cited *supra* note 278.

324. See Convention Against Torture, *supra* note 117.

325. *Id.*

326. See Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002).

327. See *id.* at Pt. IV.

to the rest of the world if we had the confidence to sign the OPCAT and open places of detention in the United States to inspection by experts versed in international standards. It is, however, unlikely whether that will happen any time soon. We can hope that at some point, international law will provide a basis for litigation in our courts to enforce the requirements of the treaties that we have signed and ratified. There are incremental steps taking place in that direction but progress will no doubt be slow. Meanwhile, all those working to improve conditions within our prisons and jails can look to the wide body of international law and to the human rights mechanisms to provide support for the changes they seek to make.