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**WOMEN AND GIRLS' EXPERIENCES
BEFORE, DURING, AND AFTER
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A Narrative of Gender-based Violence, and
an Analysis of the Criminal Justice Laws and
Policies that Perpetuate This Narrative**

By Lisa Kanti Sangoi* & Lorie Smith Goshin**

I. INTRODUCTION

Women and girls involved with the United States' (U.S.) criminal justice system experience gender-based violence (GBV)¹ at rates that far exceed the general population. Their experiences with GBV often start in childhood or early adolescence, and may continue through adulthood, producing lifelong histories of abuse. These violent experiences can influence involvement in criminal activity.² They may extend throughout incarceration, as correctional staff emotionally, verbally, physically, and sexually abuse women and girls at high rates, or facilitate such abuse by other inmates. Many criminal justice involved (CJI) women reenter their communities debilitated by their time and experiences in detention, and by laws that limit their access to public assistance due to their status as convicted felons. As a cumulative result of their histories of vio-

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¹ GBV is violence inflicted against women and girls with the intent or effect of perpetuating male power and control. It encompasses an array of abuses, including emotional, verbal, physical and sexual abuse. This article will use the terms "GBV" and "abuse" interchangeably.

² MEDA CHESNEY-LIND & LISA PASKO, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* 108 (Meda Chesney-Lind et al. eds., 3rd ed. 2012).

lence, their experiences while incarcerated, and their status on the outside, these women are disempowered to make the life choices that would help them escape further choices that would make them less vulnerable to future GBV.

In the last few decades, the United Nations has recognized GBV as a human rights issue.³ GBV is a crucial mechanism in the social control of women and girls and continues to disempower this population. The UN General Assembly's Declaration on the Elimination of Violence Against Women (1993) calls on governments to systematically and holistically address all forms of GBV and its consequences, and to implement prevention, protection and response measures.⁴ Governments can no longer ignore GBV as outside the purview of the public sphere, or limit their responses to piecemeal prosecution and victim services. The human rights program delineates governmental responsibility in preventing GBV where possible, and demands that governments prosecute it with full force when prevention measures have failed. In addition, the human rights program recognizes the devastating effects of GBV on its victims, and calls on governments to mitigate these effects with whatever programs and services can be made available.

At the same time that GBV is receiving increased attention as a global human rights issue, domestic legislators and policy-makers largely ignore the experiences of CJI women and girls with GBV, and how these experiences impact criminal activity. Policy-makers also disregard this population's vulnerability to future acts of gender-based violence, thereby creating a culture of impunity, especially when state actors are involved in violence against these women and girls. Lastly, criminal justice policy related to the legal status of formerly incarcerated women creates roadblocks to exiting cycles of GBV. The U.S. government's mechanical and harshly punitive reaction to crime shrugs off its responsibility to prevent and address GBV by both ignoring the realities of female pathways to crime and exacerbating women and girls' vulnerabilities to further acts of violence.

The widespread experiences of GBV by females in the U.S. criminal justice system warrant a closer exploration in connection with criminal justice policy. Integrating women's and girls'

³ United Nations Population Fund, *Ending Widespread Violence Against Women: Promoting Gender Equality* (July 26, 2012), <http://www.unfpa.org/gender/violence.htm>.

⁴ *Declaration on the Elimination of Violence against Women*, G.A. RES. 48/104 (Dec. 20, 1993), available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

experiences before, during, and after incarceration into one narrative illuminates the lifelong extent and impacts of GBV. Couching the role criminal justice policy plays in exacerbating these cycles of GBV in human rights terminology underscores the failure of the US to meet its obligations under international human rights law.

A. Conceptual Framework

The conceptual framing for this paper is found in feminist criminology and human rights. Feminist criminology employs a gendered perspective on criminological phenomena, recognizing that the dominant patriarchal culture is so pervasive that its influence is almost invisible, and is therefore considered the norm.⁵ Within this framework, any analysis of women's involvement with the criminal justice system must incorporate concepts of patriarchy, gender roles, structural oppression, and female vulnerability to violence.⁶ Feminist criminologists illustrate how gender can define both one's trajectory into crime, and the response of the criminal justice system to those under its supervision.⁷

All human beings are inherently entitled to human rights, regardless of nationality, place of residence, sex, national or ethnic origin, religion, language, or any other status.⁸ Human rights are supranational from a legal perspective, in that their legitimacy and moral authority are not dependent on an individual nation's legislation, constitution, or case law, but rather on the international consensus that human rights should be afforded to every person on the basis of their humanity.⁹ Regardless of a country's record of ratification of human rights treaties, human rights provide activists with a platform from which to make morally (though not necessarily legally) authoritative claims on a government. Human rights expand most domestic conceptions of citizens' rights and governments'

⁵ Barbara Bloom, Barbara Owen & Stephanie Covington, *Women Offenders and the Gendered Effects of Public Policy*, 21 REV. OF POL'Y RES. 31-32 (2004).

⁶ Joanne Belknap, Kristi Holsinger, & Melissa Dunn, *Understanding Incarcerated Girls: The Results of a Focus Group Study*, THE PRISON J., 381, 382-83 (1997).

⁷ CHESNEY-LIND & PASKO, *supra* note 2, at 3.

⁸ United Nations Office of the High Commissioner for Human Rights, *What are Human Rights?* (July 26, 2012), available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

⁹ Cynthia Soohoo, *Human Rights and the Transformation of the "Civil Rights" and "Civil Liberties" Lawyer*, in 2 BRINGING HUMAN RIGHTS HOME 71-104 (Cynthia Soohoo, Catherine Albisa, and Martha F. Davis eds., 2008).

obligations. The notion of the indivisibility of the human rights framework encourages activists and governments to acknowledge the intersecting nature of the sources of marginalization (e.g. class, race and sex), and the interdependent nature of economic, social and cultural rights with civil and political rights.¹⁰

Though human rights have provided the dominant discursive framework for social justice struggles abroad, the United States government has historically resisted the application of the human rights framework domestically. For decades after the enactment of the international human right regime, US activists relied on available domestic remedies, namely civil rights and impact litigation. Over time, however, the success of such remedies has diminished. As the judiciary has become more conservative, struggles for equality and social inclusion have met less success in the courts, and impact litigation at the national and state level has proven a decreasingly effective strategy.¹¹ The civil rights framework has not been able to adequately address the severe deprivation of economic, social and cultural rights experienced by marginalized communities, or to confront how these deprivations inhibit the full realization of civil and political rights.¹² Meanwhile, there has been a rise in the prominence of human rights as the global language for social justice struggles abroad and development of an increasingly sophisticated international human rights advocacy machinery. All the above-mentioned factors have contributed to a resurgence of a domestic human rights movement in the US.¹³

B. *Profile of Criminal Justice Involved Women and Girls*

As of 2010, more than one million women were under the supervision of the U.S. criminal justice system on any given day, with over 205,000 women incarcerated and over 800,000 women

¹⁰ *Id.*; Dorothy Q. Thomas, *Against American Supremacy: Rebuilding Human Rights Culture in the United States*, in 2 BRINGING HUMAN RIGHTS HOME 1-26 (Cynthia Soohoo, Catherine Albisa, and Martha F. Davis eds., 2008).

¹¹ Sally Engle Merry, Mihaela Serban Rosen, Peggy Levitt & Diana H. Yoon, *Law From Below: Women's Human Rights and Social Movements in New York City*, 44 LAW & SOC'Y REV. 101, 103, 110 (2010).

¹² Vanita Gupta, *Blazing a Path from Civil Rights to Human Rights: The Pioneering Career of Gay McDougall*, in 1 BRINGING HUMAN RIGHTS HOME 145-160 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008).

¹³ See Merry, *supra* note 11 (examples of successful applications of the human rights framework domestically); see also Deborah LaBelle, *Ensuring Rights for All: Realizing Human Rights for Prisoners*, in 3 BRINGING HUMAN RIGHTS HOME 127-48 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008).

on probation or parole.¹⁴ Though women make up a minority of the prison population, the number of women in prison over the last three decades has increased at nearly double the rate of men.¹⁵ More than half of the women in prison in 2010 were incarcerated for property and drug offenses.¹⁶ Between 1986 and 1999, the number of women incarcerated in state facilities for drug offenses grew by 888%.¹⁷ While older analysis suggested that feminism opened the traditionally male sphere of criminal activity to women and thus lead to the increase in female criminal justice involvement,¹⁸ newer data shows that the increase is the combined effect of pro-arrest and incarceration policies, shifts in public attitudes towards crime, and an increasing willingness to incarcerate females.¹⁹ Mandatory minimum sentencing laws and rigid sentencing guidelines have increased the proportion of women who receive prison sentences and the length of time women spend behind bars. The federal sentencing reforms of the mid-1980s have resulted in higher rates of incarceration of women for economic offenses, and have drastically increased the length of incarceration for drug offenses.

Relatively few juveniles are sentenced to prison, so in that population it is important to look at arrest data to understand trends in female youth delinquency. Despite a recent overall decrease in the number of juveniles involved in the justice system, arrests of juvenile females have decreased at a slower rate than male arrests in most offense categories, including aggravated assault and burglary, and have actually increased in others, such as simple assault, larceny, and driving under the influence.²⁰ Females accounted for 30% of the over two million juvenile arrests in 2008.²¹ Male juveniles make up a larger proportion of those in residential

¹⁴ LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, NCJ 236019, PROBATION AND PAROLE IN THE UNITED STATES, 2010 34, 44 (2011). PAUL GUERINO, PAIGE M. HARRISON, & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, NCJ 236096, PRISONERS IN 2010 (REVISED) 14 (2011). TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, NCJ 233431 JAIL INMATES AT MIDYEAR 2010 - STATISTICAL TABLES 7 (2010).

¹⁵ THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM (2007).

¹⁶ See GUERINO, *supra* note 14, at 7.

¹⁷ See THE SENTENCING PROJECT, *supra* note 15.

¹⁸ FREDA ADLER & HERBERT M. ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL (McGraw Hill 1975).

¹⁹ MEDA CHESNEY-LIND & LISA PASKO, GIRLS, WOMEN, AND CRIME: SELECTED READINGS (Sage 2013).

²⁰ CHARLES PUZZANCHERA, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, NCJ 228479, JUVENILE ARRESTS 2008 8 (2009).

²¹ *Id.*

placement (87% vs. 13%), but the female population has increased at a much higher rate.²²

Women and girls' criminal justice involvement also displays racial and ethnic disparities. Black and Latina women comprise over 40% of the sentenced female prison population,²³ while comprising less than 30% of the general population.²⁴ In 2010, Black women were incarcerated at a rate of almost three times that of White women, and Latinas were over 60% more likely to be incarcerated than White women.²⁵ Although the war on drugs has significantly affected the incarceration of all women, Black women have experienced the greatest increase in the percentage of offenders incarcerated for drug offenses. According to the Sentencing Project, between 1986 and 1991 alone the population in state prisons for drug offenses increased by 828% for Black women, 328% for Latinas, and 241% for White women.²⁶ Racial disparities found in the adult system are also present in the juvenile justice system. In 2010, minority youth constituted 61% of females in custody.²⁷ Analysts suggest that this is the result of racially targeted law enforcement, prosecution and sentencing practices.²⁸

C. Health and Social Disparities

Federal data provide strong evidence of the health problems experienced by incarcerated women and girls, and disparities between them and other population groups. Female prisoners experience higher rates of medical and mental health conditions than male

²² HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, NCJ 212906, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 208 (2006).

²³ See GUERINO, *supra* note 14, at 26.

²⁴ U. S. CENSUS BUREAU, 2010 CENSUS (2010).

²⁵ See GUERINO, *supra* note 14, at 7.

²⁶ MARC MAUER, & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 20 (1995). It is notable that these trends are slowing. In 2000, African American women were incarcerated at 6 times the rate of white women. By 2009, that disparity had dropped by half, to less than three times the white rate. See MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN'S INCARCERATION (2013).

²⁷ *Easy Access to Juvenile Populations: Population Profiles*, Office of Juvenile Justice and Delinquency Prevention, http://www.ojjdp.gov/ojstatbb/ezapop/asp/profile_selection.asp (last visited July 6, 2012).

²⁸ Marc Mauer, *Addressing Racial Disparities in Incarceration*, THE PRISON JOURNAL, Sept. 2011 at 87, 94.

inmates or women residing in the general population.²⁹ A mental health diagnosis is associated with co-morbid substance abuse, witnessing parental abuse of alcohol or drugs as a child, homelessness in the year before arrest, and a history of interpersonal victimization, which will be discussed in detail below.³⁰ Approximately 60% of women in state prisons reported using drugs in the month before their last offense, with half reporting daily use.³¹ In one Department of Justice survey, nearly one-third of female state prisoners reported committing their last offense in order to obtain money for drugs.³² Female prisoners consistently report higher drug use than the general adult population and their CJI male counterparts.³³

Women in the criminal justice system overwhelmingly live in poverty, have low educational attainment, and are persistently unemployed or underemployed. Female prisoners generally had more difficult economic circumstances than male inmates prior to entering prison. Only four of ten women in state prisons reported having been employed full time prior to arrest, compared to six of ten male prisoners.³⁴ Family and social networks are often frayed or contain CJI and substance abusing family members, partners, and peers, limiting positive support.

These disparities have an intergenerational impact. The number of children affected by incarceration has risen with the increase in female incarceration. At midyear 2007, approximately 65,600 women in federal and state custody reported being the mothers of 147,400 minor children.³⁵ In the month prior to involvement with the criminal justice system, 77% of mothers lived with their child or children compared to 26% of fathers.³⁶ Women were also more likely than men to be the head of a single-parent household.³⁷

Research has documented that girls share many characteristics with their adult counterparts. Girls involved with the criminal

²⁹ LAUREN E GLAZE & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006).

³⁰ *Id.*

³¹ LAWRENCE A. GREENFELD, & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 175688 WOMEN OFFENDER 9 (1999).

³² *Id.*

³³ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, (SMA) 11-4667, RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: MENTAL HEALTH FINDINGS (2012).

³⁴ CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS 5 (2003).

³⁵ LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, NCJ 222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2008).

³⁶ *Id.* at 5.

³⁷ *Id.* at 4.

justice system tend to be poor and belong to an ethnic or racial minority group, have performed poorly in school, have used drugs, and are, on average, in poorer physical and mental health than their peers.³⁸ In fact, severe and cumulative stressors, especially those that occur in the home, appear to place girls on the path to risk-taking behavior and criminal justice involvement.³⁹

II. RATES GENDER-BASED VIOLENCE IN WOMEN AND GIRLS BEFORE CRIMINAL JUSTICE INVOLVEMENT

One of the earliest studies of female offending from a feminist perspective was an ethnographic account of 16 women in an Oahu Community Correctional Center.⁴⁰ Amongst the authors' initial observations was the astonishing amount of severe physical and sexual abuse reported by all but two inmates in the sample. As the stories of these women's lives emerged, the authors began to construct an account of a systematic process of victimization and criminalization that was unique to women: gender-based violence forced the women from their homes and onto the streets, where the mechanisms that they used to survive and cope, such as drugs, were criminalized. Subsequent studies with increased methodological rigor, including standardized measures, larger sample sizes, and data from multiple jurisdictions, have repeatedly confirmed that criminal justice involved women and girls experience extremely high rates of gender-based violence.⁴¹ In fact, economic, psychological, and emotional survival appears to be a primary motivator for most women's crimes.⁴²

³⁸ Joanne Belknap & Kristi Holsinger, *The Gendered Nature of Risk Factors for Delinquency*, 1 FEMINIST CRIMINOLOGY 48, 48-71 (2006).

³⁹ Margaret A. Zahn et al., *Girls Study Group: Causes and Correlates of Girls' Delinquency*, 2010 OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 2.

⁴⁰ Meda Chesney-Lind & Noelle Rodriguez, *Women Under Lock and Key: A View from the Inside*, 63 PRISON J., 47, 49 (1983).

⁴¹ See Angela Browne, Brenda Miller, & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J.L. & PSYCHIATRY 301 (1999) (documenting pervasive and severe GBV across the lifespan for incarcerated women). See also Joanne Belknap & Cathy McDaniels-Wilson, *The Extensive Sexual Violation and Sexual Abuse Histories of Incarcerated Women*, 14 VIOLENCE AGAINST WOMEN 1090 (2008) (documenting rates of GBV for incarcerated women above 70%); Anita Raj et al., *Prevalence and Patterns of Sexual Assault Across the Life Span Among Incarcerated Women*, 14 VIOLENCE AGAINST WOMEN 528 (2008) (documenting sexual assault rates of incarcerated women at over 70%).

⁴² Barbara Owen & Barbara Bloom, *Profiling Women Prisoners: Findings*

Incarcerated female adolescents also experience disproportionate rates of violence. A 1998 study performed by the National Council on Crime and Delinquency revealed that 92% of girls in the California juvenile justice system reported having experienced one or more forms of abuse. Eighty-one percent of the girls had experienced one or more physical and/or sexual abuses, and more than 56% reported experiencing one or more forms of sexual abuse.⁴³ In interviews, the girls themselves linked their drug and alcohol use and other high-risk behaviors, such as sex with multiple partners and gang membership, to their victimization histories.⁴⁴ Girls in these studies overwhelmingly expressed that reporting abuse either did not ameliorate or worsened their situations.⁴⁵ In some cases, the girls undertook actions to address the abuse, which resulted in their incarceration; one girl brought a knife to school to protect herself from the aggressive sexual harassment of a classmate.⁴⁶ In other cases, girls sought the positive environments they were lacking at home by dating older boyfriends, who then influenced their criminal behavior, especially involvement with drugs.

A. Criminalization of Coping and Survival Mechanisms for Gender-Based Violence

Women and girls' criminal behavior appears to be influenced by previous victimization. Mitigating behaviors for GBV, such as running away from home, street survival tactics, and drug use, lead to involvement with the criminal justice system. This pathway to crime is uniquely female; girls and women are victimized at much higher rates than men, and girls and women must formulate their responses to victimization within a gendered context. Factors such as socialized roles and gendered oppression dictate their coping mechanisms. Many social, political, biological, and economic factors are unique to women and relevant to their trajectories to crime.

from *National Surveys and a California Sample*, 75 *THE PRISON J.* 165, 165-83 (1995).

⁴³ Leslie Acoca, *Outside/Inside: The Violation of American Girls at Home, on the Streets, and in the Juvenile Justice System*, 44 *CRIME & DELINQ.* 561, 565-67 (1998).

⁴⁴ *Id.* at 570.

⁴⁵ See CHESNEY-LIND & PASKO, *supra* note 2, at 45.

⁴⁶ See Belknap, Holsinger & Dunn, *supra* note 4, at 344.

B. *Girls Escaping Abuse: Criminalizing Running Away and Associated Behaviors*

The criminal justice system has historically instituted extremely punitive measures to curb non-criminal offenses, like running away, truancy, and curfew violations, through status offense statutes. Status offenses are actions prohibited for a certain class of people. Juvenile status offenders are children subject to juvenile court jurisdiction for noncriminal offenses such as running away from home, truancy, incorrigibility, and curfew violation. Though advocacy efforts on behalf of girls involved with the criminal justice system have decreased the number of girls charged through status offenses for running away, the criminal justice system has found other (namely person offenses) methods of criminalizing and thus curbing girls' running away from home.

Historically, the juvenile justice system has disproportionately charged girls with status offenses as compared with boys, and disproportionately institutionalized girls for status offenses, as compared to their male and female counterparts charged with crimes.⁴⁷ In *Women, Girls, and Crime*, Meda Chesney-Lind and Lisa Pasko cited a study of the Los Angeles Juvenile Court during the first half of the 20th Century. Ninety-three percent of girls accused of delinquency were charged with status offenses. Of these, 65% were charged with immoral sexual activity, and many girls were held in custody for weeks or months after their hearings.⁴⁸ Status offenses continued to comprise the majority of offenses for which girls were incarcerated through the 1960's and 1970's.⁴⁹ For many years, the large number of girls arrested for status offenses was understood to be representative of the differing nature of male and female delinquency. However, self-reported studies of male and female delinquency do not reflect dramatic differences in status offense behavior.⁵⁰

By the 1970's critics contested state and federal policies of institutionalizing non-criminal status offenders along with criminal offenders, highlighting the discriminatory nature of these policies towards girls. In 1974, the federal government pushed for the de-institutionalization of status offenders, through the Juvenile Justice

⁴⁷ See CHESNEY-LIND & PASKO, *supra* note 2, at 11; See also Belknap, Holsinger & Dunn, *supra* note 4, at 382-85.

⁴⁸ See CHESNEY-LIND & PASKO, *supra* note 5.

⁴⁹ Barry C. Feld, *Violent Girls or Relabeled Status Offenders?: An Alternative Interpretation of the Data*, 55 CRIME & DELINQ. 241, 244-47 (2009).

⁵⁰ See Belknap, Holsinger & Dunn, *supra* note 4, at 383.

and Delinquency Prevention Act (JJDP). This led to a dramatic decrease in the number of youth held in detention for status offenses; the number of girls incarcerated for status offenses fell from 25% of the total incarcerated population before the passage of the act to 11% in 1991.⁵¹

In spite of this important legislation, the juvenile justice system has shown resistance to fully realizing the goals of JJDP. The use of detention for girls increased by 65% between 1988 and 1997, with Black girls comprising 50% of those in secure detention.⁵² Delinquency cases involving girls increased by 80% during this same period, with a 106% increase for Black girls and 74% increase for White girls.⁵³ OJJDP data as recent as 2009 reveals that girls are still arrested at higher rates for running away than their male counterparts.⁵⁴

In spite of the overall decrease in status offense arrests, the criminal justice system has found other methods to criminalize girls that run away from home. The resistance to the deinstitutionalization effort, especially for female offenders, is visible in the practice of “bootstrapping” status offenders, where female noncriminal status offenders are relabeled as criminal delinquents, thereby continuing the institutionalization of females for non-criminal behaviors.⁵⁵ For example, some states have lowered the threshold for what constitutes assault so that behavior that was previously considered a noncriminal offense, such as “incurability” is now charged as a criminal offense.⁵⁶ Several analyses of girls’ court cases for assault revealed that a significant number were family-centered and involved conduct that would have been previously labeled a status offense.⁵⁷ The vagueness and malleability of status offense charges and minor assault charges coupled with the broad discretion avail-

⁵¹ Feld, *supra* note 49, at 257.

⁵² *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System*, 2001 A.B.A. AND NAT’L. B.A. 17-21.

⁵³ *Id.* at 2-3.

⁵⁴ Andrea J. Sedlak & Carole Bruce, *Youth’s Characteristics and Backgrounds: Findings from the Survey of Youth in Residential Placement*, 2010 OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, at 4.

⁵⁵ Feld, *supra* note 49, at 244; *see also* Darrell Steffensmeier, Jennifer Schwartz, Hua Zhong, & Jeff Ackerman, *An Assessment of Recent Trends in Girls’ Violence Using Diverse Longitudinal Sources: Is the Gender Gap Closing?*, 43 CRIMINOLOGY 355, 365 (2005).

⁵⁶ Feld, *supra* note 49, at 253.

⁵⁷ Carla P. Davis, *At-Risk Girls and Delinquency: Career Pathways*, 53 CRIME & DELINQ. 408-09, 421-22 (2007); *see also* Feld, *supra* note 49, at 254; Steffensmeier et. al., *supra* note 55, at 367.

able to parents and the juvenile justice apparatus facilitates this relabeling process. Practitioners have thought that the increase in arrests and charges reflect an increase in girls' delinquent behavior, especially for simple and aggravated assault. Juvenile justice officials and the media alike have fed this perception, discussing "the new female offender" who, in the post-feminist era, has become more violent than her predecessors. However, many analysts believe that the increase in girls convicted of violence is not reflective of a change in girls' behavior, but actually a social construction created by changing criminal justice policies.⁵⁸

The data and analysis indicate that the juvenile justice system continues to institutionalize girls in an effort to control their behavior and supplement parental/patriarchal authority. Feminist criminologists largely understand the juvenile justice system to be a major force in the social control of girls, reinforcing female obedience to male and familial authority. The notion that the juvenile justice system is using status and low-level criminal offenses to reinforce parental authority becomes especially problematic when considering the sexual and physical abuse perpetrated against female youth offenders. Essentially, the criminal justice system employs pro-arrest and incarceration policies directed at female youth, institutionalizing them for trying to escape from, or cope with, gender-based violence.

C. Mediating Trauma Through Drug Use: Criminalizing Self-Medication and Associated Behaviors

The most commonly cited reason that women become involved with the criminal justice system is either a drug offense, or offenses committed in order to procure drugs.⁵⁹ Most women involved with the criminal justice system have bought and used drugs, and some have peddled small amounts.⁶⁰ In addition, many CJI women, perhaps due to their own drug dependence and economic circumstance, associate with intimates or have family members who are more significantly entangled in the drug trade.⁶¹

⁵⁸ Feld, *supra* note 49 at 252; *see also* Steffensmeier et. al, *supra* note 55, at 366.

⁵⁹ *See* Greenfeld & Snell, *supra* note 30, at 9; *see also* Bloom et. al., *supra* note 3, at 37-40.

⁶⁰ Leonora Lapidus et al., *Caught in the Net: The Impact of Drug Policies on Women and Families*, AM. CIVIL LIBERTIES UNION, BRENNAN CTR. FOR JUSTICE, & BREAK THE CHAINS 11, 18 (2005), *available at* http://www.aclu.org/files/images/asset_upload_file431_23513.pdf.

⁶¹ *Id.* at 11-12, 35.

Drug offenses accounted for almost half of the increase in the number of women in state prisons between 1986 and 1996, coinciding with the peak of the implementation of the “war on drugs.”⁶² Politicians and the media have depicted the war on drugs as the government’s firm response to a perceived epidemic of male drug-related violence and increased drug use. Criminal justice strategies included street level sweeps and mandatory sentencing statutes.⁶³ Women, and more specifically women of color, unintended targets of the war on drugs due to their relatively minor roles in the drug trade, have increasingly been caught in the “widening net” of punitive tactics employed to curtail drug use and violence.⁶⁴

In spite of their peripheral involvement in the drug trade, and the role drug-use plays in mediating GBV-related trauma, women, primarily of color, have become targets of these policies.⁶⁵ Mandatory minimum sentencing, instituted in the mid-1980s, is one such measure that targets women.⁶⁶ Established to deter drug use and ensure consistency and severity in punishment of major players in the drug trade, mandatory sentencing almost unconditionally imposes severe sanctions on drug crimes without consideration for surrounding or mitigating factors.⁶⁷ Mandatory minimum sentencing statutes disparately affect women with minimal criminal culpability by tying their sentencing to only the facts of the crime committed, such as drugs or paraphernalia in possession, and disregarding prior criminal history, family responsibilities or other circumstances.⁶⁸ Mandatory sentencing has been connected to a variety of drug charges, such as possession of certain drugs and conspiracy to commit drug offenses.⁶⁹ Crack-cocaine sentencing policy gained infamy for having incarcerated women for decades on minor possession charges. Though 15 years of advocacy on the issue has decreased the frequency and severity with which federal and

⁶² See THE SENTENCING PROJECT, *supra* note 15.

⁶³ Natasha A. Frost et al., *The Punitiveness Report: Hard Hit: The Growth in the Imprisonment of Women, 1977-2004*, INST. ON WOMEN & CRIM. JUST., at 23 (2006), available at <http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf>.

⁶⁴ Lapidus et al., *supra* note 60, at 35.

⁶⁵ Frost et al., *supra* note 63, at 22.

⁶⁶ Lapidus et al., *supra* note 60, at 38-44; see also Frost et al., *supra* note 63, at 23-24.

⁶⁷ Lapidus et al., *supra* note 60, at 24-25, 41-43; see also MARC MAUER ET AL., GENDER AND JUSTICE: WOMEN, DRUGS AND SENTENCING POLICY, THE SENTENCING PROJECT 21-22 (1999).

⁶⁸ Lapidus et al., *supra* note 60, at 38-40; see also Bloom et. al, *supra* note 5, at 37-40.

⁶⁹ *Id.* at 35.

state governments tie mandatory sentencing statutes to possession charges, disproportionately punitive practices still abound at both the federal and state level.⁷⁰

Women are also implicated in harsh sentencing regimes through association with people more deeply involved in the drug trade. Social and economic forces often encourage women who use drugs to become intimately involved and cohabit with men who share, and can to some extent support, these habits.⁷¹ Unfortunately, this involvement often manifests in criminally liable ways. Conspiracy provisions, accomplice liability, constructive possession and asset forfeiture laws have all been attached to mandatory sentencing regimes and entrapped women with minimal involvement with the drug trade.⁷² These laws were tied to mandatory sentencing statutes with the intent of capturing the broad array of players involved in drug manufacturing and trafficking that previously managed to evade prosecution. However, women with insignificant involvement in the drug trade and little to no knowledge of value to infiltrating large scale drug crime syndicates have been prosecuted under these laws.⁷³

With mandatory sentencing in place, conspiracy statutes do not clearly differentiate between having knowledge of another's illegal purpose when providing some form of assistance and having the intent to aid in that illegal purpose. "As a result, commonplace interactions of two intimates or housemates, such as taking a message, renting a car for a partner or family member, or purchasing household supplies that may be construed as materials for manufacturing drugs, can expose women to harsh penalties under accomplice liability laws, leading to unjust and disproportionate punishment for women" who are peripherally, if at all, involved in drug trafficking.⁷⁴ Indeed the mandatory sentencing statutes also decrease the discretionary power of the judiciary, so that mitigating circumstances, such as coerced involvement due to physical threat, become irrelevant in sentencing.

Increasingly punitive measures to address property crimes are also subsuming the female offender population, with many women being incarcerated for low level property crimes committed

⁷⁰ See, e.g., NICOLE PORTER & VALERIE WRIGHT, *CRACKED JUSTICE, THE SENTENCING PROJECT 1-2* (2011).

⁷¹ See CHESNEY-LIND & PASKO, *supra* note 2.

⁷² Lapidus et al., *supra* note 60, at 35-38.

⁷³ *Id.*; see also Shimica Gaskins, *Women of Circumstance: The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1533-35 (2004).

⁷⁴ Lapidus et al., *supra* note 60, at 36.

to obtain drugs, such as check fraud.⁷⁵ While practitioners often assume that it is most common for women to engage in sex work to support drug habits, it is more common for women to be involved in property crimes.⁷⁶ Research on the intersection of theft and drug use is not as well developed as research on the links between drug use and street-level sex work. However, feminist criminologists have well documented that many women commit low-level property offenses to support the drug habits they have developed in response to sexual and physical abuse.⁷⁷ The relationship between GBV, drug use, street level sex work, and property crimes is complex, and warrants an equally nuanced response from the criminal justice system.

III. HUMAN RIGHTS CONCERNS AND THE ETIOLOGY OF WOMEN AND GIRLS' CRIME

Much of the criminal justice system's response to women and girls engaging in illegal behavior runs contrary to the dictates of several human rights treaties, declarations and standards of minimum treatment. As declarations, minimum standards of treatment and treaties that the U.S. has not ratified are not legally binding; thus, options for enforcement through the UN human rights system are limited. However, activists can employ a number of advocacy tactics using the normative frameworks created by human rights standards to encourage more humane and just responses from the criminal justice system at the federal, state and local level. This is especially true of advocates for CJI women and girls whose histories with GBV introduce an additional layer of human rights concerns.

A. *Punishment Versus Rehabilitation*

According to the ICCPR, signed and finally ratified by the United States in 1992, the essential aim of the penitentiary system should be the social reformation and rehabilitation of prisoners.⁷⁸ The human rights framework aims to respond to the nuanced nature of the social, economic, and political inequalities that are often at the root of criminal behavior. It recognizes that mechanical and

⁷⁵ See CHESNEY-LIND & PASKO, *supra* note 2, at 125.

⁷⁶ STEPHANIE COVINGTON & BARBARA BLOOM, *GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS* 3, 9 (Barbara Bloom ed., 2003).

⁷⁷ See, e.g., Michelle Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 *TEMP. POL. & CIV. RTS. L. REV.* 459, 473 (1999).

⁷⁸ International Covenant on Civil and Political Rights, art. 10, para 3, Dec. 16, 1966, 999 U.N.T.S. 171.

punitive responses to crime undermine human dignity by ignoring the extremely complex social realities that often constrict people's choices and influence their actions. In identifying rehabilitation as the primary goal of the criminal justice system, the human rights framework takes the view that it is the government's obligation to rehabilitate prisoners so that they are more empowered to desist from crime.

The U.S. criminal justice system's purely punitive response to crime disregards rehabilitative obligations. Mechanical and punitive arresting, booking, and sentencing practices ignore the complex social realities within which much criminal behavior plays out, including the difficult decisions people make when responding to their social, economic, and political realities. The domestic criminal justice system's punitive instead of rehabilitative responses undermine inherent dignity and humanity by punishing behaviors associated with limited agency, and providing no corresponding rehabilitative efforts to expand one's agency.

The criminal justice system's punitive approach becomes especially disconcerting in light of current knowledge on female pathways to crime and the extreme need for rehabilitative, psycho-social and other medical services to treat the root causes of women and girls' mostly non-violent crimes, given the well-documented connection to GBV. Running away from home, street survival tactics such as theft and sex work, and using drugs become for this group of women and girls necessities, not choices. Nonetheless the criminal justice system consistently responds to women's illegal behaviors with extremely punitive instead of rehabilitative efforts, disempowering women and girls in the criminal justice system and exacerbating the ramifications of the abuse they have experienced.

B. *Cruel and Unusual Punishment*

While both domestic and international law prohibit cruel and unusual punishment, human rights discussions around cruel and unusual punishment provide much more robust protection than domestic law. For instance, most domestic courts have upheld mandatory sentencing statues for drug crimes, but human rights paradigms have long established that such sentencing statutes can be inhumane and disproportionate to the gravity of the offense.⁷⁹ The extraordinary sanctions women and girls in the criminal justice sys-

⁷⁹ HUMAN RIGHTS WATCH, CRUEL AND USUAL: DISPROPORTIONATE SENTENCES FOR NEW YORK DRUG OFFENDERS A HUMAN, 28-32, (1997), available at <http://www.hrw.org/reports/1997/usny>.

tem experience as a result of their engagement with non-violent illegal behaviors would qualify for cruel and unusual punishment under the human rights framework.

Feminist criminology's analysis of the etiology of women and girls' crime exposes the especially inhumane nature of the criminal justice system's response. When women and girls' crime is understood primarily as criminalization of the mechanisms commonly employed to cope with and survive abuse, the inhumanity of harsh punitive tactics becomes evident. Detaining girls for running away or attempting to run away from abuse, incarcerating women for mediating severe physical and sexual abuse through self-medicating behaviors, and harshly penalizing women and girls' street survival tactics implicates the criminal justice system in a gross pattern of cruel and inhumane treatment of women and girl survivors of GBV. The pattern of disproportionate and unjust responses establishes a powerful baseline for cruel and unusual punishment arguments.

C. *Discrimination*

While both domestic and international human rights law prohibit gender and racial discrimination, international law confers several advantages over domestic law in its definition of discrimination. International human rights law prohibits laws, policies, behaviors, attitudes and practices that *either* have the intent and purpose of discrimination, or result in de facto discrimination.⁸⁰ That is to say, a practice such as detaining status offenders would be considered discriminatory under the U.N. Committee on Discrimination Against Women, but not under U.S. law, because it has had a disproportionate impact on girls, though it is not necessarily written with that intent. All of the racial and gendered disparities discussed above would stand in violation of international law and constitute human rights violations. The human rights framework is particularly useful in addressing discrimination, because it allows activists to expose the compounding nature of the multiple marginalization experienced by this population.⁸¹ Human rights laws provide the tools, language and framework within which activists

⁸⁰ *E.g.*, Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201249/volume-1249-I-20378-English.pdf>.

⁸¹ The indivisibility of the human rights framework stresses how certain civil and political rights cannot be fully realized without the concurrent realization of certain economic, social or cultural rights. This encourages a discussion of ways in which different forms of marginalization compound each other.

can discuss racial discrimination in light of gender discrimination, economic marginalization, and so on.

IV. VIOLENCE AGAINST WOMEN AND GIRLS

The Declaration on the Elimination of Violence Against Women defines GBV as a human rights violation, and recognizes every female's entitlement to be free of GBV.⁸² This declaration is significant because it represents a shift in thinking on violence against women and girls. Specifically, it identifies GBV as a manifestation of discrimination against women and girls, and thus creates multiple human rights obligations around its prevention, prosecution, and treatment. Before this shift, few, if any, legal frameworks contained an explicit government obligation to prevent GBV. Under the human rights framework, the government has clearly failed the female criminal justice population. Women and girls' crime can be understood as an expression of the failure of the government to fulfill this human rights obligation.

A. Gender-Based Violence when under Correctional Supervision

The GBV that a majority of women and girls experience in their homes, schools, or on the streets prior to involvement with the criminal justice system is often mirrored and compounded by abuses experienced within the correctional system. Victimization experiences under correctional supervision include violations committed either at the hands of correctional staff, or at the hands of other inmates with the acquiescence of correctional staff. They may include rape, sexual assault, or other sexual misconduct, degradation and humiliation, and physical, verbal, and emotional abuse. In addition, prison mental health and psycho-social services remain limited in most areas. The punitive and often hostile experiences of confinement, exacerbated by a lack of victims' services, aggravate the already fragile mental and physical health of CJI women and girls.

1. Rape, Sexual Assault & Sexual Misconduct

A Bureau of Justice Statistics 2010 report confirmed that sexual abuse of inmates while under correctional supervision is a

⁸² Declaration on the Elimination of Violence against Women, G.A. Res. 48/104 (Dec. 20, 1993), available at <http://www.unhcr.org/refworld/docid/3b00f25d2c.html>.

serious problem, particularly for women and girls.⁸³ The anonymous surveys with inmates reflect abuse rates on one particular day, and thus just represent the tip of the iceberg given the turnover rate in jails. In the surveys, over 4% of women reported inmate-on-inmate sexual abuse, and over two percent reported staff sexual misconduct.⁸⁴ Amongst the girls surveyed, more than 9% reported forced sexual activity with other youth, four times the rate of their male counterparts, and almost 5% reported staff sexual misconduct.⁸⁶ Of note is that while both male and female facilities reported serious problems with sexual misconduct, women's prisons had the nation's highest rates of both inmate and staff sexual abuse.⁸⁷

The sexual abuse of women and girls in correctional settings is but one in a continuum of experiences with GBV. The women and girls who are abused in detention are often the very same ones who were abused in their communities. Studies show that inmates with a history of abuse are more than twice as likely to be victimized as their counterparts with no history of abuse.⁸⁸ Inmates who identify as lesbian, gay, bisexual or transgender are also targeted for abuse at higher rates than the rest of the inmate population.⁸⁹

Most cases go unreported. Victims fear of retaliation and perceive reporting to be futile.⁹⁰ Though sexual abuse is pervasive, most survivors endure it without complaint over long periods of time. Those who do file complaints may have to confront numerous hurdles, from bureaucratic procedures designed to discourage complaints to accusations of lying and manipulating the system.⁹¹ Inmate victims of sexual assault also report feeling that the burden

⁸³ ALLEN J. BECK, PAUL GUERINO, & PAIGE M. HARRISON, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09, BUREAU OF JUSTICE STATISTICS 1 (2010); *see also* ALLEN J. BECK & PAIGE M. HARRISON, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09, BUREAU OF JUSTICE STATISTICS 5 (2010).

⁸⁴ Staff sexual misconduct includes "consensual" sex between an inmate and correction staff. Given the power differential between inmates and correctional staff, experts agree that sexual conduct between the two can never be truly consensual, and thus constitutes misconduct.

⁸⁵ BECK & HARRISON, *supra* note 83, at 5.

⁸⁶ *Id.* at 1.

⁸⁷ JUST DETENTION INT'L, SUBMISSION TO MS. RASHIDA MANJOO, U.N. SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN VIOLENCE AGAINST WOMEN IN CUSTODY IN THE UNITED STATES — A NATIONWIDE HUMAN RIGHTS CRISIS 1 (2011), available at www.justdetention.org/pdf/VAW%20_Rapporteur_submission1.pdf.

⁸⁸ *See* BECK & HARRISON, *supra* note 83, at 15.

⁸⁹ *Id.* at 14.

⁹⁰ JUST DETENTION INT'L, *supra* note 87, at 2.

⁹¹ HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 251-52 (1996).

to prove assault rested with them personally.⁹² Bureau of Justice Statistics data shows egregious impunity for even substantiated cases of staff sexual misconduct, as officials were rarely arrested and many were allowed to keep their jobs.⁹³ This culture of impunity further exacerbates an environment in which women and girls' confinement is highly sexualized and hostile.

The physical and emotional effects of sexual misconduct are devastating for any victim, but incarcerated women and girls abused during confinement experience additional torment. The conditions of detention are such that survivors may be forced to face the perpetrator regularly or face repeated victimization by the same perpetrator. Complicated complaint and grievance procedures, and the general culture of impunity for abuse, discourages victims from seeking remedy. Given the extremely poor health indicators of women and girl inmates, sexual abuse makes detention fertile breeding ground for HIV and other sexually transmitted diseases. Victims who become pregnant receive inadequate prenatal care, nutrition, and other support necessary for a healthy pregnancy.⁹⁴ Abortions are difficult to secure in most areas.⁹⁵

2. Cross-Gender Pat-downs, Involuntary Exposure, and Body Searches

Routine correctional practices perpetuate the trauma of past abuse. Correctional departments employ partial or full body pat-downs, viewing the naked body during showers or using the restroom, and body cavity searches in response to perceived security needs. The specifics and legalities of these procedures vary from state to state. Nationwide data on the pervasiveness of these practices and how they affect women and girls has yet to be collected, but reports from various jurisdictions confirm their widespread use and the detrimental effects.⁹⁶

⁹² *Id.* at 172, 253.

⁹³ JUST DETENTION INT'L, *supra* note 87, at 2.

⁹⁴ 2 BRENDA V. SMITH, NAIRI SIMONIAN & JAIME YARUSSI, *The Health Concerns of Incarcerated Women*, in WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES 33 (Russ Immarigeon ed., 2011).

⁹⁵ *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map> (last visited Apr. 17, 2013).

⁹⁶ *Prison Strip Search is Sexually Abusive*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/prisoners-rights-womens-rights/prison-strip-search-sexually-abusive> (last visited Mar. 10, 2013); *see also* Acoca, *supra* note 43, at 578-79.

Women and girls consistently note the emotional strain caused by invasive body searches and pat-downs or humiliation of being watched showering or using the restroom.⁹⁷ The injury of such practices becomes further aggravated when performed by someone of the opposite sex. These routine practices may also be employed as a proxy for harassment. Strip searches, pat-downs and involuntary exposure seem to be an extension of experiences with abuse perpetrated prior to incarceration. Women and girls report a sense of re-victimization during these routine practices, and feelings of anxiety and depression as a result.⁹⁸ In addition, victimized inmates have reported strip searches and pat-downs as the first step in their experiences with the staff sexual misconduct.⁹⁹

3. Other Verbal and Emotional Abuses

Incarcerated women and girls report similar types of emotional and verbal abuse perpetrated against them in detention as they experienced when living in their home communities outside of detention. Though nationwide prevalence data is unavailable, localized research confirms widespread use and the detrimental effects on women and girls.¹⁰⁰ Among the most common emotional and verbal abuses are demeaning and foul language used by staff, being shouted at, being isolated or forced to be alone, and being verbally threatened with harm for disobedience.¹⁰¹ The gender specific or sexual nature of the verbal abuse (for example, use of the word “whore” or “slut”) has specific implications for CJJ women and girls whose sexuality may have been assaulted since childhood. In addition to being disrespectful and demeaning, such abuse compounds damage to self-worth and self-efficacy, as a high percentage of women and girls have already experienced repeated victimization and degradation outside of prison and jail. Demeaning behavior is associated with significant emotional anxiety for incarcerated women.¹⁰²

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See BECK & HARRISON, *supra* note 83, at 24.

¹⁰⁰ See Acoca, *supra* note 44, at 576; Human Rights Watch, *supra* note 91. See also Chesney-Lind & Pasko, *supra* note 7.

¹⁰¹ *Id.*

¹⁰² See HUMAN RIGHTS WATCH, *supra* note 91 at 52-54.

4. Limited Mental Health and Psycho-Social Services

A growing body of research documents the extreme mental health needs of CJJ women and girls. However studies also show that corresponding mental health services are limited or lack the trauma focus needed to adequately respond to the complex mental health issues present in this population.¹⁰³ Correctional confinement is an inherently emotionally difficult experience. The loss of civic freedom, separation from supportive social networks, and the hostile and punitive natures of prison environments all contribute to the traumatic experience of incarceration. As such, correctional environments may exacerbate CJJ women and girls' mental health symptomatology, especially if the women and girls do not receive mental health and psycho-social services.

B. Laws and Policies that Perpetuate Gender-Based Violence under Correctional Supervision

Failures of domestic law and policy to address abuse committed against CJJ women and girls in its various forms has created a culture of impunity for GBV and significantly contributed to its pervasiveness. What follows is a discussion of specific laws and policies that fundamentally undermine efforts to deter or mitigate the effects of GBV against women and girls in under correctional supervision.

1. Violence Against Women Act and Victim of Crimes Act

In 1994, Congress passed the original Violence Against Women Act (VAWA).¹⁰⁴ Since then VAWA has provided the largest single funding source for victim services, such as mental health care and crisis intervention.¹⁰⁵ More specifically, VAWA increased

¹⁰³ See Linda A. Teplin, Karen M. Abram & Gary M. McClelland, *Prevalence of Psychiatric Disorders Among Incarcerated Women: 1. Pretrial Jail Detainees*, 53 ARCHIVES OF GEN PSYCHIATRY 505, 512 (1996); see also KATHERINE MCCAALDWIN & JACQUELYN JONES, WOMEN'S AND CHILD. HEALTH POL'Y CTR., HEALTH ISSUES SPECIFIC TO INCARCERATED WOMEN: INFORMATION FOR STATE MATERNAL AND CHILD HEALTH PROGRAMS (2000); BARBARA E. BLOOM & STEPHANIE S. COVINGTON, *Addressing the Mental Health Needs of Women Offenders, in* WOMEN'S MENTAL HEALTH ISSUES ACROSS THE CRIMINAL JUSTICE SYSTEM (Rosemary Gido & Lancelotte Dalley eds., 2008).

¹⁰⁴ Violence Against Women Act, 42 U.S.C.A. § 13701 (1994).

¹⁰⁵ Jaime M. Yarussi, *The Violence Against Women Act: Denying Needed Resources Based on Criminal History*, 3 CRIM L. BRIEF OF AM. U. 29, 29 (2008).

attention to victims of sexual assault and enabled non-governmental organizations to more robustly serve this group. The Victims of Crimes Act (VOCA) was originally signed into law in 1984 to support victim compensation and victim assistance programs across the nation.¹⁰⁶

Neither VAWA nor VOCA provide grants for services provided within correctional institutions or for violence perpetrated against incarcerated women.¹⁰⁷ As mentioned above, incarcerated female victims of sexual misconduct already have a long and complicated history with physical and sexual abuse, which necessitates their access to trauma services and victim compensation. However, due to the provisions of VAWA and VOCA, victims who happen to be incarcerated do not have complete access to the services they need most. These provisions in VAWA and VOCA were initially meant to prevent perpetrators of violence from gaining access to funds. In reality, however, they are preventing the people who need access to the funds the most from receiving them.

2. The Prison Litigation Reform Act (PLRA)

The Prison Litigation Reform Act (PLRA, 1996) is a formidable barrier to incarcerated females filing suit against prison staff who perpetrate sexual misconduct.¹⁰⁸ It has often been cited as a form of civil death¹⁰⁹ for prisoners.¹¹⁰ The most damaging hurdles imposed by PLRA are the grievance exhaustion and showing of physical injury requirements.¹¹¹ The grievance-exhaustion provision requires inmates to exhaust internal prison grievance procedures before they may bring their claims to an outside authority, regardless of how complicated, inefficient, or unfair the procedures may be. If the prisoner has failed to do so, the litigation is dismissed. Thus, a prison can insulate itself from prisoner lawsuits by creating a grievance system that is difficult to navigate, or in which the threat of retaliation scares prisoners from using it in the first place. This has particular implications for incarcerated female victims of sexual

¹⁰⁶ The Victims of Crime Act of 1984, 42 U.S.C.A. § 10601 (1984).

¹⁰⁷ Yarussi, *supra* note 105, at 29.

¹⁰⁸ See DAVID FATHI, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES, HUMAN RIGHTS WATCH I (2009).

¹⁰⁹ Term that refers to the loss of civil rights of a person due to a government act such as a felony conviction

¹¹⁰ Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. CR.-C.L. L. REV. 45, 57 (2007).

¹¹¹ See JUST DETENTION INT'L, *supra* note 85, at 4; see also Buchanan, *supra* note 110.

misconduct whose perpetrators, who are often male custodians, have great incentive for complicating the grievance system.¹¹² The PLRA also requires a showing of physical injury. Many jurisdictions do not consider a sexual assault to constitute a physical injury *per se* (thus insulating “consensual” sexual misconduct from litigation).¹¹³ Claims of sexual assault are often dismissed under this provision because victims of sexual assault — particularly women victims of sexual assault — frequently have no proof of physical injury due to delay in reporting, lack of additional violence during the assault, or prison medical providers untrained or unwilling to administer a rape kit.¹¹⁴

3. State Criminal Law

When writing staff sexual misconduct laws, each state identifies which personnel and facilities the laws will cover. Correctional staff perform a variety of functions, ranging from supervising prisoners, providing food and other necessities, and managing the facility. Non-correctional agency staff, such as civilian health care providers, volunteers and contractors, also work within these categories. Determining which institutions, settings, and employees will be covered is a critical step in writing the most comprehensive staff sexual misconduct laws.¹¹⁵ This is especially true for female prisoners whose experience with sexual misconduct in prisons is largely perpetrated by correctional officials.

The most comprehensive state laws do cover all individuals who interact with prisoners in any capacity in any facility. However, some state laws only cover secure confinement facilities and their personnel.¹¹⁶ Other state laws are even more restrictive. Laws that apply to sexual misconduct occurring only inside an institution do not provide protection for prisoners when the offense occurs outside prison walls, such as in transit, hospitals, or community corrections facilities. Such gaps pose a great threat to prisoners and create legal loopholes for perpetrators of violence.

¹¹² See Fathi, *supra* note 108, at 12.

¹¹³ Jennifer Wedekind, *Prison Rape, the PREA, and the PLRA*, SOLITARY WATCH (Mar. 7, 2011), <http://solitarywatch.com/2011/03/07/prison-rape-the-prea-and-the-plra/>.

¹¹⁴ *Id.*

¹¹⁵ BRENDA V. SMITH & JAMIE M. YARUSSI, LEGAL RESPONSES TO SEXUAL VIOLENCE IN CUSTODY: STATE CRIMINAL LAWS PROHIBITING STAFF SEXUAL ABUSE OF INDIVIDUALS UNDER CUSTODIAL SUPERVISION, NAT'L INST. OF CORRECTIONS PROJECT ON ADDRESSING PRISON RAPE I, 5 (2009).

¹¹⁶ *Id.*

The types of staff sexual misconduct covered under criminal law also vary by state. The most inclusive, and less common, set of laws acknowledge that penetration, as well as all other sexual behavior and contact perpetrated by anyone overseeing or interacting with a prisoner constitute staff sexual misconduct.¹¹⁷ Staff sexual misconduct laws commonly only address the most serious forms of sexual misconduct, such as violent sexual assault, which constitute a minority of staff sexual misconduct perpetrated in correctional facilities. Laws often do not address sexual photography, voyeurism, and forced performance of sexual acts on one's self.¹¹⁸ Staff sexual misconduct laws also generally do not prohibit non-physical behaviors such as sexual conversation and correspondence.¹¹⁹

While many states specifically prohibit consent as a defense to staff sexual misconduct charges, consent remains the most often-used defense.¹²⁰ Those states that consider prisoners capable of consenting to staff sexual misconduct often punish both the prisoner and the responsible staff member for engaging in the conduct.¹²¹ Such laws create an environment in which prisoners are scared to report staff sexual misconduct for fear of prosecution.¹²² Sensible laws recognize that consent can never be present given the inherent power differential and complex motivations prisoners may have for engaging in sexual activity with staff members, including motivations such as safety and self-protection.

Penalties for engaging in staff sexual misconduct vary among the states.¹²³ As thought and research on staff sexual misconduct develop and correctional experts increasingly realize the dangers staff sexual misconduct poses, penalties have increased. Nonetheless, some states still lag behind, continuing to penalize prisoners themselves for sexual conduct with staff, or imposing only misdemeanor penalties on staff guilty of staff sexual misconduct. Prior to 2005, the federal law addressing sexual misconduct of prisoners carried only a misdemeanor penalty.¹²⁴ Such low penalties undermine the severity of the crime and diminish incentive for prosecution.

¹¹⁷ See JANINE M. ZWEIG, REBECCA L. NASER, JOHN BLACKMORE & MEGAN SCHAFFER, ADDRESSING SEXUAL VIOLENCE IN PRISONS: A NAT'L SNAPSHOT OF APPROACHES AND HIGHLIGHTS OF INNOVATIVE STRATEGIES, THE URBAN INSTITUTE JUSTICE POL'Y CTR. 10-14 (2006).

¹¹⁸ See YARUSSI ET. AL., *supra* note 115, at 9.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 11-12.

¹²¹ *Id.*

¹²² *Id.*

¹²³ See ZWEIG ET. AL., *supra* note 117, at ii.

¹²⁴ See YARUSSI ET AL., *supra* note 115, at 14.

Impunity for sexual misconduct is perhaps the single biggest cause of sexual misconduct.

4. Constitutional Claims Regarding Cross-Gender Procedures

Rulings regarding cross-gender pat-downs, strip searches, and involuntary exposure vary by jurisdiction, and are often in favor of prison policies.¹²⁵ At the core of these rulings is the tension between Fourth Amendment claims regarding the right to privacy and Eighth Amendment claims regarding the right to be free from cruel and unusual punishment, the security interests of the prison, and the equal employment rights of male and female correctional officials. Some jurisdictions have found cross-gender searches, especially those involving women inmates, to constitute cruel and unusual punishment and have required searches to be performed by same-sex personnel.¹²⁶ Others have found that the security interests of the prison prevail and allowed cross-gender pat-downs and searches at the expense of inmates' privacy.¹²⁷ Both the American Bar Association and the Prison Rape Elimination Act Commission have recognized the need to prohibit cross-gender searches except in emergency situations.¹²⁸

C. Human Rights Concerns and Violations while under Correctional Supervision

One of the foundational principles of the human rights program is equality before the law and equal access to courts without discrimination based on status such as race, color, sex, language, religion, political or other opinion, national or social origin, property, or birth. Another bedrock principle of human rights law is the provision of effective remedy after one's rights have been violated. These rights are guaranteed in the Declaration of Human Rights, the International Covenant on Civil and Political Rights, Convention on the Rights of the Child, amongst others.¹²⁹

¹²⁵ Flynn L. Flesher, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free from Rape*, 13 WM. & MARY J. WOMEN & L. 841, 844 (2007); see also Robyn Gallagher, *Constitutional Law - Cross-Gender Pat Searches: The Battle between Inmates and Corrections Officers Enters the Courtroom*, W. NEW ENG. L. REV. 567 (2011).

¹²⁶ *Jordan v. Gardner*, 986 F.2d 1521, 1522 (9th Cir. 1993) (holding that random pat and frisks of female inmates by male officers is unconstitutional).

¹²⁷ Flesher, *supra* note 125, at 850; see also Gallagher, *supra* note 125, at 568.

¹²⁸ Gallagher, *supra* note 125, at 570.

¹²⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc.

PLRA severely limits access to the courts of incarcerated people by creating a burdensome grievance exhaustion requirement and physical injury requirement. Though the stated intent of PLRA is to discourage frivolous lawsuits, it has the practical effect of denying incarcerated people with legitimate grievances from accessing the courts. This denial of access is especially pronounced for women who are particularly vulnerable to the burdensome requirements of PLRA. In addition, due to the racial composition of the criminal justice population, PLRA has the effect of disproportionately limiting or denying Black and Latina prisoners' access to the courts.

The women's human rights program provides special protections to women and girls living on the fringes of society, challenging prevailing societal attitudes that question whether such women and girls deserve protection of their rights.¹³⁰ This stands in stark contrast to domestic laws such as VAWA and VOCA. In a sense, VAWA and VOCA perpetuate misguided perceptions of CJJ women and girls as undeserving of state protection. Human rights law, however, not only undercuts this notion, but also highlights how detention can make women and girls particularly vulnerable to GBV, and thus underscores their need for special services and protections.

Cross-gender pats, searches, and involuntary exposure are prohibited by UN Minimum Standards on Treatment of Prisoners¹³¹ and have been identified as human rights violations by both the Convention against Torture Committee and the Special Rapporteur on Violence against Women.¹³² The human rights program's definition of cruel and unusual punishment and the right to privacy encompass many violations that are overlooked by U.S. constitutional law. In particular, U.S. courts have found that cruel and unusual punishment in conditions of confinement must contain a degree of wantonness¹³³ that international law does not require. In

A/RES/217(III) (Dec. 10, 1948) at art. 10; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 19, 1966), at art. 2, 14; Convention on the Rights of the Child, G.A. Res. 44/25, 1577 U.N.T.S. 3 (Nov. 20, 1989) at art. 37.

¹³⁰ Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, 48 U.N. GAOR Supp. (No. 111) U.N. Doc. A/48/629 (Feb. 23, 1994), preamble clause 6.

¹³¹ Flesher, *supra* note 125, at 843.

¹³² JUST DETENTION INT'L *supra* note 87, at 3; *see also* United Nations Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, Report of the Mission to the United States on Issue of Violence against Women in State and Federal Prisons (1999), U.N. Doc. E/CN.4/1999/68/Add.255-57, available at <http://www.unhchr.ch>.

¹³³ *See* Flesher, *supra* note 125, at 854 (this wantonness requirement has been explained as a sadistic and malicious infliction of pain); *see also* Russel

Jordan v. Gardner, the court found that cross-gender pat-downs and searches were unconstitutional because the correctional administrators conducted the procedure with the knowledge of the extensive sexual abuse histories of women in their institution.¹³⁴ Under international law, cross-gender searches, pat-downs, involuntary exposure, and degrading treatment categorically qualify as cruel and unusual punishment, regardless of whether the institution has verified the abuse histories of its inmates. This has been more difficult to establish under U.S. law due to the wantonness requirement.

V. VIOLENCE AGAINST WOMEN AFTER INCARCERATION

Women leave prison ill-equipped to tackle the numerous challenges that accompany successful reintegration into the community. They often leave prison inhibited by the same circumstances that contributed to their incarceration in the first place. Legal roadblocks further complicate reentry into society. People convicted of a state or federal felony drug offense are subject to a lifetime ban on food stamps and cash assistance, and have their eligibility for higher education loans and public housing suspended.¹³⁵ All states must implement the ban unless its state legislature elects to modify or opt out of the ban. As of 2009, nine states completely implemented the ban, 33 states limited the ban in some way, and nine states opted out of the ban.¹³⁶ Because of disproportionate minority confinement, Black and Latina women and their children are disproportionately affected.¹³⁷

The limited research on the effects of these bans and restrictions shows the devastating impact on women with felony drug convictions. Bans increase susceptibility to GBV by constricting economic survival options and forcing women to return to the very behaviors and relationships that compromised their physical and

Gray, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AMERICAN UNIVERSITY LAW REVIEW 1339, 1349 (1992).

¹³⁴ See Gallagher, *supra* note 125, at 580-83.

¹³⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601-619 (1996); see also Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 U.S.C.).

¹³⁶ *Reentry Myth Buster!*, LEGAL ACTION CENTER (2009), available at http://www.nationalreentryresourcecenter.org/documents/0000/1176/Reentry_Council_Mythbuster_FCRA_Employment.pdf.

¹³⁷ PATRICIA ALLARD, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES, THE SENTENCING PROJECT, 6-8 (2002).

mental safety and health in the first place. Financial strain induced by these bans discourages women's educational and vocational pursuits, which are then further inhibited by subsequent legislation that places barriers to accessing educational loans.¹³⁸ Women under extreme economic hardship may not have the time or resources to pursue the types of vocational training and education that would alleviate their hardship.

The bans also affect substance abuse recovery and women's ability to maintain sobriety. Cash assistance and food stamps present potentially critical components for women in recovery, who are at risk of relapse due to the stress of managing reentry. Denial of benefits may also make it more difficult to remain in treatment.¹³⁹

The lack of welfare benefits has an intergenerational effect. Family reunification may be delayed due to a mother's inability to provide for basic needs, thus forcing her children to spend an increased amount of time in the child welfare system or with burdened family members.¹⁴⁰ For women who have planned for reunification and are deemed safe caregivers in all other ways, this prolonged separation from children can be devastating. In reunited families, lack of adequate resources endangers the basic economic and physical security of children and their mothers.

These bans leave women utterly vulnerable and helpless. Discrimination due to a history of felony conviction leaves women disconnected from both the labor force and needed safety net programs. For women with felony drug convictions, the bans undermine efforts to heal from years of physical and sexual abuse and addiction, corrode efforts at upward economic and social mobility, and damage family relationships. The unintended result may be a return to criminal behavior as a means of survival.¹⁴¹

Advocacy against the welfare ban, public housing and Housing Act Section 8 restrictions, and barriers to accessing secondary education loans has attained mixed results. At the national level, congress reauthorized TANF without addressing the welfare ban despite the insistence of an array of stakeholders that the welfare ban be removed. Most legal challenges to the housing policies have failed. For example, in *Campbell v. Minneapolis Public Housing Authority*, the 8th Circuit held that questions about drug and

¹³⁸ *Id.* at 15-16.

¹³⁹ AMY E. HIRSCH, SOME DAYS ARE HARDER THAN HARD: WELFARE REFORM AND WOMEN WITH DRUG CONVICTIONS IN PENNSYLVANIA, CENTER FOR LAW AND SOCIAL POL'Y, 64 (1999).

¹⁴⁰ *Id.* at 61.

¹⁴¹ ALLARD, *supra* note 137, at 8; *see also* HIRSCH, *supra* note 139, at 61-63.

alcohol abuse on housing applications and the release requirement did not violate anti-discrimination laws.¹⁴² Advocacy groups have achieved some success at the state level in convincing state legislatures to modify the ban by tying it to drug treatment programs so that people with felony convictions remain eligible for welfare so long as they complete a treatment regimen. Bills introduced to repeal the barriers to higher education loans have garnered lukewarm support.

Perhaps one of the greater barriers to advocacy success on this issue is that fundamental socio-economic rights enshrined in human rights documents are not correspondingly enshrined as rights in the U.S. domestic context. The rights to food, housing, education, decent work, health, and social security are not guaranteed in any domestic legal framework (save some state constitutions that guarantee a right to basic education). So while domestic advocates can point out that the welfare ban interferes with one's ability to secure housing, food, or other basic necessities, they cannot rely on a domestic legal framework to make normative claims about what the government ought to do. That is to say, the domestic legal framework falls short of providing advocates grounds for claiming that the government has an *obligation* to ensure its citizens access to basic necessities, and that by implementing the welfare ban, the government is falling short of its obligations.

The human rights framework bridges this gap in the law in several ways. First, it explicitly states that the right to food, housing, decent work, education, social security and health are all human rights — rights that are guaranteed to everyone on the basis of their humanity.¹⁴³ The human rights framework gives prescriptive authority to these socio-economic rights, and allows activists to make normative claims on these rights. Second, the human rights program recognizes and underscores the fact that fundamental civil and political rights cannot be fulfilled without the concurrent realization of fundamental socio-economic rights. For example, the human rights program has linked the right to work with the right to be free from bonded or slave labor, positing the two rights as different sides of the same coin. The human rights program provides a paradigm from which advocates can analyze the realization of certain civil and political rights in relation to socio-economic rights, and

¹⁴² ROBIN LEVI & JUDITH APPEL, COLLATERAL CONSEQUENCES: DENIAL OF BASIC SOCIAL SERVICES BASED UPON DRUG USE, DRUG POL'Y ALLIANCE, 3 (2003).

¹⁴³ CATHERINE ALBISA, *Economic and Social Rights in the United States: Six Rights, One Promise*, in BRINGING HUMAN RIGHTS HOME VOL. 2 (Cynthia Soohoo, Catherine Albisa & Martha Davis eds., 2008).

vice versa. Third, and somewhat related to the former point, the human rights program provides a mechanism through which advocates can make claims on the intersecting nature of rights violations and highlight their compounding nature. For example, with respect to the welfare ban, the government has failed to fulfill its obligation to provide access to food, it has done so in a discriminatory manner as the bans disproportionately affect Black and Latino populations, and in doing so the government is endangering the maintenance of certain civil and political rights, such as the right to be free from violence.

The women's human rights movement has illuminated the structural causes of GBV, dispelling the notion that GBV occurs in a vacuum in which the only force at play is the perpetrator. This movement recognizes that any governmental intervention limited to addressing the perpetrator will leave GBV a perpetual phenomenon. Only through a holistic approach to all the structural causes of violence against women and girls, which are manifestations of gender inequality, can GBV ever be adequately addressed.

Indeed the women's human rights movement only confirms the concerns of many women in all phases of the criminal justice system, women who cannot imagine a life in which they are free from violence if their basic socio-economic rights such as housing, food, vocational and educational training, and healthcare are not secured.¹⁴⁴ If the government has an obligation to protect women and girls from violence, it also has an obligation to create conditions in which violence cannot flourish. This obligation is laid out in various covenants, and has been further developed by the UN human rights system and non-UN human rights organizations such as Amnesty International and HRW.

VI. CONCLUSION

Despite the vast amount of research presenting compelling reasons to act to the contrary, criminal justice law and policy continue to overlook CJI women and girls' persistent and pervasive experiences with GBV before, during, and after involvement with the criminal justice system. This article presents a formulation of women and girls' experiences with the criminal justice system that underscores the inherently discriminatory nature of the system at every step. In this formulation of women and girls' crime, the criminal justice system is part and parcel of a larger system of gender

¹⁴⁴ HIRSCH, *supra* note 139, at 66.

oppression within which women and girls, and specifically in this case, poor, Black and Latina women and girls, must negotiate their daily struggles with violence, poverty, and other marginalizing factors. The challenges in fighting this larger system of oppression may at times seem insurmountable. CJI women and girls are shrouded under multiple layers of marginalization: they are poor, female, members of minority groups; they use drugs, engage in sex work, and theft; they present significant mental and physical health challenges; they are single mothers, uneducated, and underemployed. They live on the very fringes of society, are afforded little protection under domestic law, and perhaps equally as worrisome, evoke little sympathy from mainstream society.

The human rights paradigm may present a useful and innovative approach in advocating for CJI women and girls. It encompasses strategies that have not yet been fully utilized by domestic social justice organizations, such as targeted reporting, naming and shaming, and rights awareness education campaigns. Human rights empower advocates to make normative claims with regards to the various violations discussed in this paper, in a way that is not provided for by the domestic legal framework. Lastly, the global dimension of human rights places the numerous violations against CJI women and girls within the broader context of systematic gender oppression worldwide. In this sense, it provides a universal language for advocates to articulate their respective experiences, learn from each other, and bolster each other's struggles. Redefining various criminal justice laws and policies as violations within the human rights paradigm transforms the conversation about CJI women and girls in a critical way. It elevates the dialogue to a conversation about systemic, institutionalized discrimination and oppression expressed through law and policy, and underscores the state's undeniable role in CJI women and girls' oppression.

