# Women, Girls & Criminal Justice™

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## Working with Girls: The Need for Talk and the Art of Listening

by Rebecca Maniglia

### Introduction

One of the foundations of providing appropriate services for young women who are at-risk or involved in the juvenile justice system is the clear understanding of the role relationships play in their lives. As common experience with girls reveals and research confirms, relationships are truly, in the words of Carol Gilligan, "the glue that hold girls' lives together." For so many of the young women who come to the attention of the juvenile courts across the country, it is their support of and involvement with others that brings them there in the first place. While the circumstances are varied — girls holding drugs or guns for boyfriends, girls shoplifting or drinking with friends, girls becoming violent in response to years of abuse by adults — the theme of relationships is ever present.

But understanding the role relationships play in girls' personal and criminal lives must also extend to acknowledging the role relationships must play in their treatment after they enter public or private service delivery systems. Just as relationships with peers, boys, and family are often causal in the girls' involvement in the system, it is their relationships with probation officers, case managers, and residential treatment staff that have the potential to teach them alternatives

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*Legal Analysis*

## Sexually Abused Female Inmates in State and Local Correctional Institutions

by Kristine Mullendore and Laurie Beever

### Introduction

"That was not part of my sentence, to ... perform oral sex with the officers." *New York Prisoner Tanya Ross, November 1998* (Amnesty International, March 1999 citing November 1, 1998 *Dateline NBC* interview.)

Sexual abuse is a well-documented problem that is shared by male and female inmates of correctional institutions run by state and local governments (Amnesty International, 1999; Human Rights Watch, 1996; General Accounting Office [GAO], 1999). However, the treatment of female inmates and the conditions of their confinement present unique and complex problems for correctional administrators and staff.

The generally perceived and expected risk of sexual assault in correctional institutions is converted into a fact of institutional life for too many of the women and girls who are confined in these institutions whether they are there serving sentences or are pretrial detainees awaiting trial. **Women Prisoners v. District of Columbia**, 93 F.3d 910 (D.C.Cir. 1996). The severity of this problem is heightened by the fact that the number of female inmates in state and federal prisons has nearly doubled since 1990 (Bureau of Justice Statistics, 2000).

The attempts of female inmates to use the federal court system to hold their sexual abusers accountable have met with little success mirroring their treatment within the criminal justice system. This article examines lawsuits that illustrate the sexual abuse of women in state and local correctional institutions to identify some of the legal and social factors that contribute to the correctional environment that fails to protect female inmates from sexual misconduct by correctional staff.

### Prison Conditions

"There should not be male guards in women's prisons. There should not be a male superintendent of a women's prison. Our statutes should not be construed to require such a mechanical suppression of the recognition that in our culture such a relation between men in power and women in prison leads to difficulties, temptations, abuse, and finally to cruel and unusual punishment." **Jordan v. Gardner**, 986 F.2d 1521 (9th Cir.1993).

Inmates inhabit a world with conditions that differ dramatically from those found in free society. The normal operations of a prison or jail are premised on the assumption that the inmate must be maintained in custody. Inmates are, therefore, subjected to many interactions with each other as well as with correctional staff and administration that would be considered severe violations of civil and criminal law if committed by persons liv-

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ing freely in society. **Women Prisoners v. District of Columbia**, 93 F.3d 910 (D.C.Cir. 1996). As convicted persons, or pretrial detainees, inmates are expected to comply with all institutional policies and directives of correctional officers, as long as these policies and directives are aimed at the legitimate penological objective of maintaining the security and order of the institution. **Turner v. Safley**, 482 U.S.78 (1987). The care, custody, and control of the inmates is assumed by the institution and its staff. The power is removed from those that are kept and conferred on those who keep (Robertson, 1999). The institution, therefore, takes on a legally imposed duty to protect inmates from themselves and other inmates and from mistreatment by the staff, while adequately providing for their daily needs. Because this legal duty places discretionary control in the hands of correctional staff, the staff becomes even more dominant and powerful and the inmates more subordinate and dependent. The inequitable nature of this relationship creates a great potential for the abuse and mistreatment of all inmates and contributes to an environment that, all too often, results in the sexual abuse of female inmates by their male guards.

Intense surveillance is required to achieve the goals of care, custody, and control and that surveillance creates an environment where there is only a "de minimis" expectation of privacy. **Hudson v. Palmer**, 468 U.S. 517 (1984). Inmates are exposed to visual monitoring by correctional officers. **Timm v. Gunter**, 917 F.2d 1093 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209 (1991). This visual monitoring includes viewing them in states of undress while changing their clothes, showering and performing other acts of physical hygiene, using toilet facilities, and sleeping (Jurado, 1998/1999). Surveillance is often done by correctional officers of the opposite sex due to successful employment discrimination suits brought by male and female correctional officers (**Forts v Ward**, 621 F.2d 1210 (2d Cir. 1980); Amnesty International, 1999). According to a 40-state survey conducted in 1997, male correctional officers account for approximately 41 % of the officers dealing with female inmates (Amnesty International). Summarizing the obvious problems that arise, Collins and Collins note, "[t]he problem of sexual abuse of female inmates . . . may be attributed to permitting male officers to work in contact with female inmates . . ." (Collins & Collins, 1996)

In addition to intense surveillance, the bodily integrity of inmates is subject to searches that range from frisks of clothed inmates to strip searches and even (under administrative order) body cavity searches where warranted. **Bell v. Wolfish**, 441 U.S. 529 (1979). In fact, in one case where a male inmate challenged a random, visual body cavity search performed by two officers, the search was upheld as an appropriate institutional procedure. **Covino v. Patrissi**, 967 F.2d 73 (2d Cir.1991). This lack of privacy is extended also to inmate personal belongings which are similarly exposed to being searched by correctional staff. **Hudson v. Palmer**, 468 U.S. 517 (1984).

Daily exposure to these admittedly necessary invasions of personal privacy desensitize all involved to the nature of the invasion. Tolerance of these necessary surveillance behaviors creates an environment where the sexual abuse of women is also tolerated. The risk and occurrence of sexual abuse becomes an accepted reality, especially since confinement simultaneously limits female inmate contacts with any one other than correctional staff. The "caretakers" or "keepers" who are subjecting them to the abuse are part of the same social group to whom they would complain.

### Correctional Institutions' Response to Inmate Complaints

The District of Columbia has the duty not only to train its officers in matters relating to sexual contact between prison guards and inmates, but also has the responsibility to actively devise and implement a system of supervision of its first level corrections officers in accordance with the law. **Newby v. District of Columbia**, 1999 US Dist. LEXIS 10428 (D.C. 1999).

Correctional institutions have options as to what type of system should be used to respond to allegations of sexual abuse. Since inmates are confined and therefore restricted to having contact only with permitted visitors or correctional staff, the first step in whatever process is used must be the same. That first step is to make a complaint within the institution. The institution then becomes the initial

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investigator of the validity of the complaint. After that first internal complaint and investigation is complete, one process option is to continue to handle complaints internally through a formal institutional grievance and personnel process. Another option is to refer the complaint outside the institution to the criminal justice system for prosecution in the courts (Amnesty International, 1999). Both of these processes have been ineffective in protecting female inmates.

**Processes Within the Correctional Institution**

**Lack of Communication.** Interviews with female inmates reveal that they have never received information about the administrative grievance processes or are ignorant of their existence (Human Rights Watch, 1996). Even when aware of the processes, they are reluctant to use them because the inmates lack confidence in the system and feel vulnerable (Human Rights Watch, 1996). Often the abuse reporting procedure meant to assist inmates is not appropriate for a variety of reasons that are attributable to the nature of the prison environment (Human Rights Watch, 1996). For example, during an Amnesty International visit to the California Valley State Prison for Women in 1998 inmates expressed reluctance to use prison drop boxes because of the appearance that they may be reporting other prisoners' misconduct (Amnesty International, 1999).

**Perceived Failure to Respond.** The perceived failure of prison officials to respond to complaints of staff-on-inmate sexual abuse contributes to the lack of inmate confidence in the prison complaint procedures (Amnesty International, March 1999). Determining the efficacy of the system's response to those complaints is further complicated because there is no systematic documentation of the sexual abuse complaints that are made. According to a General Accounting Office report, the "U.S. correctional systems still do not adequately capture or track data related to such allegations [of sexual misconduct]." This absence of data regarding sexual misconduct also hinders future attempts by correctional administrators to effectively handle cases of inmate abuse (General Accounting Office, 1999).

**Fear of Retaliation and Feelings of Vulnerability.** "[M]any sexual relationships appear to be unreported due to the presently widespread fear of retaliation and vulnerability felt by these women." This fear on the part of female inmates is well founded. Evidence demonstrates that female inmates have been subjected to sexual and physical assaults, intrusive searches, threats of physical or sexual abuse, and false reports of inmate misconduct after complaining of sexual abuse (Amnesty International, 1999). This risk is exacerbated by grievance processes, which often require that the inmates confront their abusers. (Human Rights Watch, 1996).

**Reluctance to Report.** Court cases confirm that female inmates are reluctant to come forward with allegations of sexual abuse. Abused inmates make comments to correctional staff or to other inmates in unofficial, informal contexts, but as a general rule they do not directly invoke the formal complaint procedure. In **Barney v. Pulsipher**, 143 F.3d 1299 (10th Cir. 1998), two female inmates brought an action under Section 1983 of the Civil Rights Act, 42 U.S.C.§1983 ("Section 1983")against a correctional facility for sexual assault. One of the two plaintiffs, Barney, informed her drug counselor of her rape by the male correctional officer. The counselor then informed Barney's probation officer, who subsequently reported it to correctional administrators. Only after this report of Barney's assault, did the facility subsequently learn of the other plaintiff's earlier assault by the same officer. Similarly, in **Carrigan v. Delaware**, 957 F. Supp. 1376 (Del. 1997), a female inmate told another female inmate that a male correctional officer had raped her when he found her alone and asleep in her cell. The other female inmate assisted the inmate in bringing her complaint to the institution's attention. In **Thomas v. Galveston County**, 953 F. Supp. 163 (S.D.Texas 1997), a male correctional officer repeatedly engaged in the sexual assault of a female inmate including forcing her to perform oral sex over a five-month period before she reported it to a female correctional officer. This report triggered an investigation that revealed that other female inmates had also been sexually assaulted, but none of them had ever reported it to the jail administrator.

**Criminal Justice Responses**

Studies indicate that when correctional institutions refer complaints to criminal law enforcement, the institution's internal investigation then ceases (Amnesty International, 1999; Human Rights Watch, 1996). Since no internal investigation continues, remedying the problem is left entirely in the hands of law enforcement officials (Human Rights Watch, 1996). In many cases, the substantiation of sexual abuse ultimately rests solely on the word of the female inmate against the word of the male officer denying it (Amnesty International, 1999). A female inmate in a Massachusetts's prison described the dilemma of reporting abuse by stating, "Most officers will tell you, 'go ahead and tell-it's your word against mine. Who are they gonna believe? I'm an officer, I have a badge on, I'm in a superior position to you'" (October 16, 1998 WBUR, Boston University, radio interview as quoted in Amnesty International, 1999). In addition to the fear of retaliation, female inmates fail to report sexual abuse because of the difficulty of proving that the abuse took place (Amnesty International, 1999).

Criminal prosecution is inhibited by the generally held belief that female inmates, who have been labeled the "bad girls" by society, have consented to the sexual activity. Often female inmates have incorporated society's bad girl label into their own self-images making them unlikely candidates to be effective users of the prison complaint procedures and these complaint procedures are the first step that triggers criminal prosecutions (Baro, 1997). Even in the context of a correctional environment that inhibits complaints, there is evidence of a "non-response" by the criminal justice system to those complaints that are made. A General Accounting Office study reveals that three of the four prison systems studied, the Federal Bureau of Prisons, and the state systems of California, and Texas, (the District of Columbia was the fourth), received over 500 internal allegations of sexual abuse during 1995 to 1998 of which only 92 resulted in some form of staff discipline or termination. According to prison officials, a "lack of evidence" (medical and physical) and false allegations explain the overall low percentage of sustained allegations of sexual abuse.

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Despite the fact that all four of the studied jurisdictions permitted the options of both criminal prosecution and employment termination, only the Federal Bureau of Prisons reported any criminal convictions and only fourteen incidents resulted in convictions during the time frame under review (General Accounting Report, 1999).

Some states have amended their penal laws by eliminating one barrier to criminal prosecution through the removal of consent as a defense to claims of sexual relations between correctional officers and inmates, others have changed their treatment of this behavior as a crime by elevating its status from a misdemeanor to a felony. However, many states have not responded in this fashion. Legislation concerning sexual misconduct has failed in at least four states and no reforms in this area have been instituted in another 13 states. Michigan and Iowa, for example, proscribe the conduct as criminal, but classify it as a misdemeanor (U.S. Department of Justice). In Michigan, proposed legislation is under consideration which would amend its criminal sexual conduct code to make this behavior, previously classified as a two year circuit court misdemeanor, a 15 year felony of criminal sexual conduct in the second degree (Michigan Penal Code, 750.520e, 1996; 2000 Michigan HB 4881)

Even when this type of proactive legislation has been enacted, meaningful change is not guaranteed. Prosecutors must still decide to bring charges, fact finders must decide to convict, and judges must seek to impose appropriately severe sentences.(Baro, 1997). Addressing the cumulative effect of the failures of state officials to respond appropriately by creating, classifying, charging, convicting, and sentencing correctional officers who engage in this conduct as serious violators of criminal law is a crucial piece that is all too often missing in efforts to prevent the sexual abuse of female inmates.

## Civil Litigation and Sexual Abuse Cases

The issue concerns the realities of human nature in situations where one individual occupies a position of substantial authority relative to another. The situations or, more accurately, relationships are myriad: supervisor to employee, military officer to soldier, guard to pretrial detainee. Whatever the relationship, it is abundantly clear that our society is beginning to recognize these as potentially volatile situations [citations omitted] **Scott v. Moore**, 114 F.3d 51 (5th Cir. 1997).

*Perhaps the single most significant advantage to the use of civil litigation to remedy sexual abuse of female inmates is that the inmates, as the named plaintiffs, are able to exercise control of legal strategies.*

The use of civil litigation avoids many of the problems inherent to internal administrative complaint procedures and criminal prosecution. Perhaps the single most significant advantage to the use of civil litigation to remedy sexual abuse of female inmates is that the inmates, as the named plaintiffs, are able to exercise control of legal strategies. Also, unlike correctional grievance processes that are designed, staffed, and operated by correctional staff, the judicial branch offers an independent forum free of conflicting self-interest. And, unlike criminal cases, the female inmate is a named party whose claimed injuries to her legal interests are being determined by the court.

Plaintiffs in the federal courts have employed several legal theories to redress the sexual abuse of female inmates. These theories are presented under two causes of action:

- Section 1983 of the Civil Rights Act of 187, 42 U.S.C. §1983 and
- State tort laws.

These causes of action have been brought before the federal courts with varying degrees of success.

## Civil Rights Act Section 1983, 42 U.S.C.§1983 [Section 1983]

Courts have recognized that female inmates have "a constitutional right to be secure in their bodily integrity and free from attack by prison guards." **Hovater v. Robinson**, 1 F.3d 1063, 1068 (10th Cir. 1993). Inmates may bring federal constitutional tort claims based on alleged violations of their First, Fourth, Eighth, and Fourteenth Amendment rights under Section 1983. In order to establish a Section 1983 claim, a plaintiff must establish the following three elements:

- That a person or persons,
- Acting under color of state law, and
- Has deprived the plaintiff of one or more federally protected rights. **Thomas v. Galveston County**, 953 F. Supp. 163 (S.D. Texas, 1997).

Under Section 1983, female inmates can also allege that the sexual abuse they experienced at the hands of correctional staff was a violation of their constitutional rights, specifically:

- Their unlawful seizure as an excessive use of force in violation of the Eighth Amendment, **Hudson v. McMillian**, 503 U.S. 1 (1992),
- An invasion of their privacy, **Jordan v. Gardner**, 968 F.2d 1521 (9th Cir. 1992), and
- A violation of the Eighth Amendment cruel and unusual punishment prohibition when the sexual harassment creates conditions that fall below the "minimal civilized measures of life's necessities." **Farmer v. Brennan**, 511 U.S.825 (1994); **Boddie v. Schnieder**, 105 F. 3d 857 (2d Cir. 1997).

In Eighth Amendment conditions of confinement claims, the unlawful condition of confinement must meet the same two-part objective and subjective standard used to evaluate any condition of confinement:

- A constitutional deprivation must be established that is sufficiently serious to justify court response by an objective standard; and
- The official being sued must have a sufficiently culpable state of mind. **Farmer v. Brennan**, 511 U.S. 825 (1994); **Boddie v. Schnieder**, 105 F. 3d 857 (2d Cir. 1997).

For sexual harassment cases to meet the first part of this standard, a single occurrence must be shown to either be of sufficient severity, or there must be a repetitive nature to the conduct. **Harris**

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**v. Zappan,** 1999 U.S. Dist. 8404 (E.D.Pa. 1999); **Boddie v. Schnieder,** 105 F. 3d 857 (2d Cir. 1997).

To date, verbal sexual abuse alone, consisting of sexual innuendoes and gestures without any physical contact or other aggravating incident, has not been found to establish a sexual harassment claim for either male or female inmates. **Poe v. Haydon,** 853 F.2d 418 (6th Cir.1988); **Adkins v. Rodriguez,** 59 F.3d 1034 (10th Cir. 1995); **Blueford v. Prunty,** 108 F.3d 251 (9th Cir. 1997).

Under the second part of the **Farmer** standard, referred to as the subjective standard, a culpable state of mind may be established by "any relevant evidence" and can be demonstrated by proof either that an official had actual knowledge or through a showing of "deliberate indifference." **Farmer v. Brennan,** 511 U.S. 825, (1994). Deliberate indifference on the part of an official, which is a lesser degree of culpability than either knowing or purposeful conduct, can be proven by the establishing the absence of proper supervision, training, and discipline. **Thomas v. District of Columbia,** 887 F. Supp. 1 (D.D.C.1995). It should be noted that this type of deliberate indifference is not equivalent to the deliberate indifference that must be shown in a qualified immunity defense by municipalities and other organizational entities.

### Diversity and Pendent Claims Based on State Tort Law

Another theory is available under state tort laws, although litigated in the federal courts. Here inmates advance traditional law claims of personal injury for the sexual assault and battery as permitted by each state's tort laws. Since the state tort law claims may be brought within federal courts under federal diversity of citizenship and pendent jurisdiction theories, state courts have not played a significant role in inmate litigation. These state tort theories have been successfully employed to recover damages in federal court, even after losing under other claims made under federal law. **Downey v. Denton County,** 119 F.3d 381 (5th Cir. 1997). The state tort claims have a better chance of success then their federal counterparts under state law where states have waived their traditional common law immunity from liability for intentional acts. Since the time that the federal courts became active in hearing inmate lawsuits, they have been the court of preference for most inmate claims, a situation which contributed to the political drive to enact restrictions on access through Prison Litigation Reform Act of 1996 [PLRA] (42 U.S.C. §1997e). The success of these state tort claims in federal court further reinforces an inmate preference for bringing all potential claims in federal court.

PLRA has significantly impacted federal court access for inmate lawsuits for both state and federal inmates. Whatever the advantages with civil litigation, inmates may not elect it as their sole option. Under the PLRA, inmates are required to exhaust available grievance processes before filing a civil law suit. The PLRA also states that the federal courts can dismiss cases where immunity would prevent recovery of monetary relief. Therefore, the PLRA along with the qualified immunity doctrine present significant potential obstacles to female inmate's civil claims, especially since they face a difficult task of proving the abuse or harassment has violated a "clearly established right." **Galvan v. Carothers,** 855 F. Supp. 285 (Alaska,1994).

### Limited Judicial Remedies

While prison officials are able to consent or agree to all types of reforms aimed at combating the problem of sexual abuse of female inmates, courts do not have the same freedom to remedy sexual abuse as do the parties themselves. The dilemma faced by the courts is that of how to remedy abuse while not usurping the government's function of running correctional institutions. Although courts are not in the business of running these institutions, they must ensure that the institutions do not violate the constitutional rights of inmates. The courts's task is complicated by the fact that court orders remedying abuse may need to be monitored yet the courts themselves cannot interfere with the government's authority to operate its prisons. The challenge to remedying abuse within the constraints of their powers is illustrated by **Women Prisoners v. District of Columbia,** 877 F. Supp. 634 (D.D.C. 1994). Here, female inmates complained, among other claims, that prison guards had sexually assaulted them. The District Court characterized the District of Columbia's Department of Corrections's [DCDC] lack of response to the inmates' allegations of sexual misconduct as "most disturbing" in finding that the defendants were deliberately indifferent to the sexual harassment of female inmates in violation of the Eighth Amendment. Evidence revealed that the prisoners who complained of abuse had "little cause for hope because investigations are not taken seriously." Defendants responded "slowly and superficially" to inmate complaints and failed to keep the complaints confidential. The court determined that the policies and procedures dealing with sexual misconduct had "little value" because of the DCDC addressed "the problem of sexual harassment of women prisoners with no specific staff training, inconsistent reporting practices, cursory investigations and timid sanctions." For example, the DCDC would require written reports from inmates regarding their allegations of sexual abuse. As the court aptly noted, this presents "an obstacle for illiterate women who wish to file a complaint." Due to the DCDC's pattern of deliberate indifference to the sexual harassment of inmates, the district court ordered the following: implementation of specific inmate grievance procedures, prohibition of officer retaliation for inmate reports of sexual harassment, and appointment of a Special Officer from the district court staff to monitor allegations of abuse.

While the District of Columbia conceded to the fact that they had failed to protect female inmates from abuse, they appealed the appointment of a Special Officer of the district court monitoring sexual harassment complaints as an abuse of the court's discretion. **Women Prisoners v. District of Columbia,** 93 F.3d 910 (D.C.Cir. 1996). Specifically, the DCDC accused the District Court of performing a non-judicial, local government function when it ordered that a Special Officer of the district court investigate complaints of inmate sexual harassment within the prison. The appellate court agreed that the District Court overstepped its authority and subsequently vacated the portion of the order which directed the appointment of a Special Officer.

Although a court's remedies for sexual abuse may be somewhat limited, courts still have the ability to make corrections officials accountable for their

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failure to comply with the spirit of court orders. In **Newby v District of Columbia**, 1999 U.S. Dist. LEXIS 10428 (D.C.1999), the court found the District of Columbia guilty for violating the Eighth Amendment as a matter of law (without a trial) based on its continued maintenance of "a government custom of sexual harassment in the three D.C. correctional facilities" even though there were "existing official policies prohibiting such behavior" (p. 5). The **Newby** case, which was decided after **Women Prisoners**, relied on the fact that the District of Columbia was under an existing court order to "take remedial steps to put an end to, and prevent in the future, the gross abuses of the rights of female prisoners."

In **Newby**, evidence revealed that the DCDC male guards continued to engage in unlawful sexual activity with female inmates just seven months after the district court had ordered changes in prison policies and procedures to remedy such abuse. The evidence of ongoing sexual abuse came to light when an inmate, Jacquelyn Newby, filed a Section 1983 claim against the DCDC alleging that male guards forced the inmates to participate in strip-shows and exotic dancing. Although the **Newby** court acknowledged the DCDC's compliance with the district court's order to implement specific policies and procedures to combat the abuse complained of in **Women Prisoners**, it found that the District of Columbia "did little else to ensure the cessation of guards engaging in proscribed activities with inmates."

In finding, as a matter of law, that the District of Columbia violated the inmates' constitutional rights the court in **Newby** declared that the District had either "endorsed such violative activities or actually participated in them by failing to actively supervise its prison facilities." As a result of the violation of the inmates' rights, the court submitted only the issue of monetary damages to a jury. The court's decision in **Newby** relied heavily on the District of Columbia's failure to take affirmative steps to correct the abuse of inmates despite its awareness of the problem of sexual abuse in its correctional facilities.

Federal courts also acknowledge the importance of taking into account the state prison official's awareness of, and reaction to, allegations of sexual abuse of female inmates by male guards. One example is when inmate Amy Fisher brought a civil suit against the prison officials at Albion in New York State claiming that they did not follow up on her allegations of sexual abuse by male prison guards. **Fisher v. Goord**, 981 F. Supp. 140 (W.D.N.Y.1997). Fisher's motion for a preliminary injunction against the prison officials was denied because the court failed to find Fisher to be a credible witness. In the course of its rulings, however, it detailed many aspects of the correctional administrator's actions that caused the court to find conditions at the Albion prison to be "not right." Evidence was admitted from credible sources indicating that voluntary sexual relations between inmates, and between inmates and staff, were common at Albion and that male correctional officers "grope inmates while frisking." The court specifically stated that the denial of Fisher's motion "should not be viewed as a ringing endorsement of the situation at Albion." In its decision, the court stressed "how important it is for the defendant prison officials to investigate fully and thoroughly these matters and to take immediate and appropriate remedial action, where required."

### Mere Non-Compliance With Internal Policies Not Actionable

While courts will hold prison officials accountable for not responding to inmate allegations of sexual abuse, officials' mere noncompliance with the institution's own policies may not be used as evidence that officials knew of a risk of abuse to inmates. In **Hovater v. Robinson**, 1 F. 3d 1063 (10th Cir.1993), an inmate prevailed at trial by arguing that the institution's escort policy (requiring that a male guard not be permitted to have unsupervised care of a female inmate) was in itself evidence of the institution's knowledge of the risk to female inmates of assault from male correctional officers when left alone together. However, the appellate court overruled the trial court, finding that there was no evidence on the record to support the conclusions that a female inmate is always at risk to her "bodily integrity" when the two are left alone. The court clearly stated that the "mere existence of the policy at issue does not establish an obvious risk that females left alone with male guards are likely to be assaulted" and noted that constitutional violations cannot be established by a reliance on unsupported assumptions.

Similarly, in **Barney v. Pulsipher**, 143 F. 3d 1299 (10th Cir. 1998), female inmates claimed that the correctional institutions policy of "requiring two jailers to be present when female prisoners were removed from their cell... [reflected] ... defendants' understanding that a substantial risk of sexual misconduct to female inmates existed when only one male jailer was present." Again, the court of appeals rejected the argument that an institution's policy alone could be used to prove defendants' knowledge of a substantial risk of harm to inmates in violation of the Eighth Amendment. The court stressed the need for evidence of a risk to inmates if left alone with jailers or evidence of past sexual misconduct by the jailers to prove defendants' knowledge of a substantial risk of harm.

Although courts will not rely on "unsupported assumptions" as proof of evidence of an obvious risk of sexual abuse to inmates, courts have shown a willingness to look outside to expert witnesses to establish evidence supporting inmate claims. In **Jordan v. Gardner**, 986 F. 2d 1521 (9th Cir 1992), female inmates brought a civil suit against the officials at the Washington Corrections Center for Women (WCCW) under Section 1983 after the WCCW implemented a new policy "requiring male guards to conduct random, non-emergency, suspicionless clothed body searches on female prisoners." The District Court found that the WCCW policy violated the inmates' Eighth Amendment rights and issued a permanent injunction enjoining the routine cross-gender pat down. The appellate court, in upholding the district court's decision, discussed at length the testimony presented by psychologists, social workers and others on the "psychological impact of forced submissions' to the male guards." Social science experts played a crucial role in establishing evidence for the inmate sexual abuse claims. The appellate court noted that the female inmates' histories of sexual or physical abuse by men supported the district court's finding that female inmates react differently than male inmates to cross gender searches. Due to this testimony on the impact of

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the "pat-down" searches on female inmates the court found a high probability of harm to some inmates even if the searches are "properly conducted." As a result of the **Jordan** case, the Washington State Correction's policy on "pat-down" searches now requires routine searches of female inmates to be conducted by female officers except in defined cases of an emergency (National Institute of Corrections, 1998.)

Ironically, the Washington Corrections Center for Women instituted the cross gender "pat-down" searches complained of in **Jordan** to avoid potential litigation by female correctional officers who had traditionally conducted all such searches. **Jordan v. Gardner**, 986 F. 2d 1521 (9th Cir 1992). One year prior to the implementation of the cross gender pat-down policy, female guards had filed a grievance against the same gender search policy because the female guards, who were the only ones who could conduct the routine searches, were disturbed during meal breaks to perform these searches. The administration's fear of a lawsuit by female guards may have been based in part on the fact that the female guards could have claimed a violation of the Equal Protection clause, since the Equal Protection clause requires public institutions to treat male and female officers in a like manner when the gender-based groups are similarly situated (Stollman, 1994).

## State Prohibition of Sexual Relations Between Inmates and Corrections Staff

Judicial treatment of the power discrepancy between inmates and correctional officers in civil lawsuits appears to be strongly influenced by the individual state criminal laws regulating sexual relations between guards and inmates. In **Fisher v Goord**, 981 F. Supp. 140 (W.D.N.Y. 1997), the judge specifically noted that, while he agreed that the differential of power between inmate and guard should be considered as a factor in sexual abuse claims of female inmates, he was aware of no case law or statutory authority that an inmate could not consent as a matter of law. He noted that a law making this conduct statutory rape had been enacted by New York after the time frame when the sexual conduct involving Amy Fisher occurred and found this to be an indication that inmates could consent to sexual contact before the law was passed. The judge indicated his agreement with the public policy behind such criminal laws stating that it

> draws a "bright line" between acceptable and unacceptable conduct. Sexual interaction between correction officers and inmates, no matter how voluntary, are totally incompatible with the order and discipline required in a prison setting. Further, the Court is disturbed by the notion that an inmate might feel compelled to perform sexual favors for correction officers in order to be on the officer's "good side." Such quid pro quo behavior is inappropriate, despicable and serves no legitimate penological purpose.

**Fisher v Goord**, 981 F. Supp. 140, 175 (W.D.N.Y. 1997)

*Though prisoner's rights must give way to valid penological concerns, plaintiff's status as an inmate impacts not the least on the minimal standards of privacy and decency in the area of sexual harassment.*

**Freitas v. Ault**, 109 F. 3d 1335 (8th Cir. 1997), supports the conclusion that a government statement that this conduct is prohibited by criminal law and punished at the felony level as a serious crime will positively impact on a court's determination of the seriousness of the underlying conduct. In **Freitas**, a male inmate sued a female correctional officer in a Section 1983 action. The court found that since the sexual behavior was consensual it did not establish an Eighth Amendment claim. However, it is of interest to note that at that time Iowa, where the institution was located, graded such conduct in its criminal code as only an aggravated misdemeanor (U.S. Department of Justice, November 1996). The *de minimis* view of the injury to the male inmate is a reflection of the *de minimis* view of the nature of the crime that the state had identified.

## Conclusion

> Defendants claim that there is no evidence regarding minimal standards of privacy and decency for a woman inmate. The court finds this statement to be fantastic. Though prisoner's rights must give way to valid penological concerns, plaintiff's status as an inmate impacts not the least on the minimal standards of privacy and decency in the area of sexual harassment. [Citations omitted] The court finds that minimal standards of privacy and decency include the right not to be subject to sexual advances, to use the toilet without being observed by members of the opposite sex, and to shower without being observed by members of the opposite sex.

**Galvan v. Carothers**, 855 F. Supp 285, 289 (Alaska,1994)

Despite the efforts of the advocates for female inmate sexual abuse in U. S. correctional facilities remains unabated. Media reports of both civil and criminal pending litigation as well as governmental agency investigations of the abuse of female inmates discloses the vast nature of this continuing violation of human rights.

Civil law suits permit female inmates to maintain control of the legal strategy in the suits rather than having to rely on the abilities and discretionary choices of a public prosecutor. When this control is coupled with the lower standard of burden of proof in civil lawsuits, some of the obstacles to developing successful litigation strategies are removed and the chances of success increased.

Advocates for female inmates should continue to work for state legislation criminalizing this behavior at the felony level as well as for the removal of consent as a defense to these charges. As discussed earlier, the courts use such criminal laws as public policy statements in applying sexual abuse and harassment laws to female inmate lawsuits. Where these criminal laws do not reinforce protection of the female inmate, civil litigation is undermined.

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The most critical area for reform by correctional administrators is the internal grievance procedures. The unduly burdensome provisions of the PLPA, which require an inmate to exhaust the seriously flawed internal grievance procedures before external remedies can be pursued, serve to defeat many inmates before their cases have ever been heard by independent tribunals. Until reforms are instituted, other methods which provide access to the courts may have to be employed. In fact, recent inmate lawsuits have prompted (by settlement or court order) various prison systems to implement new procedures for reporting and responding to allegations of staff-on-inmate sexual abuse (Amnesty International, 1999). For example, the Federal Bureau of Prisons now provides the Inspector General's telephone number to all inmates so that sexual abuse can be reported to an office outside the prison itself (Amnesty International, 1999). The District of Columbia Department of Corrections now provides a 24-hour hotline to report, in confidence, staff-on-inmate abuse (General Accounting Office, 1999). These innovative alternative approaches have started to improve female inmate access to the justice system.

Improved documentation of inmate allegations and the official follow-up, including imposition of employee sanctions, and initiation of criminal prosecution, where appropriate, would serve the dual purpose of improving the integrity of the internal grievance procedures in the eyes of the aggrieved inmate and changing the cultural tolerance of this behavior. Inmate complaints should be confidential. Claims of sexual abuse should be investigated immediately, before evidence is lost, as they are when investigated in a free society. Similarly, investigators of these complaints should be appropriately trained in evidence gathering and the interviewing techniques that are unique to this type of crime. Hearing officers should be external to the correctional institution and should also be trained to understand how sexual abuse impacts the victim.

If all of these reforms are instituted then, perhaps, the historical problem of sexual abuse and institutional victimization of female inmates may be abated. It is only through such concerted efforts that any long lasting changes will be effected. Sexual abuse should not be accepted as just one of those risks that comes with incarceration.

*Resources*

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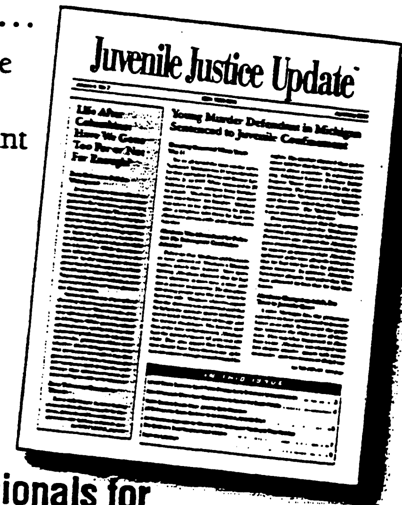


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How is this possible in an institution which, by its very nature, endeavors to control the women's lives in almost every detail?"

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