

Winter 2014

Commentary: Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration

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Recommended Citation

David W. Frank, *Commentary: Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 *BERKELEY J. GENDER L. & JUST.* (2014).

Available at: <http://scholarship.law.berkeley.edu/bgj/vol29/iss1/1>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38M03XW7R>

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Commentary

Abandoned:

Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration

David W. Frank[†]

*“It may mean a plundered girlhood and abandoned womanhood,
that the vengeance of the state may be appeased.”*

– Clarence Darrow¹

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1. CLARENCE S. DARROW, RESIST NOT EVIL 123 (1902) (Darrow argues in this anarcho-pacifist work that prisons, along with all other forms of state violence, exist only to satisfy the desire of the powerful to punish and exploit the weak).

I. INTRODUCTION

The mass sexual victimization of women in United States female prisons continues. Presidents reiterate resolutions, courts heighten condemnations, and leaders modify methods for redress and control. All fail. The United States federal government now proposes standards developed over the past decade that it promises will, this time, finally stop the abuse.² While the U.S. developed these standards, a popular movement in the United Kingdom, concerned with the conditions of its own women's prisons, arose to suggest an alternate proposal—the abolition of female incarceration.³ Proponents argued that support programs and community care centers are better and more effective alternatives.⁴ This article argues that these alternatives are the best solution to end the sexual victimization of prisoners confined in female facilities in the U.S., as well as a pragmatic first step toward implementing prison abolition for all.

The sexual victimization of prisoners in female prisons is inherent to the current U.S. penal system. A U.S. Department of Justice investigation released in 2013 confirmed reports of sexual abuse at Julia Tutwiler Prison for Women in Alabama: abuse that is mirrored in other female facilities.⁵ Sexual abuse at Tutwiler occurred despite structural protections like court injunctions,⁶ express constitutional rights,⁷ federal legislation directed at states,⁸ and administrative oversight specifically addressing prison rape.⁹ The Alabama Department of

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2. See *infra* Part II (explaining why the Prison Rape Elimination Act of 2003 and its 2012 administrative rules are unable to prevent the rampant sexual abuse of women endemic to female prisons).
 3. See *infra* Part III (showing the U.K. campaigns of reform groups to abolish female prisons, and the willingness of the government to at least consider such ideas following scandals over issues such as mistreatment and inmate suicide).
 4. *Id.*
 5. See SUSAN POOLE, U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF CORRECTIONS, ONSITE ASSESSMENT RE: CROSS-GENDER SUPERVISION IN CORRECTIONAL FACILITIES (2012), available at <http://www.eji.org/files/1-25-13%20NIC%20Tutwiler%20Report.pdf>.
 6. See JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 3, app. tbl.6 (2008), available at <http://www.bjs.gov/content/pub/pdf/csfcf05.pdf> (showing that almost fourteen percent of prisoners and inmates that are incarcerated in a state prison or local jail are under a court order).
 7. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). See also *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that "a prison official may be held liable under the Eighth Amendment for denying human conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.").
 8. See Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2006).
 9. See Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012) (U.S. Department of Justice administrative rules promulgated in accordance with the Prison Rape Elimination Act of 2003).

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Corrections vowed to take measures to make its prisons safer,¹⁰ the state prosecuted offending staff,¹¹ judges monitored inmates' health and safety,¹² and federal courts heard, though generally rejected,¹³ years of complaints from the women at Tutwiler alleging sexual victimization, retaliation, physical assault, and unjust conditions.¹⁴ Despite federal¹⁵ and state action across the nation,¹⁶ tens of thou-

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10. *See Officials Call for Reform at Tutwiler Prison*, EQUAL JUSTICE INITIATIVE (May 30, 2012), <http://eji.org/node/638> ("I'm going to look at a variety of things to make sure our policy is being carried out, and see if there's a way to improve the process, environment or climate.").
 11. Kala Kachmar, *Report: Staff Abused Dozens*, MONTGOMERY ADVERTISER (May 30, 2012), http://www.eji.org/files/Report-Staff-abused-dozens_0.pdf (explaining that since 2009, six employees of Tutwiler were convicted of crimes related to sexual misconduct).
 12. *See Laube v. Campbell*, 333 F. Supp. 2d 1234 (M.D. Ala. 2004) (approving settlement agreements arising from claims of prisoners at Tutwiler and two other female state prisons who alleged that their basic human needs were denied and that their personal safety was at risk due to overcrowding and inadequate medical services, visitation, maintenance, recreation, and educational programs).
 13. Courts apply the "deliberate indifference" standard, which generally sets a high threshold for prison officials' cruel and unusual punishment in violation of prisoners' Eighth Amendment rights. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (deciding that a prison official acts with "deliberate indifference" when she is "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists," and she draws such an inference, but "disregards [the] excessive risk").
 14. *See Washington v. Albright*, 814 F. Supp. 2d 1317 (M.D. Ala. 2011) (holding that prisoner's allegations that she was raped and impregnated by correctional officer were insufficient to show that warden and corrections commissioner were deliberately indifferent, even though prisoner argued that abuse of prisoners was well-known); *Morton v. Allen*, No. 2:08CV303-MEF, 2011 WL 2457312 (M.D. Ala. May 23, 2011), *adopted by* No. 2:08CV303-MEF, 2011 WL 2456962 (M.D. Ala. June 20, 2011) (finding that warden and former corrections commissioner were not deliberately indifferent toward actions of officer who choked prisoner in the shower); *Dixon v. Sutton*, No. 2:08-CV-745-WC, 2011 WL 1770295 (M.D. Ala. May 9, 2011) (finding corrections commissioner and medical contractor not deliberately indifferent to prisoner's safety when contracted nurse forced her to perform oral sex on him); *Johnson v. Albright*, No. 2:06-CV-546-WKW, 2009 WL 4067220 (M.D. Ala. Nov. 20, 2009) (dismissing prisoner's claims that the prison retaliated against her by placing her in isolation, denying her phone calls, and interfering with her use of legal documents); *Fretwell v. Deese*, No. 2:04CV878-WHA, 2006 WL 2080022 (M.D. Ala. July 25, 2006) (holding that the warden was not deliberately indifferent toward prisoner's medical treatment after officers broke her rib); *but cf. Henderson v. Thomas*, 891 F. Supp. 2d 1296 (M.D. Ala. 2012) (finding that HIV-positive prisoners' complaint against Alabama Department of Corrections alleging that their segregation from the general population violated the Americans with Disabilities Act was sufficient to overcome motion to dismiss), *appeal dismissed per stipulation*, 2013 WL 5493197 (M.D. Ala. Sept. 30, 2013) (approving settlement order enforcing desegregation).
 15. *See Prison Rape Elimination Act of 2003*, 42 U.S.C. §§ 15601-15609 (2006); *Prison Rape Elimination Act National Standards*, 28 C.F.R. § 115 (2012).
 16. *See Melissa C. Loomis*, *End Silence: The Project on Addressing Prison Rape at the Washington College of Law*, Administrative Investigations and Human Resources, State Laws (Dec. 2012), http://www.wcl.american.edu/endsilence/documents/Module3_StateLaws_FINAL.pdf (showing most states make sexual abuse of prisoners a felony and in least 24 states consent is not a defense to sexual misconduct with a prisoner); *The Project on Addressing Prison Rape at the Washington College of Law*, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody* (2009), <http://www.wcl.american.edu/endsilence/documents/50StateSurveyofSSMLawsFINAL2009Update.pdf> (showing most states prohibit sex abuse of inmates in jails and lock-ups, in at least 22 states correctional staff are mandatory reporters, and that almost all states have gen-

sands of female prisoners in the U.S.¹⁷ continue to endure sexual abuse in prisons.¹⁸

Coupled with a previous investigation by the non-profit legal group Equal Justice Initiative, the Tutwiler report detailed the range of sexual abuses suffered by nearly one out of six incarcerated women: rape, assault, harassment, and forced abortions.¹⁹ That these “atrocities and inhuman conditions of prison life”²⁰ are permitted in the U.S., the greatest jailer of women on earth,²¹ shows the inability of traditional reforms to prevent the rule of “despotic”²² administrations.

The problems at Tutwiler²³ portray the institutional abuse of daily life inside a women’s prison.²⁴ Security cameras did not work.²⁵ Toilets lacked privacy.²⁶ Grievance procedures were absent.²⁷ Women “did not feel physically or sexually safe.”²⁸ Male staff observed them shower.²⁹ Guards not only assaulted

eral mandatory reporting of abuse of vulnerable incarcerated adults).

17. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 7 tbl.7 (2012), *available at* <http://bjs.gov/content/pub/pdf/p11.pdf>; TODD D. MINTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2011 – STATISTICAL TABLES 6 tbl.6 (2012), *available at* <http://www.bjs.gov/content/pub/pdf/jim11st.pdf>.
18. ALLEN J. BECK & CANDACE JOHNSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, at 15 (2012), *available at* <http://bjs.gov/content/pub/pdf/svrfsp08.pdf>.
19. *See* EQUAL JUSTICE INITIATIVE, *supra* note 10 (finding that between 2004 and 2011 staff members were raping, sexually assaulting, and sexually harassing prisoners; that sexual assault was under-reported; that prisoners were punished for complaints; and that male staff members’ ability to view women change, shower, and use the restroom created an unnecessary risk of abuse).
20. *See* United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting) (arguing that prisoners who suffered physical abuse and danger should be allowed to present evidence of duress in defense of their escape even though, as the majority argued, escapees did not return to prison immediately after the duress had lost its “coercive force”).
21. *See* ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD FEMALE IMPRISONMENT LIST 1 (2012), *available at* http://www.prisonstudies.org/images/news_events/wfil2ndedition.pdf [hereinafter WORLD FEMALE IMPRISONMENT LIST]; INSTITUTE ON WOMEN & CRIMINAL JUSTICE, HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977-2004 (2006), *available at* <http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf> (showing the incarceration level of U.S. women increased 757% during the modern drug war).
22. *See* POOLE, *supra* note 5, at 11.
23. *See* POOLE, *supra* note 5.
24. *See generally*, POOLE, *supra* note 5; *see also* EQUAL JUSTICE INITIATIVE, *supra* note 10.
25. *See* POOLE, *supra* note 5, at 8; *see also* Tim Lockette, *Prison Cameras at Tutwiler Still Months Away; No Progress on Calhoun County Facility to Relieve Women’s Prison Population*, ANNISTON STAR, Aug. 27, 2013, http://www.thepiedmontjournal.com/view/full_story/23461981/article-Prison-cameras-at-Tutwiler-still-months-away—No-progress-on-Calhoun-County-facility-to-relieve-women-s-prison-population?instance=news_right (reporting that Alabama Department of Corrections Commissioner Kim Thomas does not expect the installation of new cameras in Tutwiler to be completed until September 2014).
26. *See* POOLE, *supra* note 5, at 9.
27. *See id.* at 13-15.
28. *Id.* at 20.
29. *Id.* at 20.

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the women, but served as “look-outs” during assaults by other staff.”³⁰ According to the Justice Department, “they are not given tampons, [sic] therefore, when they are showering together women menstruating will leak on to the shower floor, creating a sanitation/health issue for other inmates.”³¹ The pervasiveness of abuse confounded federal investigators, and they acknowledged that “[i]t may seem difficult to understand why staff cannot understand the simple concept ‘Don’t have sex with inmates.’”³² The prison remains under investigation.³³ Further, despite official assurances of reform,³⁴ scandals over the physical and sexual abuse of prisoners have since surfaced at three other Alabama state prisons.³⁵

Fortunately, a criminal justice system’s effectiveness does not depend upon confining women in environments that facilitate their sexual violation.³⁶ During the early twenty-first century, while the U.S. resolved to take administrative measures to mitigate the problem,³⁷ the United Kingdom openly considered a proposal that by its nature would eliminate abuse—community care programs as alternatives to female prisons.³⁸ U.K. reformers and officials generally grounded

30. See EQUAL JUSTICE INITIATIVE, *supra* note 10, at 1.

31. POOLE, *supra* note 5, at 20.

32. *Id.* at 27.

33. See Mike Cason, *Gov. Robert Bentley Not Surprised at DOJ’s Tutwiler Probe, Says State Will Treat Prisoners Humanely*, ALABAMA MEDIA GROUP (April 20, 2013, 8:01 AM), http://blog.al.com/wire/print.html?entry=/2013/04/gov_robert_bentley_not_surpris.html.

34. See Mike Cason, *Prison Commissioner Kim Thomas Says Tutwiler ‘Safer and Healthier Facility,’* ALABAMA MEDIA GROUP (Aug. 27, 2013, 9:56 PM), http://blog.al.com/wire/2013/08/prison_commissioner_kim_thomas.html (“[Alabama state] [l]egislators asked few questions today about Tutwiler and did not question [Alabama Prison Commissioner Kim] Thomas about more recent allegations of officer-on-inmate abuse at Elmore, Bibb and Donaldson correctional facilities. Much of today’s [Joint Legislative Prison Committee] meeting was about coming up with a plan to expand community corrections programs.”).

35. At Elmore Correctional Facility, “a group of officers have been taking inmates into isolated areas of the prison where they are handcuffed and stripped naked and then severely beaten.” *EJI Finds Severe Physical and Sexual Abuse and Criminal Misconduct by Correctional Officers at Three Alabama Prisons*, EQUAL JUSTICE INITIATIVE (July 9, 2013), <http://eji.org/node/789>. At Donaldson Correctional Facility and Bibb Correctional Facility, “male correctional officers forced young male inmates to perform sex acts and threatened to file disciplinary charges against them if they refused or reported the abuse.” *Id.* See also Mike Cason, *Prison Commissioner Says About 10 Use of Force Incidents at Elmore Prison Under Review*, Alabama Media Group (July 13, 2013), [available at http://blog.al.com/wire/2013/07/prison_commissioner_says_about.html](http://blog.al.com/wire/2013/07/prison_commissioner_says_about.html).

36. See DARROW, *supra* note 1, at 92 (“If the minds and energies of men were directed toward curing crime instead of brutally assaulting the victims of society, some progress might be made.”).

37. Memorandum on Implementing the Prison Rape Elimination Act of 2003, 2012 Daily Comp. Pres. Doc. 1 (May 17, 2012) (“To advance the goals of PREA, we must ensure that all agencies that operate confinement facilities adopt high standards to prevent, detect, and respond to sexual abuse. In addition to adopting such standards, the success of PREA in combating sexual abuse in confinement facilities will depend on effective agency and facility leadership and the development of an agency culture that prioritizes efforts to combat sexual abuse.”).

38. See *e.g.*, PRISON REFORM TRUST, *REFORMING WOMEN’S JUSTICE* (2011), [available at http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women's%20Justice%20Taskforce%20Report.pdf](http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women's%20Justice%20Taskforce%20Report.pdf).

the proposal in concerns about abuse as well as arguments relating to governmental efficiency and cost concerns.³⁹

Closing female prisons is also a pragmatic first step toward ending the sexual victimization of all prisoners through the abolition of all prisons. The same arguments for female prison abolition apply to prisons as a whole. Namely, given that the U.S. cannot end prisoner sexual victimization, and that the U.S. is placing prisoners at risk when non-punitive alternatives to prison exist,⁴⁰ prisons should be abolished in favor of alternatives because no prisoner deserves to be victimized, sexually or otherwise, for the sake of punishment.⁴¹

The proposal this article advocates only affects prisoners confined in female facilities; it does not apply to men, trans women, and juveniles held in non-female facilities. This article argues that the abolition of female prisons is one way to address the suffering of one group of prisoners and that the abolition of female prisons could eventually end the confinement of all prisoners.

Because the U.S. is unable to prevent widespread sexual violations of incarcerated women, it should apply the prescriptions of a recent U.K. female prison abolitionist movement as the most effective and humane solution to the problem. Part I of this article examines the mass incarceration, composition, and sexual victimization of U.S. female prisoners. Part II evaluates the most recent attempt to stop the sexual victimization of U.S. prisoners under the Prison Rape Elimination Act. Part III presents the U.K. abolitionist solution and the small, though notable, consensus of support that developed around it. Part IV contends that, because neither the Prison Rape Elimination Act nor any previous law has adequately protected prisoners from sexual abuse, the incarceration of women is unconscionable when adequate prison alternatives of support programs and community care are available. This Part also argues against alternatives rooted in retaliation and violence. The article concludes with hope: it argues that the best response to chaotic brutality is not calculated brutality, but humanity.⁴²

39. *See id.* at 1 (“Over the last 15 years, there has been a 114% increase in women’s prison numbers. Most women serve short sentences for non-violent crime and for those serving less than twelve months, almost two-thirds are reconvicted within a year of release. This approach has led to pressure on budgets and ignores the social impact of women’s imprisonment. There are, therefore, sound social and economic reasons to reform women’s justice.”).

40. *See DARROW, supra* note 1, at 117-18 (“In no theory of the law is compensation, or recompense, or making good, any part of punishment. If taking the life of the prisoner could bring to life the victim whom he killed there might be some apparent excuse for the punishment of death. If imprisoning in the penitentiary in any way retrieved a wrong or made up a loss, a prison might be tolerated, and some relation might be shown between punishment and crime.”).

41. *See id.* at 78-79 (“From the dawn of civilization an endless procession of weak and helpless victims, handcuffed, despised and outlawed, have been marching up to the prison doors and still the procession comes and goes. Time does not stay nor punishment make it less. In fact the older the community and the better settled and undisturbed its life the greater the number of these unfortunates whom, for some mysterious reason, the infinite has decreed a life of shame and a death of ignominy and dishonor.”).

42. This article is a brief argument in favor of a prison abolitionist solution to the sexual victimization of U.S. female prisoners and as a call for a movement toward the end of incarceration.

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II. VICTIMS OF U.S. PRISONS

Female prisons offer a particular opportunity for reform as a discrete unit within the sprawling U.S. carceral state. The segregated facilities account for a small segment of the overall system⁴³ and confine prisoners who are perceived as less dangerous or as better candidates for rehabilitation than other prisoners.⁴⁴ Unfortunately, women in female prisons face a greater risk of sexual abuse than the high risk already experienced by other prisoners.⁴⁵ The abuse of these women is neither more nor less objectionable than that perpetrated against others, and abolishing female prisons presents a strategic opportunity to begin the abolition of all prisons.

A. Mass Incarceration's Offense

The United States has the highest incarceration rate on earth.⁴⁶ It jails over 2.2 million human beings—more than any other nation⁴⁷—in its prisons, jails, and detention centers.⁴⁸ Almost 7 million people, nearly 3 percent of the U.S. population, are under some form of correctional system control.⁴⁹

More women are imprisoned in the nation than anywhere else in the

tion. The argument is not a comprehensive review of the literature on U.S. confinement practices, abuse, and related litigation. It is not a close examination of the drug war's link to mass incarceration, nor the U.S. Supreme Court's conservative jurisprudence, nor the British penal system, nor the political contradictions of Clarence Darrow.

43. *See infra* Part I.A.

44. In some instances, a perverse sort of rehabilitation is forced upon women prisoners through sexual assault by prison guards. *See* Heidi Lee Cain, *Women Confined by Prison Bars and Male Images* 18 TEX. J. WOMEN & L. 103, 117-18 (2008) (“Through various incentives and private and public punishments, law forces women into a domestic and maternal role. The dominant group equates femininity with submission. The women who have defied male hegemony by violating the law have thus defied their natural and legally mandated feminine roles. ‘Defiant’ women are considered mentally inadequate for rejecting the feminine role. The violation of the male norm thus requires retraining through the sexual exploits of the male guards in order to re-instill womanhood in these defiant females. Additionally, what is manifested as a sexual violation against the criminal female is actually the normal sexual practice of materializing these women who have rejected the legally mandated role. The dark shadow of female inmate sexual abuse is not unknown or ignored. Rather, the state approves and encourages this abuse as a means to force women who have challenged the male power structure back to their ‘naturally’ dominated gender role.”) (citation omitted).

45. *See infra* Part I.B.

46. ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (2011), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>. [hereinafter WORLD PRISON POPULATION LIST].

47. *Id.* at 2-6.

48. *Id.* at 2-6. *See generally* CARSON & SABOL, *supra* note 17 (collecting U.S. Bureau of Justice Statistics reports on federal prison, state prison, and jail populations).

49. LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011 1 (2012), available at <http://bjs.gov/content/pub/pdf/cpus11.pdf>. *See also* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012) (explaining the detrimental effects of non-penal sentences such as probation that are given in lieu of incarceration).

world.⁵⁰ Roughly 190,000 women are incarcerated⁵¹, which represents about six percent of the U.S. prison population⁵². The majority of these women are sentenced for non-violent drug or property crimes.⁵³ In the minority of instances where women are arrested for a violent crime, it is most often for simple assault.⁵⁴ Many incarcerated women have faced difficult family, health, or economic circumstances.⁵⁵ Over half of the women who enter state prisons are dependent on drugs.⁵⁶ Women are less likely than the average male prisoner to be judged a danger to the public.⁵⁷

The U.S. dramatically expanded its female prison population in the late twentieth and early twenty-first centuries as it intensified prosecution of non-violent drug offenders.⁵⁸ The female prison population rose more than 750 percent during that time, nearly twice the rate of the male prison population,⁵⁹ and brought the incarceration rate from 10 women per 100,000 to 64 women per 100,000.⁶⁰ Such enforcement of drug prohibition⁶¹ crowded offenders into pris-

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50. WORLD FEMALE IMPRISONMENT LIST, *supra* note 21, at 1, 3.
51. About 100,000 female prisoners are confined in federal or state prison and another 90,000 are confined in local jails and other detention facilities. *See* CARSON & SABOL, *supra* note 17 (collecting U.S. Bureau of Justice Statistics reports on federal prison, state prison, and jail populations); Federal Bureau of Prisons, Institutions Housing Female Offenders, *available at* http://www.bop.gov/locations/female_facilities.jsp (listing the 27 federal facilities and units designated for women); JAMES J. STEPHAN & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000 tbls.1, 10 (2003), *available at* <http://bjs.gov/content/pub/pdf/csfcf00.pdf> (identifying the 381 state facilities designated for women).
52. *See* CARSON & SABOL, *supra* note 17, at 9.
53. *Id.* *See generally* DARROW, *supra* note 1, at 131 (“Most of the laws governing the taking and obtaining of property, which constitute the great burden of our penal code, are arbitrary acts, whose sole purpose is to keep the great mass of property in the hands of the rulers and exploiters and to send to jail those who help themselves and who have no other means within their power to sustain their lives.”).
54. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ARREST IN THE UNITED STATES, 1990-2010 2 tbl.1 (2012), *available at* <http://bjs.gov/content/pub/pdf/aus9010.pdf>.
55. *See* JUNE H. CICERO & ELAINE T. DECOSTANZO, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRECTIONS, SENTENCING WOMEN OFFENDERS: A TRAINING CURRICULUM FOR JUDGES 33-35 (2000).
56. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 7 tbl.6 (2007), *available at* <http://bjs.gov/content/pub/pdf/dudsfp04.pdf>.
57. *See* CICERO & DECOSTANZO, *supra* note 55, at 16 (noting that women offenders generally differ from male offenders in that they are far less likely to be convicted of violent crimes and less likely to recidivate for violent crimes).
58. *See infra* Part I.B.
59. INST. ON WOMEN & CRIMINAL JUSTICE, *supra* note 21, at 9.
60. *Id.* at 31.
61. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ARREST IN THE UNITED STATES, 1980-2009 1 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/aus8009.pdf> (showing that during this time the arrest rate for adult drug possession or use grew 138 percent, the arrest rate for drug sale or manufacture grew 77 percent, and the arrest rate for violent crime, particularly murder, decreased overall).

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ons even though the violent and property crime rate fell sharply throughout the period.⁶² As the National Prison Rape Elimination Commission Report acknowledged, the emergence of mass incarceration was due “more to legislative changes than to increases in crime rates,”⁶³ imprisoning many through harsher drug laws and mandatory minimum sentences.⁶⁴

The U.S. maintains a severe prison policy, and the size of the population is unrelated to threat of real danger. Accordingly, the government must begin to reevaluate its policy by questioning why it places female prisoners in great danger of sexual victimization when alternatives to mass incarceration exist.

B. The Terror of Sexual Victimization

A few months before the U.S. Department of Justice’s 2012 inspection of Julia Tutwiler Prison for Women,⁶⁵ it released the first national survey to comprehensively document the extent of sexual abuse in U.S. prisons.⁶⁶ In this report, the Department of Justice relied on reports by former prisoners rather than reports by prison officials⁶⁷ or inmates still in prison—a departure from the methods used in previous national surveys.⁶⁸ The 2012 survey gave a clear picture of what many had suspected:⁶⁹ Prisoners commonly suffer “brutality [that] is the equivalent of torture.”⁷⁰

Within the U.S. system of mass incarceration, nearly one out of six women and close to one out of ten of all prisoners has been sexually victimized,⁷¹ ac-

62. *Id.*; see also *Crime in the United States*, FED. BUREAU OF INVESTIGATION, tbl.1, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1/> (last visited Oct. 18, 2013) (showing that between 1992–2011, the violent crime rate dropped by nearly half and the property crime rate also dropped significantly).

63. NATIONAL PRISON RAPE ELIMINATION COMMISSION, at 44.

64. *Id.* See generally DARROW, *supra* note 1, at 155 (“We look back with horror at the criminal courts of England, of Spain, of Italy, even upon our own Puritan judges who sentenced witches to death. These judges were doubtless as intelligent as our own. Their brutal, cruel judgments did not grow from a wicked perverted heart, but from the fact that they were passing judgment on their fellow man [sic]. These unjust judgments are the fruit of the cruel system of force and barbarism which clothes one man with the authority and power to condemn his fellow.”).

65. POOLE, *supra* note 5, at 2.

66. BECK & JOHNSON, *supra* note 18, at 7.

67. See, e.g., ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006 1 (2007), available at <http://bjs.gov/content/pub/pdf/svrca06.pdf>.

68. See, e.g., ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09 6 (2010), available at <http://bjs.gov/content/pub/pdf/svpjri0809.pdf>.

69. See Christopher Hensley & Richard Tewksbury, *Inmate-to-Inmate Prison Sexuality: A Review of Empirical Studies*, 3 TRAUMA, VIOLENCE, & ABUSE 226, 227 (2002).

70. Bailey, 444 U.S. at 423.

71. Sexual victimization is defined as all “types of unwanted sexual activity with other inmates . . . abusive sexual contacts with other inmates, and both willing and unwilling sexual activity with staff.” BECK & JOHNSON, *supra* note 18, at 13.

ording to the Justice Department.⁷² Anal tearing, vaginal tearing, chipped teeth, and lost teeth are the most common injuries experienced by former prisoners who report sexual victimization.⁷³ Among former prisoners who reported unwilling sexual activity with staff, approximately one quarter were coerced into such activity through blackmails or bribes by staff, and nearly one half were coerced through offers of favors or special privileges by staff.⁷⁴ Sexual victimization by staff most often occurs in a closet, office, or locked room, while inmate-on-inmate assault, which constitutes the majority of victimization, most often occurs in the victim's cell.⁷⁵ A Human Rights Watch report affirmed that "being a woman prisoner in a U.S. state prison can be a terrifying experience."⁷⁶ Further, the likelihood of female prisoner sexual victimization, according to the DOJ survey, generally increases in accordance with the length of prison sentences and level of confinement.⁷⁷ The majority of sexual abuse occurs in prisons, a much smaller percentage occurs in local jails, and almost none occurs at post-release community treatment facilities.⁷⁸ Female sexual victimization, accordingly, is highest in maximum-security facilities like Tutwiler and lowest in facilities that allow daytime release.⁷⁹

A prison's ability to control, confine, and inspect a prisoner necessarily defines its ability to abuse her body.⁸⁰ Efforts toward reform that intensify or expand incarceration only recast the problem.⁸¹ If prison is the total governance of the prisoner, greater control of physical bodies will not reduce the instance of a problem shown to increase with a punishment's severity. Unlike the U.S. Prison Rape Elimination Act, the U.K proposal would by its nature end sexual abuse in female prisons and drive incarceration and punishment into obsolescence.

72. *Id.* at 15 tbl.6.

73. *Id.* at 12 tbl.4.

74. *Id.* at 13.

75. *Id.* at 14 (reporting that of the 16.1 percent of female former prisoners who reported sexual victimization, 13.7 percent reported that the perpetrator was another inmate and 4.4 percent reported that the perpetrator was a staff member); *Id.* at 15 tbl.6.

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

77. BECK & JOHNSON, *supra* note 18, at 6.

78. *Id.* at 8 tbl.1.

79. *See Id.* at 6.

80. *See* Ristroph, *Prison and Punishment: Sexual Punishments*, at 160 ("All of a prisoner's outwardly visible being, including any outward manifestations of sexuality, is subject to substantial scrutiny and control by the institution and its inhabitants. All sexual activity, coerced or not, is difficult to conceal from other inmates even on the limited occasions that it is successfully concealed from guards. Even aside from sexual interaction or masturbation, the general absence of bodily privacy contributes to the sexualized atmosphere. Much of the time, prisoners' bodily functions, including toilet use, showering, and hygiene are visible to corrections officers as well as other prisoners. Not only are daily bodily functions rendered public, but prison security measures often subject inmates to intrusive examinations such as body cavity searches.").

81. *See generally* DARROW, *supra* note 1, at 116 ("Rulers have invented and used all sorts of punishments and constantly alternated from one to the other; each one in use seeming to be inferior to some one hitherto untried.").

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III. PREA'S FAILURE

The U.S. government's current solution to the mass sexual victimization of incarcerated women, the Prison Rape Elimination Act, attempts to cauterize the carceral apparatus at its weakest points while fortifying the sentence of confinement.⁸² It revisits past failed controls in hopes of success in elaboration. It directs prisoners to civil remedies that have never before been systemically effective. It provides promises that may fail without consequence. It is an attempt, at best, to rule more carefully those it rules in totality. Compare this U.S. solution with the U.K. abolitionist model.⁸³ The latter replaces punishment with support and surrounds those in need with community. As Clarence Darrow observed in a work advocating abolition, *Resist Not Evil*, "[a]ll communities and states are in reality ashamed of jails and penal institutions of whatever kind. Instinctively they seem to understand that these are a reflection on the state."⁸⁴ As the enactment of the Prison Rape Elimination Act reveals, the U.S. is unwilling to abandon punishment despite the mass abuse it unleashes on women.

A. The Scope of PREA

The U.S. federal government's solution to mass sexual victimization in female prisons, the Prison Rape Elimination Act ("PREA"),⁸⁵ was originally less ambitiously titled the Prison Rape Reduction Act,⁸⁶ before former President George W. Bush signed it into law in 2003.⁸⁷ PREA promises to establish a zero-tolerance policy for sexual abuse and make the issue a "top priority" of the federal government.⁸⁸ PREA offers few new reforms,⁸⁹ as the Act follows statutes, court orders, and causes of action that provided similar protections and made similar promises without success.⁹⁰

Through PREA, the federal government plans to stop abuse by the use of protocols, inspections, and threats of funding cuts.⁹¹ It mandates data collection, training, and education on the issue,⁹² and it sets up a commission to develop recommendations for administrative rules.⁹³ These rules, issued by the U.S. De-

82. See *infra* Part II.

83. See *infra* Part III.

84. DARROW, *supra* note 1, at 75.

85. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2006).

86. H.R. REP. NO. 108-219, at 1 (2003).

87. Presidential Statement on Signing the Prison Rape Elimination Act of 2003, 2 PUB. PAPERS 1091 (Sept. 4, 2003).

88. 42 U.S.C. § 15602.

89. See *supra* Part I.B.

90. See *infra* Part II.B.

91. See 42 U.S.C. §§ 15601-09; National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37106-37231 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

92. *Id.* at §§ 15603-04.

93. *Id.* at §§ 15606-08.

partment of Justice,⁹⁴ set out planning, training, investigating, reporting, and auditing standards for both prisons and jails.⁹⁵

The Act does offer a few provisions that may at least give greater publicity to the problem of prisoner victimization. First, a mandatory annual statistical review of prison rape in the U.S. may generate regular media attention and discussions on reform.⁹⁶ The provision has already produced a first-of-its-kind survey showing that nearly one in ten prisoners have been sexually victimized while confined.⁹⁷ Second, federal administrative rules promulgated under the Act require prisons to show that they have internal policies and procedures to address complaints of sexual abuse.⁹⁸ As a result, prisons will have to demonstrate they have abuse-prevention standards in place for training and educating employees, disciplining and reporting misconduct, collecting evidence and data, and screening prisoners for risk of abuse.⁹⁹ Third, the Act contains provisions that require segregation of minors from the adult population,¹⁰⁰ prohibit cross-gender strip searches (“except in exigent circumstances”), and prevent cross-gender viewing restroom use (“except in exigent circumstances or when such viewing is incidental to routine cell checks.”).¹⁰¹ Finally, the rules prevent physical searches for the specific purpose of inquiring into the genital status of transgender or intersex individuals.¹⁰²

However, public support for addressing sexual abuse in prisons, as well as the integrity of the auditing process,¹⁰³ is already in question.¹⁰⁴ The U.S. Department of Justice noted the public’s ambivalence to the issue, commenting in the National Standards to Prevent, Detect, and Respond to Prison Rape that:

For too long, incidents of sexual abuse against incarcerated persons have not been taken as seriously as sexual abuse outside prison walls. In popular culture, prison rape is often the subject of jokes; in public discourse, it has been at times dismissed by some as an inevitable — or even deserved — consequence of criminality.¹⁰⁵

Additionally, the main auditor for the process is scheduled to be the American Correctional Association, the world’s largest membership organization of

94. *Id.* at § 15607.

95. Prison Rape Elimination Act National Standards, 28 C.F.R. §§ 115.5-115.93 (2012).

96. 42 U.S.C. § 15603.

97. BECK & JOHNSON, *supra* note 18, at 7-8.

98. 28 C.F.R. §§ 115.401-115.501 (outlining auditing and state compliance standards).

99. 28 C.F.R. §§ 115.11-98.

100. 28 C.F.R. § 115.14.

101. 28 C.F.R. § 115.15(a), (d).

102. 28 C.F.R. § 115.15(e).

103. For a description of the auditing process, *see* 28 C.F.R. §§ 115.93, 115.401-405.

104. Joaquin Sapien, *In Effort to End Prison Rape, Questions About a Monitor’s Independence*, PROPUBLICA (Aug. 30, 2013, 7:57 AM), <http://www.propublica.org/article/in-effort-to-end-prison-rape-questions-about-a-monitors-independence>.

105. 77 Fed. Reg. at 37106.

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prison professionals.¹⁰⁶

Further, PREA fails to depart from past attempted solutions and does not contain any significant new initiatives to end the sexual victimization of incarcerated women in the country.¹⁰⁷ In fact, the administrative rules implementing PREA candidly acknowledge it may have no measurable effect whatsoever.¹⁰⁸ It is a policy that is not “outcome-based”¹⁰⁹ and “compliance with its standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse.”¹¹⁰ The rules go so far as to assign responsibility for reform to the very prisons and bureaucracies supposedly being regulated. As the Department of Justice acknowledges, “The success of the PREA standards in combating sexual abuse in confinement facilities will depend on effective agency and facility leadership . . . [which] cannot, of course, be directly mandated by rule.”¹¹¹

PREA is not simply a law without teeth, but one without stakes. It acknowledges that it cannot mandate compliance, and, even if it could, compliance would have an immeasurable effect. It also acknowledges that it does not guarantee fundamental protections and abuses may continue unabated no matter what is done under the Act. PREA is not legislation that reasonably guarantees the protection of women in prison.

B. Ineffectiveness of PREA and Its Predecessors

PREA is not only unlikely to abate sexual abuse in female prisons, but could also compound the problem by simultaneously expanding the penal system while teeing up hopes for relief in a bureaucracy unable to effectively respond to the problem. Prison and jail expansions, in fact, commonly follow prison scandals in the guise of penal reform.¹¹² Unsurprisingly, one of PREA’s stated purposes is to increase the efficiency of federal funding for prison construction,¹¹³

106. *Id.*; AMERICAN CORRECTIONAL ASSOCIATION, <http://www.aca.org/> (last visited Nov. 5, 2013).

107. *See id.*

108. *See* 77 Fed. Reg. at 37107 (“Notably, the standards are generally not outcome-based, but rather . . . generally aim to inculcate policies and procedures that will reduce and ameliorate bad outcomes, recognizing that one possible consequence of improved performance is that evidence of more incidents will come to light.”).

109. *Id.*

110. *Id.*

111. *Id.*

112. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 562-63 (2006) (noting that since prison reform lawsuits became active in the 1970s, “[p]rison and jail officials were frequently collaborators in the litigation. If they did not precisely invite it, they often did not contest it. And as I and others have observed, the remedies in the cases, frequently designed at least in part by the defendants themselves, very much served what at least some of those defendants saw as their interests: increasing their budgets, controlling their inmate populations, and encouraging the professionalization of their workforces and the bureaucratization of their organizations.”).

113. 42 U.S.C. §§ 15602(8) (2006) (listing that one of the purposes of PREA is to “increase the efficiency and effectiveness of Federal expenditures through grant programs such as those

despite the government's own acknowledgment that the number of prisoners who experienced the "day-to-day horror" of sexual victimization during the rise of mass incarceration likely exceeded one million.¹¹⁴ Because this prison expansion facilitates the ongoing epidemic of abuse, PREA would be likely ineffective even if it did contain provisions that could systematically address sexual abuse or mass incarceration. PREA's implementation scheme is both weak and limited. First, compliance with the legislation is not mandatory for state or local facilities,¹¹⁵ even though 90 percent of female prisoners are incarcerated in state and local facilities.¹¹⁶ Facilities that do not comply with the Act risk the loss of only 5 percent of their federal funding.¹¹⁷ Loss of such funding is unlikely, however, because state governors can certify their own state prisons' compliance with the federal rules.¹¹⁸ Even if a state's prisons are not certified as compliant, the state can keep its federal funding simply by promising to come into compliance with PREA.¹¹⁹ Second, the legislation, though endorsing funding for the expansion of prisons, does not provide or require additional substantial spending to help eliminate sexual abuse.¹²⁰ This lack of compulsory funding, coupled with the government's hands-off approach to implementation, ensures that states have little to fear for non-compliance.

Moreover, PREA does not grant the federal government any significant new powers to prevent prison sexual victimization. Prisoners' right to file federal claims against the unconstitutional cruel and unusual punishment of sexual abuse

dealing with . . . prison construction, maintenance, and operation . . .")

114. 42 U.S.C. §§ 15601(2), (12) ("[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000. . . . Members of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates.").
115. 77 Fed. Reg. at 37107 ("A State whose Governor does not certify full compliance with the standards is subject to the loss of five percent of any Department of Justice grant funds that it would otherwise receive for prison purposes, unless the Governor submits an assurance that such five percent will be used only for the purpose of enabling the State to achieve and certify full compliance with the standards in future years. The final rule specifies that the Governor's certification applies to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch."); *See also id.* at 37115 ("[T]he intent of this definition is to make clear that a Governor may certify 'full compliance' even if, in circumstances that are not reasonably foreseeable, certain of the State's facilities are at times unable to comply with the letter of certain standards for some short period of time, but then act promptly to remedy the violation.").
116. CARSON & SABOL, *supra* note 17, app. at 25 tbl. 5.
117. 28 C.F.R. § 115.501.
118. *Id.*; 28 C.F.R. § 115.501.
119. *Id.*
120. 42 U.S.C. § 15607(a)(3) ("The Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities. The Attorney General may, however, provide a list of improvements *for consideration* by correctional facilities." (emphasis added)).

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pre-existed PREA.¹²¹ Further, under the Civil Rights of Institutionalized Person Act, the U.S. Attorney General already had the power to sue any prison for the serious deprivation of a prisoner's rights.¹²² The PREA standards add little protection to existing state law. In most states, prisoner sex abuse is already prosecuted as a felony.¹²³ In nearly all states, reporting prisoner sexual abuse is mandatory.¹²⁴ Further, despite the U.S. Supreme Court's general deference to prison operators,¹²⁵ lower courts often attempt to improve prison conditions. In 2005, nearly 14 percent of state correctional facilities were under court orders or consent decrees mandating the improvement of prison conditions.¹²⁶ With the availability of federal and state law exceeding PREA in scope and force, the new legislation provides little indication as to how its limited measures would change the lives of prisoners suffering sexual abuse.¹²⁷

Another decree, inspection, or admonishment that fails to address mass incarceration will not protect female inmates and other prisoners in the U.S. cor-

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211. *See* Farmer v. Brennan, 511 U.S. 825, 833-34, 847 (1994) (finding that "gratuitously allowing the beating or rape of one prisoner by another . . . is simply not 'part of the penalty that criminal offenders pay for their offenses against society,'" and holding that a prison official may violate an inmate's Eighth Amendment right to freedom from cruel and unusual punishment if he or she knows that an inmate faces "a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."). It is possible, however, that a plaintiff may use PREA's procedural and data collection requirements to show standards for what constitutes deliberate indifference to sexual assault. *See* David K. Ries, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & POL'Y 915, 976-89 (2005).
212. Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a (2006) ("Whenever the Attorney General has reasonable cause to believe that any State . . . is subjecting persons residing in or confined to an institution . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . the Attorney General, for or in the name of the United States, may institute a civil action . . . to insure the full enjoyment of such rights, privileges, or immunities . . .").
213. *See* Loomis, *supra* note 16.
214. *See id.*
215. *See* Turner v. Safley, 482 U.S. 78, 84-85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."); Bell v. Wolfish, 441 U.S. 520, 562 (1979) ("The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination.").
216. *See* STEPHAN, *supra* note 6, app. at tbls. 1, 6 (indicating that in 2005, there were 1,719 state correctional facilities, of which 238 were under some form of court order or consent decree).
217. *See* DARROW, *supra* note 1, at 118 ("Everywhere in the theory and administration of punishment is the rule the same. The one purpose is to injure, to harm, to inflict suffering upon the individual whom society sets apart.").

rectional system. If the U.S. wishes to eliminate prison abuse while retaining confinement's perceived benefits, it must turn away from incarceration and look to the prison alternatives of support and community care advocated by U.K. reformers. Sanctions that rely on the principle of punishment do not heal society, but rather create a population marked as outcasts. These forms of punishment tempt the powerful to harm the weak and provide institutionalized opportunities for revenge. The routine of retaliation soon becomes entrenched as a way of being. At that point, only a society committed to justice can turn away from the punishment of prison.

IV. THE U.K. ABOLITIONIST SOLUTION

The U.K. proposal of female prison abolition, basing its arguments on the high societal costs of prison and the availability of more effective alternatives to incarceration, attempted to end their correctional system. More specifically, advocates for the most popular version of the proposal argued that even based on a strict economic analysis, community-based programs and services could provide the same benefit of prisons at a reduced cost. U.S. reformers could magnify the appeal of alternatives to incarceration by presenting a modified approach: emphasizing the benefits both of reducing the costs of incarceration and eliminating the mass sexual victimization of inmates.

A. Incarceration in the U.K.

Unfortunately, the United Kingdom remains one of Europe's leading jailers, with a female prisoner population proportionately reflecting that of the U.S.¹²⁸ In June 2013, the 3,853 women incarcerated in the U.K.'s thirteen female-designated facilities represented around 5 percent of the prison population¹²⁹ and, as in the U.S., most are sentenced for minor drug or property crimes.¹³⁰ Also similar to the U.S., the number and rate of overall incarceration dramatically rose throughout the 1980s, 1990s, and 2000s largely due to harsher drug laws and stricter sentencing.¹³¹ Moreover, few "present a serious threat to society"¹³² — a profile similar to that of the U.S. female prisoner. According to

128. See World Prison Population List, *supra* note 46, at 5-6.

129. GAVIN BERMAN & ALIYAH DAR, MINISTRY OF JUSTICE, PRISON POPULATION STATISTICS 1, 8 (2013), available at www.parliament.uk/briefing-papers/sn04334.pdf.

130. MINISTRY OF JUSTICE, NATIONAL OFFENDER MANAGEMENT SERVICE, A DISTINCT APPROACH: A GUIDE TO WORKING WITH WOMEN OFFENDERS 5 (March 2012), available at <http://www.justice.gov.uk/downloads/publications/noms/2012/guide-working-with-women-offenders.pdf> (showing that one-half of women are incarcerated for property crimes and about one-third of women are incarcerated for drug crimes).

131. See Janice Joseph, *Drug Offenses, Gender, Ethnicity, and Nationality: Women in Prison in England and Wales*, 86 PRISON J. 140, 146 (2006) ("Similar to the United States, the war on drugs has become a war on women in England and Wales. . . . a significant factor in the rise of the female prison population is the increase in numbers of women being sentenced to prison for drug offences.").

132. Richard Smith, *Women in Prison*, 288 BRIT. MED. J. 630, 633 (1984).

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the British Medical Journal, “[m]ost women sent to prison are petty offenders who have severe mental, social, alcohol, or drug problems, and prison has little or no success either in deterring them from committing further crimes or in rehabilitating them.”¹³³

As the modern female prison abolitionist movement emerged in the early twenty-first century, the U.K. government began to consider female prison reform. Why reformers and the U.K. government focused particularly on female prison reform is not entirely clear. Reasons may have ranged from reports of abuse, to sheer practicality, to traditional views of female domesticity. Whatever the reason, the movement showed that a broad range of interests could push together for change.

B. Early Calls for Reform

The Howard League for Penal Reform, the U.K.’s oldest penal reform charity,¹³⁴ was one of the first to advocate for the modern female prison abolitionist position, and it did so in the wake of scandals over female prisoner suicide.¹³⁵ In 2006, the League said the government must act to “institute a programme of closures of women’s prisons, and transfer . . . resources to community programmes and treatment facilities that tackle women’s needs and reduce re-offending.”¹³⁶ The organization proposed that such reform would be the first step toward the overall improvement of the correctional system for both men and women.¹³⁷ “We are not arguing that men and women should be treated differently as a matter of principle; rather, it is a pragmatic suggestion. The door is already ajar . . . Women prisoners represent a discrete and relatively small group compared to men, and so real change can be made quickly.”¹³⁸ The

133. *Id.*

134. THE HOWARD LEAGUE FOR PENAL REFORM, ABOUT US, <http://www.howardleague.org/about-us/> (last visited Nov. 10, 2013).

135. See The Howard League for Penal Reform, Government Should Close Women’s Prisons (Aug. 2, 2006), available at http://www.howardleague.org/fileadmin/howard_league/user/pdf/Government_should_close_women_s_prisons_2_August_2006.pdf; Frances Crook, *Close Down Women’s Prisons*, THE GUARDIAN (Aug. 2, 2006, 11:01 AM), <http://www.guardian.co.uk/commentisfree/2006/aug/02/closedownwomensprisons> (Crook is the Howard League for Penal Reform’s director); Amelia Hill, *Suicide Levels in Women’s Prisons Soar*, THE OBSERVER (Jan. 3, 2004), <http://www.theguardian.com/uk/2004/jan/04/ukcrime.prisonsandprobation> (showing a 60 percent rise in female prison suicides from 2002 to 2003, most of which involved young non-violent prisoners); Eric Allison and Tania Branigan, *Five Suicide Attempts a Day at Holloway*, THE GUARDIAN (Aug. 9, 2004, 7:27 AM), <http://www.theguardian.com/uk/2004/aug/09/ukcrime.prisonsandprobation> (discussing the connection between over-incarceration and self-harm at female facilities); Martin Bright, *Prison Suicides Soar as Jails Hire ‘Babysitters,’* THE OBSERVER (Oct. 16, 2004), <http://www.theguardian.com/uk/2004/oct/17/ukcrime.prisonsandprobation> (discussing calls for stationing more “operational support staff” in female and male facilities to prevent a rising number of suicides).

136. The Howard League for Penal Reform, *supra* note 135, at 1.

137. See Crook, *supra* note 135.

138. *Id.*

League observed that, within the population of U.K. female prisoners, few receive sentences for violent crimes, few are properly treated for substance abuse or mental health issues, and too many are harmed physically or psychologically while incarcerated.¹³⁹ The League concluded that alternatives to confinement, including access to services such as healthcare and the availability of community-based programs to provide resources should replace prison. The League's call for "programmes and projects that meet women's needs and, unlike prison, do successfully reduce re-offending"¹⁴⁰ helped develop the voice and solutions offered by the female prison abolitionist movement in the U.K.

One year after the League's call for reform, Baroness Jean Corston of the U.K. Home Office issued a report demanding "radical change" in the way the criminal justice system treats women.¹⁴¹ The report followed her review of the poor conditions of and problems arising from female prisons, particularly suicide.¹⁴² Though her report stopped short of endorsing abolition, it called for alternative sanctions and community support programs for most female offenders.¹⁴³ Alternative approaches included monitored work programs, reparations to victims, substance abuse treatment, and mental health care — all coupled with an overall reduction in prosecutions.¹⁴⁴ Community support options included referrals to support programs and women's centers that provide essential services, such as financial training, mental health counseling, domestic violence support, housing assistance, legal advice, and health and child care.¹⁴⁵

C. The Prison Reform Trust Proposal

The Prison Reform Trust's ("the Trust's") 2011 proposal, advocating for an increased use of community-based, individualized programs, was the most publicized and well-received in the movement.¹⁴⁶ The proposal recommended reinvesting funds otherwise used for prisons into programs and women's centers that provide services such as substance abuse and mental health treatment, domestic violence support, childcare, housing assistance, and educational training.¹⁴⁷ The Trust's proposal focused on women rather than men mostly because "there may be more cost-effective ways of dealing with women's offending."¹⁴⁸

139. *Id.*

140. The Howard League for Penal Reform, *supra* note 135, at 1.

141. JEAN CORSTON, U.K. HOME OFFICE, THE CORSTON REPORT: THE NEED FOR A DISTINCT, RADICALLY DIFFERENT, VISIBLY-LED, STRATEGIC, PROPORTIONATE, HOLISTIC, WOMAN-CENTRED, INTEGRATED APPROACH 2 (2007), available at <http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf> [hereinafter THE CORSTON REPORT].

142. *Id.* at ii-2, 4, 20, 29-32.

143. *Id.* at 49-58.

144. *Id.* at 50-52, 58.

145. *Id.* at 59-65, 69, 78, 84-86.

146. See PRISON REFORM TRUST, *supra* note 38.

147. *Id.* at 3, 8, 11-12, 16-17.

148. *Id.* at 1.

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In making its “economic case,” the proposal considered whether community-based interventions were more cost-effective than incarceration in terms of meeting certain objectives, such as offending and reoffending rates.¹⁴⁹ Financial costs of incarceration include the resources poured into courts and prisons, the loss of the prisoners’ economic contributions to society, and the cost of harm to future victims of prisoners released without proper services or treatment.¹⁵⁰ Non-financial costs of prison include family separation, the displacement of children, the disruption to community life, and the inadequate treatment of health issues.¹⁵¹ Benefits of the Trust’s recommended alternatives to incarceration include better-adjusted members of society and reduced physical and psychological harm for victims of crime.¹⁵² The proposal concluded that “studies to date support the likelihood of an overall net advantage for society from community based intervention for women offenders, compared to custodial sentences.”¹⁵³ Although a purely economic analysis may not be the most attractive to criminal justice reformers, it appealed to the government officials and helped lift the profile of a movement committed to ending the confinement of women.

The Conservative U.K. government, in fact, welcomed and “carefully consider[ed]” the proposal of the Trust.¹⁵⁴ The publicity of a rehabilitation model of criminal justice reform advocated by Ministry of Justice Secretary Ken Clarke inspired an open response to the bold proposal.¹⁵⁵ The Ministry of Justice also advocated for governmental efficiency, cost cutting, reductions in bureaucracy, and public accountability.¹⁵⁶ Referring to the over-incarceration of prisoners, Clarke said, “[i]t is just very, very bad value for taxpayers’ money to keep banging them up and warehousing them in overcrowded prisons where most of them get toughened up.”¹⁵⁷ *The Daily Telegraph*, a newspaper aligned with the Conservative government, endorsed the Trust’s proposal, arguing that “[i]t makes no sense for the taxpayer to . . . lock someone away when the only return on that investment is broken families and reoffending, with all the attendant private heart-

149. *Id.* at 24.

150. *Id.* at 25.

151. *Id.*

152. *Id.*

153. *Id.* at 31.

154. *Women’s Prisons Should Close, Says Justice Taskforce*, BBC NEWS (June 6, 2011, 7:15), <http://www.bbc.co.uk/news/uk-13666066> (“Women should not be sent to prison and should instead serve community sentences, according to a new report by the Women’s Justice Taskforce [of the Prison Reform Trust]. The focus should be on health, housing and treatment for drug addiction to reduce reoffending, its report said. It called for a director of women’s justice to be appointed to provide ‘clear leadership and accountability.’ The Ministry of Justice (MoJ) welcomed the report and said it was carefully considering the recommendations.”).

155. *See id.*

156. *See Three Prisons to Close as Ken Clarke Aims to Reduce Number of Inmates*, LONDON EVENING STANDARD (Jan. 13, 2011), <http://www.standard.co.uk/news/three-prisons-to-close-as-ken-clarke-aims-to-reduce-number-of-inmates-6555174.html>.

157. Ben Quinn, *Kenneth Clarke: Prison is a Waste of Money*, THE GUARDIAN (Apr. 15, 2011), <http://www.guardian.co.uk/politics/2011/apr/16/ken-clarke-prison-waste-money>.

ache and public cost.”¹⁵⁸

Unfortunately, Clarke’s proposed reforms were too bold for many reactionaries in the Conservative government,¹⁵⁹ and the government replaced him with a traditional law-and-order official before he could make serious cuts to the penal system.¹⁶⁰ However, many heard Clarke’s message. The press noted Clarke’s observations that policies tending toward mass incarceration simply “don’t work.”¹⁶¹

U.S. reformers concerned about the current crisis of mass sexual victimization should apply the lessons of the U.K. movement. The case for this application is compelling. The U.S. female prison population is a small and discrete portion of the larger prison population. Female prisoners, who face great danger of sexual abuse, generally end up in prison as a consequence of minor drug or property crimes. As has been argued in the U.K., social service organizations and community support centers could address the needs of these women. The public in the U.S., as in the U.K., may be willing to consider an abolitionist proposal in light of these circumstances.

V. ALTERNATIVES TO THE PUNISHMENT OF INCARCERATION

Female prison abolition would end the sexual abuse common in those facilities and begin a movement to end all incarceration in the U.S. The alternatives to prison advocated by the U.K. reformers, such as increasing social services support and community involvement, are the proper replacements for current confinement practices.

Alternatives to incarceration that reproduce the methodology and motivations of imprisonment are not enough. These alternatives merely displace the vengeance, violence, control, surveillance, and cruelty that underlie our current incarceration system. Punishment that takes place in the community, rather than inside a jail, still encourages society to persecute rather than aid a disfavored minority – people accused and convicted of crimes.

As Clarence Darrow wrote in *Resist Not Evil*, “[i]n the rule of force the weak must always fall.”¹⁶² Insistence on imprisonment or prison-like punishments, especially when alternatives exist, reveals vengeance as the true purpose

158. Mary Riddell, *Ken Clarke Should Keep Women Out of Jail*, THE TELEGRAPH (June 6, 2011), available at <http://blogs.telegraph.co.uk/news/maryriddell/100090905/ken-clarke-should-keep-women-out-of-jail/>.

159. *Three Prisons to Close as Ken Clarke Aims to Reduce Number of Inmates*, *supra* note 156.

160. Theo Usherwood, *Chris Grayling to Review Prison Regime*, THE INDEPENDENT (Sept. 20, 2012), <http://www.independent.co.uk/news/uk/politics/chris-grayling-to-review-prison-regime-8159207.html> (quoting the new Justice Secretary, Chris Grayling, “[p]rison is not meant to be a place that people enjoy being in. I don’t (want to) see prisoners in this country sitting in cells watching the Sunday afternoon match on Sky Sports. Am I planning to reduce the number of prison places? No I’m not. I do not want to set a target to reduce the prison population.”).

161. Quinn, *supra* note 157.

162. DARROW, *supra* note 1, at 160.

of carceral confinement. The U.S. should renounce this self-imposed duty to punish, and instead bring an end to the collective sexual victimization of female prisoners.

The proposal of female prison abolition in the U.S. as the best solution to eradicating sexual abuse in these facilities relies on a few key premises. First, the U.S. cannot reasonably guarantee incarcerated women will be free from sexual victimization.¹⁶³ Second, alternatives to incarceration sufficiently address the aims of correction.¹⁶⁴ Third, the continued incarceration of U.S. women in facilities where they face a substantial danger of sexual victimization is unconscionable.¹⁶⁵ Any argument for the value of carceral punishment in spite of the danger of sexual victimization is not compelling.¹⁶⁶ If the sexual victimization of women is inherent to the U.S. prison system, and if an alternative model is available, and further, if that alternative model addresses the legitimate needs of society, then the U.S. should favor the alternative as a replacement for incarceration.¹⁶⁷ An alternative approach based on the U.K. model of community care and support is the solution needed.

Opponents of prison abolition will likely raise two primary arguments against this solution. First, opponents will claim that incarcerated women violated the law, people who violate the law should be punished and removed from society, and imprisonment is an acceptable means of punishment, even accounting for its danger.¹⁶⁸ Second, opponents of prison abolition will likely argue that some women pose such a danger to the community that they have forfeited their right to not be confined in an institution where they face a great risk of sexual victimization.¹⁶⁹

In regard to the first objection, even the conservative U.S. Supreme Court

163. *See supra* Part I.B.

164. *See infra* Parts III.B, IV.

165. *See supra* Part I.B.

166. This claim draws upon the philosophies of John Stuart Mill, which suggest that justice is not served through the “infliction of purposeless suffering” upon the criminal. *See* JOHN STUART MILL, *An Examination of Sir William Hamilton’s Philosophy*, in *FREE WILL* 59, 63-64 (Sidney Morgenbesser & James Walsh eds., Prentice-Hall 1962).

167. My belief that alternatives to prison are ultimately better for society and better for those who would otherwise be incarcerated are reflected in the writings of Clarence Darrow. *See* DARROW, *supra* note 1, at 162 (“Even now, with all the injustice of to-day, the expenditure of public money to relieve suffering, to furnish remunerative employment, to rationally prevent crime by leaving men [sic] with something else to do, would produce better results than all the imagined benefits that follow in the wake of scaffolds and of jails.”).

168. *See* Stephen D. Soble, *A Regime of Social Death: Criminal Punishment in the Age of Prisons* 21 N.Y.U. REV. L. & SOC. CHANGE 497, 558-59 (1995) (“The collapse of the rehabilitative ideal transformed imprisonment into an end in itself. The prisoner is banished from society not as a means of transforming him or, by way of example, transforming society more generally, but for the sole purpose of removing the criminal from the community.”).

169. *But see* James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison* 81 N.C. L. REV. 433, 439, n.26 (2003) (“Incapacitation theory posits that disabling offenders will reduce crime rates,” but “[t]he scholarly literature largely concludes that imprisonment has a marginal impact on crime rates.”) (citations omitted).

does not accept prison rape as an acceptable sentence.¹⁷⁰ The second argument, separate and apart from moral considerations, is unconvincing. The majority of women sent to prison are non-violent offenders.¹⁷¹ Further, little evidence supports the idea that incapacitating prisoners in a locked cell for a certain period of time reduces crime or makes society safer.¹⁷² The argument for incarcerating women despite their great risk of being sexually abused implicitly endorses a view of punishment as vengeance expressed through inflicting the violence of incarceration on a selected group of outcasts. Justice requires society not to abandon and abuse some, but instead to include and attend to all.

As described earlier, U.K. prison reformers offered support and community care as alternatives to prisons and punishment.¹⁷³ The U.S. should adopt these alternatives as it ends female incarceration and moves toward total prison abolition. Funds for prisons should be reinvested in community programs that provide support services such as substance abuse treatment, childcare, medical attention, housing assistance, and educational training.¹⁷⁴ The development of support and community care services would benefit both the would-be-prisoner and society as a whole.¹⁷⁵ While the urge to retaliate against a perceived offender is understandable, ultimately it is ineffective.¹⁷⁶

True prison alternatives, such as models of support and community care, can be defined by what they are not. They are not incarceration, punishment, or retribution by another name.¹⁷⁷ They are not alternatives that reproduce the conditions of confinement through other forms of in-jail treatment or community-based corrections.¹⁷⁸ They are not alternatives, such as probation or parole, im-

170. See *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994) (“Prison conditions may be restrictive and even harsh but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.”) (quotation marks and citations omitted).

171. See *supra* Part I.A.

172. See Robertson, *supra* note 169.

173. See *supra* Part III.B-C.

174. See PRISON REFORM TRUST, *supra* note 38, at 3, 8, 11- 12, 16-17.

175. *Id.* at 25.

176. See Robertson, *supra* note 169; DARROW, *supra* note 1, at 165 (“To use violence and force upon the vicious and the weak must produce the evil that it gives. Like produces like. Clubs, jails, harsh language, brutal force inevitably tend to reproduce the same state of mind in the victim of the assault.”).

177. These models do not aim to punish or to exact revenge. See Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic’s View*, 102 DICK. L. REV. 355, 363 (1998) (“We rationalize punishment by various means. But when the penological smoke clears, punishment is psychologically for the punisher. We like to punish, and our rationale for doing so is really quite simple. The ugly truth is that we punish because it makes us feel good to get even. I am opposed to any penological expression of revenge.”). *But see* Michael K. Greene, “Show Me the Money!” *Should Taxpayer Funds Be Used to Educate Prisoners Under the Guise of Reducing Recidivism?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 173, 205-06 (1998) (advocating for examples of “various workable alternatives to prison” that merely offer a different form of incarceration or retribution, “such as shock incarceration for juvenile offenders, house arrest, and more effective and active use of the death penalty”).

178. See, e.g., Jessica Y. Kim, *In-Prison Day Care: A Correctional Alternative for Women Of-*

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posed under the threat of incarceration.¹⁷⁹ They do not incarcerate at arms-length through home detention or halfway houses.¹⁸⁰ They do not restrict people's movements through community policing¹⁸¹ or electronic monitoring programs¹⁸². They do not attempt to reform through the physical coercion of boot camps,¹⁸³ substance testing,¹⁸⁴ daily inspections,¹⁸⁵ or chemical castration.¹⁸⁶

Such alternatives, modeled on incarceration, inflict punishment and pain imprecisely, uneconomically, or ineffectively. While seeking vengeance against an outcast group—those accused and convicted of crimes—may provide society with a sense of justice and finality, this vengeful urge is ultimately destructive. True alternatives to prison abandon this vengeance by refusing to create outcasts, and instead recognizing and attending to the needs of those most marginalized by our society.

VI. CONCLUSION

Abolishing female prisons to eliminate the sexual abuse that occurs in carceral facilities is a radical solution only if the nature and extent of mass victimization is unrecognized. However, once society recognizes those accused of crimes not as outcasts but as members of the community, humane treatment

fenders 7 CARDOZO WOMEN'S L.J. 221 (2001) (arguing for a "reversed day care program" where female prisoners are allowed to raise their young children in a separate prison center).

179. See, e.g., Jason J. Ben, *America's Need to Explore Alternatives to Incarceration: Can America Purport to be the "Land of the Free" When It Currently is the World's Leading Incarcerator?*, 30 S.U. L. REV. 349, 368-69 (2003) (supporting a reduction in prosecution but endorsing severe restrictions on liberty for some offenders through probation and parole).
180. See, e.g., Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443 (1993); Elizabeth D. Chicknavorian, *House Arrest: A Viable Alternative to the Current Prison System* 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 53 (1990) (concluding that while house arrest risks invasions of privacy, it is a cost-effective alternative to prison and provides a social benefit to the offender).
181. See DARROW, *supra* note 1, at 173 (arguing that, while "mob law" is more excusable than criminal courts because it is driven by passion and provocation, rather than "deliberation, coldness, and settled hate," ultimately, both civil law and mob law are unnecessary for the protection of individuals).
182. See, e.g., Natasha Alladina, *The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical Yet Incomplete Alternative to Incarceration* 28 ALASKA L. REV. 125 (2011) (supporting the use of electronic monitoring in combination with halfway housing or therapeutic treatment).
183. See, e.g., Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders* 39 BRANDEIS L.J. 847 (2001) (proposing single-sex boot camps that integrate women's children into the alternative sentencing).
184. See, e.g., *Alternatives to Incarceration for Drug-Abusing Offenders* 111 HARV. L. REV. 1898, 1910 (1998) (presenting the alternative of coerced abstinence from drug use as an alternative for those convicted of non-violent crimes such as property offenses and prostitution).
185. See, e.g., Paul E. Braunlich, *Day Report – An Alternative to Incarceration*, 75 MICH. B.J. 156 (Feb. 1996) (supporting a program that requires low-level non-violent drug offenders to report twice a day, pay a fee, and submit to drug screening).
186. See, e.g., Kenneth B. Fromson, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure* 11 N.Y.L. SCH. J. HUM. RTS. 311 (1994) (arguing for castration of certain sexual offenders both as a preventative treatment and a punishment).

through true incarceration alternatives will become widely accepted as proper conduct. I would like to believe that Clarence Darrow was only partially correct when he wrote:

However thoroughly the futility, cruelty and injustice of punishment may be shown, men will still persist that it must exist. The thought that society could live without prisons and policemen seems to be beyond the conception of the common man. If punishment has no effect to diminish or prevent crime, then no danger would be incurred to dismiss our jailers and jurors and close our prison doors.¹⁸⁷

The U.S. must indeed close its prison doors, because punishment alone does not deter or prevent crime. Our nation's insistence on incarceration and on retributive punishment must not continue. By releasing prisoners from female facilities and embracing true alternatives to incarceration, the U.S. will see that there is a better way to live with one another and to take care of our most marginalized members. Confinement will be remembered as an error of our past, and we will wonder why the nation did not abandon prison long ago.

187. DARROW, *supra* note 1, at 159.