



**Research,  
Practice, and  
Guiding  
Principles  
for Women  
Offenders**

**Gender-Responsive Strategies**



**National Institute of Corrections**

# Gender-Responsive Strategies

Research, Practice, and Guiding Principles  
for Women Offenders

by

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In September 1999, the National Institute of Corrections (NIC) began a 3-year project to create a foundational body of work on gender-relevant approaches to managing and intervening effectively with women offenders in adult corrections. An NIC-wide team on women offenders saw the need to summarize current evidence regarding what is known and not known about gender-responsive policy and practice. This project was timely for several reasons, including the following:

- The sheer growth in the number of women in all sectors of corrections and their faster rate of growth compared with that of men.
- The increased demand on correctional resources generated by the increased number of women in corrections, including the demand for expanded professional training. In prisons, women's services have traditionally been the domain of a limited number of dedicated professionals. The era of a small number of specialists in women's services is over.
- Frequent requests for summary information in brief and readable formats from policymakers and managers attending NIC seminars. These managers were convinced that gender made a critical difference to their operations and programs, but they lacked the grounding or evidence needed both to define and to make a case for gender-responsive management, operations, and programs.
- A recognition that the 1990s saw enormous growth in research on women offenders, and particularly on their pathways into criminal behavior and their prior histories of sexual and physical abuse.
- Recent research conducted in the fields of health, mental health, substance abuse, and violence against women. The interests of health and human services systems overlap significantly with those of the criminal justice system in a search for effective approaches with regard to women offenders and their children.
- Public policy interest in the potential of effective programming for women offenders that will improve the life circumstances and prospects of their children and disrupt intergenerational cycles of criminality.

The NIC team anticipated that the grounding would emanate both from the available literature of diverse disciplines (including many traditionally outside corrections) and, in a significant way, from consultation with practitioners who have worked with women offenders for many years and whose expertise and insights are invaluable. Thus, in addition to an exhaustive search of published

and unpublished literature, the authors conducted focus groups with practitioners in all sectors of corrections and worked with a Practitioner Advisory Group throughout the project.

Eventually, the project's goals expanded from a summary of research and practice to include the development of guiding principles to inform correctional policy and practice for the next decade.

In undertaking this large effort, the NIC team wishes to clarify a few important philosophical points:

- The purpose of the document is not to argue that everything about women and men is different but, rather, to identify critical differences and to define their implications for improving correctional management and services for women offenders.
- The perception exists that working with women offenders is difficult, with the women said to be incredibly needy. It is our hope that this document will shed light on

women offenders' real needs and that those needs will be better understood from the perspectives of women's criminal pathways and the realities of their lives.

- This is a developmental body of knowledge; it is not the last word on this topic. It is NIC's hope that it will serve as a significant grounding for the present and as the basis for a continuing dialog on effective policy and practice. In fact, NIC looks to important projects in other Federal agencies—on women offenders and their children and on the convergence of substance abuse, mental health problems, and violence in women's lives—for additional evidence on effective intervention approaches.

Finally, the NIC team extends heartfelt thanks to Barbara Bloom, Barbara Owen, Stephanie Covington, and all the practitioner advisers for their courage in undertaking this project and their commitment to seeing it through.

**Morris L. Thigpen**

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National Institute of Corrections

# preface

Women now represent a significant proportion of all offenders under criminal justice supervision. Numbering more than 1 million in 2001, female offenders make up 17 percent of all offenders under some form of correctional sanction. This report summarizes current knowledge on the characteristics of women in correctional settings, the ways in which gender makes a difference in current criminal justice practice, and multidisciplinary research and theory on women's lives that have implications for managing women in the criminal justice system. It concludes by offering guiding principles and strategies for improving the system's response to women offenders.

The report offers guidance to those throughout the criminal justice system who seek a more effective way to respond to the behavior and circumstances of female offenders. The intended audience ranges from policy- and decisionmakers at the legislative, agency, and system levels to those who manage or serve offenders on a daily basis.

Bloom and Covington define gender responsiveness as "creating an environment . . . that reflects an understanding of the realities of women's lives and addresses the issues of the women."<sup>1</sup> As the criminal justice system becomes more responsive to the issues of managing women offenders, it will become more effective in targeting the pathways to offending that both propel women into the criminal justice system and return them to it. This report indicates that gender-responsive practice can improve outcomes for women offenders by considering their histories, behaviors, and life circumstances. It also suggests that investments in gender-responsive policy and procedures will likely produce long-term dividends for the criminal justice system and the community as well as for women offenders and their families.

## Approach

To construct a knowledge base that provides a foundation for gender-appropriate policy and practice, project staff reviewed multidisciplinary research literature in such areas as health, family violence, substance abuse, mental health, trauma, employment, and education. They then analyzed this literature to determine its application to gender responsiveness in criminal justice.

Additional data pertinent to managing the female offender within the criminal justice framework were collected through national focus groups and interviews with experts representing various criminal justice agencies. Project staff conducted more than 40 individual and group interviews with policymakers, managers, line staff, and women offenders in all phases of the criminal justice system throughout the country.

Project staff then collected and analyzed written documents, including official and technical reports concerning women offenders, policies and procedures, and existing academic research and other materials relevant to these topics. Finally, the Practitioner Advisory Group, which represents community corrections, jail, prison, and parole professionals at all levels of the criminal justice system, reviewed multiple drafts of these findings.

## Findings

Study findings indicate that consideration of the differences in male and female pathways into criminality, their differential response to custody and supervision, and other differing realities of the two genders can lead to better outcomes for both men and women offenders in institutional and community settings. Policies, programs, and procedures that reflect these empirical, gender-based differences can accomplish the following:

- Make the management of women offenders more effective.
- Enable correctional facilities to be more suitably staffed and funded.
- Decrease staff turnover and sexual misconduct.
- Improve program and service delivery.
- Decrease the likelihood of litigation against the criminal justice system.
- Increase the gender-appropriateness of services and programs.

## Organization

This report is organized into the following chapters that present the basis for a gender-relevant and culturally appropriate approach.

Legal considerations are addressed in appendix A; a reading list is presented in appendix B.

## Chapter 1. Characteristics of Women in the Criminal Justice System

This chapter provides a general description of women in the criminal justice system, including their numbers and the specific characteristics of women under community and institutional supervision. The first aspect of gender-responsive planning involves understanding the profile of women offenders in terms of their sociodemographic characteristics and the patterns of experience and personal history that shape their behavior as offenders and as probationers, inmates, and parolees. This chapter also provides information regarding the racial and ethnic disparities found in the criminal justice system, the differences in criminality and background between women and men, and gender-specific issues that contribute to the realities of women offenders' lives.

## Chapter 2. Women Offenders and Criminal Justice Practice

This chapter examines the ways in which gender makes a difference in current criminal justice practice. This review identifies the impact of these gender-based differences on the supervision and management of women in community correctional and institutional settings.

Two key findings emerged from this examination. First, the overwhelming number of male offenders often overshadows the issues relevant to women offenders. Second, the criminal justice system often has difficulty applying to women offenders policies and procedures that have been designed for male offenders. Differences in women's pathways to crime, their behavior while under supervision or in custody, and the realities of women's lives in the community have significant bearing on

criminal justice system practices. Legal issues regarding women offenders are also summarized in this chapter.

### **Chapter 3. The Context of Women's Lives: A Multidisciplinary Review of Research and Theory**

This chapter reviews the concepts of gender and gender differences within society and associated implications for the criminal justice system. The sections review multidisciplinary research on gender, including such areas as health, family violence, substance abuse, mental health, and trauma; theoretical perspectives specific to women; and the gendered effects of policies.

The criminal justice system has until recently lacked a specific focus on the female offender for a variety of reasons. Often by default, practices designed for male offenders have been viewed as the norm. To provide a foundation for identifying gender-relevant and culturally responsive options, this chapter summarizes the current research and theory on women, with specific emphasis on issues involving women offenders. The chapter suggests that understanding the contexts of women's lives, both in the general population and in the criminal justice system, is an important first step in developing gender-responsive policy and practice.

### **Chapter 4. A New Vision: Guiding Principles for a Gender-Responsive Criminal Justice System**

This chapter documents the need for a new vision for the criminal justice system—a vision that recognizes the behavioral and social differences between female and male offenders that have specific implications for gender-responsive policy and practice. This chapter delineates guiding principles and strategies, steps for implementing the principles, and the development of gender-responsive policies, practices,

programs, and services. It incorporates the following key findings:

- An effective system for female offenders is structured differently from a system for male offenders.
- Gender-responsive policy and practice target women's pathways to criminality by providing effective interventions that address the intersecting issues of substance abuse, trauma, mental health, and economic marginality.
- Criminal justice sanctions and interventions recognize the low risk to public safety created by the typical offenses committed by female offenders.
- When delivering both sanctions and interventions, gender-responsive policy considers women's relationships, especially those with their children, and women's roles in the community.

The chapter presents a set of guiding principles that are intended to serve as a cornerstone for improving the ways in which the criminal justice system manages and supervises the woman offender. These principles are fundamental building blocks for correctional policy and provide a blueprint for the development of a gender-responsive approach.

The guiding principles include the following categories:

- Gender.
- Environment.
- Relationships.
- Services and supervision.
- Socioeconomic status.
- Community.



## Legal Considerations With Regard to Women Offenders

As summarized in chapter 2 and described in detail in appendix A, a number of legal issues should be considered when managing women offenders. The current legal environment for prison officials is favorable to the development of gender-appropriate policy and criminal justice practice, due both to judicial interpretation and to congressional legislation. This legal environment appears to support opportunities for creative administrators to adopt innovative programs that are more likely to ensure better outcomes for women offenders and their children.

Administrators who believe that gender-responsive programming will better serve the needs of the female inmate population have great leeway to experiment with creative approaches that will allow them to solve previously intractable problems. Appendix A describes the major areas in which gender has an impact by discussing the following legal issues concerning women offenders:

- Equal protection and access.
- Staffing and supervision.

- Sexual misconduct.
- Challenges to due process.
- Pregnancy and child-related questions.

The report concludes that it is the commitment of policymakers and practitioners that will make the difference in creating the vision of a gender-responsive criminal justice system and implementing its principles and strategies. Managing women offenders more effectively in correctional settings and providing more effective programs and services will benefit the women, increase community safety, and help build a more effective criminal justice system. It also will positively affect the generations of children to come.

### Note

1. Bloom, B., & Covington, S. (2000, November). *Gendered justice: Programming for women in correctional settings*. Paper presented to the American Society of Criminology, San Francisco, CA, p. 11.

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## Characteristics of Women in the Criminal Justice System

Female offenders represent a growing percentage of correctional populations nationwide. More than 1 million women are currently under criminal justice supervision in the United States. Women now make up 17 percent of the total number of offenders under criminal justice supervision, or one in every six offenders; the vast majority (85 percent) are under community supervision and are typically on probation.

The numbers of females and males under correctional supervision and the percent increase in each category from 1990 to 2000 are shown in table 1. The total number of women under correctional control increased 81 percent over this 10-year period, while the number of men increased 45 percent.

The significant increase in the number of women under correctional supervision has called attention to the status of women in the criminal justice system and to the particular circumstances they encounter. The increasing numbers have also made evident the lack of appropriate policies and procedures for women offenders and the need for gender-responsive policy and practice in correctional planning. The first step in developing gender-responsive criminal justice policy and practice is to understand gender-based characteristics. In addition to offense and demographic characteristics, the specific life factors that shape women's patterns of offending should be included in gender-responsive planning.

Recent research has established that women offenders differ from their male counterparts regarding personal histories and pathways to crime.<sup>1</sup> For example, a female offender is more likely to have been the primary caretaker of young children at the time of arrest, more likely to have experienced physical and/or sexual abuse, and more likely to have distinctive physical and mental health needs. Additionally, women are far less likely to be convicted of violent offenses, and they pose less danger to the community (see "National Profile of Women Offenders" on page 8).

<b>Table 1</b>	<b>Offenders Under Correctional Control, by Gender, 1990 and 2000</b>		
	1990	2000	Percent Increase
<b>Probation</b>			
Females	480,642	844,697	76
Males	2,189,592	2,994,835	37
<b>Jail</b>			
Females	37,198	70,414	89
Males	365,821	543,120	48
<b>Prison (state and federal)</b>			
Females	44,065	91,612	108
Males	729,840	1,290,280	77
<b>Parole</b>			
Females	42,513	87,063	105
Males	488,894	638,464	31
<b>Total</b>			
Females	604,418	1,093,786	81
Males	3,774,147	5,466,699	45

Sources: Bureau of Justice Statistics. (2001d). *Prison and jail inmates at midyear 2000*. Washington, DC: U.S. Department of Justice; Bureau of Justice Statistics. (2001c). *Prisoners in 2000*. Washington, DC: U.S. Department of Justice; Bureau of Justice Statistics. (2001b). *National correctional population*. Washington, DC: U.S. Department of Justice.

## Profiles of Women in the Criminal Justice System

Women offenders are disproportionately low-income women of color who are undereducated and unskilled, with sporadic employment histories. They are less likely than men to have committed violent offenses and more likely to have been convicted of crimes involving drugs or property. Often, their property offenses are economically driven, motivated by poverty and by the abuse of alcohol and other drugs.

Women face life circumstances that tend to be specific to their gender, such as sexual abuse, sexual assault, domestic violence, and the responsibility of being the primary caregiver for dependent children. Approximately 1.3 million minor children have a mother who is under criminal justice supervision, and approximately 65 percent of women in state prisons and 59 percent of women in federal prisons have an average of two minor children. Women involved in the criminal justice system thus represent a population marginalized by race, class, and gender.<sup>2</sup> For example, African-American women are overrepresented in correctional populations. While they constitute only 13 percent of women in the United States, nearly 50 percent of women in prison are African American. Black women are eight times more likely than white women to be incarcerated. The characteristics of women under correctional supervision (community supervision, prison, or jail) are summarized in table 2.

## Community Supervision

As previously noted, the majority of women in the criminal justice system are on probation or parole; 85 percent of women offenders are under community supervision. In 2000, more than 900,000 women were on probation (844,697) or parole (87,063). Women represented an increasing percentage of the probation

<b>Table 2</b>	<b>Characteristics of Women Under Correctional Supervision</b>			
Characteristic	% Under Community Supervision	% in Jail	% in State Prison	% in Federal Prison
<b>Race/ethnicity</b>				
White	62	48	33	29
African American	27	44	48	35
Hispanic	10	15	15	32
<b>Median age</b>	32	31	33	36
<b>High school diploma/GED</b>	60	55	56	73
<b>Single</b>	42	48	47	34
<b>Unemployed</b>	Unknown	60	62	Unknown
<b>Mother of minor children</b>	72	70	65	59

and parole populations in 2000 compared with 1990. They represented 22 percent of all probationers in 2000 (up from 18 percent in 1990) and 12 percent of those on parole (up from 8 percent in 1990).<sup>3</sup>

In contrast to women in jail or prison or on parole, nearly two-thirds of women on probation are white. Women under institutional supervision are more likely to be women of color. Nearly two-thirds of those confined in jails and prisons are African American, Hispanic, or other (nonwhite) ethnic groups. About 60 percent of women on probation have completed high school, and 72 percent have children under 18 years of age. Although the greatest number of women offenders are under community supervision, far less information is available about their characteristics than about those of women in custodial settings.

## Prisons

The Bureau of Justice Statistics (BJS) estimates that 11 of every 1,000 women will be incarcerated at the federal or state level at some point in their lives. This probability is mediated by racial and ethnic membership. Approximately 5 of every 1,000 white women, 15 of every 1,000 Hispanic women, and 36 of every 1,000 African-American women will be incarcerated at some point during their lifetime.<sup>4</sup>

The number of women incarcerated in state and federal prisons has increased dramatically in recent decades, rising nearly eightfold between 1980 and 2000, from 12,000 to more than 90,000 (representing 6.6 percent of the U.S. prison population). The increase in women's rate of imprisonment has outpaced the increase for men each year since the mid-1980s. While the total number of male prisoners since 1990 grew 77 percent, the number of female prisoners increased 108 percent during the same period.<sup>5</sup>

In 2000, Texas led the nation in the number of women in prison (12,245), followed closely by California (11,161). Oklahoma (138 sentenced female prisoners per 100,000 women residents), Mississippi (105), Texas (100), and Louisiana (100) had the highest incarceration rates in the nation. The average incarceration rate for women in the United States in 2000 was 59 per 100,000 female residents.<sup>6</sup>

## Jails

In 2000, 70,414 women were in local jails, representing 11 percent of the jail population. A study of women incarcerated in jails exclusively for women showed that race and ethnic composition of jail populations differed by region.<sup>7</sup> In major urban settings, minority women make up the bulk of the jail population. Stohr and Mays suggest that the profile of women in jail is quite similar in several respects to that of women in prison. Women in jail typically lack educational and vocational training, the majority are single or divorced, and more than two-thirds were unemployed at the time of arrest. Of those who were employed, their earnings "placed many women in the lowest economic strata of their communities."<sup>8</sup> About one-third of these women had no history of previous incarceration, and others had experienced multiple periods of incarceration. More than 70 percent of the women were mothers.

According to a recent study in California, three-quarters of the women in jail were incarcerated for property, drug, or public-order offenses.<sup>9</sup> The majority are under the age of 30 and are addicted to drugs or alcohol. More than three-quarters report having had a first child by the age of 18. The women in this study were characterized as being mentally ill or seriously drug dependent, homeless prior to incarceration, and indigent.<sup>10</sup> The two most common offenses in this sample were for drug offenses (about one-third) and petty theft with a prior petty theft

conviction. Sexual assault histories were also comparable with those of women in the prison population. More than 60 percent of women in jail reported having been sexually assaulted before the age of 18.

## Offense Profiles

Accompanying this increase in population are several questions about women offenders. Why has women's involvement with the criminal justice system increased so dramatically? Are women committing more crimes? Are these crimes becoming more violent? The data on arrests demonstrate that the number of women under criminal justice supervision has risen disproportionately compared with women's arrest rates. For example, the total number of arrests of adult women increased by 38.2 percent between 1989 and 1998, while the number of women under correctional supervision increased by 71.8 percent. Overall, women have not become more violent as a group. In 2000, women accounted for only 17 percent of all arrests for violent crime. About 71 percent of all arrests of women were for larceny/theft or drug-related offenses.

Women on probation have offense profiles that differ somewhat from those of incarcerated women. Nationwide, the majority of women on probation have been convicted of property crimes (44 percent). Of female probationers, 27 percent have committed public-order

offenses and 19 percent have committed drug offenses. Only 9 percent have committed violent crimes.

BJS data indicate that violent offenses are the major factor in the growth of the male prison population; however, this is not the case for women.<sup>11</sup> For women, drug offenses represent the largest source of growth. In 1998, approximately 20 percent of women in jails or prisons had been detained for, or convicted of, violent offenses.<sup>12</sup> The majority of offenses committed by women in prisons and jails are nonviolent drug and property crimes. Offenses committed by women in jails and prisons during 1998 are detailed in table 3.

Additional offense data indicate the following:

- Women in prison are less likely than men to have long criminal histories. Approximately 51 percent of incarcerated women have one or no prior offenses. Among males, only 39 percent have one or no prior offenses.
- The per capita rate of murder committed by women in 1998 was the lowest recorded since 1976; the rate of murder by women has been declining since 1980.
- Three of four women offenders serving time for a violent offense committed simple assault.
- An estimated 62 percent of women offenders serving time for a violent offense had

Offense	Jail		State Prison		Federal Prison	
	No.	%	No.	%	No.	%
Violent	7,655	12	21,056	28	644	7
Property	21,689	34	20,304	27	1,104	12
Drug	19,137	30	25,568	34	6,624	72
Public order	15,310	24	8,272	11	736	8
Total	63,791	100	75,200	100	9,108	100

Source: Bureau of Justice Statistics. (1999b). *Special report: Women offenders*. Washington, DC: U.S. Department of Justice.



a prior relationship with the victim as an intimate, relative, or acquaintance; of the 60,000 murders committed by women between 1976 and 1997, more than 60 percent were against an intimate or family member.

- According to Mauer, Potler, and Wolf, the number of women in state prisons for drug offenses rose by 888 percent from 1986 to 1996.<sup>13</sup>

## Family Background

Women in the criminal justice system are more likely than women in the general population to have grown up in a single-parent home. Nearly 6 of 10 women under all forms of criminal justice supervision grew up in a household where at least 1 parent was absent. According to BJS, 42 percent of women in prison grew up in homes with only one parent, usually the mother.<sup>14</sup> Almost 17 percent of women offenders lived in foster care or in a group home at some point during childhood.

Incarcerated women are more likely than are men to have at least one family member who has been incarcerated. About 50 percent of women and 37 percent of men had an immediate family member who had been incarcerated. Women often grew up in families where drugs or alcohol were abused. Approximately one-quarter of imprisoned women report prior physical and/or sexual abuse by a family member.

## Physical and Sexual Abuse

The prevalence of physical and sexual abuse in the childhoods and adult backgrounds of women under correctional supervision has been supported by the research literature; abuse within this segment of the population is more likely than in the general population.<sup>15</sup>

In examining the abuse backgrounds of male and female probationers, the Bureau of Justice Statistics found a dramatic gender difference: More than 40 percent of the women reported having been abused at some time in their lives compared with 9 percent of the men.<sup>16</sup>

BJS reported that about half (48 percent) of women in jail (but only 13 percent of men) and half (48 percent) of women in state and federal prisons (but only 12 percent of men) had been physically or sexually abused before incarceration.<sup>17</sup> Women in prison are three times more likely to have a history of abuse than men in prison.<sup>18</sup> Approximately 37 percent of women in state prison, 23 percent of women in federal prison, 37 percent of women in jail, and 28 percent of women on probation reported physical or sexual abuse before the age of 18.<sup>19</sup> Of the women incarcerated in state prisons, those who had been abused were considerably more likely than those who had not been abused to be incarcerated for a violent offense (34 versus 21 percent).

Other studies of abuse history reveal a much higher rate than the BJS data. For example, Owen and Bloom found that 80 percent of their sample of incarcerated women in California had been physically and/or sexually abused prior to incarceration.<sup>20</sup> A later study found that more than 80 percent of the women incarcerated in North Carolina's state prisons had been physically and/or sexually abused.<sup>21</sup> Browne, Miller, and Maguin found that 70 percent of incarcerated women interviewed in a New York maximum security prison reported physical violence, and nearly 60 percent reported sexual abuse.<sup>22</sup> Women's substance abuse has been shown to be highly correlated with physical and sexual abuse.<sup>23</sup> Women in state prisons who had experienced abuse prior to their arrests reported higher levels of alcohol and drug abuse.<sup>24</sup>

## Substance Abuse

The link between female criminality and drug use is very strong. Research consistently indicates that women are more likely to be involved in crime if they are drug users.<sup>25</sup> Substance abuse is also linked to issues of trauma and mental health. Approximately 80 percent of women in state prisons have substance abuse problems.<sup>26</sup> About half of women offenders in state prisons had been using alcohol, drugs, or both at the time of their offense. Nearly one in three women serving time in state prisons reported committing the offense to obtain money to support a drug habit. About half described themselves as daily users.<sup>27</sup>

To put these statistics into perspective, it is helpful to compare them to statistics on substance abuse among women in the general population. The Substance Abuse and Mental Health Services Administration reports that 2.1 percent of females in the United States age 12 and older had engaged in heavy alcohol use within the 30 days preceding the survey, 4.1 percent had used an illicit drug, and 1.2 percent had used a psychotherapeutic drug for a non-medical purpose.<sup>28</sup> By contrast, the National Center on Addiction and Substance Abuse found that 54 percent of women offenders in state prisons had used an illicit drug during the month before they committed their crimes, and 48 percent were under the influence of either alcohol or another drug when they committed their crimes.<sup>29</sup> Among women offenders in federal prisons, 27 percent had used an illicit drug in the month before they committed their crimes, and 20 percent were under the influence when they committed their crimes. Among jail inmates, 54 percent had used an illicit drug in the previous month, and 48 percent were under the influence when they committed their crimes.

On every measure of drug use, women offenders in state prisons reported higher usage than

did their male counterparts—40 percent of women offenders and 32 percent of male offenders had been under the influence of drugs when the crime occurred. According to BJS, 89 percent of women report using drugs on a regular basis compared with 76 percent of men.<sup>30</sup> By contrast, every measure of alcohol use was higher for male offenders than for female offenders. At the time of the offense, 29 percent of female offenders and 38 percent of male offenders had been under the influence of alcohol. An estimated 25 percent of women on probation, 29 percent of women in local jails, 29 percent of women in state prisons, and 15 percent of women in federal prisons were under the influence of alcohol at the time of the offense.

## Physical Health

Women frequently enter jails and prisons in poor health, and they experience more serious health problems than do their male counterparts. This poor health is often due to poverty, poor nutrition, inadequate health care, and substance abuse.<sup>31</sup> It is estimated that 20 to 35 percent of women go to prison sick call daily compared with 7 to 10 percent of men. Women also have more medical problems related to their reproductive systems than do men. About 5 percent of women enter prison while pregnant, and 6 percent enter jails while pregnant. Most of these pregnancies are considered high risk due to a history of inadequate medical care, abuse, and substance abuse. Studies have found that women who were abused during pregnancy are more likely to abuse alcohol and other drugs and to be more depressed than women who were not abused.<sup>32</sup> While the specific health consequences of long-term substance abuse are significant for all women, they are particularly so for pregnant women.

Sexually transmitted diseases are also a problem among women offenders. Approximately

3.5 percent of women in prison are HIV positive. Women prisoners are 50 percent more likely than male prisoners to be HIV positive. The number of women infected with HIV has increased 69 percent since 1991, while the number of infected male offenders decreased by 22 percent.<sup>33</sup> Women offenders are also at greater risk for breast, lung, and cervical cancer. A study by Coker, Patel, Krishnaswami, Schmidt, and Richter found that incarcerated women who reported sexual abuse before the age of 17 were six times more likely than those who did not experience this abuse to exhibit cervical dysplasia (precancerous cervical lesions).<sup>34</sup> Approximately 22 percent of women in jails had received a gynecological exam since admission compared with 90 percent of women in state prisons.

## Mental Health

Many women who enter the criminal justice system have had prior contact with the mental health system. Women in prison have a higher incidence of mental disorders than women in the community. One-quarter of women in state prisons have been identified as having a mental illness.<sup>35</sup> The major diagnoses of mental illness are depression, post-traumatic stress disorder (PTSD), and substance abuse. Women offenders have histories of abuse that are associated with psychological trauma. PTSD is a psychiatric condition often seen in women who have experienced sexual abuse and other trauma. Symptoms of PTSD include depression, low self-esteem, insomnia, panic, nightmares, and flashbacks.

Approximately 75 percent of women who have serious mental illness also have co-occurring substance abuse disorders; about one in four (23 percent) of all women in state prisons are receiving medication for psychological disorders. A total of 22.3 percent of women in jail have been diagnosed with PTSD, 13.7 percent

have been diagnosed with a current episode of depression, and about 17 percent are receiving medication for psychological disorders. Approximately 18.5 percent of females admitted to a large urban jail had serious diagnosable mental illnesses.<sup>36</sup>

Women with serious mental illness and co-occurring disorders experience significant difficulties in jail and prison settings. Lack of appropriate assessment and treatment of women with mental health issues is a problem.<sup>37</sup>

## Children and Marital Status

Approximately 70 percent of all women under correctional supervision have at least one child younger than age 18. Two-thirds of incarcerated women have minor children; about two-thirds of women in state prisons and half of women in federal prisons had lived with their young children before entering prison. It is estimated that 1.3 million minor children have a mother who is under correctional supervision and more than 250,000 minor children have mothers in jail or prison.<sup>38</sup>

Of children whose fathers are incarcerated, approximately 90 percent live with their mothers; only 25 percent of the children of women offenders live with their fathers. Grandparents are most likely to be the caregivers of the children of female offenders. Approximately 10 percent of these children are in foster care or group homes.

More than half of the children of women prisoners never visit their mothers during the period of incarceration.<sup>39</sup> The lack of visits is due primarily to the remote location of prisons, a lack of transportation, and the inability of caregivers to arrange visitation.

Women under criminal justice supervision are more likely than the general population never to have been married. In 1998, nearly half of

the women in jail and prison reported that they had never been married.<sup>40</sup> Forty-two percent of women on probation reported that they had never been married. About 31 percent of women in prison reported that they were either separated or divorced.

## Education and Employment

In 1998, an estimated 55 percent of women in local jails, 56 percent of women in state prisons, and 73 percent of women in federal prisons had a high school diploma.<sup>41</sup> Approximately 40 percent of the women in state prisons reported they were employed full time at the time of their arrest. This compares with almost 60 percent of males.<sup>42</sup> About 37 percent of women and 28 percent of men had incomes of less than \$600 per month prior to arrest. Most of the jobs held by women were low-skill, entry-level jobs with low pay. Two-thirds of the women reported they had never held a job that paid more than \$6.50 per hour.

Women are less likely than men to have engaged in vocational training before incarceration. Those who have received vocational training in the community have tended to focus on traditional women's jobs, such as cosmetology, clerical work, and food service.

## Conclusion: Improving Outcomes for Women Offenders

An understanding of gender-based life experiences and the consequences of these experiences must inform and shape appropriate policy, operational, and programmatic responses to women offenders. Most women offenders are nonviolent, and their crimes are typically less threatening to community safety than those of male

offenders. Women's most common pathways to crime involve survival efforts that result from abuse, poverty, and substance abuse. Research suggests that all of these factors are interconnected.

While this chapter summarizes national data, criminal justice administrators are encouraged to develop data-informed profiles of women offenders specific to their jurisdictions. The experiences of agencies and jurisdictions in several NIC-sponsored initiatives have demonstrated that understanding the unique characteristics of the female offender population is crucial to the development of gender-appropriate policy and practice and to improving outcomes for women offenders.

### NATIONAL PROFILE OF WOMEN OFFENDERS

A profile based on national data for women offenders reveals the following characteristics:

- Disproportionately women of color.
- In their early to mid-30s.
- Most likely to have been convicted of a drug-related offense.
- From fragmented families that include other family members who also have been involved with the criminal justice system.
- Survivors of physical and/or sexual abuse as children and adults.
- Individuals with significant substance abuse problems.
- Individuals with multiple physical and mental health problems.
- Unmarried mothers of minor children.
- Individuals with a high school or general equivalency diploma (GED) but limited vocational training and sporadic work histories.

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## Women Offenders and Criminal Justice Practice

This chapter examines the effects of gender on current criminal justice practice and the impact of gender-based differences on the supervision and management of women in community correctional and institutional settings. For this report, national focus groups were conducted and research reports and other written materials were examined to determine the state of criminal justice practice regarding women.

Two key findings emerged from this examination. First, because of the overwhelming number of male offenders, the issues relevant to women are often overshadowed. In a discussion of legal issues concerning women in jail, Thigpen suggests: “[I]gnoring problems relating to female inmates on the basis of comparative numbers, or pushing those issues to the back burner in order to focus on issues involving male inmates, increases exposure to litigation and liability.”<sup>1</sup>

Second, the criminal justice system often has difficulty applying to women offenders policies and procedures that have been designed for male offenders. Differences in women’s pathways to the criminal justice system, women’s behavior while under supervision or in custody, and the realities of women’s lives in the community have significant bearing on the practices of the criminal justice system. There is significant evidence that the responses of women to community supervision, incarceration, treatment, and rehabilitation differ from those of men. These differences between men and women under community supervision and in custody have been documented in terms of the following:

- Levels of violence and threats to community safety in their offense patterns.
- Responsibilities for children and other family members.
- Relationships with staff and other women offenders.
- Vulnerability to staff sexual misconduct.
- Programming and service needs, especially in terms of health, mental health, substance abuse, recovery from trauma, and economic/vocational skills.
- Reentry into the community and community integration.

## Existing Policy

Many systems lack a written policy on the management and supervision of female defendants, probationers, inmates, or parolees.\* In a 1998 survey of current issues related to the operation of women's prisons, NIC identified the following policy areas that may affect female and male inmates differently:

- Pat-search and strip-search procedures.
- Commissary items, particularly health and beauty items.
- Allowable personal property.
- Transportation and restraint policies for pregnant women.

In focus group interviews, many managers and line staff reported that they were expected to manage women offenders using policies and procedures developed for the male offender population. They also reported difficulties in modifying these policies to develop a more appropriate and effective response to women's behaviors within the correctional environment.

The American Correctional Association policy on female offenders also raises this issue, stating:

Departments of corrections should ensure that their written policies and procedures address both female and male offenders. Historically, manuals or policies and procedures have been written from the point of view of the male offenders. For example, official lists of "clothing to be issued," "permissible personal items," and "rules of probation" have overlooked the needs of the female offender; policies on hygiene, recreation, paid employment, and visitation with children are often inappropriate for female offenders or else do not exist.<sup>2</sup>

Morash and Bynum have found that at the policy and system levels, the reality of managing a women's institution is often ignored or dismissed. They report that institutional-level managers often feel that their superiors fail to recognize gender distinctions, as noted in the following statement: "The higher administration in this state does not understand us. When we try to bring up issues related to women offenders, they don't want to be bothered by us."<sup>3</sup> A commitment to improving operations and procedures for women offenders acknowledges these important distinctions and devotes resources to addressing them.

The lack of written policy addressing gender differences between male and female offenders often puts managers and line staff in a quandary, as illustrated by this quotation from a community corrections focus group participant:

We need to develop policy and guidelines to deal with the differences women present in supervising them on probation. Instead, we don't have policy dealing with women's issues so we sit by passively and wait till she gets arrested. Then we call her a failure when it is the system that failed her.

## The Effects of Gender on Criminal Justice Practice

Gender differences in behavior, life circumstance, and parental responsibilities have broad implications for almost every aspect of criminal justice practice. The project's analysis of written materials and focus groups results identifies numerous areas in which day-to-day practice in probation, jail, prison, and parole becomes problematic because behavioral and situational differences between female and male offenders are ignored. The discussion in

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\*A variety of existing policies developed by the National Institute of Corrections Intermediate Sanctions for Women Offender Project, the Federal Bureau of Prisons, the American Correctional Association, the Minnesota Task Force on the Female Offender, and the Florida Department of Corrections contain crucial elements of a gender-appropriate approach. These elements are discussed in chapter 4.



this section offers a starting point for examining the ways in which agencies in community and institutional settings respond to female offenders. Issues related to gender differences and their effects are described with regard to the following:

- Criminal justice processing.
- Assessment procedures and classification.
- Women's services and programs.
- Staffing and training.
- Staff sexual misconduct.

### **Criminal Justice Processing**

To begin the examination of the effect of gender on criminal justice processing, consider this: If gender played no role in criminal behavior and criminal justice processing, then 51.1 percent of those arrested, convicted, and incarcerated could be expected to be women, as that figure represents the proportion of women in the general population. Instead, men are overrepresented in most classes of criminal behavior and under all forms of correctional supervision in relationship to their proportion of the general population.

Although the information presented here is not a comprehensive discussion of these implications, it provides a basis for considering some of the ways in which gender differences in the behavior and life circumstances of female and male offenders affect criminal justice processing. With some cited exceptions, the bulk of the information in this section has been taken from Harris's work in this area.<sup>4</sup> Harris discusses the general effects of differences between women and men in selected areas; she notes that the extent and nature of these differences across time and across different jurisdictions vary greatly. Many additional areas require empirical investigation, particularly research into the effects of gender in jails and community corrections.

### **Crime Definition**

The law defines the specific aspects of behavior that are considered a crime. Gender, as a primary determinant of behavior, often plays a role in this definition. Some differences place men at a disadvantage, such as the traditional definition of rape victims as being only female. Some differences place women at a disadvantage, such as the historical reluctance to treat violence against women as a crime when it occurs at the hands of husbands and other intimates. Many of these gender differences are found in prostitution-related and other sexual offenses. In the juvenile justice system, juvenile status offenses such as running away and being ungovernable play out in gendered ways: Girls' behavior is subject to a double standard and a greater focus on sexual activity than is the behavior of boys.

**Crime Reporting and Counting.** Gender differences can be found in the objective reporting and counting of crime. Traditionally, many measures of crime have ignored gender and have thus been the basis for gender-blind data collection. In earlier versions of the National Crime Victimization Survey, the survey questions resulted in underreporting of victimization related to domestic violence and sexual assault. This survey has since been redesigned to measure these gender-based events. In another example from the Uniform Crime Reports (UCR), incidents of forcible rape are limited to those involving female victims. UCR offense categories are broad, lumping together a wide range of behaviors of varying levels of seriousness and thus often masking gender-based differences.

**Types of Crime and Levels of Harm.** The Bureau of Justice Statistics reports that, according to victim accounts, only one of seven violent offenders is female. Women accounted for 1 in 50 violent sex offenders, 1 in 14 robbers, 1 in 9 offenders committing

aggravated assaults, and 1 in 6 offenders committing simple assault.<sup>5</sup>

The levels of harm produced by many criminal behaviors are closely related to gender. One example is the general crime category *fraud*, which includes both passing bad checks for small amounts and engaging in stock frauds involving large sums of money. Women are more likely to be involved in lower level bad-check writing, whereas men are more likely to be involved in higher level stock fraud. Both offenses are typically included in a general *fraud* category. Another example of a gender difference is found in the *larceny/theft* category. Although larceny/theft is considered a serious Index crime in the UCR, most larceny crimes women commit are less serious (e.g., shoplifting, passing bad checks, credit card fraud, and welfare fraud) than the larceny crimes men commit.

This lesser degree of harm in crimes committed by women is also found in victims' reports of violent crime. In general, the level of injury associated with female-committed crime is significantly less than that associated with male-committed crime.<sup>6</sup> BJS found that the consequences of male violence were generally more serious for the victim in terms of weapon use, injury, and out-of-pocket losses to the victim. Robbery provides another illustration. Although men and women report similar motivations to commit robbery, the ways in which they commit robbery are strikingly different, with men more likely than women to use physical violence or a weapon.

Female gang members, like their male counterparts, are disproportionately involved in delinquency, but young men in gangs still are involved more extensively in the most serious forms of gang crime. Wald summarizes research on the gender differences in circumstances that surround the committing of a

crime.<sup>7</sup> Characteristics associated with women as compared with men include the following:

- Less aggressive and less likely to use physical force in committing a crime.
- Less likely to use a gun or another weapon.
- Less apt to have played a major role in planning the crime.
- More often in a coerced or submissive role to a male codefendant.
- Most likely to play a minor role in the actual commission of a variety of crimes.
- In a lower status overall in criminal enterprises.

### **Arrest**

There are also significant differences by gender in the arrest stage. Men are harmed by being members of the more crime-prone sex, with men (especially minority men) more likely to be stopped and suspected. Overall, men are overrepresented as arrestees in terms of their proportion in the general population. They make up nearly 80 percent of all persons arrested and 90 percent or more of those arrested for the violent offenses of forcible rape, weapons offenses, sex offenses, and robbery, although men represent just under 49 percent of the general population. In contrast, women, who make up just more than 51 percent of the general population, represent just more than 20 percent of all arrestees.

Of all females arrested, more than 30 percent are charged with prostitution and commercialized vice, embezzlement, fraud, forgery, counterfeiting, and larceny/theft. In only two categories of offenses—commercial sex crimes and running away—do females account for more than 50 percent of all arrestees.

## Bail

Bloom and Covington argue that the task of making bail is quite different for men and women.<sup>8</sup> Most female offenders are economically disadvantaged and experience more difficulty in making bail. Because bail and own-recognition procedures are based on such stability measures as employment and income, women become disadvantaged as a result of their overall lower socioeconomic status. Unlike men, few women have partners that might post bail. In a study of female pre-trial jail detainees, the majority of subjects were nonviolent offenders who had been jailed because they could not pay bail for misdemeanors.<sup>9</sup> Counties participating in the Intermediate Sanctions for Women Offenders Project also found that women were less likely to make even low levels of bond.

## Sentencing

In part because men are more likely than women to be convicted of a violent felony and to have prior convictions, men are also more likely to be incarcerated and to serve longer sentences. Men have substantially higher lifetime probabilities of going to prison; a man has a 1 in 11 chance of going to prison in his lifetime, while a woman's chances are 1 in 91.<sup>10</sup> These probabilities, of course, differ within racial and ethnic groups. Of all men convicted of felonies in 1996, about 40 percent were sentenced to prison, 33 percent to jail, and 25 percent to probation. Among women felons convicted in 1996, roughly 25 percent were sentenced to prison, 33 percent to jail, and 40 percent to probation or some other nonincarcerative sanction.<sup>11</sup>

## Community Supervision

Focus groups conducted for this project with probation and parole officers across the United

States highlighted some of the gender differences in the supervision of women and men in the community. Among the points made were these:

- Men in community supervision have “learned to keep their mouths shut” and withhold information from their agents. With men, it is “yes/no answers; get in and get out.” Women, in contrast, provide us much more information and detail in office interaction. This takes much more time and places more demands on the officer.
- Women also appear to have the expectation that agents will provide help, in terms of concrete assistance, in navigating the system and providing other aid. One manager said: “Women believe it when they are told at orientation that the officer is there to help them. The men don’t. A woman will tell you ‘this is what is happening with me’ and look to you for help. Many times this help is not available.”
- Another supervisor observed that when you become the focal point for someone who has so many needs, “you can’t do it all.” Often staff will burn out because of these additional demands. This extra work is not typically acknowledged, and there is no incentive or system of rewards for this work.
- The need women have for connection is played out in the relationships they develop with probation and parole agents. Women want to talk individually with the agent, and they go into more detail and specifics with their agent than men do. This relationship endures even when the woman is transferred to another agent; the woman will still come to the original agent, and this can create conflict.

- Sometimes, one participant noted, “We cause women problems in ways we don’t cause men problems by requiring them to do so many things in the name of treatment or helping them.”
- A probation manager stated that “Probation staff (for women offenders) often do what is ‘normal’—by that, I mean what they do with male offenders. They do this because they don’t know any better.”

### **Incarceration**

Gender differences between male and female prisoners have been documented in several studies of prison populations.<sup>12</sup> These differences are summarized below:

- There are far fewer women than men in jails and prisons.
- Women, as a group, commit crimes that are less violent, and they are also less violent in custody.
- Drug offenses account for a greater proportion of the imprisonment of women than that of men.
- Children play a more significant role in the lives of incarcerated women than in the lives of incarcerated men.
- Trauma and victimization histories, substance abuse histories, and mental and physical health profiles are different for female and male prisoners.
- Educational, vocational, and treatment programs are typically less available to female prisoners than to male prisoners.
- Staff training traditionally ignores female offender issues.

### **Transition to the Community**

Like men, women who are returning to their communities from correctional facilities must comply with conditions of supervised release, achieve financial stability, access health care, locate housing, and try to reunite with their families. These tasks are often complicated by gender. The majority of women in the correctional system are mothers, and a major consideration for these women is reunification with their children. This adds what Brown, Melchior, and Huba refer to as an additional “level of burden” for these women, as their requirements for safe housing, economic support, medical services, and other needs include the ability to take care of their children.<sup>13</sup>

Important points concerning these women include the following:

- A majority of incarcerated mothers expect to take responsibility for their children once they are released and rarely receive any financial or emotional support from their children’s fathers.
- Families who have taken care of the children of imprisoned women often expect the released woman to take custody of her children immediately following release.
- Reunification with children is an important but often elusive goal of released mothers.
- If a child has been placed in foster care or state custody while the mother has been incarcerated, it is especially difficult for the released mother to demonstrate to state agencies that she is able to take care of and provide for her child adequately.
- Many women released from prison have lost touch with their families and thus face greater adjustment problems in reintegrating into the community.

## Assessment and Classification Procedures

Research on community corrections and prison assessment and classification suggests that gender-based behavior and characteristics complicate this aspect of criminal justice practice. Traditionally and statistically based on experiences with male offenders, community and prison classification systems are often unable to accurately assess either the risks or the needs of women. The discussion in this section strongly suggests that the purposes of assessment and classification systems for women offenders need further investigation in the form of both empirical exploration and work with jurisdictions concerned with more closely matching gender characteristics to criminal justice practice.

Current classification and assessment mechanisms, calculations of community risk, or custodial placement are based on individual offender characteristics. These actuarial approaches assign various weights (usually through a point system) to arrive at a score that, theoretically, represents the type or level of community supervision or institutional placement that an individual requires.

Most of the evidence provided here is drawn from empirical research on prison classification. However, this discussion illustrates the influence of gender on decisionmaking processes throughout the criminal justice system. Van Voorhis and Presser found that gender differences were often ignored in this process, as with previous studies of assessment and classification procedures for women:<sup>14</sup>

Although many respondents discussed differences between men and women offenders in terms of needs and risks to institutional and public safety, few states have incorporated these differences in objective classification instruments.<sup>15</sup>

In a national survey of women's programs in the criminal justice system conducted by Morash and Bynum, classification, screening, and assessment were mentioned as critical management problems because they did not provide needed information, were not adapted to women, and were not useful in matching women's needs for programming.<sup>16</sup>

Additional concerns have been raised, particularly by Canadian scholars, regarding the reliability and validity of risk assessment and classification instruments as they relate to women and to people of color.<sup>17</sup> Most risk-assessment instruments are developed and validated for white males, and the use of these tools with women and nonwhite offender populations raises empirical and theoretical questions about their utility.<sup>18</sup> Bloom asks a similar question:

Does women's offending relate to criminogenic risks and needs, or is it a factor of the complex interconnection of race, class, gender, abuse, trauma, addiction, or a combination?<sup>19</sup>

### Managing Risk in the Community

At the community level, assessment and classification involve assessing the degree of risk an offender represents and, increasingly, determining service and program needs as well (this approach is often referred to as "risk and needs" assessment). In the community, these calculations are designed to assess the level of threat, again typically related to reoffending but also including cases of failure to appear or absconding from supervision. The following problems have been identified in existing screening and assessment procedures:

- Assessment instruments that have not been normed or validated on women offenders.
- Exclusion of specific variables that materially affect women's offenses, including



abuse and victimization histories, parental responsibilities, and cultural issues.

- Narrow definitions of risk in terms of violence and community safety.

Few studies have examined women's risk and needs separately from those of men.<sup>20</sup> Existing instruments were designed to measure the behavior of men under community supervision, with particular attention to the degree of harm or danger their offenses represent to the community. These standardized instruments were normed and validated or statistically tested on samples of male offenders. They typically have been applied to female probationers without being tested on samples of women. Bloom states:

Compared to male offenders, female offenders have received little attention in the area of prediction of the risk for reoffending. In fact there are only a few prediction studies on adult female offenders. For example, in a meta-analysis of the risk prediction literature, Gendreau, Andrews, Goggin and Chanteloupe (1992) identified nearly 400 studies on the prediction of criminal behavior that produced 1,734 individual correlations between a predictor and outcome. Only 46 of the correlations were based on female offender samples.<sup>21</sup>

Whitaker notes that addressing issues of culture and gender in risk assessments has sometimes been seen as “superfluous, expensive, excessive, and unnecessary.”<sup>22</sup> In discussing the predictive power of community risk assessment instruments, Van Voorhis suggests that “high risk” can mean different things for women and men.<sup>23</sup> For example, for men, the factor “anti-social peers” often translates into “dysfunctional learning situations,” whereas for women this variable often translates into

“relationship difficulties.” These results might indicate a need for men to learn how to avoid high-risk situations and a need for women to develop healthy relationships and self-efficacy.

A second example involves the variable measuring family factors, which often indicates aggression on the part of the men and victimization on the part of the women.\*

One result of excluding samples of women in these validation studies is that specific variables that materially affect women's offenses—including abuse and victimization histories, parental responsibilities, and cultural issues—are thus ignored in these calculations. Most instruments do not assess the specific needs of women that are tied to their pathways to offending and, specifically, the intersecting problems of substance abuse and victimization.

There is also evidence that community correction agencies often respond to the high-level needs of female offenders by creating treatment obligations (such as unrealistic reporting requirements or burdensome treatment conditions) that are unmanageable and thus result in participants' failure to conform to conditions of supervision. In both of the above cases, instruments and approaches do not measure the facts of women's lives and the elements that contribute to success or failure while women are under community supervision.<sup>24</sup> Urging caution in terms of variables' predictive power with regard to female offenders, Chapple suggests the addition of more variables relevant to female offenders, such as abuse and parental responsibilities.<sup>25</sup>

Williams, McShane, and Dolny ask whether standard parole prediction instruments, also

\*Discussion is ongoing regarding the application to women offenders of popular risk-assessment instruments such as the Level of Service Inventory and Salient Factor Score. As of this writing, little published research was available for inclusion in this section. Some of those interviewed for this project noted that critical measures used in the “what works” literature, such as “antisocial peers,” “antisocial associates,” and “criminal history,” did not fully consider additional gender-responsive variables suggested by the pathways perspective. The debate continues, as does the need for empirical research to validate the predictive power of a range of variables.

based on actuarial calculations, accurately predict female parolee recidivism.<sup>26</sup> Their review of the literature shows that women have higher overall rates of parole success and that female recidivists typically do not commit violent crimes. In analyzing data from a large western state, they found that existing male-based instruments “do no harm” to women on parole, but they suggest caution in using instruments that do not take female-specific variables into consideration.

### Prison Classification Studies

In correctional institutions, classification systems are designed to make housing and programming assignments within the available range of options. The research on prison classification systems has identified concerns similar to those associated with community assessment procedures. To assess the current state of women’s prison classification systems, Van Voorhis and Presser conducted a national assessment of state and federal classification practices for female offenders. Respondents in some states voiced a desire for classification models that would better support gender-responsive programming and move less serious offenders through the system more quickly.<sup>27</sup> Central findings from this study include the following:

- Most policymakers recognize that, as a group, women offenders are less dangerous than male offenders.
- Women’s needs differ from those of men, but these needs are seldom considered by institutional needs-assessment systems.
- Existing classification systems in many states overclassify women offenders.
- Many states do not use the classification system to assign women offenders to institutional or housing areas.

- Only about 20 states have validated their systems on samples of women.

Current debate in this area centers on the question of appropriate classification systems for women and the lack of empirically validated classification instruments for them.<sup>28</sup> In smaller systems, the lack of multiple facilities often makes the question of housing assignments moot. Morash and Bynum note that states with only one women’s facility were challenged to “manage women who span all custody levels and address their needs whether it is aging, mental health, medical issues, or lengthy sentences.”<sup>29</sup>

The problem of overclassification of female offenders is also significant.<sup>30</sup> With risk-assignment scores based on male behavior, women are often given scores that do not match their actual levels of violence or escape potential. This overprediction (or overclassification) problem results in useless scores that are often overridden in actual practice. Overclassification can result in unwarranted assignment to higher security levels and to exclusion from community corrections placements.<sup>31</sup>

As Nancy Stableforth, Deputy Commissioner for Women, Correctional Service of Canada, asserts:

There are respected and well-known researchers who believe that criminogenic needs of women offenders is a concept that requires further investigation; that the parameters of effective programs for women offenders have yet to receive basic validation; that women’s pathways to crime have not received sufficient research attention; and that methodologies appropriate for women offender research must be specifically developed and selected to be responsible not only to gender issues, but also to the reality of the small number of women.<sup>32</sup>

Additionally, most classification systems tend to use a woman's offense as a primary predictor of risk. Research indicates, however, that a woman's offense often has little relationship to her adjustment to prison and is also a weak predictor of success following release to the community.<sup>33</sup> Instead of criminogenic factors, women's risk for reoffending may be tied to a lack of transitional programs and support systems that could help them reintegrate into their communities.

Since classification calculations consider institutional behavior, differences between men and women also play a role in how disciplinary procedures are used. McClellan examined disciplinary practices at two Texas prisons housing female inmates and compared the practices to those found in the male prisons. She found gender-related differences in treatment between the sexes: Women were cited more frequently for disciplinary infractions and punished more severely than male inmates. McClellan also found higher levels of surveillance at the institutions for women, which suggests that gender bias may influence the number of infractions for which women are cited, especially for less serious infractions such as "violation of a written or posted rule" or "refusing to obey an order."<sup>34</sup> Van Voorhis and Presser found that overcitation may lead to overclassification because most reclassification instruments place a heavy weight on institutional misconduct.<sup>35</sup>

Van Voorhis and Presser state that "it is noteworthy that few states have designed systems that started with women in mind. Most map existing male-based assumptions regarding goals and purposes of corrections onto women and the systems that classify them."<sup>36</sup> In their national assessment, respondents in 15 states indicated that the following correctional goals were as central to women offenders as traditional custody concerns:

- Habilitation and rehabilitation, particularly the establishment of programs targeted to meet needs unique to women.
- Transitional programming pertinent to parenting and family issues.
- Transferring women who commit minor offenses to lower custody levels and out of the system as soon as possible with the intention to serve more women in community facilities rather than institutions.<sup>37</sup>

Van Voorhis and Presser conclude by suggesting: "If we started with women, we might expect to see classification systems which focused more attention on factors that seem key to women's reintegration—their children, relationships, abuse, earlier trauma, mental illness, and job skills."<sup>38</sup> Subsequent research has found these variables to be as predictive of prison misconduct as the traditional variables of prior record and current offense, especially variables pertaining to child abuse, relationships, and mental illness.<sup>39</sup>

## Women's Services and Programs

The salient features that propel women into crime include family violence and battering, substance abuse, and their struggle to support themselves and their children.<sup>40</sup> As discussed in chapter 1, there are strong similarities between the profiles of women under community and institutional sanctions. In discussing the program needs of women in community corrections settings, Chesney-Lind has stated: "[W]omen offenders, then, have different personal histories than their counterparts and less serious offense backgrounds. In particular, women's long histories of repeated victimization have to be considered in crafting any response to their criminal conduct."<sup>41</sup> She continues that women offenders in the community must have safe and affordable housing, access



to reliable transportation, and realistic employment opportunities. There is corresponding evidence that these issues are essential to successful community reintegration following incarceration in jails and prisons.

Richie found that women have a great need for comprehensive, wraparound services in the community.<sup>42</sup> A case-management approach that addresses women's multiple treatment needs in a comprehensive, gender-responsive way has been found to work effectively. Richie argues that child care, transportation, safety from abusive partners, and access to staff beyond business hours are critical elements of successful reintegration. She suggests that policy should address community needs as well as individual needs to improve outcomes for women. In concluding her series of in-depth interviews with women, Richie states:

[Women] need families that are not divided by public policy, streets and homes that are safe from violence and abuse, and health and mental health services that are accessible. The challenges women face must be met with expanded opportunity and a more thoughtful criminal justice policy. This would require a plan for reinvestment in low-income communities in this country that centers around women's needs for safety and self-sufficiency.<sup>43</sup>

Harris indicates there is significant evidence that rehabilitative programs for women offenders are often based on generic programs that make no gender distinctions.<sup>44</sup> For example:

- Program staff may have little knowledge of gender differences in behavioral, cognitive, moral, and emotional development.
- Most correctional interventions do not address the effects of early physical, sexual, and emotional abuse and the resulting trauma.

- A common perception still exists that nothing works with women offenders because they are an intractable population.
- Placement of women in lower risk groups may result in the belief that they are inappropriate targets of intervention.
- Various agencies of the criminal justice system, the social services system, and the treatment community continue to operate as independent entities; full integration of the planning and delivery of treatment services seldom occurs.

### Community Corrections

Wellisch, Anglin, and Prendergast found that women have special requirements in community treatment settings, including a means to maintain or reestablish contact with children, training in work that allows for self-support, and adequate health care.<sup>45</sup> Other problems include the lack of a coordinated system of support within communities that can provide a comprehensive range of assistance to women (e.g., in such areas as housing, job training, employment, transportation, family reunification, child care, drug and alcohol treatment, peer support, and aftercare).

Women who are on probation or under other forms of community supervision or who are transitioning from jail or prison to the community must navigate myriad systems that often provide fragmented services. Many of those interviewed in the national focus groups noted that little coordination exists among the systems assigned to address substance abuse, criminal justice, public health, employment, housing, and child welfare. Hoskins also notes the danger in conflicting expectations when community treatment services are not integrated within community correctional obligations.<sup>46</sup> She asserts that a coordinated case-management

approach, developed in partnership with community corrections and treatment staff, can minimize these conflicts.

### Jails

In their study of jails operated exclusively for women, Stohr and Mays suggest that women are often denied the same recreational, social, and programming opportunities that men have traditionally been afforded.<sup>47</sup> They also found that women's medical and familial needs are not met in jails designed to incarcerate men. In our national focus group interviews, one administrator of a co-ed jail stated:

There is no question that different programming is needed for female offenders, particularly in a jail. . . . Many were arrested and incarcerated at the same time as their spouse or significant other and so received few visits or had no one on the outside. Many were dealing with issues of sexual or physical abuse, and others were left with working out arrangements for children, as well as dealing with financial issues, family separation, and other issues.

In a 1996 review of legal issues involving female jail inmates, Collins and Collins suggest that the Equal Protection Clause of the Fourteenth Amendment requires jail officials to explain and justify differences in housing, privileges, and programming for male and female inmates. They suggest that female jail inmates are without many of the programs and services available to men owing to their smaller numbers and the resulting limited resources allocated to them.<sup>48</sup> Collins and Collins and Gray, Mays, and Stohr found that work programs were much less common for women in jail, sometimes resulting in fewer opportunities for earned good time and work release.<sup>49</sup>

Vocational programs were found to be inadequate both in number and in the ability to prepare women for career-oriented training. Health-related resources, particularly those relating to gynecological and obstetric needs,

were also found to be lacking. Johnston, Veysey, Teplin et al., and Singer et al. all found that mental health problems among jail populations were particularly significant and were typically not addressed in the jail environment.<sup>50</sup> Pregnant inmates, argued Collins and Collins, presented particular challenges to the jail health-care system. As in the prison setting, staff sexual harassment was identified as a problem in jails, but one with little documentation at the time of the report. Family concerns, they assert, are magnified for women in jail because women are often both the sole caretakers and source of financial support for their children. Other problems identified in women's jails were obstacles to visiting and access to legal resources that provide assistance in the area of parental rights.

### Prisons

In the national survey of prison administrators conducted by Morash and Bynum, about 40 percent of the states surveyed indicated that providing programs and services for women offenders (including resources) was their most serious operational problem.<sup>51</sup> In a survey of state prison administrators, the National Institute of Corrections requested information on programs developed specifically to meet the needs of women offenders.<sup>52</sup> They found that female-focused programs fell into one of two categories:

- Programs offered solely or primarily to female offenders that addressed issues common in this population, such as victimization through domestic violence and sexual abuse, low self-esteem, and mentoring needs.
- Programs dealing with issues common to both women and men but with specific content altered to deal with the different treatment needs or survival skills important to women.

Research on prison programs for women has consistently established the following:

- Male prisons typically provide a greater variety of educational and vocational programs and training for more skilled (and better compensated) occupations.
- Women were offered a narrow range of stereotypical job-training programs for conventionally “female” occupations, such as cosmetology and low-level clerical work.
- Women in prison receive fewer institutional work assignments and lower rates of pay than male inmates, and men have greater access to work-release programs.<sup>53</sup>

## Staffing and Training

Staffing and training are core issues in the appropriate management and supervision of women in the criminal justice system. The national focus groups conducted for this report revealed a need for gender-specific training within each segment of the system. As a community corrections participant noted, “Our staff are continually frustrated because they lack any information or training about dealing with the women in their caseloads.” Respondents also mentioned that the lack of training contributed to the perception that female offenders were much more difficult to work with than male offenders. A participant in a jail focus group noted, “None of the jail staff have received any gender-specific training. We had to learn on the job. We need training in communication skills, sensitivity training, available community resources, and how to handle the emotions and manipulations of the female inmate.”

Although the Morash and Bynum study found that at the institutional level most administrators report staffing and training as a high priority, Rasche stated that a 1998 national survey of 40 prison systems found that more than half

did not have specialized training on the female offender.<sup>54</sup> Rasche also suggests that specialized training for those working with female offenders is justified, based on the real differences between male and female offenders along three dimensions: demographics, needs, and personalities.

Morash and Bynum also suggested that the education of central office management in the nature of these differences is important.<sup>55</sup> Preparing staff to work with female offenders requires increased knowledge about women that will enable staff members to develop constructive attitudes toward female offenders, the interpersonal skills necessary for working with women, and guidelines for appropriate interaction with women under correctional supervision.

## Knowledge Regarding Women Offenders

Data sources reviewed for this project uniformly indicated that standard training protocols neglect or minimize information about the female offender. Focus group interviews and a review of existing training materials suggest that including the following content areas and points of information will better prepare staff and management to work with women offenders:

- Demographics of women offenders.
- Proportion of female offenders within the system.
- Reasons for female criminality.
- Offense distributions.
- Parenting and the importance of children in the lives of female offenders.
- Developmental and psychological differences between men and women.
- Sexuality and alternative lifestyles.
- Racial, ethnic, and cultural differences among women.

- Implications of violence and trauma across the lifespan.
- Substance abuse and treatment histories and the trajectory of the healing process.
- Physical and mental health needs.
- Educational and vocational backgrounds.

A community corrections participant in the national focus groups also noted: “[Staff] need to be equipped with both the skills and the referrals to address the real problems and issues of women in the community. We need to learn how to advocate for positive changes in women’s lives in the community context.” One corrections officer in a western state noted: “None of us have been trained to work with female offenders because our academy focused totally on men.”

### **Attitudes About Women Offenders**

National studies,<sup>56</sup> research,<sup>57</sup> and national focus group interviews have all identified negative attitudes and cultural stereotypes about the female as major obstacles to supervising women and providing services for them. In the prison setting, Rasche refers to these attitudes as “the male inmate preference” and suggests that it is found among both low- and high-ranking male and female correctional officers.<sup>58</sup> Pollock notes: “[T]here is an informal agreement among correctional personnel that female offenders are somehow ‘harder to work with’ than male offenders.”<sup>59</sup> Pollock also found that both male and female officers defined women inmates as more demanding, more complaining, and more likely to refuse orders.

In the community, as one probation officer participating in the national focus groups stated, “Women are often defined as ‘less than’ and not worth the trouble they cause.” Many

staff interviewed in the focus groups report that the woman offender is often defined as inconvenient and difficult to work with in a system designed to supervise the behavior of men. Others note that working with the woman offender is seen as a low-status assignment. Attitudes toward female offenders were described as “stereotypical” and “negative.”

Respect was also seen as a critical issue in managing the female offender in the community. As one probation officer stated:

Most women have been abused before by their intimates and also by the criminal justice system. They expect to be abused and humiliated and are prepared to be treated badly. When women are respected, this breaks down the barriers. It is important to know that we are not here to continue the abuse. We also have to treat a woman like a woman instead of like a child.

### **Skills Needed for Working With Women Offenders**

Women and men have vastly different styles of communication.<sup>60</sup> Many of those interviewed in the national focus groups expressed the view that female offenders are more willing than males to share the details of their lives and that they also express themselves more extensively. This creates a need to educate staff in the different ways in which females and males communicate and relate to others. “Listening skills,” in particular, were seen as specifically appropriate to women offenders. In the national focus groups, a prison manager suggested: “[I]t is important to learn how to talk to women offenders, maybe even more important than with male offenders. For example, you would want to talk to a woman before you write her up. Sometimes those few minutes of conversation can save you hours of paperwork.” A prison administrator in a mid-western state commented that working with

women required more patience and time. Basic counseling skills were also mentioned as essential.

### **Guidelines for Appropriate Interaction With Women Offenders**

A review of procedure and operations manuals reveals that few guidelines exist for working with women offenders. Cross-gender supervision strategies, appropriate language to be used in referring to women, and the meaning of professional boundaries were among the guidelines mentioned in the national interviews and in Pollock's study.<sup>61</sup> Sexual misconduct issues are also included in this area. To reduce both the abuse of inmates by staff and the incidence of lawsuits, employees need to be trained specifically in how to work better with all inmates and how to maintain professional boundaries between themselves and inmates.

### **Staff Sexual Misconduct**

During the past 10 years, the problems of staff sexual misconduct have received significant attention from the media, the public, and many correctional systems.<sup>62</sup> While the discussion here is based on published work that describes this problem within the institutional environment, the problem exists throughout the criminal justice system. Moss offers a definition of sexual misconduct as "sexual behavior directed toward inmates, including sexual abuse, sexual assault, sexual harassment, physical contact of a sexual nature, sexual obscenity, invasion of privacy and conversations or correspondence of a romantic or intimate nature."<sup>63</sup> The potential abuse of power inherent in staff-inmate relationships is at the core of staff sexual misconduct. Moss states that this inherent difference in power between staff and inmates makes any consensual relationship between staff and inmates impossible.

Misconduct can take many forms, including inappropriate language, verbal degradation, intrusive searches, sexual assault, unwarranted visual supervision, denying of goods and privileges, and the use or threat of force.<sup>64</sup> Misconduct includes disrespectful, unduly familiar, or threatening sexual comments made to inmates or parolees. It is important to note that female officers have also been found to be involved in this serious misconduct, although the more publicized pattern appears to involve male staff with female inmates.

The problem can be aggravated by poor grievance procedures, inadequate investigations, and staff retaliation against inmates or parolees who "blow the whistle." In addition, standard policies and procedures in correctional settings (e.g., searches, restraints, and isolation) can have profound effects on women with histories of trauma and abuse, and they often act as triggers to retraumatize women who have PTSD. Such operational concerns as the isolation of post assignments, the overuse of overtime, inadequate facility design for privacy, extended inmate work assignments, poor transportation practices, and an absence of teamwork among security staff and civilian staff can also contribute to the inadequacies of the environment in systemically addressing staff sexual misconduct. One focus group respondent noted that, in the final analysis, staff sexual misconduct should be defined as a security issue, in that such behavior damages the safety and security of everyone, staff and inmates alike.

Kupers has identified a constellation of issues relevant to the problems of sexual harassment, abuse, privacy violations, and retaliation in women's correctional facilities.<sup>65</sup> In his written testimony in the case of *Everson v. Michigan Department of Corrections*, he reviews evidence regarding staff sexual misconduct in U.S. prisons in general, and specifically in



Michigan. His argument can be summarized as follows:

- Women prisoners with histories of abuse may be retraumatized by sexual harassment and abuse in prison and by the absence of a “safe place” for them to heal and rehabilitate themselves.
- The impact of retraumatization includes PTSD, depression, anxiety, and other mental illnesses and disabilities; and decreased ability to participate in rehabilitative programs while in prison and the effects of this on a female offender’s reintegration into the community upon release.

### **Legal Aspects of Staff Sexual Misconduct**

Smith reviews the history of contemporary litigation, beginning in 1990 with the Women’s Correctional Institution at Milledgeville, Georgia.<sup>66</sup> The allegations included claims that women were forced to have sex with staff, routinely exchanged sex for favors, and experienced verbal harassment. The suit also alleged that the women’s complaints had been ignored and that they had not received appropriate counseling to deal with the trauma created by the abuse. As a result of litigation, the consent decrees entered into by the state set the standard for systemwide policy to address this problem. These decrees established the following standards:

- Misconduct would be reported confidentially and the individual reporting it would be protected from retaliation.
- Counseling would be provided to women who experience such abuse.
- Strip searches would be prohibited except in very special circumstances.
- Procedures would be put in place for investigating allegations of sexual contact, sexual harassment, and sexual abuse.

- Training for employees and women inmates would be provided.

The highlighted lawsuits and other, less visible lawsuits contributed substantially to raising the issue of staff sexual misconduct to the level at which it received correctional administrators’ deliberate policy-level attention.

In her detailed discussion of selected legal issues (see appendix A), Professor Myrna Raeder begins the section on staff sexual misconduct by stating that misconduct cannot be tolerated in any correctional setting, whether or not it involves violence on the part of a correctional official. Sexual misconduct has criminal and civil consequences. It can result in disciplinary actions or in criminal charges against the staff member accused of improper behavior. In addition, civil litigation may be instituted against the particular staff member, other staff members, supervisors, and even the municipality. Beyond the legal context, sexual misconduct implicates the culture of the institution and hinders the ability of administrators to achieve rehabilitative goals.

### **Independent Reports**

Several major reports were instrumental in documenting the scope of staff sexual misconduct in women’s prisons. Human Rights Watch reviewed the conditions of women incarcerated in five states (California, Georgia, Illinois, Michigan, and New York) and the District of Columbia and made recommendations concerning training, legislation, and policy.<sup>67</sup> Amnesty International also researched the issue and made similar recommendations.<sup>68</sup> Smith summarizes the following overlapping recommendations:<sup>69</sup>

- Same-sex supervision for female inmates.
- More explicit policies and laws prohibiting sexual abuse of inmates.

- Stronger mechanisms for investigating and prosecuting sexual abuse.
- Appropriate supportive services and redress for sexual abuse.
- Greater protection from retaliation for inmates reporting sexual misconduct.

The General Accounting Office also examined this issue through a review of staff sexual misconduct policy in selected jurisdictions.<sup>70</sup> Recommendations contained in this report focused on problems in monitoring, tracking, and reporting incidents.

### **NIC Surveys**

The National Institute of Corrections has responded to the issue of staff sexual misconduct in a variety of ways. The Institute has sponsored several national surveys of state laws and existing policy and has supported the development of training programs. Strategies designed to address staff sexual misconduct in correctional facilities, as reported by NIC, include the following:<sup>71</sup>

- Passing new laws that define sexual misconduct and exclude consent by the inmate as a legal defense.
- Assessing agencies' operational and management practices.
- Developing new policies specifically prohibiting staff sexual misconduct.
- Improving training programs to heighten staff awareness of the issue and its consequences.
- Revising agency procedures for investigating charges of staff sexual misconduct.
- Developing new ways to increase inmates' awareness of this issue.

### **Implications for Jail and Community Settings**

Although most of the publicity and research attention given to the issue of staff sexual misconduct has involved the prison setting, it is a serious issue in jail and community correctional settings as well. While jails may experience issues similar to those of prisons, the issue may play out differently in the community. Regardless of location, common concerns include the following:

- Community corrections and jail staff have significant power over the female offender.
- Women offenders in the community have similar backgrounds of sexual abuse.
- Most agencies have not addressed the problem through policy, training, legal penalties, or reporting and grievance procedures.

### **Legal Aspects of Criminal Justice Practice Concerning Women Offenders**

In appendix A, Raeder states that the current legal environment for prison officials is favorable toward the development of gender-appropriate policy and criminal justice practice owing to both judicial interpretation and congressional legislation. This legal environment appears to support opportunities for creative administrators to adopt innovative programs that are more likely to ensure better outcomes for women offenders and their children. Administrators who believe that gender-responsive programming will better serve the needs of the female inmate population have great leeway for experimenting with creative approaches to solve previously intractable problems (see "Key Legal Themes").

In addition to the discussion of the legal aspects of staff sexual misconduct summarized above,

the following specific issues have significant bearing on managing women offenders:

- Cross-gender supervision.
- Due process challenges.
- Pregnancy and child-related questions.
- Equal protection issues/equivalent access to programs and services.

### **Cross-Gender Supervision**

A number of lawsuits involving women offenders are based on issues surrounding cross-gender supervision. Administrators must balance competing institutional security and management interests with the privacy interests of women offenders. Courts have accorded women more rights to privacy than men in correctional settings. Thus, women are more likely than men to continue to be successful in suits that implicate privacy interests. This stems from society's apparent view that women should be afforded more privacy than men and from the fact that cross-gender supervision will cause many female offenders to experience additional trauma, given their histories of sexual and physical assault.

### **Due Process Challenges**

Typically, due process has failed to provide a useful tool for convicted prisoners to use in challenging their conditions of confinement. Research has indicated that women in prison are given penalties for minor types of behavior that would not be considered violations of the rules in a men's prison. These penalties may prolong women's incarceration or put them in solitary confinement more frequently. Raeder argues that it is difficult for prisoners to raise due process claims successfully. However, officials should determine whether women are being segregated for mental health problems that are made worse by that type of confinement.

## **KEY LEGAL THEMES**

- Under an equal protection analysis, the goal is parity of facilities, programming, and services for women offenders.
- Gender-responsive programming is an appropriate correctional response.
- Differences exist between men's and women's rights to privacy: Essentially, the employment rights of female correctional officers supersede the privacy rights of male inmates. Women offenders' rights to privacy have been ruled as extending farther than those of male offenders.
- Cross-gender supervision can be appropriate, but case law is stricter when male correctional officers pat-search female inmates than when female correctional officers pat-search male inmates. In some situations, single-sex supervision may be the better response. However, female employees should be given opportunities for job advancement that ensure they serve in male institutions.
- Decisionmakers need to be proactive to lessen the chances of sexual misconduct litigation. Protocols should be established and followed, and training should be instituted. Consideration should be given as to how best to deploy male staff.
- Restrictions on access to abortion services, such as court approval, should be eliminated. However, an inmate may not be entitled to public funds to pay for the abortion.
- Restricted visiting and parental rights termination proceedings are significant to women inmates and may adversely affect their rehabilitation, even if such policies and laws are not unconstitutional.

### **Pregnancy and Child-Related Questions**

Inmate pregnancy is an issue of particular significance for jails; however, it also occurs in prison settings. Legal issues often arise concerning access to nontherapeutic abortions and the conditions surrounding the birth of an inmate's child. Restrictions on termination of pregnancies and deliveries should be carefully monitored by administrators because they are likely to result in litigation.



Also, because most female offenders are mothers, visits with their children can be key to motivating them to change their behavior. Understanding how such family-based legal issues impact women offenders is important in designing programs that can ensure the best outcomes for women and their children, not only in jail or prison settings but also in probation, parole, and community correctional settings.

### Equal Protection and Access

Raeder suggests that penological goals may justify gender-specific treatment. In evaluating equal protection arguments, courts vary as to what standard of review to apply to evaluating the legality of a policy or criminal justice practice.<sup>72</sup> However, even if the policy is intentionally discriminatory, applying only to women, it will be upheld if an important penological justification is demonstrated. Under either standard, different policies, facilities, programs, and services can satisfy equal protection even if the populations are similarly situated as long as a valid penological justification exists for the differences.

### Conclusion: The Importance of a Coordinated Response to Gender-Specific Needs

The preceding discussion of the implications of gender within the criminal justice system is based on a simple assumption: Responding to the differences between women and men and their pathways to criminal behavior is consistent with the goals of all correctional agencies. These goals are the same for all offenders, whether they are male or female. Across the criminal justice continuum, the goals of the system typically involve sanctioning the initial offense, controlling behavior while the offender is under its jurisdiction, and, in many cases, providing interventions, programs, and servic-

es to decrease the likelihood of future offending. At each stage in the criminal justice process, the differences between female and male offenders affect behavioral outcomes and the ability of the system to address the pathways to offending and thus achieve its goals. As Judge Patricia Wald stated, “[I]t is commonly understood that women offenders as a group display significant differences from their male counterparts in ways that materially affect the goals of sentencing.”<sup>73</sup>

A review of the evidence strongly suggests that systems and agencies encounter problems and minimize success by not acknowledging gender differences and integrating them into their operational and management practices. The need for the criminal justice system to respond appropriately to the documented gender differences is clear. As Modley has written, the “sheer growth in the numbers of women offenders . . . contributes to our sense of urgency to understand *why so many* women, *why they keep returning to* (and failing in) our corrections systems, and *what more effective strategies* for supervising and for treating them might be available.”<sup>74</sup>

These issues will be the focus of chapters 3 and 4.

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## The Context of Women's Lives: A Multidisciplinary Review of Research and Theory

This chapter reviews the concept of gender and gender differences within society and associated implications for the criminal justice system. Three general areas are reviewed: first, multidisciplinary research on gender, including such disciplines as health, family violence, substance abuse, mental health, and trauma; second, theoretical perspectives specific to women; and third, the gendered effects of policies.

Until recently, the criminal justice system has lacked a specific focus on the female offender for a variety of reasons. First, the overall number of men in custody and under supervision overwhelms the small number of women; little contemporary work has focused on the female offender (most theory and research are centered on crimes perpetrated primarily by males); and traditional policy and practice are based on experiences with male offenders. Often by default, practices designed for male offenders are viewed as the norm. With the rise of women offenders in the system and the increased knowledge gained from research on women in the general population, gender-based issues are now receiving attention at all levels of the criminal justice system.

Recent research and theory on women, with emphasis on issues involving women offenders, are summarized to provide a foundation for identifying gender-responsive and culturally responsive options. Understanding the context of women's lives, both in the general population and under criminal justice supervision, is an important first step in developing gender-responsive policy and practice.

### **Acknowledging Gender: Differences Between Women and Men**

Research on the differences between women and men suggests that social and environmental factors, rather than biological determinants, account for the majority of behavioral differences. While purely physiological differences influence some basic biological processes (such as health and medical care) and a range of reproductive issues, many of the observed behavioral differences are the result of differences in gender socialization, gender roles, and gender inequality.



It is important to understand the distinction between sex and gender differences. Belknap explains that sex differences are biological differences, such as those concerning reproductive organs, body size, muscle development, and hormones. Gender differences are ascribed by society and relate to expected social roles.<sup>1</sup> They are neither innate nor unchangeable. Gender shapes the reality of women's lives and the contexts in which women live.

Understanding the distinction between sex and gender informs us that most differences between men and women are societally based (gender), not biologically determined (sex). It is important to comprehend and acknowledge some of the dynamics inherent in a gendered society. The influence of the dominant culture is so pervasive that it is often unseen. One of the gender dynamics found where sexism is prevalent is that programs or policies declared "genderless" or "gender neutral" are in fact male based.<sup>2</sup>

Race and class can also determine views of gender-appropriate roles and behavior. Differences exist among women based on race and socioeconomic status or class. Regardless of their differences, all women are expected to incorporate the gender-based norms, values, and behaviors of the dominant culture into their lives. As Kaschak states:

The most centrally meaningful principle on our culture's mattering map is gender, which intersects with other culturally and personally meaningful categories such as race, class, ethnicity, and sexual orientation. Within all of these categories, people attribute different meanings to femaleness and maleness.<sup>3</sup>

The differences between women and men exist in a range of areas, including biological, health, violence, substance abuse, mental health, trauma, and socioeconomic status. Concerns relating to these areas pertain to

women in both the general population and the criminal justice system.

## Biology

A great deal of controversy surrounds any discussion of biological differences between women and men. The one obvious area of agreement involves reproductive differences, such as birth and lactation. Beyond this difference, there is considerable debate regarding other sex differences.

At this point, separating biological effects from social and cultural effects is problematic. Pollock argues that a "biosocial" approach takes these findings into account.<sup>4</sup> For example, she reviews research that suggests that male aggression is based on the fact that men possess 10 to 15 times more testosterone than women. Although enormous measurement and definitional issues are involved in this work, there appear to be consistent findings that "the differential level of aggressiveness among men was a sex difference rather than a gender difference."<sup>5</sup> However, studies that indicate some link between testosterone and aggression also suggest that such a relationship is socially mediated.<sup>6</sup>

Another area of biological research concerns brain differences. As Pollock notes, there is increasing evidence that the brains of men and women are different both in size and in the complexity of neural networks and pathways.<sup>7</sup> One area of research is brain lateralization. Women are likely to have more neural pathways in the left hemisphere, and men have more pathways in the right hemisphere. These findings have thrown into further dispute speculation regarding men as being more "left brain" (e.g., more analytic) and women as more "right brain" (e.g., more emotional). Women also show greater connections between the two hemispheres. There is some speculation that this suggests that men, with

more lateralized brains, thus tend to be more self-oriented, while a more integrated brain makes women tend to be more “other” and “us” oriented. While much further study is needed, this finding may be the basis for the more relationship-oriented behavior exhibited by women.

## Physical Health and Health Care

Research into gender differences related to biology and medical needs has been increasing in recent decades. In addition to the biological and medical needs, new research is being conducted on the effects of sociological and institutional factors. One of the primary sources for information about women’s health comes from the National Institutes of Health (NIH) and the NIH Women’s Health Initiative. In summarizing information about women’s health in the general population, this section begins with a discussion about the need to study women’s medical and health care needs independently from those of men.

In the 1999 *Agenda for Research on Women’s Health in the 21st Century*, the National Institutes of Health Office of Research on Women’s Health (ORWH) found that research results are rarely reported or analyzed by gender, and that women are typically not recruited in sufficient numbers to support conclusions regarding the impact of gender on the study findings. The report states:

We are just beginning to understand and appreciate the differences between men and women in virtually every system of the body, as well as the way men and women experience disease. Differences in drug metabolism frequently explain women’s drug vulnerability to medications that have been tested primarily on men.<sup>8</sup>

ORWH also noted:

Investigators consistently assume that information they glean from clinical and basic studies on male subjects can be

extrapolated without modification to women. This traditional assumption was rarely, if ever, directly tested. It is remarkable that we have tolerated this “leap of faith” in an otherwise rigorous research enterprise. . . . We now have enough information about the differences between males and females to acknowledge the danger of assuming that they are identical.<sup>9</sup>

The ORWH report found that the terms “sex” and “gender” have also confused the understanding of health and medical issues. Although some biological differences can account for differences in male and female health profiles, they found that a purely biological model is an inadequate approach to develop a clear understanding of these observed differences. The impact of social and cultural variables also must be included in future investigations. In this regard, the NIH panels see that women’s health must be conceptualized as “gender-specific medicine that will provide new information to correct the male models and definition of normal functioning and pathophysiology.”

This emphasis on women’s health as qualitatively different from that of men is justified by findings that document the specific differences in women’s bodies, the way in which they experience disease processes, and the way in which they interact with medical and health care institutions. The following sections summarize both biological and social findings regarding medical conditions that affect men and women differently.

## Cardiovascular Disease

Heart disease is the leading cause of death among American women, and the death rate is nearly 20 percent greater for African-American women. Cardiovascular disease, which includes heart disease, stroke, and high blood pressure, kills nearly 250,000 more women every year than all forms of cancer combined and is often

linked to tobacco use. Although heart disease usually affects women 10 years later than it affects men, nearly 43,000 more women than men die each year as a result of cardiovascular disease. While the prevalence of cardiovascular disease is greater in women than men, it is not detected and treated in women until the condition has become severe. As a result of delayed detection, 44 percent of women who suffer a heart attack die within 1 year compared with 27 percent of men.<sup>10</sup>

### **Cancer**

Cancer rates also have specific gender differences. Lung cancer is the leading cause of cancer death among American women. Nearly 23 percent of all adult American females are smokers; these women have much higher rates of lung cancer, emphysema, and chronic bronchitis than female nonsmokers. If current smoking trends continue, the death rate among women from smoking-related diseases will exceed that of men by early in the next century. Teenage females smoke at higher rates than teenage males, and female smokers are somewhat more likely to develop lung cancer than male smokers.<sup>11</sup>

Breast cancer and gynecological cancers are also gender related. After lung cancer, breast cancer is the second leading cause of cancer death for women. Seventy-seven percent of new cases and 84 percent of breast cancer deaths occur in women age 50 and older, with women accounting for 99 percent of all breast cancer incidence and mortality.<sup>12</sup> Of all gynecological cancers, uterine cancer is the most common form of gynecological cancer, while the lack of a reliable method of early detection makes ovarian cancer the deadliest form.

### **Osteoporosis**

Osteoporosis is a degenerative disease characterized by loss of bone mass. The National

Osteoporosis Foundation reports that osteoporosis affects 25 million Americans. More than 80 percent of those afflicted are women, with white and Asian females at greatest risk.<sup>13</sup>

### **Eating Disorders**

According to the National Institute of Mental Health, eating disorders are 8 to 10 times more prevalent among women than men. Anorexia, a condition in which an individual starves herself for weight control, leads to death in 10 percent of cases, killing approximately 1,000 adolescent girls each year in the United States. Bulimia, characterized by binge eating, affects 1 to 4 percent of the American population, and women are more likely to suffer from it than men.<sup>14</sup>

### **Sexually Transmitted Diseases**

More than 12 million new cases of sexually transmitted diseases (STD) other than AIDS are diagnosed each year in the United States. Women are twice as likely as men to contract a sexually transmitted disease. They suffer a disproportionate burden of STD-related complications, which include pelvic inflammatory disease, infertility, potentially fatal ectopic pregnancies, and cancer of the reproductive tract.<sup>15</sup>

### **HIV/AIDS**

Women are 10 times more likely than men to contract HIV during unprotected sex with an infected partner.<sup>16</sup> According to the Centers for Disease Control and Prevention, between 120,000 and 160,000 females in the United States were living with HIV in 1998, including those diagnosed with AIDS.<sup>17</sup> The proportion of reported cases of HIV or AIDS in American females rose from 7 percent to 20 percent between 1985 and 1996. HIV is the fourth leading cause of death for U.S. women between the ages of 25 and 44 and the second leading cause of death for African-American women in this age group.

## Seeking Medical Services

According to Bertakis et al., women use more health-care services than men.<sup>18</sup> They found that the women in their study had poorer health and lower education and income levels than the men. Women had a significantly higher number of visits to primary care clinics and diagnostic service providers. Women were charged more for primary care, specialty care, emergency treatment, and diagnostic services. Women are 48 percent more likely to receive prescriptions and to use prescription drugs.<sup>19</sup>

## Health Issues for Women Offenders

Incarcerated women are at greater risk for serious health problems than nonincarcerated women because it is more likely they have experienced poverty, poor nutrition, substance abuse, limited access to preventive medical care, and limited education on health issues.<sup>20</sup> The majority of imprisoned women have significant health-care problems, and few of these needs are met in prison for a range of reasons, including scheduling, limited access to physicians, and, in the case of emergencies, transportation from rural prisons to urban hospitals.<sup>21</sup>

Acoca notes that the lack of female-specific drug treatment is one of the factors linked to the high incidence of HIV infection among imprisoned women.<sup>22</sup> Nationally, about 3.5 percent of women prisoners are thought to be HIV positive compared with about 2.2 percent of male prisoners.<sup>23</sup> Researchers in New York have found that female inmates in New York prisons have a higher seroprevalence rate of HIV than prisoners elsewhere.<sup>24</sup> Women in prison are also at risk for other infectious diseases, including tuberculosis, sexually transmitted diseases, and hepatitis B and C. Acoca suggests that both risky behavior preceding

arrest and inadequate prison health care contribute to this problem.<sup>25</sup>

A 1994 study conducted by the California Department of Corrections found that 18 percent of incarcerated women tested positive for exposure to tuberculosis (TB). Medications for preventing and treating TB must be taken consistently, and TB-exposed women who are released from prison without completing the medication are at greater risk of either developing active TB or transmitting the disease. They are also at risk of developing drug-resistant strains of TB.<sup>26</sup>

Estimates of the percentage of pregnant women in prisons and jails range from 4 percent to 9 percent. A survey of U.S. women's prisons found that fewer than half provided prenatal care, only 15 percent provided special diets and nutritional programs for pregnant women, and only 11 percent provided postnatal counseling.<sup>27</sup>

Acoca argued that pregnancy during incarceration must be understood as a high-risk situation, both medically and psychologically, for inmate mothers and their infants.<sup>28</sup> She notes that deficiencies in the correctional response to the needs of pregnant inmates may include lack of prenatal and postnatal care, including nutrition; inadequate education regarding childbirth and parenting; and inadequate preparation for the mother's separation from the infant following delivery.

This lack of knowledge about women's health needs within the criminal justice system, coupled with increased health-care costs, has specific implications for correctional health-care delivery. In the focus groups and in analyses of comments made in NIC training seminars, prison managers consistently noted that health care was a critical concern in managing women offenders.

## Violence Against Women and Children

Awareness of violence against women and children has increased over the past 25 years. The pervasiveness of traumatic violence within our culture has a dramatic impact on the well-being of women, creating victims of physical and sexual abuse, victims of racial and gender discrimination, and witnesses to violence. Violence is defined as a verbal or physical act that causes physical or emotional injury or harm; the unfair or abusive use of power or force; the violation of a person's sense of self through intimidation, humiliation, or physical force; or the meeting of one's own needs by exploiting another person without regard for that person's well-being. Basic facts include the following:

- Approximately 52 percent of child abuse and neglect victims are girls, and 48 percent are boys.<sup>29</sup>
- "Stranger" sexual abuse is by far the most publicized form of child sexual abuse, but it constitutes only 10 percent of all reported cases.<sup>30</sup>
- Compared with victims of childhood physical abuse and neglect, victims of childhood sexual abuse are at greater risk of being arrested for one type of sex crime: prostitution.<sup>31</sup>
- More female than male adolescents have been sexually assaulted: one study reported assaults on 13 percent of females compared with 3.4 percent of males;<sup>32</sup> another reported assaults on 38 percent of females and 7 percent of males.<sup>33</sup>
- An estimated 67 of every 100,000 females in the United States were reported rape victims in 1998. Despite a decline in the nation's crime rate over the past decade, reported rates of rape and sexual assault did not decline.<sup>34</sup>
- Only 22 percent of rapes are committed by someone the victim does not know.<sup>35</sup>
- The National Crime Victimization Survey found that, in 1996, more than two-thirds of the rapes and sexual assaults committed in the United States remained unreported.<sup>36</sup>
- Approximately 2.5 million females age 12 and older are raped, robbed, or assaulted each year.<sup>37</sup>
- There are 4 million cases of domestic violence in this country each year; a woman is beaten every 15 seconds.<sup>38</sup>
- Every year, more than 5,000 women are murdered in the United States. Every day, four women are killed by their male partners.<sup>39</sup>
- Domestic violence is found across all ethnic, racial, and socioeconomic lines.<sup>40</sup>
- From 22 to 35 percent of emergency room visits by women are the result of partner violence,<sup>41</sup> and approximately 53 percent of domestic violence victims are seen by physicians repeatedly (i.e., six or more times) with trauma-related injuries.<sup>42</sup>
- Approximately 20 to 30 percent of marriages in this country have been characterized at one point by overt interpersonal aggression,<sup>43</sup> and between roughly 1.8 and 4 million women in the United States are physically abused by their partners each year.<sup>44</sup>
- Women are up to six times more likely to be violently assaulted by a partner or ex-partner than by a stranger, and they are more likely to suffer injury when the assailant is an intimate.<sup>45</sup>
- Sexual assault is also highly prevalent in domestic settings. From 33 to 50 percent of women who are physically assaulted by



their partners are also sexually assaulted by those partners.<sup>46</sup>

## Family Violence and Children

Researchers in the area of family violence have begun to study the harmful consequences children experience as a result of witnessing domestic violence. While it may seem obvious that observing the abuse of one's mother would cause trauma to a child, not all children are affected in the same way. Their different experiences related to the impact of violence make it difficult to address the complex policy issues facing family violence experts today. According to Carlson, the immediate negative effects on a child who witnesses violence against his or her mother appear to be low self-esteem, behavioral problems, reduced social competence, depression, and anxiety.<sup>47</sup> One factor complicating the identification of the negative effects of parental violence on children is that many witnesses are also themselves victims of physical abuse.

The first national survey on family violence confirmed the connection between violence in childhood and the later use of violence. As adults, the sons of the most violent parents were found to beat their wives at a rate 1,000 times greater than the sons of nonviolent parents.<sup>48</sup> Among females, childhood domestic violence may manifest in adulthood as increased vulnerability to victimization and, specifically, as increased likelihood of being victimized by a spouse. Furthermore, both men and women who reported having been hit by their parents in childhood were found to be more likely to hit their own children.<sup>49</sup>

Seventy percent of those who enter domestic violence shelters are children. In 1998, the Centers for Disease Control and Prevention published a study indicating that violence against mothers by their intimate partners may also pose a concurrent risk of abuse to

the victims' children. Conversely, mothers of abused children are at a higher risk of being abused than mothers of children who are not abused. The mother's abuser is her partner, while the child may be abused by either the partner or the battered mother herself. When women do abuse children, the abuse is primarily physical and rarely sexual.

## Abuse Histories of Women Offenders

Many women in the criminal justice system have extensive histories of sexual and physical abuse. By some estimates, women offenders have rates of abuse 6 to 10 times that of women in the general population.<sup>50</sup> The Bureau of Justice Statistics (BJS) reports that women in the criminal justice system are more likely than women in the general population to have experienced abuse.<sup>51</sup> According to BJS:

- Nineteen percent of female state prison inmates, 10 percent of female federal inmates, and 16 percent of women in local jails and on probation had been physically or sexually abused before their most recent admission to a criminal justice setting.
- One-third of the women in state prisons, one-sixth of the women in federal prisons, and one-quarter of those in jails said they had been raped. Another 3 to 6 percent reported that someone had tried to rape them but had not succeeded.
- As many as 9 in 10 abused women knew their abuser.
- Two-thirds of women in criminal justice settings had been injured in a fight or assault.
- Just fewer than half of the women in correctional populations but only 1 in 10 men indicated past abuse.



- Women in the criminal justice system are more likely than women in the general population to have been abused in childhood.
- Between 7 and 16 percent of male offenders and between 40 and 57 percent of female offenders reported that they had been physically or sexually abused before the age of 18.

Owen and Bloom found that physical, sexual, and emotional abuse has been a defining experience for the majority of women in California prisons.<sup>52</sup> In their sample, which included the category of emotional abuse, 80 percent of the women interviewed reported having experienced some kind of abuse. With the exception of sexual assault, most women indicated that the abuse had been committed by family members or other intimates.

In a detailed examination of women incarcerated in New York prisons, Browne et al. found that a substantial majority of their sample reported sexual molestation or severe violence in childhood and adolescence.<sup>53</sup> Most telling is the finding that when all forms of violence are taken together, only 6 percent of the 150 respondents did not report at least one physical or sexual attack during their lifetime.<sup>54</sup> These findings suggest that violence across the life-span for women incarcerated in the general population of a maximum security prison is pervasive and severe.<sup>55</sup> Most prisons lack programs to deal with this fundamental problem of the female prisoner.<sup>56</sup>

## **Substance Abuse, Mental Health, and Trauma**

There is significant evidence that women and men have divergent experiences in the areas of substance abuse, mental illness, and trauma. These gender differences have specific application with regard to women offenders.

## **Substance Abuse**

In the last two decades, clinicians and researchers have developed a solid body of knowledge in best practices for the treatment of addicted women. The National Institute on Drug Abuse has contributed to this knowledge through a major research commitment to identifying and understanding the differences between women and men. Research indicates that gender differences play a role from an individual's earliest opportunity to use drugs; that the effects of drugs are different for women and men; and that some approaches to treatment are more successful for women than for men.<sup>57</sup> Studies indicate that substance-abusing women and men differ on numerous variables, including etiological, physiological, psychological, sociological, and familial factors.

The pathway to drug use and abuse has a later onset and is more complex for females than it is for males. For females, there is typically a breakdown of individual, familial, and environmental protective factors and an increase in childhood fears, anxieties, phobias, and failed relationships. The roots of female drug use often lie in psychiatric disorders that began prior to the drug use. Other important points include the following:

- Women describe the onset of drug use as sudden and heavy rather than gradual. They report that often it has begun for a specific reason, such as depression or a family problem.<sup>58</sup>
- Women experience the adverse physiological effects of alcohol on the liver, cardiovascular system, and gastrointestinal system more quickly than men, a condition referred to as "telescoping."<sup>59</sup>
- The link between HIV/AIDS and drug use is greater in women. Nearly half of all women diagnosed with AIDS are users of injectable drugs.<sup>60</sup>

- Women are more likely than men to have been initiated into drug use by a male sexual partner, and they often continue to use drugs to maintain the relationship. Women are also more likely to have a partner with an addiction problem.<sup>61</sup>
- Female substance abusers have a greater number of life problems than do most male substance abusers. Such problems may be related to employment, family issues, child care, and mental health.<sup>62</sup>
- Women who abuse substances also have higher rates of childhood physical and sexual abuse than men and non-substance-abusing women. Using alcohol and other drugs also increases a woman's risk of being abused during her adult life.<sup>63</sup>
- Treatment programs for women recognize the need for comprehensive services and for a focus on relationship issues. Women's programs are seen as more effective if they focus on support and skill building and if they are strength based rather than confrontational.<sup>64</sup>
- Culture, race, and ethnicity have an impact on women's development of substance abuse problems. Societal and institutional responses to these issues, especially when combined with lower income, less education, and unemployment, can lead to feelings of alienation and powerlessness.

Women also experience barriers to treatment that differ from those experienced by men. Barriers experienced by women include a lack of economic resources, referral networks, women-oriented services, and conflicting child-related responsibilities. Research has shown that treatment of substance-dependent women is more successful when the treatment environment is mutually supportive and therapeutic, addressing the following issues:

psychopathology, a woman's role as mother, interpersonal relationships, and the need for parenting education.<sup>65</sup> These programs seek to balance treatment for the individual woman with help for the parent-child relationship. Children also should receive services designed to meet their own needs.<sup>66</sup>

## Mental Health

Implications of the role of gender in mental health are complex and require a careful study of many variables (including biology, age, race, ethnicity, and socioeconomic status) and recognition of the social constructs of mental health diagnoses. Gender stereotypes, sex-role expectations, cultural attributes, and such gender-related stressors as access to resources, help-seeking behaviors, and the multiple demands placed on women in our society also must be examined. There is a consensus among practitioners that gender plays an important role in psychological development, personality structure, and other areas that relate to psychological health and well-being.

Although women and men are equally affected by psychiatric disorders, they experience different types of disorders. Depression is diagnosed twice as often in women as in men, and women are two to three times as likely to experience anxiety disorders. The most common anxiety disorders for women are panic, phobias, and post-traumatic stress. Women are also more likely to experience eating disorders, particularly anorexia and bulimia. In contrast, men are twice as likely to experience a substance abuse disorder and five times as likely to experience an antisocial personality disorder.<sup>67</sup>

Depression, the most common mental disorder for women, affects between 7 and 11 million women each year and correlates strongly with low income, low educational level, and other measures of powerlessness in society.<sup>68</sup>

Researchers have consistently found that

poverty and exposure to unrelenting stress are two factors that can precipitate the onset of mental health problems.<sup>69</sup> Women, particularly those who are single parents, are more likely to live in poverty. Female heads of households are also significantly more likely to experience the stress of chronic and persistent poverty. In addition, low-income women, particularly women of color, often experience crime, violence, discrimination, and the loss of a child or a partner to violence, imprisonment, or disease.<sup>70</sup> Finally, as mentioned previously, domestic violence and sexual victimization are widespread problems and can have significant mental health consequences.

Although women are more likely than men to report and seek treatment for mental health problems, they remain significantly underserved, with only one-quarter of women receiving any form of treatment.<sup>71</sup> In addition, women are also more likely than men to somaticize—that is, to develop a physical symptom that cannot be fully explained as a medical condition. Women with mental health issues may thus seek services from a primary care provider instead of a mental health specialist. However, primary care providers often fail to diagnose mental health problems, and they tend to be overly reliant on drug therapy, often prescribing inappropriate dosages.<sup>72</sup>

Studies show that women receive two-thirds of all prescriptions for psychotropic drugs. Although women's increased expression of distress has been said to account for drug prescription patterns, women receive more prescriptions even when symptom levels are held constant.<sup>73</sup> In addition, most drug testing is done without analyzing male/female differences, which means that psychotropic drugs are often prescribed for women in the absence of adequate information regarding appropriate dosages or unique side effects in women. Women are also more likely than men to

become addicted to prescription drugs and to combine them with alcohol as a coping mechanism.

Among women, the intersections among mental health, trauma, and substance abuse are critical. In a study of both men and women in the general population, 23 percent of those surveyed reported a history of psychiatric disorders, and 30 percent reported also having had a substance abuse problem at some time in their lives.<sup>74</sup> Furthermore, among substance abusers, depression, anxiety, and other mood disorders are more common among women than men. Blume found that major depression co-occurred with alcohol abuse in 19 percent of women (almost 4 times the rate for men); phobic disorder co-occurred in 31 percent of women (more than twice the rate for men); and panic disorder co-occurred in 7 percent of women (3.5 times the rate for men).<sup>75</sup>

Other aspects of mental disorders that differ between men and women include the prevalence of certain syndromes, the age of onset, the presentation and diversity of symptoms, the course and severity of a disorder, responses to intervention, and known risk factors. For example, Kessler et al. found that women were at higher risk than men for comorbidity of substance use and psychiatric illness.<sup>76</sup> Prior found that women were at higher risk of both annual and lifetime co-occurrence of substance abuse and at least one other mental disorder.<sup>77</sup> Other findings suggest that women have more affective disorders (with the exception of mania) than men and higher rates of somaticization, obsessive-compulsive disorder, anxiety disorders, and episodes of major depression.<sup>78</sup>

## Trauma

One of the most important developments in health care over the past several decades is the recognition that a substantial proportion of people have a history of serious traumatic

experiences that play a vital, and often unrecognized, role in the evolution of an individual's physical and mental health problems. The risk of interpersonal violence continues to be higher for women than for men throughout life: "While both male and female children are at risk for abuse, females continue to be at risk for interpersonal violence in their adolescence and adult lives. The risk of abuse for males in their teenage and adult relationships is far less than that for females."<sup>79</sup>

A number of disorders are known to be related to traumatic experience. Post-traumatic stress disorder is the most obvious and well recognized. PTSD symptoms include flashbacks, nightmares, physiological reactions when remembering, hypervigilance, and exaggerated startle response.<sup>80</sup> There is also a high level of comorbidity between PTSD and depression, anxiety, panic disorder, phobic disorder, substance abuse, and many physical disorders.

In addition, recent brain research describes neurological changes related to experiencing violence that has resulted in trauma. While some change in brain chemistry is immediate, chronic abuse may increase the severity of the chemical changes. The biology of trauma has been the subject of recent research that suggests that childhood sexual abuse creates a cascade of neurological events that affect brain development and emotional behavior and produce a risk factor for the development of substance abuse.<sup>81</sup>

The connection between addiction and trauma for women is intricate and not easily disentangled. One key finding is that substance-abusing women are vulnerable targets for violence. M. Miller found that both childhood and current abuse increase a woman's risk for substance abuse.<sup>82</sup> In one of the earliest comparison studies of addicted and nonaddicted women, 74 percent of the substance-abusing women reported sexual abuse (versus 50

percent of the nonaddicts); 52 percent reported physical abuse (versus 34 percent); and 72 percent reported emotional abuse (versus 44 percent).<sup>83</sup>

In a review of studies that examined the combined effects of PTSD and substance abuse, Najavits found more comorbid mental disorders, medical problems, psychological symptoms, inpatient admissions, and interpersonal problems and other significant life problems (such as homelessness, HIV, domestic violence, and loss of custody of children) among those experiencing both PTSD and a substance abuse disorder compared with those experiencing one of those problems alone.<sup>84</sup>

As previously stated, women who have been exposed to trauma and who are also addicted to drugs or alcohol are at higher risk for other mental disorders. The rate of major depression among alcoholic women was almost three times the rate of the general female population, and the rate for phobias was almost double. The rate of antisocial personality disorder—a disorder that can often result in criminal justice involvement—was 12 times higher among alcoholic women than among the general female population.<sup>85</sup>

Co-occurring disorders are complex, and the historic division in the fields of mental health and substance abuse often has resulted in contradictory treatment. Women in early recovery frequently show symptoms of mood disorders, but these can be temporary conditions associated with withdrawal from drugs. Also, it is difficult to know whether a psychiatric disorder existed before a woman began to abuse alcohol or other drugs, or whether the psychiatric problem emerged after the onset of substance abuse.<sup>86</sup> Research suggests there is slower improvement in preexisting psychiatric disorders for recovering substance abusers and that this needs to be addressed directly in treatment.

## Implications for Women Offenders

As noted in chapter 1, Characteristics of Women in the Criminal Justice System, the issues of substance abuse, mental health, and trauma are closely intertwined in the lives of women offenders. According to BJS, nearly 8 of every 10 female offenders with a mental illness report prior physical or sexual abuse.<sup>87</sup> A 1994 study of women in U.S. jails indicated that approximately 22 percent of the women had been diagnosed with PTSD.<sup>88</sup> In a study of participants in prison-based treatment programs, Messina, Burdon, and Prendergast found that women report childhood abuse at nearly twice the rate reported by men.<sup>89</sup> Abuse of women as adults was reported at eight times the rate reported by men. One study indicated that nearly 80 percent of female prisoners in California had experienced some form of abuse as children or as adults.<sup>90</sup> It is also important to note that abuse statistics may reflect the possibility that women are more willing to report victimization than men.

In a survey of female pretrial jail detainees, more than 80 percent of the women in the sample met the *Diagnostic and Statistical Manual of Mental Disorders* criteria for one or more lifetime psychiatric disorders.<sup>91</sup>

According to Teplin et al., “The most common disorders were drug abuse or drug dependence (63.6 percent), alcohol abuse or alcohol dependence (32.3 percent), and post-traumatic stress disorder (33.5 percent).”<sup>92</sup> Sixty percent of the subjects had exhibited drug or alcohol abuse or dependence within 6 months prior to the interview. In addition, 17 percent met the criteria for a major depressive episode.

Women with serious mental illness and co-occurring disorders experience significant difficulties in criminal justice settings.

As Teplin et al. reported:

The American Bar Association recommends that persons with mental disorders who were arrested for misdemeanors be diverted to a mental health facility instead of being arrested. With appropriate community programs, nonviolent felons could also be treated outside the jail after pretrial hearings . . . Unfortunately, community-based programs are rarely available for released jail detainees, who often have complex diagnostic profiles and special treatment needs.<sup>93</sup>

With the higher rate of mental illness among female offenders, high rates of medication can be expected. However, there is a tendency to overmedicate women both in society at large and in correctional settings. The use of psychotropic drugs is 10 times higher in women’s than in men’s prisons.<sup>94</sup> In comparing men’s and women’s prisons, McCorkel finds that “women’s institutions rely on the prescription of psychotropic drugs to restrict and control behavior.”<sup>95</sup> Many women interviewed by Leonard reported that psychotropic drugs directly interfered with their ability to participate in the preparation of their defense cases. Leonard notes the overuse of antidepressants and mood regulators, which she refers to as “chemical restraints,” as a means of institutional social control.<sup>96</sup>

## Socioeconomic Status

Women’s socioeconomic status is significantly affected by gender-related differences in earnings, educational attainment, and type of employment.

## Employment

Research in the area of women and work indicates an ongoing gender gap in earnings despite advances in women’s education and improvement in occupational niches. In 1997, women working full time earned \$26,029 per year and men earned \$35,248.<sup>97</sup> Overall, across most job classes, women earn about 74 percent



of what men earn. In 1997, the U.S. Census Bureau reported that men working full time earned more than \$35,000 while only 30 percent of women earned that amount.<sup>98</sup> Female college graduates earn less than male college graduates and only slightly more than males with only a high school education. A gender stratification perspective shows that pay is distributed according to gender: Women earn less than men both historically and currently, even when similar positions are held. This gender stratification is further complicated by race. M. Anderson summarizes data that show minority women to be particularly subject to decreased earning power.<sup>99</sup>

A variety of explanations are offered for this gender gap in earnings. In terms of statistical facts, women earn less than men for the following reasons:

- Women, more often than men, stay home with children.
- Women complete fewer years of training and schooling.
- Women typically prepare themselves for lower income positions, such as clerical and service work.

There are less obvious explanations as well: Women often experience the “glass ceiling,” with its “implicit limits on their ability to move up at work.”<sup>100</sup> The 1995 government-sponsored “Glass Ceiling Commission” found that despite the development of new policies to promote gender and racial equality, women were effectively blocked from most senior management positions.<sup>101</sup>

The lack of parity in earnings is reflected in the high rates of poverty among women who are single heads of households. In 1997, the median family income for all families was \$37,005. In 1997, almost 32 percent of all

female-headed households lived below the official poverty line. For households headed by women, the following was true:

- White families had a median income of \$25,670, with 28 percent living below the poverty line.
- African-American families had a median income of \$17,962, with almost 40 percent living below the poverty line.
- Hispanic families had a median income of \$16,393, with 48 percent living below the poverty line.<sup>102</sup>

## Education

Historically, women have lagged behind men in educational attainment. Although both genders theoretically have the same access to education, actual completion rates vary by gender and race. In its influential report *How Schools Short-change Girls*, the American Association of University Women (AAUW) explored the gender gap in education and found that even in the same classroom, girls were given “different amounts of education.”<sup>103</sup> Research on education shows that, in the classroom, girls typically wait to be called on and boys tend to volunteer. The AAUW report documented that females and males respond to modes of teaching differently and that typically competitive teaching styles place girls at a disadvantage. One study found that while girls in general may get less feedback from teachers overall, black girls get even less attention.<sup>104</sup> Sapiro also cites evidence that demonstrates that teachers have different kinds of interactions with girls than with boys.<sup>105</sup> These differences in teaching styles and interactions are also mediated by type of subject.

Other studies show that in the 1990s, most females of high school age indicated that they planned to be employed in the future. Only 7 percent thought they would stay home



with children and be supported by a husband. Sapiro reviews studies showing the following:

- Girls tend to take marriage and children into account in planning their occupational futures.
- Girls anticipate that they will have their children at a younger age than boys do.
- Girls from higher socioeconomic backgrounds tend to plan for academic achievement, and girls from lower socioeconomic backgrounds tend to plan for vocational training.
- Boys begin paid work earlier and work longer hours than girls.<sup>106</sup>

The AAUW also examined differential dropout rates. Once again, race and gender combined to create differential patterns. There was no real difference among white students, but among African-American students, young men (18 percent) were more likely to drop out of high school than young women (14 percent). Hispanic young women, however, were more likely to drop out (35 percent) than Hispanic young men (27 percent).<sup>107</sup> Sapiro further indicates that while pregnancy is often seen as the primary reason for dropping out among young women, more than half reported other circumstances as their motivation for leaving high school. Among young women, family problems were mentioned as the most common reason for leaving school; among young men, going to work was the primary rationale for leaving school.

After high school, about half of women with high school degrees work compared with three-quarters of men with high school degrees. This difference narrows among college-educated women and men. Although decreasing numbers of women are staying home with their children, many women attempt to enter the job market after their

children are grown. Late entry into the job market creates specific problems for women, such as the lack of a consistent work history, the lack of prior relevant experience, and out-dated skills that limit earning potential.

The types of work that women and men do also differ by gender. Women are more likely to be employed in service and clerical industries; women are most represented in the professional occupations of teaching, nursing, and cosmetology. Sapiro notes that both women and men make job choices based on an assessment of their chances, not only in specific jobs but also in the job market overall.

### **Employment and Education Histories of Women Offenders**

As noted in chapter 1, most female offenders are poor, undereducated, and unskilled. A survey of female jail inmates in the United States found that more than 60 percent were unemployed when arrested, and one-third of these had not been looking for work. Fewer than one-third of male inmates were similarly unemployed, and fewer than 12 percent of these had not been looking for work.<sup>108</sup>

Another study of women prisoners found that of those women who had been employed before incarceration, many had been on the lower rungs of the economic ladder, with only 37 percent working at a legitimate job. Twenty-two percent had been on some kind of public support, 16 percent had made money from drug dealing, and 15 percent had been involved in prostitution, shoplifting, or other illegal activities.<sup>109</sup>

When the educational and work experiences of women under correctional supervision are examined, the data show that these women have been marginalized from the conventional world of work. In a survey of women in California prisons, Owen and Bloom found that women in prison have few skills and little education:<sup>110</sup>

- Almost 40 percent reported less than a high school education. About 15 percent had completed high school, and another 25 percent had some training beyond high school. The remainder had completed college. Of the women with any vocational training, the trades most commonly studied were in the clerical, medical/dental, and cosmetology fields.
- About half of the women in the representative sample had never worked at any time, and more than half had been unemployed in the year before this prison term. One-third of the women indicated their ongoing substance abuse problems had prohibited them from working; others said they made more money from illegal pursuits; and about 12 percent said child care and other responsibilities had kept them at home. Fewer than 10 percent said that their partners or families had provided them with support.

Other measures of female offenders' education and work history come from BJS:<sup>111</sup>

- In 1998, an estimated 55 percent of women in local jails, 56 percent of those in state prisons, and 73 percent of those in federal prisons had a high school degree.
- Approximately 40 percent of women in state prisons reported that they had been employed full time at the time of their arrest compared with almost 60 percent of males.
- Most of the jobs held by women were entry level, requiring a low level of skills and providing low pay. Two-thirds of the women reported they had never held a job that paid more than \$6.50 per hour.

Because women appear disproportionately among the poor, changes in public assistance and other welfare systems also affect women

disproportionately. Recent changes in these support systems also negatively affect the ability of women to support themselves and their children. Phillips and Bloom analyze the impact of the changing welfare system on relatives caring for the children of incarcerated parents, detailing the social and emotional challenges inherent in caring for these children and the financial problems faced by their caregivers. They argue that lack of financial support for these children is grounded in the inflexibility of public assistance programs that were not designed to meet the needs of relative caregivers.<sup>112</sup>

Currie has long argued that there are connections among crime, work, and welfare, asserting that unemployment is a steady predictor of criminality and subsequent imprisonment. Currie sees the lack of adequate economic and social supports for women and children in society as a key factor in rising crime rates. For some women, the poverty of their lives on the street and the lack of educational opportunity and economic advantages make crime a reasonable choice, with subsequent imprisonment a predictable outcome. Currie argues that material disadvantages and quality of family life are intimately related and may in fact combine to create conditions that foster crime.<sup>113</sup>

## Theoretical Perspectives on Women in the Criminal Justice System

Women and men enter the criminal justice system in different ways. This is due partly to differences in pathways into criminality and offense patterns and partly to the gendered effect of the war on drugs. A fuller understanding of women in the criminal justice system involves a discussion of the context of their lives in several key dimensions. These factors have been shown to affect women's lives quite

differently from men's lives and to mediate the impact of the criminal justice system for women offenders. Scholarship on women's lives has made significant strides in the past decades.

This section summarizes that work in the following areas:

- Race and ethnicity.
- Theories of women and crime.
- Relational theory and female development.
- Trauma theory.
- Addiction theory.

## Race and Ethnicity

In all cultures, the experiences and developmental contexts of women differ from those

of their male peers. Thus, the variable of gender molds the life experiences of all women, regardless of race, ethnicity, or social class. However, the culture or social class context of each woman will influence how she experiences the variable of gender. (See “Triple Jeopardy: The Intersection of Race, Class, and Gender.”)

Culture may be seen as a framework of values and beliefs and a means of organizing experiences. Providing appropriate services and supervision for a woman calls for consideration of the particular circumstances of each woman—of her reality as it has been informed by her individual history, including her class and racial, ethnic, and cultural context. No two women exist in exactly the same circumstances and context, although all exist in the same circumstance as women.

## TRIPLE JEOPARDY: THE INTERSECTION OF RACE, CLASS, AND GENDER

Although female offenders share many of the problems of their male counterparts, they also experience unique issues as a result of their race, class, and gender. Women of color, especially African-American women, are disproportionately incarcerated in the United States. In 1999, African-American women were nearly eight times more likely to be incarcerated than white women.<sup>a</sup>

According to a recent study by the Sentencing Project, from 1989 to 1994 African-American women experienced the greatest increase in criminal justice supervision of all demographic groups studied.<sup>b</sup> The 78 percent increase in criminal justice control rates for African-American women was more than double the increase for African-American men and for white women, and more than nine times the increase for white men. Nationally, between 1980 and 1992 the number of African-American females in state or federal prisons grew 278 percent, while the overall inmate population increased by 168 percent.

In a review of studies concerned with racial and ethnic differences among women offenders, McGee and Baker concluded that, in particular, women of color from low-income communities continue to bear the burden of punitive philosophies within the criminal and juvenile justice systems and have experienced the greatest criminal justice control of all demographic groups. Continuing stereotypes about women of color, particularly African-American women, limit access to programs that relate to economic independence, family reunification, and reduced criminal involvement.<sup>c</sup>

In their analysis of nearly 1,600 probation files between 1986 and 1989, these researchers found that about 42 percent of those in the sample had completed high school and that the majority had been employed less than 40 percent of the time. The vast majority (84 percent) had been convicted of only one charge, with 83 percent having had no prior felony convictions. In analyzing the outcomes of these cases, they found that white women, at 54 percent, were more likely than African-American women (35 percent) to have received such services as substance abuse treatment and mental health counseling as conditions of probation. McGee and Baker conclude that there is very little Afro-centric treatment throughout the criminal justice system.

a. Bureau of Justice Statistics. (2001a). *Mental health treatment in state prisons, 2000*. Washington, DC: U.S. Department of Justice.

b. Mauer, M., & Huling, T. (1995). *Young black Americans in the criminal justice system: Five years later*. Washington, DC: The Sentencing Project.

c. McGee, Z.T., & Baker, S.R. (2003). Crime control policy and inequality among female offenders: Racial disparities in treatment among women on probation. In R. Muraskin (Ed.), *It's a crime: Women and justice* (pp. 196-208). Upper Saddle River, NJ: Prentice Hall Press.

It is imperative to recognize that just as women's lives differ from those of men, women's lives are not all the same. Although they share common threads because of their gender, cultural and other differences also must be acknowledged. For example, there are differences among the lives of African-American women, Latinas, and Asian women; differences among heterosexual women, bisexual women, lesbian women, and transgendered women; differences between older women and younger women; and differences due to privilege and oppression.

Any discussion of ethnicity raises definitional and conceptual issues. Ethnicity, as discussed here, is defined by culture: a shared identity and a shared ideological, normative, and behavioral framework. Although this shared cultural framework may overlap with race or national origin, the fit is usually imperfect. The categories "Asian," "Latina," "African American," and "Native American" do not denote homogeneous populations but, rather, are convenient census and survey categories. For example, the category "Latina" includes Cubans, Mexican-Americans, Puerto Ricans, and other groups. The terms "African American" or "black" mask any variations that may exist, such as the differences between those whose families have been in the United States for many generations and those who have recently arrived from the Caribbean or from African nations.<sup>114</sup>

Myriad differences are experienced by women from different ethnic and racial backgrounds, including patterns of alcohol and drug use, importance of family, and role of mothers. Because of the Anglo-Saxon focus of our society and its neglect of cultural variability, ethnic minorities are either excluded or their difference is understood as a deficit.<sup>115</sup> Being "different" often leads to marginalization and oppression due to lack of privileges and limited access to power. Culture and race can also

affect "the degree to which . . . women internalize negative racial stereotypes from the dominant society."<sup>116</sup>

A risk of "cultural encapsulation" exists when correctional personnel allow culturally based perceptions of reality to dominate.<sup>117</sup> A culturally encapsulated person, unable to see others through a different cultural lens, may regard as pathological what is normal for the minority cultural group.<sup>118</sup> The challenge is to become culturally attuned; that is, to become aware and accepting of cultural differences when working with someone from a different cultural background.

Sapiro concludes there is immense variation in the ways that gender is shaped in a complex sex/gender system.<sup>119</sup> Bloom similarly makes this argument in her discussion of "triple jeopardy" in the lives of women prisoners.<sup>120</sup> There is also evidence that age creates different classifications and life experiences for women and men.

## Theories of Women and Crime

Contemporary theorists note that most theories of crime were developed by male criminologists to explain male crime.<sup>121</sup> Historically, theories about women's criminality have ranged from biological to psychological and from economic to social. Social and cultural theories have been applied to men, while individual and pathological explanations have been applied to women.

Pollock found that, until recently, most criminology theory ignored the dynamics of race and class and how these factors intermix with gender to influence criminal behavior patterns.<sup>122</sup> In fact, she argues, a common belief is that adding gender to these analytic variables "tended to complicate the theory and were better left out."<sup>123</sup> Based on this lack of

attention, Belknap has called the female offender “the invisible woman.”<sup>124</sup>

Class membership, particularly poverty, is also racially and ethnically based. Across groups of women, class differences emerge in such forms as disease patterns, response to treatment, and other behaviors. These findings support the contention that differences among women are also critical in providing woman-sensitive policies and programs. Contemporary theorists argue for the integration of race, class, and gender in any analytic framework to study the experiences of women in the criminal justice system. Without such a framework, they assert, it is impossible to draw an accurate picture of the experiences of these women.<sup>125</sup>

Two primary approaches to explaining female criminality have been taken. The first involves theories that attempt to explain female criminality separately, without recourse to theories of male criminality. These theories are often based on assumptions about the female psyche that are without empirical support.

The second approach is demonstrated in traditional mainstream theories of crime developed to explain male criminality. This raises what some scholars refer to as the “generalizability problem.”<sup>126</sup> In addressing the issue of whether theories related to men’s crime can be applied to women’s crime, criminologists have tested theories derived from all male samples to see whether they also apply to females. Others have borrowed from existing theories (e.g., social learning theory) or have recast the logic of a theory altogether.

The earliest work on women’s crime focused on women’s biology.<sup>127</sup> Lombroso and Ferraro explained female criminality by stating that women are throwbacks to an earlier evolutionary state in human development. Much of the literature that followed continued to focus on

individual and pathological theories to explain female criminality, well into the 1960s.

In the mid-1970s, female criminality was often explained as a byproduct of the women’s liberation movement.<sup>128</sup> Simon attributed a rise in women’s involvement in property crime to increased opportunities to enter previously male occupations, such as banking and business.<sup>129</sup> Steffensmeier criticized the liberation theory on the grounds that neither the status of women nor their patterns of offending had changed dramatically over time.<sup>130</sup>

Feminist theorists have examined other factors that relate to female criminality. For example, the economic marginalization theory asserts that for women, it is the absence rather than the availability of employment opportunity that appears to lead to criminal behavior.<sup>131</sup> Much of women’s crime is petty property crime, often committed as a response to poverty and economic insecurity. Proponents of this theory suggest that the feminization of poverty, not women’s liberation, is most relevant to women’s criminality.

### **The Pathways Perspective**

Research on women’s pathways into crime indicates that gender matters significantly in shaping criminality. Steffensmeier and Allan note that the “profound differences” between the lives of women and men shape their patterns of criminal offending.<sup>132</sup> Among women, the most common pathways to crime are based on survival (of abuse and poverty) and substance abuse. Belknap has found that the pathways perspective incorporates a “whole life” perspective in the study of crime causation.<sup>133</sup> The pathways research has used extensive interviews with women to uncover the life events that place girls and women at risk of criminal offending. Other studies use presentence investigative reports<sup>134</sup> and official



records.<sup>135</sup> These diverse data collection strategies “sequence” the life events that shape women’s choices and behaviors.

Research on female offenders has established conclusively that women enter the criminal justice system in ways different from those of male offenders. The following differences have been empirically documented:

- The roles of violence, trauma, and substance abuse in criminal pathways.<sup>136</sup>
- Offense and reoffense patterns.<sup>137</sup>
- The impact of responsibilities for children and other dependent family members, and reduced ability to support self and children.<sup>138</sup>
- Race and ethnicity and the impacts of these in terms of crime, violent partners, and substance abuse.<sup>139</sup>
- Connections with violent and substance-abusing partners.<sup>140</sup>

Recent work on the totality of women’s lives has established that because of gender, women are at greater risk of experiencing sexual abuse, sexual assault, and domestic violence. They are also more likely than men to have the responsibility of caring for children. The pathways research has identified the following key issues in producing and sustaining female criminality.

**Histories of Personal Abuse.** Empirical research has established that female offenders have histories of sexual and/or physical abuse that appear to be major roots of subsequent delinquency, addiction, and criminality.<sup>141</sup> Abusive families and battering relationships are also strong themes in the lives of female offenders.<sup>142</sup> Frequently, women have their first encounters with the justice system as juveniles who have run away from home to

escape situations involving violence and sexual or physical abuse. Prostitution, property crime, and drug use can become a way of life for these individuals.

**Mental Illness and Substance Abuse.** Covington discusses the ways in which emotional disconnections contribute to criminal pathways.<sup>143</sup> Many women suffer from some form of mental illness or co-occurring disorder. According to BJS, nearly 8 in 10 female offenders with a mental illness reported having experienced prior physical or sexual abuse.<sup>144</sup>

The link between female criminality and drug use has been found to be very strong; research indicates that women who use drugs are more likely to be involved in crime.<sup>145</sup> Approximately 80 percent of women in state prisons have substance abuse problems,<sup>146</sup> and about 50 percent of female offenders in state prisons had been using alcohol, drugs, or both at the time of their offense.<sup>147</sup> Nearly one in three women serving time in state prisons reports having committed the offense to obtain money to support a drug habit. About half describe themselves as daily users.

**Economic and Social Marginality.** Many women on the social and economic margins struggle to survive outside legitimate enterprises, which brings them into contact with the criminal justice system. Economic marginalization, often shaped by disconnections from conventional institutions, such as school, work, and families, further increases the likelihood of criminal behavior. A significant proportion of women in the criminal justice system have little education or work experience and significant histories of personal abuse.<sup>148</sup>

**Homelessness.** A result of severed social relations, economic vulnerability, addiction, and abuse, homelessness is a frequent complication in the lives of women involved in the criminal justice system.<sup>149</sup> North and Smith reported that



homeless women are far more likely than their male counterparts to have young children in their care and to be more dependent on public assistance. These women (23 percent) are also more likely than men (4 percent) to be victims of sexual abuse.<sup>150</sup>

**Relationships.** Another gender difference found in studies of female offenders is the importance of relationships, with criminal involvement often having come about through relationships with family members and significant others.<sup>151</sup> Women are often first introduced to drugs by partners who frequently continue to be their suppliers. Women's attempts to get off drugs, and their failure to supply partners with drugs through prostitution, often elicit violence from the partners; however, many women remain attached to partners despite neglect and abuse.

Research using the pathways perspective continues to add to the portrait of female offending:

- Arnold suggests that for young African-American girls from poor families, law breaking often represents a resistance to victimization. These girls experience a structural dislocation from family, education, and legitimate occupations. Arnold suggests that sustained criminal involvement becomes a rational coping strategy.<sup>152</sup>
- Daly identifies the following categories: street women, harmed and harming women, battered women, drug-connected women, and other.<sup>153</sup>
- Richie's theory of "gender entrapment" explains the connection between African-American women who have been battered and their pathways to crime.<sup>154</sup>
- Owen identifies five significant factors in women's pathways to imprisonment: the multiplicity of abuse; early family life;

children; the street life; and spiraling marginality.<sup>155</sup>

In identifying the specific events and contexts of women's lives that promote criminal behavior, the pathways perspective has made significant contributions to our understanding of women's criminality. This perspective appears to be most promising in terms of providing an empirical framework for the development of gender-responsive principles, policy, and practice.

## Relational Theory and Female Development

One way of understanding gender differences is found in relational theory, which has developed from an increased understanding of gender differences and, specifically, of the different ways in which females and males develop psychologically.

Traditional theories of psychology have described individual development as being a progression from childlike dependence to mature independence. According to these theories, an individual's goal is to become a self-sufficient, clearly differentiated, autonomous self. A person would thus spend his or her early life separating and individuating in a process leading to maturity, at which point he or she would be equipped for intimacy. Jean Baker Miller challenged the assumption that separation is the route to maturity. She suggested that these accepted theories are describing only the experience of males, with a female's path to maturity being different. A female's primary motivation, said Miller, is to build a sense of connection with others. Females develop a sense of self and self-worth when their actions arise out of, and lead back into, connections with others. Connection, not separation, is thus the guiding principle of growth for girls and women.<sup>156</sup>

Miller's work led a group of researchers and practitioners to create the Stone Center at Wellesley College in 1981 to examine the qualities of relationships that foster growth and development. The Stone Center relational model defines connection as "an interaction that engenders a sense of being in tune with self and others and of being understood and valued."<sup>157</sup> Such connections are so crucial that many of the psychological problems of women can be traced to disconnections or violations within relationships, whether in families, with personal acquaintances, or in society at large.

Mutual, empathic, and empowering relationships produce five psychological outcomes: increased zest and vitality, empowerment to act, knowledge of self and others, self-worth, and a desire for greater connection.<sup>158</sup> These outcomes constitute psychological growth for females. Mutuality, empathy, and power with others are thus essential qualities of an environment that will foster growth in women. By contrast, Miller has described the outcomes of disconnections—that is, nonmutual or abusive relationships, which she terms a "depressive spiral."<sup>159</sup> These outcomes are diminished zest or vitality, disempowerment, confusion or lack of clarity, diminished self-worth, and a turning away from relationships.<sup>160</sup>

## Communication

Recent research and popular literature have also focused on gender differences in communication patterns.<sup>161</sup> Such communication differences have been attributed to distinct differences in socialization of women and men, resulting in "distinct female and male subcultures."<sup>162</sup> According to DeLange:

When men and women listen, they use different behaviors and may, in fact, listen for different things. Men tend to listen for the bottom line, for some action to be taken or decision to be made; women tend to listen for details to fill in the full

picture. Men use less eye contact and head nods; women ask more questions and tend to work at maintaining the communication. . . . Research has found that men generally talk more than women and interrupt more. Women tend to engage in more self-disclosure, display more empathetic behaviors, and be more adept at decoding and translating nonverbal behavior into meaningful messages.<sup>163</sup>

Different communication patterns between women and men are particularly noticeable in group settings. In general, studies indicate that mixed-gender groups benefit men, and all-female groups are most beneficial to women.<sup>164</sup>

## Relationships and Women Offenders

The importance of understanding relational theory is reflected in the recurring themes of relationship and family seen in the lives of female offenders. Disconnection and violation rather than growth-fostering relationships characterize the childhood experiences of most women in the correctional system. In addition, these women have often been marginalized because of race, class, and culture as well as by political decisions that criminalize their behavior (e.g., the war on drugs). "Females are far more likely than males to be motivated by relational concerns. . . . Situational pressures such as threatened loss of valued relationships play a greater role in female offending."<sup>165</sup>

Although Gilligan, Lyons, and Hanmer reported that girls are socialized to be more empathic than boys, incarcerated women have been repeatedly exposed to nonempathic relationships.<sup>166</sup> As a result, they may lack empathy for both self and others, or they may be highly empathic toward others but lack empathy for themselves. To create change in their lives, women need to experience relationships that do not repeat their histories of loss, neglect, and abuse.

When criminal justice policy ignores the dominant theme of connections and relationships that threads throughout the lives of female offenders, the ability to improve women's lives through correctional intervention is significantly diminished. Additionally, when the concept of relationships is ignored in the correctional environment, the ability of the system or agency to operate effectively is undermined. Thus, a relational context is critical to success in addressing the reasons why women commit crimes, their motivations, the ways in which they change their behaviors, and their reintegration into the community. Understanding the role of relationships and connections is thus fundamental to understanding the female offender.

For example, women offenders who cite drug abuse as self-medication often discuss personal relationships as the cause of their pain.<sup>167</sup> Abusive families and battering relationships are often strong themes in the lives of these women.<sup>168</sup> This has significant implications for therapeutic interventions that deal with the impact of such relationships on women's current and future behavior.

It is important that women learn about and experience healthy relationships as part of the intervention process. If women in the system are to change, grow, and recover, it is critical that they be in programs and environments in which relationships and mutuality are core elements. It is therefore essential to provide a setting that makes it possible for women to experience healthy relationships both with staff and with one another. However, the design of the criminal justice system discourages women from coming together, trusting, speaking about personal issues, or forming bonds in relationships. In addition, women who leave prison are often discouraged from associating with other women who have been incarcerated, so there is a lack of continuity of relationships.

A pilot project in a Massachusetts prison found that women benefited from being in a group in which members both received information and had the opportunity to practice mutually empathic relationships with others.<sup>169</sup> Female offenders also need to have respectful, mutual, and compassionate relationships with correctional staff. In an Ohio study, respect was one of the main things young women in detention said they needed from correctional staff.<sup>170</sup> Finally, women would benefit if relationships among staff and between staff and administration are mutual, empathic, and aimed at power *with* others rather than power *over* others.

### **Women Offenders and Their Children**

Male and female differences in terms of relationships are best illustrated by examining women offenders and their children. It is estimated that 1.3 million minor children have a mother who is under criminal justice supervision,<sup>171</sup> and an estimated 70 percent of women offenders in the United States have a child or children younger than age 18.<sup>172</sup>

As stated earlier in this report, the Bureau of Justice Statistics reported that in 1997, 65 percent of women in state prisons and 59 percent of women in federal prisons had minor children.<sup>173</sup> The majority were single mothers with an average of two children, and prior to their arrests they had been the custodial parents.<sup>174</sup> Many of these women felt enormous guilt about being absent from their children's lives and worry about whether they would regain custody of their children following their release.<sup>175</sup> Bloom and Steinhart found that more than half (54 percent) of the children of incarcerated mothers never visited their mothers during the period of incarceration. Such barriers to visitation as the isolated locations of prisons and a lack of transportation exacerbate the problems of maintaining family ties and of reunification with children.<sup>176</sup>

Bloom and Chesney-Lind have discussed the implications of motherhood among women prisoners in the United States. They argue that mothers in prison face multiple problems in maintaining relationships with their children and that they encounter obstacles created both by the correctional system and by child welfare agencies. Bloom and Chesney-Lind state that geographical distance between the prison and the children's homes, a lack of transportation, and limited economic resources compromise a woman prisoner's ability to maintain relationships with her children.<sup>177</sup>

An estimated 4 to 9 percent of women are pregnant at the time of incarceration. Women who give birth while incarcerated are rarely allowed to spend time with the child after birth; mother-infant bonding is severely undermined by this lack of contact. Termination of parental rights also affects prisoner mothers. About half the states in the nation have policies that address the termination of parental rights of incarcerated parents.<sup>178</sup>

While the majority of women offenders are mothers, substance abuse and involvement in the criminal justice system may have affected their ability to maintain custody of their children. However, there is significant evidence that the mother-child relationship may hold significant potential for community reintegration. Incarcerated women tend to experience a sense of isolation and abandonment while in prison because of their inability to keep their families together. Research demonstrates that recidivism is less likely among both male and female offenders who maintain ties to their families and communities during incarceration.<sup>179</sup>

The only source of hope and motivation that many women have while under criminal justice supervision is their connection to their children. Recognizing the centrality of women's roles as mothers provides an opportunity for the criminal justice, medical, mental health, legal,

and social service agencies to develop this role as an integral part of program and treatment interventions for the female offender population. Promoting relationships between mothers and their children also entails providing programs and services that increase a woman's ability to support her children following her release. The majority of women offenders are poor; they possess few job skills and little education. Without attention to the improvement of women's capacity to support themselves, responsible connections between mothers and their children cannot be maintained.

### Relationships in Prison

Relationships also influence the ways in which women and men live and relate to others while in prison. There is a clear gender difference in the relationships women and men prisoners develop and maintain while incarcerated. As Elaine Lord, warden of Bedford Hills Correctional Facility in New York, states:

Women "do time" differently from how men do time. Men concentrate on "doing their own time," relying on feelings of inner strength and their ability to withstand outside pressures to get themselves through their time in prison. Women, on the other hand, remain interwoven in the lives of significant others, primarily their children and their own mothers, who usually take on the care of the children. Yet, the inmate continues a significant caregiving role even while incarcerated.<sup>180</sup>

Three types of relationships occur within prison: relationships with children and family in the community, relationships with other women prisoners, and relationships with staff. Owen documents the gender differences that exist between male and female connections to the outside world, particularly in contacts with families and significant others.<sup>181</sup>

In 1990, an American Correctional Association survey asked women prisoners to name "the most important person in your life right now."

Fifty-two percent of the women interviewed responded that their child (or children) was most important to them. Another 18 percent identified their mothers as most important to them. Just more than 10 percent replied that a husband or significant other held this status.<sup>182</sup>

Understanding relationships among women in prison is also important in developing an understanding of how women behave in an institutional environment. Women in prison often develop close personal relationships as part of their adjustment to prison life, either in intense emotional relationships or through pseudo- or “play family” arrangements. The research on prison culture among women has consistently described the play family or the prison family as the primary way in which women organize their relationships while in prison. The same-sex relationships appear to be an important, but not exclusive, aspect of these families. Owen argued that a complicated pattern of personal relationships exists.<sup>183</sup> These relationships have at their base emotional, practical, and material connections as well as sexual and familial ties.

Somewhat related to the prison family, but not necessarily tied to it, is the existence of the romantic dyad or couple. Women in prison form deep attachments to others that may or may not be sexual in nature and endure as friendships rather than romance. Research on prison staff shows that many workers are often unprepared to respond appropriately to these relationships and that a better understanding of women’s behavior with other women while in custody is needed.

Relationships with staff are also quite different in female and male prisons. Historical scholarship<sup>184</sup> details the oppressive and often sexually abusive nature of the relationship between male workers and female prisoners. Contemporary writers suggest that more subtle forms of

oppression, such as invasive searches and privacy violations, characterize the modern relationship. In their study of classification, Van Voorhis and Presser suggest that staff often view women as more difficult to supervise because the staff members are “reacting to women’s different ways of problem solving, relating to staff, and doing time. Women ask more questions, question authority, want to discuss things, and challenge decisions. Staff who are inexperienced with these differences become irritated and more likely to write up the inmates in an effort to better control their behavior.”<sup>185</sup> Recent attention to staff sexual misconduct also demonstrates the need for further education on these issues.

## Trauma Theory

The terms “violence,” “trauma,” “abuse,” and “PTSD” are often used interchangeably. One way to clarify these terms is to think of trauma as a response to violence. Trauma is the injury done by violence and abuse, and it often requires treatment. PTSD is one type of traumatic response.

Women exhibit different responses to violence and abuse. Some may respond without trauma because they possess coping skills that may be effective for a specific event. Sometimes, however, trauma has occurred but may not be recognized immediately because the individual may have perceived the violent event as normal.

Trauma occurs on multiple levels. “Trauma is not limited to suffering violence; it includes witnessing violence, as well as stigmatization because of gender, race, poverty, incarceration, or sexual orientation.”<sup>186</sup> Root also expands the conventional notion of trauma to include not only direct trauma but also indirect trauma and insidious trauma. Insidious trauma “includes but is not limited to emotional abuse, racism, anti-Semitism, poverty, heterosexism, dislocation, [and] ageism.”<sup>187</sup> The effects of insidious



trauma are cumulative and are often experienced over the course of a lifetime. For example, women of color are subject to varying degrees of insidious trauma throughout their lives. According to Root, the exposure to insidious trauma activates survival behaviors that might be easily mistaken for pathological responses if their etiology is not understood. Misdiagnosis of pathology can be a consequence of a lack of understanding of the impact of insidious trauma on women who have lived their lives under the impact of racism, heterosexism, and/or class discrimination.

Over the past 100 years, a number of studies have investigated trauma, and various experts have written about the process of trauma recovery.<sup>188</sup> It is now understood that there are commonalities between rape survivors and combat veterans, between battered women and political prisoners, and between survivors of concentration camps and survivors of abuse in the home. Because the traumatic syndromes have basic features in common, the recovery process follows a common pathway.

Theorists have based their constructs on a stage model of recovery, describing the stages in different language but referring to the same process. Essentially, recovery unfolds in three stages. The central task in the first stage is establishing safety; in the second stage, the central task is experiencing remembrance and mourning; and in the third stage, it is reconnecting with ordinary life.<sup>189</sup> Several treatment models are based on this three-stage process.<sup>190</sup>

As the understanding of traumatic experiences has increased, mental health conceptualizations and practice have changed accordingly. It is now necessary for all service providers to become “trauma informed” if they want to be effective. Trauma-informed services are those that are provided for problems other than trauma but that require knowledge concerning violence against women and the impact of

trauma. Trauma-informed services encompass the following characteristics:

- Take the trauma into account.
- Avoid triggering trauma reactions and/or retraumatizing the individual.
- Adjust the behavior of counselors, other staff, and the organization to support the individual’s coping capacity.
- Allow survivors to manage their trauma symptoms successfully so that they are able to access, retain, and benefit from these services.<sup>191</sup>

### **The Role of Physical and Psychological Safety**

Safety is a critical and primary element in trauma work and is a key environmental component of that work. The importance of environment is stressed in the field of child psychology,<sup>192</sup> which demonstrates that the optimum context for childhood development consists of a safe, nurturing, consistent environment where the child experiences warmth and a sense of being cared for and understood. In the therapeutic process, the environment becomes the foundation for a corrective experience and is a cornerstone in the healing process. Community psychologists also emphasize the importance and role of environment as they seek to create communities that sustain life. A basic tenet of community psychology is that “environment cues behavior.”

Studies indicate that social support turns out to be critical to the recovery of victims, and the lack of that support is damaging.<sup>193</sup> The growing awareness of the long-term consequences of unresolved traumatic experience, combined with the disintegration or lack of communities of meaning (such as neighborhoods, extended families, and occupational identities), has encouraged a new look at the established practice of the therapeutic milieu model. The therapeutic milieu model provides an example of



the environmental context needed for trauma survivors.

The term “therapeutic milieu” means a carefully arranged environment that is designed to reverse the effects of exposure to situations characterized by interpersonal violence.

Trauma always occurs within a social context, and social wounds require social healing. As S. Bloom argues, “We have come to believe that retraumatizing people by placing them in environments that reinforce helplessness, scapegoating, isolation, and alienation must be viewed as antitherapeutic, dangerous, immoral, and a violation of basic human rights.”<sup>194</sup>

Safety has also been identified as a key factor in addressing the needs of victims of domestic violence and sexual assault. Research and practice have established the importance of both physical safety and psychological safety in addressing the problems of domestic violence and assault. Without both forms of safety, there is little likelihood of obtaining a positive outcome.

The therapeutic culture contains the following five elements,<sup>195</sup> all of which are fundamental in both institutional settings and the community:

- Attachment: A culture of belonging.
- Containment: A culture of safety.
- Communication: A culture of openness.
- Involvement: A culture of participation and citizenship.
- Agency: A culture of empowerment.

Any teaching and reorientation process will be unsuccessful if the environment mimics the behaviors of the dysfunctional systems the women have experienced. Rather, the design of program and treatment strategies should be aimed at undoing some of the prior damage.

Therapeutic community norms are consciously designed to be different: Safety with oneself and with others is paramount, and the entire environment is designed to create living and learning opportunities for everyone involved, staff and clients alike.<sup>196</sup>

### **Safety in Criminal Justice Environments**

Abuse and trauma histories have specific implications for an understanding of the need for safety and security within criminal justice environments. It has been well established that women in prison have extensive abuse histories and are also likely to have been involved with substance abuse. These background characteristics can make women offenders more vulnerable to inappropriate relationships with staff and can create the possibility of women-initiated sexual situations. The issue of staff sexual misconduct has gained most of its publicity and research attention in the prison setting, but there is significant concern with community corrections about staff sexual misconduct. Although the issue plays out differently in the community, essential elements remain the same.

### **Addiction Theory**

Depending on how one defines addiction, it can be said that addiction will afflict approximately 26 percent of all Americans at some time in their lives. It is also estimated that 25 to 40 percent of addicts are women.<sup>197</sup> The damage caused by addiction is incurred not only by the addicts themselves but also by their families and friends. This type of damage touches one in every three American families.<sup>198</sup>

Historically, addiction research and treatment have been focused on men even though women’s addictions span a wide scope, ranging from alcohol and other types of drug dependence to smoking, gambling, sex, eating disorders, and shopping.<sup>199</sup> According to the National

Center on Addiction and Substance Abuse, 4.5 million women in the United States are alcohol abusers or alcoholics, 3.5 million misuse prescription drugs, and 3.1 million regularly use illicit drugs.<sup>200</sup> Other studies estimate that 31 million women have a substance addiction.<sup>201</sup>

It is important to have a theoretical framework to use when designing services for women. The model presented here is a disease model that has been developed for women.<sup>202</sup> Decades ago, Gitlow argued:

The American Medical Association, American Psychiatric Association, American Public Health Association, American Hospital Association, American Psychological Association, National Association of Social Workers, World Health Association, and the American College of Physicians have now each and all officially pronounced alcoholism a disease. The rest of us can do no less.<sup>203</sup>

Much of what has been learned about alcoholism has informed the understanding of the addictive process generally. Additionally, health professionals in many disciplines have revised their concepts of all disease and have created a holistic view of health that acknowledges the physical, emotional, psychological, and spiritual aspects of disease.<sup>204</sup> Alcoholics Anonymous (AA) was one of the first proponents of a holistic health model of the disease of addiction that encompassed all of these aspects.

The holistic health model of addiction, with the inclusion of the environmental and sociopolitical aspects of disease, is the theoretical framework recommended for the development of women's services.<sup>205</sup> This is consistent with information from the National Institute on Drug Abuse and the Center for Substance Abuse Treatment:

- The reality, based on 25 years of research, is that drug addiction is a brain disease, one that disrupts the mechanisms responsible

for generating, modulating, and controlling cognitive, emotional, and social behavior.<sup>206</sup>

- Alcohol and drug use disorder, or addiction, is a progressive disease, with increasing severity of biological, psychological, and social problems over time.<sup>207</sup>

Although the debate over models will continue, this updated and expanded disease perspective offers a more helpful approach to the treatment of addiction for women because it is more comprehensive and meets the requirements for a multidimensional framework. In contrast, the disorder model focuses on social learning theory and a cognitive-behavioral approach,<sup>208</sup> thereby minimizing the importance of genetic studies, the affective aspects of the problem and its solution,<sup>209</sup> and the sociopolitical and environmental elements involved. The holistic health model allows clinicians to treat addiction as the primary problem while also addressing the complexity of issues that women bring to treatment: genetic predisposition, health consequences, shame, isolation, and a history of abuse, or a combination of these. For example, although some women may have a genetic predisposition to addiction, it is important in treatment to acknowledge that many have grown up in environments in which drug dealing, substance abuse, and addiction are ways of life. In sum, when addiction has been a core part of the multiple aspects of a woman's life, the treatment process requires a holistic, multidimensional approach.

A generic definition of addiction as "the chronic neglect of self in favor of something or someone else"<sup>210</sup> is helpful when working with women. This view conceptualizes addiction as a kind of relationship. The addicted woman is in a relationship with alcohol or other drugs, "a relationship characterized by obsession, compulsion, nonmutuality, and an

imbalance of power.”<sup>211</sup> The relational aspects of addiction are also evident in the research that indicates that women are more likely than men to turn to drugs in the context of relationships with drug-abusing partners in order to feel connected through the use of drugs. In addition, women often use substances to numb the pain of nonmutual, nonempathic, and even violent relationships.<sup>212</sup> Therefore, it is important to integrate trauma theory and relational theory when developing substance abuse services for women.

## The Gendered Effects of Current Policy

Current policies have specific implications for women in a number of areas, including sentencing, welfare benefits, drug treatment, public housing, employment, and reunification with children.

## The War on Drugs

Gender is important in examining the differential effects of drug policy. Nationwide, the number of women incarcerated for drug offenses rose by 888 percent from 1986 to 1996.<sup>213</sup> Mauer and colleagues have presented compelling evidence to support their contention that much of the increase in criminal justice control rates for women is a result of the war on drugs.<sup>214</sup> Inadvertently, the war on drugs became a war on women, particularly poor women and women of color.<sup>215</sup>

According to Bush-Baskette,

Drug use by any woman, whether she lives in suburban or urban areas, brings with it the psychological, social, and cultural experience of stigmatization that can perpetuate the continued problem of drug use. This usage and its inherent problems violate gender expectations for women in our society. Poor women who use street-level drugs experience additional societal

stigma because they do not have the protective societal buffer enjoyed by women who are insulated by their families, friends, and economic status. Those who use street-level drugs are also less protected from becoming prisoners of the “war on drugs” because of their high visibility.<sup>216</sup>

The emphasis on punishment rather than treatment has brought many low-income women and women of color into the criminal justice system. Women offenders who in past decades would have been given community sanctions are now being sentenced to prison. Mandatory minimum sentencing for drug offenses has significantly increased the numbers of women in state and federal prisons. Between 1995 and 1996, female drug arrests increased by 95 percent, while male drug arrests increased by 55 percent. In 1979, approximately 1 in 10 women in U.S. prisons was serving a sentence for a drug conviction; in 1999, this figure was approximately 1 in 3.<sup>217</sup>

Mandatory minimums for federal crimes, coupled with new sentencing guidelines intended to reduce racial, economic, and other disparities in sentencing males, have distinctly disadvantaged women. Twenty years ago, nearly two-thirds of the women convicted of federal felonies were granted probation; in 1991, only 28 percent of women were given straight probation.<sup>218</sup> Female drug couriers can receive federal mandatory sentences ranging from 15 years to life following their first felony arrest. These gender-neutral sentencing laws fail to recognize the distinction between major players in drug organizations and minor ancillary players. According to Judge Patricia Wald:

The circumstances surrounding the commission of a crime vary significantly between men and women. Yet penalties are most often based on the circumstances of crimes committed by men, creating a male norm in sentencing which makes the much-touted gender neutrality of guideline sentencing very problematical.<sup>219</sup>

While most of the attention on the impact of the war on drugs has focused on the criminal justice system, policy changes in the areas of welfare reform, housing, and other social policy arenas have combined to create a disparate impact on drug-abusing women and women of color.<sup>220</sup>

## Welfare Benefits

Section 115 of the 1996 Welfare Reform Act, Temporary Assistance for Needy Families (TANF), stipulates that persons convicted of a state or federal felony offense involving the use or sale of drugs are subject to a lifetime ban on receiving cash assistance and food stamps. This provision applies only to those who are convicted of a drug offense.<sup>221</sup> For several reasons, the lifetime welfare ban has had a disproportionate impact on African-American and Latina women with children. First, due to disparities in drug policies and in the enforcement of drug laws, women of color have experienced greater levels of criminal justice supervision. Second, as a result of race- and gender-based socioeconomic inequities, women of color are more susceptible to poverty and are therefore disproportionately represented in the welfare system.<sup>222</sup>

## Drug Treatment

Research has shown that drug treatment plays a critical role in the recovery process and improves offenders' chances for law-abiding behavior. Access to drug treatment is frequently impeded for women who lose welfare benefits as a result of drug convictions. Cash assistance and food stamps are critical for the successful recovery of low-income women for whom work obligations may prevent participation in treatment. In addition, limited numbers of residential treatment programs can accommodate women with children. In states where eligibility for TANF or food stamps is dependent on mothers' participation in or completion of a

treatment program, women may lose their benefits because of a lack of availability of treatment slots.

## Public Housing

Obtaining public housing may not be a viable option for women with a drug conviction. In 1996, the federal government implemented the One Strike Initiative, authorizing local public housing authorities (PHAs) to obtain from law-enforcement agencies the criminal conviction records of all adult applicants or tenants. (This policy was upheld by the U.S. Supreme Court in *Department of Housing and Urban Development v. Rucker et al.*, March 26, 2002.) Federal housing policies permit (and in some cases require) PHAs, Section 8 providers, and other federally assisted housing programs to deny housing to individuals who have a drug conviction or are suspected of drug involvement.<sup>223</sup>

## Education and Employment

As previously mentioned, a significant number of women under criminal justice system supervision have a history of low educational attainment. As of 1996, only 52 percent of correctional facilities for women offered post-secondary education. Access to college education was further limited when prisoners were declared ineligible for Pell Grants.<sup>224</sup> Educational opportunities may also be limited by the Higher Education Act of 1998, which denies eligibility for students convicted of drug offenses. Lack of education is a key factor contributing to the underemployment and unemployment of many women in the criminal justice system.

A significant number of women under criminal justice supervision have limited employment skills and sporadic work histories, and many correctional facilities offer little in terms of gender-specific vocational training. Also, having a criminal record poses an additional barrier to

securing employment. The transitional assistance provided through TANF and food stamps offers the financial support women need as they develop marketable employment skills and search for work that provides a living wage. Women who are denied this transitional assistance may not be able to provide shelter and food for themselves and their children while engaging in job training and placement.

### Reunification With Children

The Adoption and Safe Families Act of 1997 (ASFA) mandates termination of parental rights once a child has been in foster care for 15 or more of the past 22 months. It is difficult enough for single mothers with substance abuse problems to meet ASFA requirements when they live in the community, but the short deadline has particularly severe consequences for incarcerated mothers, who serve an average of 18 months.<sup>225</sup> Placement of children with relatives, which would avoid the harsh ASFA mandate, is hampered by state policies that provide less financial aid to relatives who are caregivers than to nonrelative foster caregivers.

### Conclusion: Contemporary Perspectives Provide a Solid Foundation

This multidisciplinary review of the context of women's lives concludes that contemporary perspectives on female criminality can provide a solid foundation for the development of a gender-responsive criminal justice system. The current theories have particular strengths. First, a focus on women's lives and their personal histories highlights the connections among crime, substance abuse, violence, and trauma. Second, the pathways perspective applies a variety of research methodologies in the search for explanations of criminal behavior. Third, the pathways and relational explanations offer specific targets for correctional

intervention. These descriptions are particularly useful for developing an empirical framework for gender-responsive principles, policy, and practice.

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## A New Vision: Guiding Principles for a Gender-Responsive Criminal Justice System

This report documents the need for a new vision for the criminal justice system, one that recognizes the behavioral and social differences between female and male offenders and the specific implications those differences hold for gender-responsive policy and practice. This chapter delineates guiding principles, general strategies, and steps for implementation. Developing gender-responsive policies, practices, programs, and services requires incorporation of the following key findings:

- An effective system for female offenders is structured differently than a system for male offenders.
- Gender-responsive policy and practice target women's pathways to criminality by providing effective interventions that address the intersecting issues of substance abuse, trauma, mental health, and economic marginality.
- Criminal justice sanctions and interventions recognize the low risk to public safety presented by the offenses that female offenders typically commit.
- When delivering sanctions and interventions, gender-responsive policy considers women's relationships, especially those with their children, and their roles in the community.

Being gender responsive in the criminal justice system requires an acknowledgment of the realities of women's lives, including the pathways they travel to criminal offending and the relationships that shape their lives.

To help those working with women to respond effectively and appropriately to these findings, Bloom and Covington define being gender responsive as:

[C]reating an environment through site selection, staff selection, program development, content, and material that reflects an understanding of the realities of women's lives and addresses the issues of the participants. Gender-responsive approaches are multidimensional and are based on theoretical perspectives that acknowledge women's pathways into the criminal justice system. These approaches address social (e.g., poverty, race, class and gender inequality) and cultural factors, as well as therapeutic interventions. These interventions address issues such as abuse, violence, family relationships,

substance abuse and co-occurring disorders. They provide a strength-based approach\* to treatment and skill building. The emphasis is on self-efficacy.<sup>1</sup>

## Principles and Strategies

Evidence drawn from a variety of disciplines and effective practice suggests that addressing the realities of women's lives through gender-responsive policy and programs is fundamental to improved outcomes at all criminal justice phases. The six guiding principles that follow are designed to address system concerns about the management, supervision, and treatment of women offenders in the criminal justice system (see "Guiding Principles"). Together with the general strategies for their implementation (see "General Strategies"), the guiding principles provide a blueprint for a gender-responsive approach to the development of criminal justice policy.

### GUIDING PRINCIPLES

**Gender:** Acknowledge that gender makes a difference.

**Environment:** Create an environment based on safety, respect, and dignity.

**Relationships:** Develop policies, practices, and programs that are relational and promote healthy connections to children, family, significant others, and the community.

**Services and supervision:** Address substance abuse, trauma, and mental health issues through comprehensive, integrated, and culturally relevant services and appropriate supervision.

**Socioeconomic status:** Provide women with opportunities to improve their socioeconomic conditions.

**Community:** Establish a system of community supervision and reentry with comprehensive, collaborative services.

\*A strength-based approach measures the emotional and behavioral skills, competencies, and characteristics that create a sense of personal accomplishment.

### GENERAL STRATEGIES

The following overarching strategies can be applied to implement each guiding principle:

**Adopt:** Adopt each principle as policy on a systemwide and programmatic level.

**Support:** Provide full support of the administration for principle adoption and implementation.

**Resources:** Evaluate financial and human resources to ensure that implementation and allocation adjustments are adequate to accommodate any new policies and practices.

**Training:** Provide ongoing training as an essential element in implementing gender-responsive practices.

**Oversight:** Include oversight of the new policies and practices in management plan development.

**Congruence:** Conduct routine procedural review to ensure that procedures are adapted, deleted, or written for new policies.

**Environment:** Conduct ongoing assessment and review of the culture/environment to monitor the attitudes, skills, knowledge, and behavior of administrative, management, and line staff.

**Evaluation:** Develop an evaluation process to consistently assess management, supervision, and services.

### Guiding Principle 1: Acknowledge That Gender Makes a Difference

The foremost principle in responding appropriately to women is to acknowledge the implications of gender throughout the criminal justice system. The criminal justice field has been dominated by the rule of parity, with equal treatment to be provided to everyone. However, this does not necessarily mean that the exact same treatment is appropriate for both women and men. The data are very clear concerning the distinguishing aspects of female and male offenders. They come into the criminal justice system via different pathways;



respond to supervision and custody differently; exhibit differences in terms of substance abuse, trauma, mental illness, parenting responsibilities, and employment histories; and represent different levels of risk within both the institution and the community. To successfully develop and deliver services, supervision, and treatment for women offenders, we must first acknowledge these gender differences (see “Implementing Guiding Principle 1”).

### Key Findings

The differences between women and men are well documented across a variety of disciplines and practices, and evidence increasingly shows that the majority of these differences are due to both social and environmental factors. Although certain basic issues related to health, such as reproduction, are influenced by physiological differences, many of the observed behavior disparities are the result of gender-related differences such as socialization, gender roles, gender stratification, and gender inequality. The nature and extent of women’s criminal behavior and the ways in which the women respond to supervision reflect such gender differences, which include the following:

- Women and men differ in levels of participation, motivation, and degree of harm caused by their criminal behavior.
- Female crime rates, with few exceptions, are much lower than male crime rates. Women’s crimes tend to be less serious than men’s crimes. The gender differential is most pronounced in violent crime, where women’s participation is profoundly lower.
- The interrelationship between victimization and offending appears to be more evident in women’s lives. Family violence, trauma, and substance abuse contribute to women’s criminality and shape their patterns of offending.

- Women respond to community supervision, incarceration, and treatment in ways that differ from those of their male counterparts. Women are less violent while in custody but have higher rates of disciplinary infractions for less serious rule violations. They are influenced by their responsibilities and concerns for their children, by their relationships with staff, and by their relationships with other offenders.

### IMPLEMENTING GUIDING PRINCIPLE 1

- Allocate both human and financial resources to create women-centered services.
- Designate a high-level administrative position for oversight of management, supervision, and services.
- Recruit and train personnel and volunteers who have both the interest and the qualifications needed for working with women under criminal justice supervision.

### Guiding Principle 2: Create an Environment Based on Safety, Respect, and Dignity

Research from a range of disciplines (e.g., health, mental health, and substance abuse) has shown that safety, respect, and dignity are fundamental to behavioral change. To improve behavioral outcomes for women, it is critical to provide a safe and supportive setting for supervision. A profile of women in the criminal justice system indicates that many have grown up in less than optimal family and community environments. In their interactions with women offenders, criminal justice professionals must be aware of the significant pattern of emotional, physical, and sexual abuse that many of these women have experienced. Every precaution must be taken to ensure that the criminal justice setting does not reenact women offenders’ patterns of earlier life experiences.

A safe, consistent, and supportive environment is the cornerstone of a corrective process. Because of their lower levels of violent crime and their low risk to public safety, women offenders should, whenever possible, be supervised with the minimal restrictions required to meet public safety interests (see “Implementing Guiding Principle 2”).

### Key Findings

Research from the field of psychology, particularly trauma studies, indicates that environment cues behavior. There is now an understanding of what an environment must reflect if it is to affect the biological, psychological, and social consequences of trauma. Because the corrections culture is influenced by punishment and control, it is often in conflict with the culture of treatment. The criminal justice system is based on a control model, and treatment is based on a model of behavioral change. These two models must be integrated so that women offenders can experience positive outcomes. This integration should acknowledge the following facts:

- Substance abuse professionals and literature report that women require a treatment environment that is safe and nurturing. They also require a therapeutic relationship that reflects mutual respect, empathy, and compassion.
- A physically and psychologically safe environment produces positive outcomes for women.
- Studies in child psychology demonstrate that the optimal context for childhood development consists of a safe, nurturing, and consistent environment. Such an environment is also necessary for changes in adult behavior.

## IMPLEMENTING GUIDING PRINCIPLE 2

- Conduct a comprehensive review of the institutional or community environment in which women are supervised to provide an ongoing assessment of the current culture.
  - Develop policy that reflects an understanding of the importance of emotional and physical safety.
  - Understand the effects of childhood trauma to avoid further traumatization.
  - Establish protocols for reporting and investigating claims of misconduct.
  - Develop classification and assessment systems that are validated on samples of women offenders.
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- Safety is identified as a key factor in effectively addressing the needs of domestic violence and sexual assault victims.
  - Custodial misconduct has been documented in many forms, including verbal degradation, rape, and sexual assault.
  - Classification and assessment procedures often do not recognize the lower level of violence by women both in their offenses and in their behavior while under supervision. This can result in women’s placement in higher levels of custody than necessary in correctional institutions and in an inappropriate assessment of their risk to the community.
  - Low public safety risk suggests that women offenders can often be managed in the community. Female offenders’ needs for personal safety and support suggest the importance of safe and sober housing.

### **Guiding Principle 3: Develop Policies, Practices, and Programs That Are Relational and Promote Healthy Connections to Children, Family, Significant Others, and the Community**

Understanding the role of relationships in women's lives is fundamental because the theme of connections and relationships threads throughout the lives of female offenders. When an understanding of the role of relationships is incorporated into policies, practices, and programs, the effectiveness of the system or agency is enhanced. This concept is critical when addressing the following:

- Reasons why women commit crimes.
- Impact of interpersonal violence on women's lives.
- Importance of children in the lives of female offenders.
- Relationships between women in an institutional setting.
- Process of women's psychological growth and development.
- Environmental context needed for programming.
- Challenges involved in reentering the community.

Attention to the above issues is crucial to the promotion of successful outcomes for women in the criminal justice system (see "Implementing Guiding Principle 3").

#### **Key Findings**

Studies of women offenders highlight the importance of relationships and the fact that criminal involvement often develops through relationships with family members, significant others, or friends. This is qualitatively different

from the concept of peer associates, which is often cited as a criminogenic risk factor in assessment instruments. Among many females, connections with significant others are often key to their involvement in crime. A basic difference in the way women and men "do time" is in their ability to develop and maintain relationships. Interventions must acknowledge and reflect the impact of relationships on women's current and future behavior. Important relationship findings include the following:

- Developing mutual relationships is fundamental to women's identity and sense of worth.
- Female offenders frequently suffer from isolation and alienation created by discrimination, victimization, mental illness, and substance abuse.
- Studies in the substance abuse field indicate that partners, in particular, are an integral part of women's initiation into substance abuse, continuing drug use, and relapse. Partners can also influence the retention of women in treatment programs.
- Theories that focus on female development, such as the relational model, posit that the primary motivation for women throughout life is the establishment of a strong sense of connection with others.
- The majority of women under criminal justice supervision are mothers of dependent children. Many women try to maintain their parenting responsibilities while under community supervision or while in custody, and many plan to reunite with one or more of their children upon release from custody or community supervision.
- Studies have shown that relationships among women in prison are also important. Women often develop close personal relationships and pseudo families as a way to

adjust to prison life. Research on prison staff indicates that correctional personnel often are not prepared to provide appropriate responses to these relationships.

### **IMPLEMENTING GUIDING PRINCIPLE 3**

- Develop training for all staff and administrators in which relationship issues are a core theme. Such training should include the importance of relationships, staff-client relationships, professional boundaries, communication, and the mother-child relationship.
- Examine all mother and child programming through the eyes of the child (e.g., child-centered environment, context), and enhance the mother-child connection and the connection of the mother to child caregivers and other family members.
- Promote supportive relationships among women offenders.
- Develop community and peer-support networks.

### **Guiding Principle 4: Address Substance Abuse, Trauma, and Mental Health Issues Through Comprehensive, Integrated, and Culturally Relevant Services and Appropriate Supervision**

Substance abuse, trauma, and mental health are three critical, interrelated issues in the lives of women offenders. These issues have a major impact on a woman's experience of community correctional supervision, incarceration, and transition to the community in terms of both programming needs and successful reentry. Although they are therapeutically linked, these issues historically have been treated separately. One of the most important developments in health care over the past several decades is the recognition that a substantial proportion of women have a history of serious traumatic experiences that play a vital

and often unrecognized role in the evolution of a woman's physical and mental health problems (see "Implementing Guiding Principle 4").

### **Key Findings**

The salient features that propel women into crime include family violence and battering, substance abuse, and mental health issues. The connections between substance abuse, trauma, and mental health are numerous. For example, substance abuse can occur as a reaction to trauma, or it can be used to self-medicate symptoms of mental illness; mental illness is often connected to trauma; and substance abuse can be misdiagnosed as mental illness. Other considerations include the following:

- Substance abuse studies indicate that trauma, particularly in the form of physical or sexual abuse, is closely associated with substance abuse disorders in women. A lifetime history of trauma is present in 55 to 99 percent of female substance abusers.
- Research shows that women who have been sexually or physically abused as children or adults are more likely to abuse alcohol and other drugs and may suffer from depression, anxiety disorders, and PTSD.
- Regardless of whether the mental health or substance abuse disorder is considered to be primary, co-occurring disorders complicate substance abuse treatment and recovery. An integrated treatment program concurrently addresses both disorders through treatment, referral, and coordination.
- Research conducted by the National Institutes of Health indicates that gender differences, as well as race and ethnicity, must be considered in determining appropriate diagnosis, treatment, and prevention of disease.

- Experience in the substance abuse field has shown that treatment programs are better able to engage and retain women clients if programs are culturally targeted.

## IMPLEMENTING GUIDING PRINCIPLE 4

- Service providers need to be cross-trained in three primary issues: substance abuse, trauma, and mental health.
- Resources, including skilled personnel, must be allocated.
- The environment in which services are provided must be closely monitored to ensure the emotional and physical safety of the women being served.
- Service providers and criminal justice personnel must receive training in cultural sensitivity so that they can understand and respond appropriately to issues of race, ethnicity, and culture.

## Guiding Principle 5: Provide Women With Opportunities To Improve Their Socioeconomic Conditions

Addressing both the social and material realities of women offenders is an important aspect of correctional intervention. The female offender's life is shaped by her socioeconomic status; her experience with trauma and substance abuse; and her relationships with partners, children, and family. Most women offenders are disadvantaged economically and socially, and this reality is compounded by their trauma and substance abuse histories. Improving outcomes for women requires preparing them through education and training to support themselves and their children (see "Implementing Guiding Principle 5").

## Key Findings

Most women offenders are poor, undereducated, and unskilled. Many have never worked, have sporadic work histories, or have lived on public assistance. Additional factors that affect their economic and social conditions include the following:

- Most women offenders are female heads of household. In 1997, nearly 32 percent of all female heads of households lived below the poverty line.
- Research from the field of domestic violence has shown that such material and economic needs as housing and financial support, educational and vocational training, and job development are essential to women's ability to establish lives apart from their abusive partners.
- Research on the effectiveness of substance abuse treatment has noted that without strong material support, women presented with economic demands are more likely to return to the streets and discontinue treatment.
- Recent changes in public assistance due to welfare reform (e.g., Temporary Assistance for Needy Families) affect women disproportionately and negatively affect their ability to support themselves and their children. In approximately half the states in the Nation, convicted drug felons are ineligible for benefits. When eligible, they still may not be able to apply for benefits until they have been released from custody or community supervision. They cannot access treatment or medical care without Medicaid. Additionally, their convictions may make them ineligible for public housing or Section 8 subsidies.



## IMPLEMENTING GUIDING PRINCIPLE 5

- Allocate resources within both community and institutional correctional programs for comprehensive, integrated services that focus on the economic, social, and treatment needs of women. Ensure that women leave prison and jail with provisions for short-term emergency services (e.g., subsistence, lodging, food, transportation, and clothing).
- Provide traditional and nontraditional training, education, and skill-enhancing opportunities to assist women in earning a living wage.
- Provide sober living space in institutions and in the community.

## Guiding Principle 6: Establish a System of Community Supervision and Reentry With Comprehensive, Collaborative Services

Women offenders face specific challenges as they reenter the community from jail or prison. Women on probation also face challenges in their communities. In addition to the female offender stigma, they may carry additional burdens such as single motherhood, decreased economic potential, lack of services and programs targeted for women, responsibilities to multiple agencies, and a general lack of community support. Navigating through myriad systems that often provide fragmented services and conflicting requirements can interfere with supervision and successful reintegration. There is a need for wraparound services—that is, a holistic and culturally sensitive plan for each woman that draws on a coordinated range of services within her community (see “Implementing Guiding Principle 6”). Types of organizations that should work as partners in assisting women who are reentering the community include the following:

- Mental health systems.
- Alcohol and other drug programs.

- Programs for survivors of family and sexual violence.
- Family service agencies.
- Emergency shelter, food, and financial assistance programs.
- Educational organizations.
- Vocational and employment services.
- Health care.
- The child welfare system, child care, and other children’s services.
- Transportation.
- Self-help groups.
- Consumer-advocacy groups.
- Organizations that provide leisure and recreation options.
- Faith-based organizations.
- Community service clubs.

## Key Findings

Challenges to successful completion of community supervision and reentry for women offenders have been documented in the research literature. These challenges can include housing, transportation, child care, and employment needs; reunification with children and other family members; peer support; and fragmented community services. There is little coordination among community systems that links substance abuse, criminal justice, public health, employment, housing, and child welfare services. Other considerations for successful reentry and community supervision include the following:

- Substance abuse studies have found that women’s issues are different from those of men. Comprehensive services for women should include, but not be limited to, life skills training, housing, education, medical

care, vocational counseling, and assistance with family preservation.

- Studies from fields such as substance abuse and mental health have found that collaborative, community-based programs that offer a multidisciplinary approach foster successful outcomes among women.
- Substance abuse research shows that an understanding of the interrelationships among the women, the programs, and the community is critical to the success of a comprehensive approach. “Comprehensive” also means taking into consideration a woman’s situation and desires related to her children, other adults in her family or friendship network, and her partner.
- Data from female offender focus groups indicate that the following needs, if unmet, put women at risk for criminal justice involvement: housing, physical and psychological safety, education, job training and opportunities, community-based substance abuse treatment, economic support, positive role models, and a community response to violence against women. These are all critical components of a gender-responsive prevention program.
- Research has shown that women offenders have a great need for comprehensive, community-based wraparound services. This case management approach has been found to work effectively with women because it addresses their multiple treatment needs.
- Relational theory indicates that approaches to service delivery that are based on women’s relationships and the connections among the different areas of their lives are especially congruent with female characteristics and needs.

## IMPLEMENTING GUIDING PRINCIPLE 6

- Create individualized support plans and wrap the necessary resources around the woman and her children.
- Develop a “one-stop shopping” approach to community services, with the primary service provider also facilitating access to other needed services.
- Use a coordinated case management model for community supervision.

## Developing Gender-Responsive Policy and Practice

The guiding principles proposed in this report are intended to serve as a blueprint for the development of gender-responsive policy and practice. These principles can also provide a basis for systemwide policy and program development. Following are scenarios based on a gender-responsive model for women offenders:

- The correctional environment or setting is modified to enhance supervision and treatment.
- Classification and assessment instruments are validated on samples of women offenders.
- Policies, practices, and programs take into consideration the significance of women’s relationships with their children, families, and significant others.
- Policies, practices, and programs promote services and supervision that address substance abuse, trauma, and mental health and provide culturally relevant treatment to women.

- The socioeconomic status of women offenders is addressed by services that focus on their economic and social needs.
- Partnerships are promoted among a range of organizations located within the community.

A first step in developing gender-appropriate policy and practice is to address the following questions:

- How can correctional policy address the differences in the behavior and needs of female and male offenders?
- What challenges do these gender differences create in community and institutional corrections?
- How do these differences affect correctional practice, operations, and supervision in terms of system outcomes and offender-level measures of success?
- How can policy and practice be optimized to best meet criminal justice system goals for women offenders?

### **Policy Considerations**

As agencies and systems examine the impact of gender on their operations, policy-level changes are a primary consideration. A variety of existing policies developed by the National Institute of Corrections Intermediate Sanctions for Women Offender Projects, the Federal Bureau of Prisons, the American Correctional Association (ACA), the Minnesota Task Force on the Female Offender, and the Florida Department of Corrections contain crucial elements of a gender-appropriate approach. Gender-responsive elements derived from this analysis are considered below.

#### **Create Parity**

As expressed in the *ACA Policy Statement*, “Correctional systems should be guided by

the principle of parity. Female offenders must receive the equivalent range of services available to male offenders, including opportunities for individual programming and services that recognize the unique needs of this population.”<sup>22</sup> Parity differs conceptually from “equality” and stresses the importance of equivalence rather than sameness: Women offenders should receive opportunities, programs, and services that are equivalent, but not identical, to those available to male offenders.

#### **Commit to Women’s Services**

Executive decisionmakers, administrators, and line staff must be educated about the realities of working with female offenders. Establishing mission and vision statements regarding women’s issues and creating an executive-level position charged with this mission are two ways to ensure that women’s issues become a priority. A focus on women is also tied to the provision of appropriate levels of resources, staffing, and training.

The National Institute of Corrections has recognized the need for gender-specific training and has sponsored a variety of initiatives designed to assist jurisdictions in addressing issues relevant to women offenders. In Florida, a staff training and development program was mandated and will be implemented for correctional officers and professionals working with female offenders in institutions and community corrections. In the Bureau of Prisons, training occurs at the local institution level. The Texas Division of Community Corrections has also created specific training for those working with female offenders in the community.

#### **Develop Procedures That Apply to Women Offenders**

Another key element of policy for women offenders concerns a review of policies and procedures. Although staff working directly

with female offenders on a day-to-day basis are aware of the procedural misalignment of some procedures with the realities of women's lives, written policy often does not reflect the same understanding of these issues. As stated by the ACA, "Sound operating procedures that address the [female] population's needs in such areas as clothing, personal property, hygiene, exercise, recreation, and visitations with children and family" should be developed.<sup>3</sup>

### **Respond to Women's Pathways**

Policies, programs, and services need to respond specifically to women's pathways in and out of crime and to the contexts of their lives that support criminal behavior. Procedures, programs, and services for women should be designed and implemented with these facts in mind. Both material and treatment realities of women's lives should be considered. For example, Florida's policy states the following:

[E]mphasis is placed on programs that foster personal growth, accountability, self-reliance, education, life skills, workplace skills, and the maintenance of family and community relationships to lead to successful reintegration into society and reduce recidivism.<sup>4</sup>

ACA standards call for the following:

[A]ccess to a full range of work and programs designed to expand economic and social roles for women, with an emphasis on education, career counseling and exploration of non-traditional training; relevant life skills, including parenting and social and economic assertiveness; and pre-release and work/education release programs.<sup>5</sup>

Florida's policy states that the system must "ensure opportunities for female offenders to develop vocational and job-related skills that support their capacity for economic freedom."<sup>6</sup>

### **Consider Community**

Given the lower risk of violence and community harm found in female criminal behavior, it is important that written policy acknowledge the actual level of risk represented by women offenders' behavior in the community and in custody. The recognition and articulation of this policy will enable the development of strong community partnerships, creating a receptive community for model reentry and transitional programs that include housing, training, education, employment, and family support services.

The ACA advocates for a range of alternatives to incarceration, including pretrial and posttrial diversion, probation, restitution, treatment for substance abuse, halfway houses, and parole services. Community supervision programs need to partner with community agencies in making a wide range of services and programs available to women offenders. Community programs are better equipped than correctional agencies to respond to women's realities. After a review of its Security Designation and Custody Classification procedures, the Bureau of Prisons developed additional low- and minimum-security bed space to house female offenders more appropriately and closer to their homes.

### **Include Children and Families**

Children and families play an important role in the management of women offenders in community and custodial settings. As noted elsewhere in this report, more female than male offenders have primary responsibility for their children. However, female offenders' ties to their children are often compromised by criminal justice policy. ACA policy states that the system should "facilitate the maintenance and strengthening of family ties, particularly

between parents and children.”<sup>7</sup> In Florida, an emphasis on the relationships of women offenders with their children and other family members has potential rehabilitative effects in terms of motivation for treatment and economic responsibility.<sup>8</sup>

### Implications for Practice

After policy development, the next step concerns the specific ways in which gender-appropriate policy elements can be incorporated into practice to improve service delivery and day-to-day operations and procedures. Identifying problems created by a lack of knowledge about women offenders and by gender-neutral practice is a critical step in addressing the issue.

The analysis of operational practice and procedures raises several questions that agencies and the criminal justice system need to consider in developing a systemic approach to women offenders. These questions are organized into categories that reflect specific elements of gender-responsive practice (see “Questions To Ask in Developing a Systemic Approach for Women Offenders”).

### Build Community Support

Building community support is an important factor in effective community corrections. To improve the circumstances of women offenders and their children, a gender-responsive approach must emphasize community support for women. A critical need exists to develop a system of support within our communities that assists women who are returning to their communities in the areas of housing, job training, employment, transportation, family reunification, child care, drug and alcohol treatment, peer support, and aftercare. Women transitioning from jail or prison to the community must navigate myriad systems that often provide fragmented services, and this can pose a barrier to their successful reintegration.<sup>9</sup>

**Prevention.** Prevention is another aspect of building community support. In the series of focus groups conducted with women in the criminal justice system for this report, participants identified the following factors when asked what they felt could help prevent them from criminal involvement:

- Housing.
- Physical and psychological safety.
- Education, job training, and opportunities.
- Community-based substance abuse treatment.
- Positive female role models.
- An appropriate community response to violence against women.

**Restorative Justice.** Restorative justice is an important vehicle for building community support for criminal justice services. In keeping with female psychosocial developmental theory, the framework for restorative justice involves relationships, healing, and community. The focus of this is not on punishment and retribution but, rather, on a variety of mechanisms, such as victim-offender mediation, family conferencing, and community circles of support. This perspective is consistent with both the level of harm represented by women offenders and the need to target their pathways to offending. Social support is a key variable in a range of effective interventions and includes intimate relationships, social networks, and communities.

Women offenders are good candidates for restorative justice and community corrections. Because they commit far fewer serious or violent offenses and pose less risk to public safety than male offenders, they are in a preferred position to take the lead in participating in programs of restorative justice. Similarly, because of their suitability for community correctional settings, women offenders may be in a better



# QUESTIONS TO ASK IN DEVELOPING A SYSTEMIC APPROACH FOR WOMEN OFFENDERS

## Operational Practices

- Are the specifics of women's behavior and circumstances addressed in written planning, policy, programs, and operational practices? For example, are policies regarding classification, property, programs, and services appropriate to the actual behavior and composition of the female population?
- Does the staff reflect the offender population in terms of gender, race/ethnicity, sexual orientation, language (bilingual), ex-offender, and recovery status? Are female role models and mentors employed to reflect the racial/ethnic and cultural backgrounds of the clients?
- Does staff training prepare workers for the importance of relationships in the lives of women offenders? Does the training provide information on the nature of women's relational context, boundaries and limit setting, communication, and child-related issues? Are staff prepared to relate to women offenders in an empathetic and professional manner?
- Are staff trained in appropriate gender communication skills and in recognizing and dealing with the effects of trauma and PTSD?

## Services

- Is training on women offenders provided? Is this training available in initial academy or orientation sessions? Is the training provided on an ongoing basis? Is this training mandatory for executive-level staff?
- Does the organization see women's issues as a priority? Are women's issues important enough to warrant an agency-level position to manage women's services?
- Do resource allocation, staffing, training, and budgeting consider the facts of managing women offenders?

## Review of Standard Procedures

- Do classification and other assessments consider gender in classification instruments, assessment tools, and individualized treatment plans? Has the existing classification system been validated on a

sample of women? Does the database system allow for separate analysis of female characteristics?

- Is information about women offenders collected, coded, monitored, and analyzed in the agency?
- Are protocols established for reporting and investigating claims of staff misconduct, with protection from retaliation ensured? Are the concepts of privacy and personal safety incorporated in daily operations and architectural design, where applicable?
- How does policy address the issue of cross-gender strip searches and pat-downs?
- Does the policy include the concept of zero tolerance for inappropriate language, touching, and other inappropriate behavior and staff sexual misconduct?

## Children and Families

- How do existing programs support connections between the female offender and her children and family? How are these connections undermined by current practice? In institutional environments, what provisions are made for visiting and for other opportunities for contact with children and family?
- Are there programs and services that enhance female offenders' parenting skills and their ability to support their children following release? In community supervision settings and community treatment programs, are parenting responsibilities acknowledged through education? Through child care?

## Community

- Are criminal justice services delivered in a manner that builds community trust, confidence, and partnerships?
- Do classification systems and housing configurations allow community custody placements? Are transitional programs in place that help women build long-term community support networks?
- Are professionals, providers, and community volunteer positions used to facilitate community connections? Are they used to develop partnerships between correctional agencies and community providers?

position to model the significant benefits to the community that may be achieved through effective restorative justice programs.

**Reentry and Wraparound Services.** Reentry programs can serve as a model for enhancing community services. Although all offenders must confront the problems of reentry into the community, many of the obstacles and barriers faced by women offenders are specifically related to their status as women. Beyond the stigma attached to a criminal conviction and to a history of substance abuse, women carry additional burdens. These extra burdens are due to such individual-level characteristics as single motherhood and decreased economic potential as well as to system-level characteristics, such as the lack of services and programs targeted for women, responsibilities to multiple agencies, and lack of community support for women in general. Often, nonoffender women in the larger community confront many of the same harsh realities. As noted elsewhere in this report, there is a need for wraparound services—that is, a holistic and culturally sensitive plan for each woman that draws on a coordinated continuum of services within the community. As Jacobs notes, “[W]orking with women in the criminal justice system requires ways of working more effectively with the many other human service systems that are involved in their lives.”<sup>10</sup> Integrated and holistic approaches, such as wraparound models, can be very effective because they address multiple goals and needs in a coordinated way and facilitate access to services.<sup>11</sup>

Wraparound models stem from the idea of “wrapping necessary resources into an individualized support plan.”<sup>12</sup> Both client-level and system-level linkages are stressed in the wraparound model. The need for wraparound services is highest for clients with multiple and complex needs that cannot be addressed by

limited services from a few locations in the community.

For women leaving custodial environments, the program focus should be on planning for successful community reentry. Many types of reentry services for female offenders would also benefit women in the larger community. The development of more effective and comprehensive services for women generally and women offenders specifically could enhance community services and also could help to prevent crime.

### **Create Gender-Responsive Programs and Services**

A number of issues may be considered for the development of gender-responsive programs and services. For women who are in the system, a gender-responsive approach would include comprehensive services that take into account the content and context of women’s lives. Programs need to take into consideration the larger social issues of poverty, abuse, and race and gender inequalities as well as individual factors that affect women in the criminal justice system.<sup>13</sup> Services also need to be responsive to women’s cultural backgrounds.<sup>14</sup> Culture may be defined as a framework of values and beliefs and a means of organizing experience. Programs and services that are culturally sensitive take into account differences in ethnicity (e.g., language, customs, values, and beliefs) to create a sense of inclusiveness (see “Approaches for Developing Gender-Responsive Programs and Services”).

Programming that is responsive in terms of both gender and culture emphasizes support. Service providers need to focus on women’s strengths, and they need to recognize that a woman cannot be treated successfully in isolation from her social support network (i.e., her relationships with her children, partner, family, and friends). Coordinating

## APPROACHES FOR DEVELOPING GENDER-RESPONSIVE PROGRAMS AND SERVICES

The following approaches are organized into two categories: structure; and content and context/environment.

### Structure

- Contemporary theoretical perspectives on women's particular pathways into the criminal justice system (e.g., relational theory, trauma theory) fit the psychological and social needs of women and reflect the realities of their lives.
- Treatment and services are based on women's competencies and strengths and promote self-reliance.
- Women-only groups are used, especially for primary treatment (e.g., trauma, substance abuse).
- Staff members reflect the client population in terms of gender, race/ethnicity, sexual orientation, language (bilingual), and ex-offender and recovery status.
- Female role models and mentors are provided who reflect the racial, ethnic, and cultural backgrounds of the clients.
- Cultural awareness and sensitivity are promoted using the resources and strengths available in various communities.
- Gender-responsive assessment tools and individualized treatment plans are utilized, with appropri-

ate treatment matched to the identified needs and assets of each client.

- Transitional programs are included as part of gender-responsive practices, with a particular focus on building long-term community support networks for women.

### Content and Context/Environment

- To fully address the needs of women, programs use a variety of interventions with behavioral, cognitive, affective/dynamic, and systems perspectives.
- Services/treatment address women's practical needs, such as housing, transportation, child care, and vocational training and job placement.
- Participants receive opportunities to develop skills in a range of educational and vocational (including nontraditional) areas.
- Emphasis is placed on parenting education, child development, and relationship/reunification with children.
- The environment is child friendly, with age-appropriate activities designed for children.

systems that link a broad range of services will promote a continuity-of-care model. Such a comprehensive approach would provide a sustained continuity of treatment, recovery, and support services, beginning at the start of incarceration and continuing through transition to the community.

### Evaluate Programs

Program evaluation is another step in building gender responsiveness. As the vision of gender responsiveness evolves, documenting the effectiveness of practice addresses the need for empirical research on the outcomes of gender-responsive programs. Process evaluation identifies the fit between the principles of gender responsiveness and program implementation.

This type of evaluation measures the environments within which programs operate.

Process evaluation measures the unique "culture" of individual programs (such as the relationships between staff and women offenders, relationships between women, and rules and regulations) to determine how these factors may affect the program. Such evaluations must also involve participants' input so that their feedback on the services provided can be obtained.

Outcome evaluations describe measures of program success or failure, examining both the short- and long-term effects of the intervention on program participants. Ideally, outcome measures used in evaluations should be

tied to a program's mission, goals, and objectives. Also, outcome measures should go beyond traditional recidivism measures to assess the impact of specific program attributes on pathways to female criminality.

## **Conclusion: The Importance of Understanding Women Offenders**

This report documents the importance of understanding and acknowledging the differences between female and male offenders and the impact of those differences on the development of gender-responsive policies, practices, and programs in the criminal justice system. Analysis of available data indicates that addressing the realities of women's lives through gender-responsive policy and practice is fundamental to improved outcomes at all phases of the criminal justice system. This review maintains that consideration of women's and men's different pathways into criminality, their differential responses to custody and supervision, and their differing program requirements can result in a criminal justice system that is better equipped to respond to both male and female offenders.

The guiding principles and strategies outlined in this report are intended to be a blueprint for the development of gender-responsive policy and practice. They can serve as the foundation for improving the ways in which criminal justice agencies manage and supervise women offenders in both institutional and community settings. Ultimately, commitment and willingness on the part of policymakers and practitioners will be needed to actualize the vision and to implement the principles and strategies of a gender-responsive criminal justice system. Reducing women's involvement in the criminal justice system will benefit the women

themselves, their communities, and society. Such efforts will develop a more effective criminal justice system and generate positive effects for generations to come.

## **Notes**

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## Legal Considerations With Regard to Women Offenders\*

by Professor Myrna Raeder\*\*

A number of legal topics must be considered when managing women offenders (see “Summary of Key Legal Themes”). It is essential for all involved to become knowledgeable and to be proactive and responsive. Although litigation is always a possibility regardless of its ultimate likelihood of success, positive outcomes are more likely when legal issues have been anticipated and administrators can articulate appropriate reasons for the policy, practice, or conduct in question.

The following discussion points out the major areas in which gender has an impact. However, specific questions must be researched according to the particular state or federal case law. Only U.S. Supreme Court decisions and congressional legislation applicable to federal and state governments are binding in all jurisdictions. Therefore, to the extent that a legal question has not been decided by the U.S. Supreme Court, any reference to specific cases should be viewed as persuasive but not necessarily predictive of how a different state or federal court will rule.

The following legal issues concerning women offenders are addressed:

- Equal protection and access to facilities, programs, and services.
- Staffing and supervision.
- Sexual misconduct.
- Due process challenges.
- Pregnancy and child-related questions.

### General Legal Framework

The current legal environment for prison officials is extremely favorable as a result of both judicial interpretation and congressional legislation. This situation presents opportunities for creative administrators to adopt innovative programs that will help ensure better outcomes for women offenders and their children. For example, effective gender-responsive programming for treating the problems underlying substance abuse can be justified as promoting female offenders’

\* This document is intended to be read by individuals who do not have any legal training.

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## SUMMARY OF KEY LEGAL THEMES

- Under an equal protection analysis, parity of facilities, programming, and services for women offenders is the goal.
- Gender-responsive programming is an appropriate correctional response.
- There are differences in how courts interpret men's and women's rights to privacy: Essentially, women's employment rights are weighed against men's rights to privacy, and women offenders' rights to privacy extend farther than male offenders' rights to privacy.
- Cross-gender supervision can be appropriate, but case law is less supportive of pat-searches of female inmates by male correctional officers than of male pat-searches by female correctional officers. In some situations, single-sex supervision may be the better response. However, female employees should be given opportunities for job advancement that ensure they serve in male institutions.
- Be proactive to lessen the chances of sexual misconduct litigation. Establish protocols and follow them; institute training. Consider how best to deploy male staff.
- Restrictions on access to abortion services, such as court approval, should be eliminated. However, an inmate may not be entitled to public funds to pay for an abortion.
- Restricted visiting and parental rights termination proceedings are significant to women inmates and may adversely affect their rehabilitation, even if such policies and laws are not unconstitutional.

rehabilitation and lowering their risk of recidivism. Similarly, expanded visits with children, including programs for overnight visits, can be implemented to foster the mother-child bond. This would support the mother's own rehabilitation and better prepare her for successful reentry into the community. Also, as will be further discussed, in some situations cross-gender supervision of women prisoners can be limited.

Because litigation is always a possibility, proactive administrators must be able to articulate a reasonable basis for their decisions based on

specific circumstances. They need not fear, however, that doing something new will have worse legal consequences than doing nothing. Indeed, in some situations (e.g., allegations of sexual misconduct), doing nothing may ultimately pose more legal difficulties for officials.

## Deference to Decisions of Prison Officials

Over the past 15 years, the U.S. Supreme Court has consistently deferred to prison officials:

Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.  
*Turner v. Safley*, 482 U.S. 78, 89 (1987)

*Turner* established that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Id.* The decision in this case was grounded in the belief that courts are not suited to managing prisons. *Turner* identified four criteria for determining the constitutionality of prison regulations:

- Is there a valid rational connection between the prison regulation and the legitimate governmental interest?
- Do alternative means of exercising the right remain open to inmates?
- What impact will accommodation of the constitutional right have on guards, other inmates, and allocation of prison resources?
- Are there ready alternatives that permit accommodation of the right at de minimis cost to valid penological interests?



The Court recently reaffirmed the use of the *Turner* standard in two cases. The first was *Shaw v. Murphy*, 532 U.S. 223 (2001), a case involving the First Amendment, right of access to the courts, and due process. In the second case, *Overton v. Bazzetta*, 2003 WL 21372482 (June 16, 2003), upholding restrictions on non-contact visits to prisoners, the Court reiterated “[w]e must accord substantial deference to the professional judgment of prison administrators.” As a result, courts do not second-guess prison administrators or require them to justify why they did not adopt other alternatives.

It is unresolved whether the *Turner* standard applies to jails: Pretrial detainees cannot be punished, meaning that penological rationales such as rehabilitation are not relevant. The general standard for measuring the constitutionality of regulations aimed at detainees is found in *Bell v. Wolfish*, 441 U.S. 520 (1979), which permits restrictions that are an incident of some other legitimate governmental purpose, such as to ensure that the individual will be present for trial or to maintain security and order at the institution.

### Decreased Prisoner Litigation

The Prison Litigation Reform Act (PLRA), enacted in 1996 because of the perception that prisoners were bringing many frivolous actions, has dramatically decreased inmate litigation. The legislation governs all civil litigation, whether in federal or state court, with respect to conditions in federal, state, or local correctional facilities that are alleged to violate a federal right, and applies to detainees as well as convicted prisoners. See 18 U.S.C. §§ 3626(a)(1)(A), (d), and (g)(2) and (5). It provides that a court shall not grant or approve any prospective relief unless it is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right. See 18 U.S.C.

§ 3626(a)(1)(A). The act also limits attorneys’ fees. In the case of *Martin v. Hadix*, 527 U.S. 343 (1999), the Supreme Court held that the PLRA limits attorney fees for postjudgment monitoring services performed after the PLRA’s effective date but that it does not limit fees for monitoring performed before that date.

The PLRA also requires prisoners to exhaust their remedies before they can sue. In *Booth v. Churner*, 532 U.S. 731, 741 (2001), a unanimous Supreme Court held that under 42 U.S.C. § 1997e(a), an inmate seeking only monetary damages must complete any prison administrative process capable of addressing the complaint and providing some form of relief, even if the process does not make specific provision for monetary relief. *Porter v. Nussle*, 534 U.S. 516 (2002), clarified that exhaustion applies to all actions about prison life including excessive force claims. The PLRA imposes another substantial restriction on obtaining relief by making any recovery for mental or emotional injury contingent on a showing of physical injury. See 42 U.S.C. § 1997(e)(c). Finally, the PLRA requires prisoners to pay filing fees, and it prohibits prisoners from proceeding in forma pauperis if they have brought three prior frivolous actions or appeals.

### The Combined Impact of the PLRA and *Turner* Favors Gender-Responsive Innovation

The combined impact of the PLRA and *Turner* has dramatically reduced the feasibility and efficacy of both prison reform litigation and individual prisoner suits. Although this has the potential to worsen prison conditions and decrease services, it also leaves administrators free to introduce innovative programs designed to aid rehabilitation. Thus, administrators who believe that gender-responsive programming will better serve the needs of the female inmate population have great leeway for

experimenting with creative approaches to solve previously intractable problems.

In this legal environment, while anyone can sue for anything, the prisoners most likely to sue are those who complain about egregious circumstances or sexual misconduct and those who remain undaunted when assessed filing costs. Additional potential litigants include former prisoners whose suits are not barred by statutes of limitations and staff members.

It should also be noted that every jurisdiction adopts their own laws and policies to dictate sentencing and correctional issues. Therefore, specific questions can be answered definitively only by reference to the applicable state or federal legal standards. However, to the extent that the U.S. Supreme Court has spoken on a topic, states cannot provide lower protections to their prisoners. In contrast, state constitutions, statutes, or policies can provide inmates with greater protection than that afforded by the U.S. Constitution.

### **Equal Protection and Title IX: Equivalent Access to Programs and Services**

Although the goal is to provide parity of treatment for all prisoners, regardless of gender, administrators may not be required to provide the same level of facilities and services to men and women if they can justify the differences. For example, if a court does not find a male and female population to be “similarly situated” because men vastly outnumber women in the comparable institutions, equal protection is not violated even if women are disadvantaged. In addition, penological goals may justify gender-specific treatment. In evaluating equal protection arguments, courts vary as to what standard of review is applied to evaluating the legality of a policy or practice. However, even if the policy is intentionally discriminatory,

applying only to women, it will be upheld if an important penological justification is demonstrated. The following important questions and answers should be considered when evaluating how best to manage, supervise, and rehabilitate female inmates.

**1. Do the same policies, facilities, programs, and services have to be offered to men and women?** In many circumstances, differences will not run afoul of equal protection because male and female inmate populations are not deemed to be similarly situated. The modern trend treats gender as governed by *Turner*, unless the gender discrimination is purposeful, in which case regulations must satisfy heightened scrutiny in equal protection analysis. Under either standard, different policies, facilities, programs, and services can satisfy equal protection even if the populations are similarly situated, as long as a valid penological justification exists for the differences. Fairness and rehabilitative concerns dictate that parity should be the goal even when not constitutionally required. Thus, women should not be disadvantaged simply because in some settings according them fewer resources may not be unconstitutional.

Because there are so many more men than women in prison, providing equivalent facilities and services for women has always posed an issue for administrators. A number of the early prison reform suits addressed such inequalities. Since *Reed v. Reed*, 404 U.S. 71, 76 (1971), gender issues have typically received heightened scrutiny in equal protection analysis. Classifications must be reasonable, not arbitrary, and they must rest on some fair and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike.

In a prison setting, this can be satisfied by showing that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

The pre-*Turner* case law found male and female inmates to be similarly situated for equal protection analysis, applied the heightened scrutiny test by comparing programs, and typically found substantial disparities. Financial arguments based on women's smaller numbers were rejected as a justification of poorer conditions and programming for them. Relief was afforded based on concepts of parity—that is, substantially equivalent in substance, if not form.

In contrast, post-*Turner* case law has generally required a threshold showing that the women are similarly situated to the male population based on prison population, security classification level, types of crime committed, length of sentence, and special characteristics. See, e.g., *Klinger v. Department of Correctional Servs.*, 31 F.3d 727 (8th Cir. 1994). In addition, the rational relationship test is applied unless the plaintiff shows purposeful or intentional discrimination because of the plaintiff's gender. Cases reject any burden on the state to provide a gender-neutral basis for the discrepancy. If policy is neutral, disparate impact alone does not suffice to invalidate a classification without a showing of discriminatory purpose. See, e.g., *Jackson v. Thornburgh*, 907 F.2d 194, 196-98 (D.C. Cir. 1990), relying on *Personal Administrator v. Feeney*, 442 U.S. 256, 274 (1979). The focus is on the process by which programming decisions are made. Therefore, program comparisons are rejected. The anomalous result is that the more unequal the men's and women's prisons are, the less likely it is that this court will consider differences in the prison experiences of men and women unconstitutional.

Although no litigants have challenged sex-segregated prisons, it should not follow that women may be segregated into unequal facilities. Indeed, *United States v. Virginia*, 518 U.S. 515 (1996) (VMI) may have implications for

sex-segregated prisons. *VMI* rejected a claim that women were receiving separate but equal education, instead holding that sex segregation in an all-male educational institution violated equal protection because the comparable women's institution did not have equivalent programs or resources. Because the Supreme Court has not addressed unequal treatment of women in prison, it is unclear whether heightened scrutiny for gender discrimination survives *Turner*. It has been suggested that the focus should be on the purpose of programming, which is directed to preparing both male and female populations for release into the community. Therefore, the appropriate factors include custody levels, length of sentence, purpose of incarceration, and ability to benefit from a program, not the number of inmates at the institution and their special characteristics, which are dictated by sex segregation.

One case that has received wide attention is *West v. Va. Dept. of Corrections*, 847 F. Supp. 402, 407 (W.D. Va. 1994), which held that the absence of any equivalent to placement in a male boot camp that could result in a shorter sentence violates equal protection. *West* applied a heightened scrutiny standard in analyzing the equal protection claim. This accords with decisions that view purposeful discrimination as requiring a higher level of scrutiny.

In general, proactive administrators should strive for parity based on fairness as well as rehabilitative rationales. Parity should not be viewed as requiring the same programming for male and female inmates but, rather, as including gender-responsive programs that may look different but that serve the same rehabilitative goals as equivalent programs for men.

Some 14 states also have enacted Equal Rights Amendments, which provide another means of attacking sex discrimination. However, depending on the state, the plaintiffs may have

to demonstrate differential treatment of similarly situated groups. The standard of judicial review is also state specific.

**2. Can women prisoners raise sex discrimination claims under Title IX in addition to those based on equal protection?** To the extent that Title IX remains a viable litigation approach, it appears to provide more favorable outcomes for female litigants than equal protection claims.

Title IX, 20 U.S.C. § 1681a, prohibits sex discrimination in any educational program or activity receiving federal assistance. Thus, by definition it does not apply to the Federal Bureau of Prisons but only to state and local governments. The comparison of programs in Title IX litigation has been measured against the entire prison system. Although it is unclear whether a comparison between similarly situated prisons will satisfy Title IX, in practical terms, it is difficult to identify similarly situated male and female institutions.

Title IX provides several advantages for female inmates. In contrast to equal protection litigation, the trend has been to reject a threshold showing that the female and male populations are similarly situated. Moreover, some courts have applied strict scrutiny to Title IX claims, which is even more demanding than heightened scrutiny applied to gender-based discrimination.

In addition, Title IX requires equality of programs rather than parity. However, this difference is somewhat elusive. While women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality, judges have not required gender-integrated classes in prisons, strict one-for-one identity of classes, or as many classes in the smaller women's prisons as in the larger men's prisons. The extension of Title IX to recreation

and paying jobs has met with mixed success, depending on their relationship to educational and vocational programs. *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994), held that the award of merit pay to men but not to women when both are participating in the same vocational training course in the same location violated Title IX.

The application of Title IX in prison cases is currently in doubt. *Alexander v. Sandoval*, 532 U.S. 275 (2001), held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The Court interpreted prior Title IX case law as providing private actions only in cases of intentional discrimination. As a result, it is likely that private claims would also be barred in disparate impact cases under Title IX. Such a restriction would virtually eliminate the use of Title IX in prison cases because courts typically focus on the following questions:

- Is there a disparate gender impact?
- Is there no substantial justification for difference?
- Is there an equally effective alternative that would have a less discriminatory impact?

While the presence of Title IX has provided an incentive for creating educational programs for women, its absence would not eliminate the overarching goal of reaching parity in programs for female prisoners.

Moreover, *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002), recognized that disparate impact claims can still be brought against state officials for prospective injunctive relief to enforce Title VI, which would also apply to Title IX claims.



**3. Can female prisoners be given gender-responsive programming or services not provided to men?** Typically, gender-responsive programming can be justified on penological and rehabilitative grounds.

It is ironic that although women traditionally have been placed in a prison system based on a male model for facilities, programs, and services, providing them with gender-responsive programming is viewed by some as inappropriate from an equal protection perspective. In other words, they are doubly disadvantaged by their gender. First, women receive fewer resources, and the resources they do receive often are not directed toward their needs. Second, when women seek gender-responsive programs and accommodations, they are told that women cannot be treated differently from men. The fallacy of this position should be self-evident. For example, there are valid biological reasons why women do not use urinals or why one-piece jumpsuits are a great inconvenience for women.

Significant numbers of women offenders have histories that demonstrate severe physical and sexual abuse, substance abuse, and more mental illness than male offenders; these are also factors that should be considered in determining differences in policies and programs for the two genders. Indeed, physiological differences are emerging in addiction and sexual trauma research that also suggest the need for men and women to be given distinct programming. Similarly, women's pathways to crime and their biological and cultural parenting ties to their children should be considered when attempting to determine how to create programming that will best enable women to succeed when they are released from custody.

Only when there is general recognition that the current correctional system is not gender neutral but is gender responsive to male inmates will the concept of gender-responsive female

programming be fully accepted by administrators. Without such recognition, correctional systems will be handicapped in ensuring successful reintegration of women into the community because programming for them has not been designed in the most effective way to promote rehabilitation and deter recidivism.

Legally, two approaches may be employed to analyze gender-responsive programming. One is based on heightened scrutiny and the other on *Turner's* rational basis test. In the current legal framework, there is reason to believe that either type of challenge to gender-responsive programming is unwarranted. Preliminarily, the Prison Litigation Reform Act makes litigation on such issues less likely to be pursued by prisoners or their advocates. However, to the extent that such programming affects job opportunities for staff members, Title VII litigation claiming sexual discrimination remains a possibility.

Under *Turner*, courts routinely defer to correctional administrators who need only demonstrate the rehabilitative rationale for the programming. In addition, in jurisdictions where courts have rejected program-to-program analysis for purposes of establishing that male and female populations are similarly situated, equal protection litigation has become virtually unwinnable, despite even blatant disproportionality. Ultimately parity, not identity of programs, is the focus, even when the male and female populations are similarly situated.

If heightened scrutiny is applied, the administrator must show that gender-responsive programming serves important governmental objectives (e.g., has a better likelihood of rehabilitating women) and that it is substantially related to the achievement of these objectives. The court would address whether a stereotypical view of women is the basis for the programming as well as whether supportable reasons justify why such programming works. For



example, for many women, the underlying reason for substance abuse often involves previous sexual or physical abuse. Thus, the response to an equal protection challenge based on gender-responsive substance-abuse treatment is that, until the underlying causes for these females' substance abuse are addressed in programming, such women are unlikely to forsake drugs.

The Court's decision in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), lends support to providing gender-specific programming for women offenders. *Nguyen* upheld a statute that distinguished proof of citizenship based on whether the citizen parent was the child's mother or father. The biological differences between men and women concerning birth justified the statutory distinction that required fathers to acknowledge paternity in a way not required of mothers. The Court noted that "[t]he issue is not the use of gender-specific terms instead of neutral ones" (533 U.S. at 64). In other words, so long as "the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis" it will satisfy equal protection (533 U.S. at 68). Therefore, justification based on penological research and rehabilitative goals should survive claims of stereotyping, meaning it is unlikely that courts will attempt to second-guess prison administrators concerning gender-specific programming based on rational distinctions.

Concerning programs available only to women, in *Smith v. Bingham*, 914 F.2d 740, 742 (5th Cir. 1990), *cert. denied*, 499 U.S. 910 (1991), the court denied a claim of sex discrimination brought by a male inmate who was precluded from attending vocational classes that were open only to females. Security claims dictated the result. *Smith* noted that the

challenge would have failed had either *Turner* or heightened scrutiny been applied.

**4. Can gender-specific programming affect staffing?** Care should be taken in deciding whether any position requires a female staff member. Such positions must either place a de minimis burden on male employees or meet a bona fide occupational qualification (BFOQ) under Title VII.

If a job description for a gender-responsive program specifies that only women are qualified for certain positions, staff members or their union may challenge the restriction. This could occur if a female therapist is designated because administrators have found that women prisoners relate better to them, particularly in the early stages of treatment.

The same type of issue has arisen when prisons have attempted to limit the role of male officers in female institutions to avoid cross-gender supervision and sexual misconduct. Such employee complaints are based on Title VII, which prohibits sexual discrimination in employment. However, *Tharp v. Iowa Department of Corrections*, 68 F.3d 223 (8th Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996), held that a prison employer may, without violating Title VII, adopt a reasonable gender-based job-assignment policy that is favorable to women employees if it imposes only minimal restrictions on male employees.

Similarly, *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998), held that a policy of assigning only females to certain posts imposed a de minimis restriction on male employees. To the extent that a colorable Title VII claim was raised, *Robino* held that gender was a BFOQ to accommodate the privacy interests of female inmates.\*

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\*Although courts give deference to decisions of prison administrators in a Title VII context, they balance the rights of employees. Therefore, the *Turner* standard appears to play a role in the analysis of whether the sex discrimination is a BFOQ, even though it is not directly determinative. See *Torres v. Wisconsin Department of Health and Human Services*, 859 F.2d 1523 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989).

In the therapist example, the response to a Title VII challenge by male staff is twofold:

- The restriction is de minimis because it affects only one or two slots in a prison system that includes many such slots (for these purposes, slots in male facilities can be included, since the focus is job opportunity within the correctional setting).
- Gender is a BFOQ because effective therapy for the women to aid their rehabilitation is dependent on the therapist's gender.

However, BFOQs are difficult to justify and must be carefully considered. In addition, a BFOQ may ultimately disadvantage female staff in the overall correctional system if the same arguments regarding gender responsiveness apply to male prisoners. In many situations, a BFOQ may not be necessary. For example, pat searches of female inmates can be performed by women on staff, whether these staff members have correctional or other assignments.

## Other Staffing and Litigation Issues

A number of lawsuits involving women offenders are based on cross-gender supervision. Administrators must balance competing institutional claims with the privacy interests of women offenders. The law on cross-gender supervision and searches is very fact specific. However, challenges brought by women prisoners appear to be treated more favorably than those brought by male prisoners. Thus, women are more likely than men to continue to be successful in suits that implicate privacy interests. This circumstance stems from society's apparent view that women should be afforded more privacy than men. Also, because many female offenders have been victims of sexual and physical assault, cross-gender supervision can cause them additional trauma.

Cross-gender supervision also provides opportunities for sexual misconduct, which is one of the few areas in prison administration that is likely to generate high-profile litigation, and a substantial likelihood of liability being imposed. While prisoners bring suits concerning cross-gender supervision, staff members or their unions sometimes challenge same-sex supervision policies. Generally, these issues require administrators to be proactive, to institute and enforce policies designed to lessen the possibility of improper contact, and to be able to articulate reasonable explanations to justify staffing decisions.

If litigation is brought, it may require discovery and a full record before any defendant's claim of qualified immunity can be determined. In other words, equal protection litigation is very fact bound. As a result, summary judgment rather than a motion to dismiss is often the more likely procedural vehicle used to end the case.

## Philosophical Underpinnings

We must not exaggerate the distance between us, the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.

—Chief Judge Posner, concurring and dissenting from a request for an en banc rehearing in *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), *cert. denied*, 519 U.S. 1006 (1996).

The following questions need to be considered with regard to privacy and strip-searches.

**1. Do prisoners have a general right to privacy?** A prisoner's right to privacy is quite curtailed. However, courts appear to accord female inmates more privacy rights than male inmates.

The Fourth Amendment provides that “the right of people to be secure in their persons,

houses, papers and effects against unreasonable searches and seizures shall not be violated.” Privacy to decide personal matters has been found under the penumbra of the First Amendment (e.g., marriage, procreation, abortion, family relationships, child rearing, and education). In contrast, inmates have no reasonable expectation of privacy in their cells (*Hudson v. Palmer*, 468 U.S. 517 (1984)) and can be subjected to visual body-cavity inspections (*Bell v. Wolfish*, 441 U.S. 520 (1979)).

Based on *Hudson* and *Bell*, most federal courts recognize that under the Fourth Amendment a convicted prisoner maintains some reasonable expectations of bodily privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by nonprisoners. See, e.g., *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992); *Moore v. Carwell*, 168 F.3d 234, 236-37 (5th Cir. 1999); *Peckham v. Wisconsin Dept. of Corrections*, 141 F.3d 694, 697 (7th Cir. 1998) (narrowing *Johnson v. Phelan*, which held that “the Fourth Amendment does not protect privacy interests within prisons”); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993); and *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992).

Such rights are subject to *Turner’s* reasonable relationship test. Therefore, observation must be more than inadvertent, occasional, casual, and/or restricted to be actionable. In addition, qualified immunity may bar liability of administrators in their individual capacity. See *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991); *Somers v. Thurman*, 109 F.3d 614, 618-19 (9th Cir. 1997); and *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993).

Many of the cases involve male prisoners. For example, in *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985), male inmates brought a class action challenging the prison policy of allow-

ing female officers to view them in various stages of nudity. The Ninth Circuit affirmed the district court’s grant of summary judgment for the state, concluding that under the Fourteenth Amendment, the prisoners’ right to privacy was not violated and that the state had chosen the least intrusive means to further its interest in security. It is important that the female guards saw the men only in casual observation and from a distance. The court was concerned about providing female guards with equal employment opportunities.

Generally, men have been unsuccessful in their suits as long as the supervision was designed to be professional. For example, *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987), held that the male inmates’ claims could not be dismissed out of hand and remanded to the district court, which applied *Turner* to find in favor of the prison. *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), dismissed a male pretrial detainee’s action, based on female guards’ observation of him while naked, for failure to state a claim. *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), held that surveillance of nude male prisoners by female guards violated no privacy interest and must yield to the prison’s security needs.

Courts apparently think that women have a greater expectation of privacy than men. Thus, cases in which women complain about cross-gender supervision have a greater probability of success. In *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980), female inmates challenged male guards’ placement in their housing units during nighttime shifts. The court took as a given that women had a constitutional expectation of privacy. Women would be provided suitable sleepwear and permitted to cover cell windows for 15-minute intervals. *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981), upheld a jury verdict on behalf of a woman inmate who had been forced to disrobe in the presence of male guards. *Torres v. Wisconsin Department of*

*Health and Human Services*, 859 F.2d 1523 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989), held that the state could exclude male guards from its female prisons to promote female prisoners' rehabilitation without violating the male staff's employment rights, if it could show that the BFOQ was "reasonably necessary to furthering rehabilitation." Privacy was a key concern in reassignments.

However, the law is not settled in this area and is very factually oriented. For example, *Cain v. Rock*, 67 F. Supp. 2d 544 (D. Md. 1999), upheld a cross-gender guarding policy and rejected Section 1983 liability where the plaintiff failed to establish that the policy was the direct cause of her alleged sexual assault.

**2. What is the law concerning cross-gender strip-searches and pat-downs?** While strip-searches should always be considered a same-sex function, female prisoners have fared better in the courts on their challenges to both strip-searches and pat-downs. In some factual settings, such general practices may even violate the Eighth Amendment rights of female prisoners.

Results differ depending on whether the inmate is male or female. Assuming nonegregious facts, cross-gender searches of male inmates by females tend to be upheld, and cross-gender searches of females by male guards have a greater chance of being struck down. This relates to differing expectations of privacy and to concerns that female correctional employees will be denied employment opportunities if they are routinely excluded from jobs in male prisons.

This double standard is evident in *Madyun v. Franzen*, 704 F.2d 954 (7th Cir.), *cert. denied*, 464 U.S. 996 (1983), where no violation of the First Amendment, Fourth Amendment, or Equal Protection Clause was found where female guards conducted pat searches of male inmates. No Fourth Amendment violation existed because there was no requirement that

female guards examine the genital area; no First Amendment violation existed, given the state's important governmental interest in security and equal employment opportunities for women staff; and while female inmates were searched only by female staff members, no equal protection violation existed for the different treatment.

Similarly, in *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002), the court found no constitutional privacy violation by cross-sex surveillance of male prisoners in showers and bathrooms. *Oliver* also rejected their equal protection challenge, although female inmates were accorded more privacy, holding the men were not similarly situated to the women. Differences in the population included the fact that there were six times as many men as women; unlike the women, the men had been convicted of violent crimes; and the male units had a higher incidence of violent gang activity and sexual predation. The court noted that "all of the facts that justified round-the-clock surveillance by guards of both sexes applied uniquely to men" (276 F.3d at 747).

Cases involving female inmates are often fact specific. *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc), held that a Washington state policy that allowed male guards to conduct a pat search on women inmates violated the women's Eighth Amendment right to be free from cruel and unusual punishment where the cross-gender searches were random, non-emergency, without suspicion, and conducted on women offenders who had prior histories of abuse and would be likely to feel revictimized by the intimate contact of their breasts and genitals by male guards.

*Colman v. Vasquez*, 142 F. Supp. 2d 226 (D. Conn. 2001), refused to dismiss Fourth and Eighth Amendment claims on qualified immunity grounds where males conducted pat searches on female inmates assigned to a special unit for victims of sexual abuse. However,



in *Carlin v. Manu*, 72 F. Supp. 2d 1177 (D. Or. 1999), officers were entitled to qualified immunity for strip-searches by female officers in the presence of male guards because the practice was not clearly unlawful at the time of the search. In contrast, in *Footte v. Spiegel*, 118 F.3d 1416 (10th Cir. 1997), strip-searches of female jail inmates without reasonable suspicion resulted in an officer being denied qualified immunity.

A strip search of arrestees charged with a minor offense is permissible only if the official has individualized suspicion that an arrestee is hiding weapons or contraband. See, e.g., *Kelly v. Foti*, 77 F.3d 819, 822 (5th Cir. 1996); *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000); *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993). Some courts do not even permit routine strip-searches of females arrested for drug possession or nonviolent felonies. See, e.g., *Footte* (marijuana possession) and *Ford v. City of Boston*, 154 F. Supp. 2d 131 (D. Ma. 2001) (nonviolent felonies).

## Sexual Misconduct

Sexual misconduct cannot be tolerated in any correctional setting, whether or not it involves violence on the part of any correctional official. *Farmer v. Brennan*, 511 U.S. 825 (1994), clearly establishes that “being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.” Increasingly, statutes and case law recognize that employees have a duty not to engage in any sexual activity with inmates, even if the inmate initiated the contact, because such liaisons cannot be deemed voluntary in light of the employee’s position of authority in the institution. The existence of sexual misconduct in female institutions in the United States can no longer be dismissed as an isolated phenomenon. It has been condemned by several human rights organizations as well

as in the case law. Undoubtedly, the burgeoning of the female inmate population and the prevalence of male employees in most female institutions has contributed to the increased incidence of sexual misconduct.

Sexual misconduct has criminal and civil consequences. It can result in discipline or in criminal charges against the staff member accused of improper behavior. In addition, civil litigation may be instituted against the particular staff member, other staff members, supervisors, and even the municipality.

Beyond the legal context, sexual misconduct implicates the culture of the institution and hinders the ability of administrators to achieve rehabilitative goals. Administrators must develop protocols and training that strive to eliminate sexual misconduct. Explicit prohibition of all sexual contact between staff and inmates, regardless of who initiates it or whether it is arguably consensual, should be adopted to send a message of zero tolerance. Only if all such conduct is treated as abusive and warranting termination can the safety of the inmates and the integrity of the institution be ensured. Supervisors must reinforce that any sexual contact will not be tolerated. Being proactive also ensures the best possibility that any resulting civil liability will be restricted to the offending staff member.

Most suits will be based on Section 1983 claims of Eighth and Fourteenth Amendment violations, although some will be based on privacy and cross-gender supervision claims citing the First and Fourth Amendments. For municipal liability, an official policy or custom must be alleged that deprives a person of a federally protected right. Failure to adequately train or supervise can be actionable if the policy was adopted with deliberate indifference to the known or obvious possibility of sexual assaults. The municipality must also have actual or constructive knowledge of the inappropriate



practice before liability can be imposed against it. When liability is imposed it can be costly. For example, *Daskalea v. DC*, 227 F.3d 433 (D.C. Cir. 2000), upheld a \$350,000 verdict where a jail inmate was forced to perform a striptease in front of other prisoners and male and female guards. The imposition of personal liability against a warden and director of security for failure to protect female inmates from harm was affirmed in *Riley v. Olk-Long*, 282 F.3d 592 (8th Cir. 2002), despite a claim that the collective bargaining agreement prohibited the removal of the predatory guard. In both of these cases, there had been a history of complaints.

### **Eighth Amendment Challenges (Applied to the States by the Fourteenth Amendment)**

Demonstrating an Eighth Amendment violation requires both an objective and a subjective component. See, generally, *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Estelle v. Gamble*, 429 U.S. 97 (1976).

The injury is objectively and sufficiently serious, denying “the minimal civilized measure of life’s necessities” if it—

- results in the “unnecessary and wanton infliction of pain,”
- is “grossly disproportionate to the severity of the crime warranting imprisonment,” or
- results in an “unquestioned and serious deprivation of basic human needs.”

The official has a sufficiently culpable state of mind demonstrating deliberate indifference when—

- the official knew of and disregarded an excessive risk to inmate safety or health,

- the official was aware of facts from which an inference could be drawn that a substantial risk of harm existed, and
- the official actually drew the inference.

It is not sufficient that the injury was grave enough that the official should have known of the risk, if that individual did not subjectively know of the risk. For example, if an inmate did not tell the guards she was offended and harassed by their verbal abuse, they did not have the requisite culpable state of mind. See *United States v. Sanchez*, 53 M.J. 393 (2001).

Qualified immunity was created to shield government officials from civil liability for the performance of discretionary functions as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have knowledge. It is available as a defense to public officials sued in their individual capacity, unless the official has acted with an impermissible motivation or with such disregard of the person’s clearly established constitutional rights that the action cannot be reasonably characterized as having been in good faith. If a reasonably competent official knew or should have known that conduct was unlawful, immunity does not exist. *Richardson v. McKnight*, 521 U.S. 399 (1997), clarified that prison guards who are employees of a private prison management firm are not entitled to qualified immunity from suit by prisoners charging a violation of Section 1983. The Court left open whether a defense of good faith was available to private guards.

### **Questions Typically Posed to Administrators in Sexual Misconduct Cases**

Administrators are often asked the following in sexual misconduct cases:

- Did the misconduct happen on your watch?
- Were you responsible for promulgating and enforcing policy?
- Did you fail to act?
- Did you ignore information presented to you?

To obtain personal liability, the plaintiff must provide notice that the suit is against the official in his or her personal capacity. It requires fairly egregious behavior for an official to be held liable in individual capacity.

The following questions need to be considered with regard to preventive policy and same-sex supervision.

**1. What precautions should be taken to avoid lawsuits resulting from sexual harassment, sexual misconduct, or cross-gender supervision?** Establish clear policies and procedures and follow them.

Precautions may include—

- Establishing clear policies concerning inappropriate conduct.
- Conducting training of staff concerning sexual misconduct and cross-gender supervision.
- Establishing multiple reporting mechanisms.
- Establishing protocols for investigating claims and ensuring against retaliation.
- Ensuring that prisoner complaints are investigated because they provide notice to the municipality if the correctional staff member commits further misconduct.

It is very important to create an appropriate inmate grievance procedure and a method to punish retaliatory conduct against inmates who report abuse. Policies also must be established

for reporting abuse to the appropriate prosecutorial agencies.

*Carrigan v. Delaware*, 957 F. Supp. 1376 (D. Del. 1997), held that an inmate’s “consent” to an officer’s sexual misconduct is not a defense. Similarly, *Morris v. Eversley*, 205 F. Supp. 2d 234 (S.D. N.Y. 2002), denied a qualified immunity defense because the state penal code deemed an inmate incapable of consent.

**2. Could same-sex supervision lessen the likelihood of sexual misconduct or privacy claims arising from cross-gender supervision?** Although not all sexual misconduct or privacy claims will be eliminated through same-sex supervision, this practice will likely decrease the number of such claims.

Several factors support the conclusion that same-sex supervision lessens the likelihood of sexual misconduct or privacy claims. Although sexual misconduct also may occur between same-sex staff and inmates, the most visible claims are those brought against males who are supervising female inmates. The prevention of sexual misconduct serves legitimate prison interests in security and rehabilitation. There are historical, cultural, and psychological reasons why women may feel more violated and/or intimidated by cross-gender supervision than men. In addition, cross-gender supervision and sexual misconduct may violate standards of international law.

**3. Does same-sex supervision violate the rights of employees of the opposite sex? Is it a BFOQ for certain positions that the employee be female or male?** Same-sex supervision or job descriptions can be justified in certain specific factual settings. However, care should be taken to review the manner in which such policies are implemented. See also Equal Protection and Title IX: Equivalent Access to Programs and Services, Question 4.

Although it can be difficult to obtain a BFOQ for intentional discrimination based on gender,

BFOQs on this basis have been permitted in correctional settings. Privacy and rehabilitation concerns, as well as security interests, must be documented. *Dothard v. Rawlinson*, 433 U.S. 321 (1977), upheld gender restrictions that prohibited hiring of female guards in contact positions in an all-male maximum security prison, finding that gender was BFOQ based on the need to protect women guards from assaults by male prisoners. Courts often narrowly construe this case to its facts when it is cited as a justification to limit the employment opportunities of female correctional staff members.

In contrast, when female employees are not disadvantaged and when significant reasons support the same-sex staff for female inmates, courts have approved such designations. For example, *Tharp v. Iowa Department of Corrections*, 68 F.3d 223 (8th Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996), held that a prison employer may, without violating Title VII, adopt a reasonable gender-based job-assignment policy that is favorable to women employees if it imposes only minimal restrictions on male employees. Similarly, *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998), held that a policy of assigning only females to certain posts imposed a de minimis restriction on male employees. To the extent that a colorable Title VII claim was raised, gender was a BFOQ to accommodate the privacy interests of female inmates.

*Torres v. Wisconsin Department of Health and Human Services*, 859 F.2d 1523 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989), held that the state could exclude male guards from its female prisons to promote female prisoners' rehabilitation without violating the male staff's employment rights if it could show that the BFOQ was "reasonably necessary to furthering rehabilitation." The state is not required to show objective evidence, either

from empirical studies or otherwise, displaying the validity of its theory. Proper evaluation is on the totality of the circumstances as contained in the entire record. In other words, the decision of a penal administrator is entitled to substantial weight when it is the product of a reasoned decisionmaking process based on available information and experience. The fact that a program is considered a reasonable approach by other professional penologists is a significant consideration.

Even assuming deference to decisions favoring single-sex supervision, an administrator must demonstrate reasons justifying the policy for the specific prison population. For example, *Carl v. Angelone*, 883 F. Supp. 1433 (D. Nev. 1995), held that an administrator could not base a claim of qualified immunity on an affirmative defense of BFOQ because the discrimination was intentional. In that case, an issue of fact precluded summary judgment on the BFOQ defense because there were no factual findings that a large percentage of female prisoners would suffer psychological pain or harm upon being physically searched by men or that prison security was not dependent on cross-gender clothed body searches. The employer's single-sex supervision decision had been based solely on an interpretation of *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc), that cross-gender searches were illegal in all situations.

*Carl* pointed to the factual underpinnings in the *Jordan* case, demonstrating that a very large percentage of the female population in the prison in question were victims of prior abuse and would suffer psychological harm from random searches. Moreover, *Carl* indicated that before the prison will be entitled to the BFOQ exception, the employer must demonstrate why it cannot reasonably rearrange job responsibilities within the prison to minimize

the clash between the privacy interests of inmates and the safety of prison employees on the one hand and the nondiscrimination requirement of Title VII on the other.

*Everson v. Mich. Dept of Corrections*, 222 F. Supp. 2d 864 (E.D. Mich. 2002), exemplifies how not to justify a decision to eliminate cross-gender supervision for all correctional and resident unit officers in female housing units throughout the state. Despite a long history of sexual misconduct and privacy problems that resulted in several class settlements, the trial judge rejected an across-the-board BFOQ where the change would have affected numerous employees because he concluded the correctional director had a stereotyped view of the role of sex in employment in prisons. The new director, who had previously been a legislator, ostensibly adopted the policy to protect male correctional officials from charges of sexual misconduct and was characterized as making the decision “without consulting staff or reviewing internal studies, national policies or the literature.”

The judge noted that most cases upholding BFOQs were based on extensive studies and reasoned conclusions undertaken for penological reasons. In contrast, in *Everson* there was no proof as to why rescheduling was not sufficient, since elimination of the requirement of five pat-down searches per shift could have lessened male-female interactions. The Department also did not initiate any effort to enhance pre-employment screening. In addition, it was noted that the female inmates were already protected against strip-search by males as a result of prior settlements that provided that strip-searches, observation of female inmates while undressed, and staffing of medical visits were limited to female officers.

Whether or not *Everson* is affirmed on appeal, it should not be read as a general rejection of

same-sex staffing. *Everson* recognized that four states have gender BFOQs equivalent to those requested in Michigan. More significantly, the decision stated that task-oriented gender assignments might have been justified by the factual record. Survey information presented to the Court listed 26 states that require that a minimum number of female corrections officers be available to perform selected tasks and 31 states that have gender-specific assignments for such tasks as transportation runs, strip-searches, urine collection, and medical appointments. Ultimately, *Everson* exemplifies why the evidence presented to the Court to justify a BFOQ was found wanting when balanced against the rights of large numbers of employees. In other words, even though deference is given to administrators in Title VII litigation, this occurs only when the original decision relies on the views of seasoned penologists in the system. Thus, the Department’s use of outside experts at trial, without calling any senior staff to testify, reinforced the judge’s view that they had not been adequately consulted and an across-the-board BFOQ was not warranted.

Although a prison administrator should be able to justify a policy of single-sex pat-downs, searches, or close supervision in many women’s prisons, this must be done with reference to the population held in a given prison. Discussions with the prison psychologist and security officers are necessary before such a policy is instituted. It should also be remembered that such policies should be formulated in a manner that will not unduly disadvantage employees of either sex.

Establishing a gender-sensitive policy that addresses potentially litigious issues requires thought. The prison administrator must be clear about the interests to be served and certain that the policy is narrowly tailored to meet such interests as security, rehabilitation, simple decency, past trauma of women inmates, and

affirmative action considerations for women staff. It is appropriate in such situations for the administrator to—

- Obtain legal analysis.
- Try to enlist the support of the union.
- Try to defuse the opposition of the union.
- Involve mental health staff in documenting the presence of trauma in the female population.
- Determine whether security is dependent on cross-gender searches.

## Due Process Challenges

Typically, due process has not provided a useful tool for convicted prisoners to challenge their conditions of confinement. While restrictions placed on detainees cannot be justified on penological grounds, *Bell v. Wolfish*, 441 U.S. 520 (1979), permits restrictions that are an incident of some other legitimate governmental purpose, such as to ensure that the individual will be present for trial, or to maintain security and order at the institution.

*Sandin v. Conner*, 515 U.S. 472, 484 (1995), clarified due process analysis in prisoner cases:

First, a state may create liberty interests protected by due process. However, these interests will generally be limited to freedom from restraint, which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

In *Sandin*, discipline in segregated confinement did not present a due process claim because there was no liberty interest in remaining in the general prison population and free of disciplinary or administrative segregation. Therefore, discipline by prison officials

“falls within the expected parameters of the sentence imposed by a court of law.” See 515 U.S. at 485.

Because the particular burdens imposed by segregation in *Sandin* were not great, facts that implicate atypical significant deprivations or inevitably affect the duration of sentence could arguably still present a due process claim. Thus, in relation to women prisoners, allegations of particularly brutal isolation and sensory deprivation for women who act out or attempt suicide in the general population may raise due process as well as Eighth Amendment and equal protection concerns. The higher percentage of mentally ill female inmates has been well documented. In general, the interrelation of mental health care and security needs is a subject that calls for more attention. Women appear to be placed in solitary confinement for less egregious behavior than men, some of which is directed at themselves rather than others. Yet, their confinement appears to increase their violent behavior against themselves and may impose devastating psychological effects. Proactive administrators should consult with their mental health professionals to determine whether isolation is an appropriate response for the behavior in question.

## Pregnancy and Child-Related Questions

Inmate pregnancy is an issue of particular significance for jails; however, it also occurs in prison settings. Legal issues often arise concerning access to nontherapeutic abortions and the conditions surrounding the birth of an inmate’s child. Restrictions on termination of pregnancies and on deliveries should be carefully monitored by administrators because they are likely to result in litigation.

Because most female offenders have children, visits can be key to motivating them to change



their behavior. Although prison officials can control the nature and extent of visits, other child-related issues, such as termination of parental rights or placement of women in facilities close to their homes, may be outside the administrator's control. Yet, maintaining relationships can be particularly difficult when women are housed at great distances from their families. Similarly, custody issues can also have detrimental effects on the state of mind of incarcerated mothers.

Understanding how such family-based legal issues impact women offenders is important in designing programs to ensure the best outcomes for women and their children, not just in a jail or prison setting but also in probation, parole, and community correctional settings. For example, the type and extent of community services available to female offenders, particularly mothers of young children, may affect the women's ability to meet conditions of release. Preparation in prison is key to women offenders' ability to deal with their family responsibilities in a way that ensures the best chance of their success in the community.

Consideration must be given to the following pregnancy- and child-related questions.

**1. Is restraining a pregnant woman who is about to deliver legal when it can endanger her or her child?** Whether or not it is currently a constitutional violation, such restraint in the absence of any security risk is questionable viewed from either a humanitarian, public relations, or litigation perspective.

Restraints on pregnant women have been the subject of worldwide attention. Amnesty International, Human Rights Watch, and the United Nations Special Rapporteur on Violence Against Women have all questioned this practice. In particular, Amnesty International has recommended legislation, regulation, policies, and practices to reflect a commitment to protect

inmates against such abuse. It also considers the routine use of restraints on pregnant women, particularly on women in labor, a cruel and unusual practice that rarely can be justified in terms of security concerns because it endangers the woman and her unborn child and also constitutes a violation of international standards. Whether an Eighth Amendment violation can be stated depends on a finding that such conduct involves the unnecessary and wanton infliction of pain. See *Estelle v. Gamble*, 429 U.S. 97 (1976). The Eighth Amendment standard is described in the sexual misconduct section above.

*Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997), noted that the district judge had found the use of physical restraints on pregnant women to violate the Eighth Amendment, a finding that was not challenged by the defendant on appeal. The court order in that case provided that:

- Defendants shall use no restraints on any woman in labor, during delivery, or in recovery immediately after delivery.
- During the last trimester of pregnancy up until labor, the defendants shall use only leg shackles when transporting a pregnant woman prisoner, unless the woman has demonstrated a history of assaultive behavior or has escaped from a correctional facility.

At a minimum, prison and jail administrators should question the necessity of physical restraints in individual cases, since most pregnant women, particularly those nearing labor, are not flight risks. In addition, the use of restraints may factor into a claim for inadequate medical care for a pregnant inmate. See, e.g., *Calloway v. City of New Orleans*, 524 So.2d 182 (La. Ct. App. 1988) (affirming

liability against the sheriff but reducing the award of damages).

**2. Does a pregnant prisoner have a right to obtain a nontherapeutic abortion, and, if so, must the state pay for it?** Officials cannot hinder a woman's right to obtain an abortion and should not require a court order before allowing a woman to obtain one. However, it is unclear whether in all settings the facility must pay for the abortion.

It is well settled that a woman has a right to obtain an abortion before viability of the fetus without undue interference from the state. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). However, liability over a state's refusal to permit a pregnant detainee or prisoner access to abortion services has met with mixed results. Several courts have issued injunctions against regulations requiring court-ordered releases for inmates to obtain nontherapeutic elective abortions. For example, *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988), found that a county order requiring inmates to secure court-ordered releases to obtain abortion while in the county's custody was unconstitutional. In addition, to the extent that a county's regulation requiring inmates to obtain their own financing for abortion impinged upon the inmate's right to make an abortion choice, the regulation was unconstitutional. In the absence of alternative methods of funding, *Lanzaro* found that the county must assume the cost of providing inmates with elective, nontherapeutic abortions. *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio, 1999), granted a Temporary Restraining Order to a female prisoner requesting access to pregnancy termination services after the director of the correctional center refused to provide access without a court order. However,

*Doe* did not involve any request to fund the abortion.

In contrast, the District Court in *Victoria W. v. Larpenter*, 205 F. Supp. 2d 580 (E.D. La. 2002), found no constitutional violation for a policy that required an inmate to obtain an attorney, get a court order, and pay all costs of her nontherapeutic abortion. Moreover, it rejected an Eighth Amendment challenge, holding that a nontherapeutic abortion was not a serious medical need for Eighth Amendment purposes. It is questionable how this decision will fare if appealed, although it is likely to be upheld on the issue of payment. Louisiana has a law prohibiting the expenditure of public funds for abortion. Such funding bans are legal. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (in which a statutory ban on use of public employees and facilities for performance or assistance of nontherapeutic abortions did not contravene the Constitution).

Similarly, *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991), *cert. denied*, 502 U.S. 849 (1991), affirmed a grant of summary judgment in a Section 1983 action where the pretrial detainee failed to establish that the delay in scheduling the abortion was the result of anything more than mere negligence on the part of correctional authorities. In other words, negligence did not establish a deprivation of due process. The plaintiff's Eighth Amendment claim failed because the facility's procedure for termination required only a written request, not permission from either the Department of Corrections or the court. *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991), also held that officials were entitled to qualified immunity and that their actions did not rise to a level of constitutional violation concerning negligent failure to provide an abortion. Again, the grant of qualified immunity rested on the lack of a clearly

established constitutional right at the time of the abortion request.

While *Victoria W.* held the regulation requiring a court order for the elective procedure was constitutional, several of the mentioned cases either explicitly or implicitly reject such requirements. Administrators should review their own regulations carefully to determine whether they hinder an inmate's right to choose to terminate her pregnancy. It is only a matter of time before qualified immunity claims will be rejected for policies requiring court orders. Even if a facility is not required to pay for the abortion, policies that require inmates to pay for transport and security may be suspect.

### **3. Women's prisons are often located far from home, depriving them of the opportunity to meet with their families as often as men. Is this a basis for a constitutional challenge?**

While it is unlikely that a successful constitutional challenge can be raised on these grounds, from a policy perspective it is questionable whether such family separation is beneficial to either most incarcerated mothers or their children. Administrators must be sensitive to how family issues affect an incarcerated mother's programming in prison and her chances of rehabilitation when she returns to the community.

Because the number of incarcerated women is smaller than that of incarcerated men, and because there is hesitancy to place women in facilities for men, fewer institutional choices are typically available to women. Therefore, it is not uncommon for women to be located farther from home than men. Although this circumstance might seem ripe for an equal protection challenge, as the previous discussion has indicated, such claims often fall prey to penological realities. For example, in *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989), the court applied heightened scrutiny in a case challenging general budgetary and policy choices made over decades that resulted in

women prisoners being sent out of the District of Columbia.

*Pitts* reasoned that, unlike *Turner*, the basic policy decision of whether to provide a local women's prison facility "does not directly implicate either prison security or control of inmate behavior, nor does it go to the prison environment and regime." However, despite heightened review, the court upheld closing the local women's institution to provide more housing for men because it satisfied a substantial governmental interest of alleviating overcrowding in men's institutions. As a result, the women were required to serve their sentences in West Virginia, far from home and family.

The Supreme Court's view of the Due Process Clause in a prison setting also has not been proved to be useful to prisoners because "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." See *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977). *Meachum v. Fano*, 427 U.S. 215, 225 (1976), held that due process did not create a liberty interest in prisoners to be free from intrastate prison transfers, even from a medium to maximum security facility, because this was within the normal limits or range of custody that the conviction has authorized the state to impose. Thus, a prisoner has no inherent constitutional right to be confined in a particular prison or to be held in a specific security classification. See also *Olim v. Wakinekona*, 461 U.S. 238, 245-46 (1983) (interstate transfer).

In *Froehlich v. Wisconsin Department of Corrections*, 196 F.3d 800 (7th Cir. 1999), the children of an incarcerated mother sued to prohibit her transfer to an out-of-state prison. Judge Posner rejected the Eighth Amendment challenge based on cruel and unusual punishment as frivolous because the state is not

punishing the children. In other words, the incidental infliction of hardship on a person not convicted of a crime is not punishment within the meaning of the Eighth Amendment. However, the transfer was viewed as insensitive, and while recognizing that such an accommodation is not constitutionally imposed on prison officials, the judge noted “it may be a moral duty.”

The underlying question raised by the imprisonment of women far from home is whether many of them who are nonviolent and are serving lengthy terms under harsh drug laws can be rehabilitated in community correctional facilities located closer to their homes. Thus, they would be able to maintain family ties and would also be more likely to obtain training and jobs that would assist them in their re-entry following release. If prison administrators consider such inmates to be good risks for community-based programs without jeopardizing public safety, the chance of obtaining such options is increased. Several urban areas have created coordinating councils among all of the agencies involved in the criminal justice system to deal more fairly with women offenders.

**4. Are jails and prisons required to provide visitation? If not, are they inflicting hardship not only on the mother but on the children as well?**

While visitation is a privilege, not a right, restrictions must be reasonably related to penological goals. From a policy perspective, extended visiting by children strengthens the mother-child bond and increases the likelihood of the mother’s successful reintegration into the community.

*Block v. Rutherford*, 468 U.S. 576 (1984), upheld a blanket prohibition on contact visits for pretrial detainees as an entirely reasonable, nonpunitive response to the legitimate security concerns identified, and therefore one consistent with the Fourteenth Amendment. The decision specifically noted:

We do not in any sense denigrate the importance of visits from family or friends to the detainee. Nor do we intend to suggest that contact visits might not be a factor contributing to the ultimate reintegration of the detainee into society. We hold only that the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility (458 U.S. at 589).

The denial of contact visits for prisoners has been upheld by *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), and *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997).

Similarly, the denial of prison access to a particular visitor “is well within the terms of confinement ordinarily contemplated by a prison sentence,” *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 461 (1989). However, in his concurring decision in *Thompson*, Justice Kennedy recognized that:

[N]othing in the Court’s opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause in a way that the precise and individualized restrictions at issue here do not.

One court found that a total ban on visits with children violated the First Amendment right to freedom of association. See *Valentine v. Englehardt*, 474 F. Supp. 294, 295 (D. N.J. 1979). At a minimum, prison administrators should consider the negative effect on rehabilitation caused by restricted visitation because women’s ties with their children have been recognized as a strong motivation for reducing recidivism.

Typically, the impact of limited visitation on children and families is not factored into the legal analysis, although it is not doubted that



the children, particularly those raised by single mothers, face hardship that is exacerbated by the inability to interact on a personal level. However, particular restrictions on visitors may run afoul of *Turner* or may be evaluated by a stricter standard of review. See *Proconier v. Martinez*, 416 U.S. 396, 413-14 (1974). For example, *Burgess v. Lowery*, 201 F.3d 942, (7th Cir.), *cert. denied*, 531 U.S. 817 (2000), affirmed the trial court's denial of a defendant's qualified immunity claim because it was clearly established that visitors have a Fourth Amendment right not to be strip searched in the absence of a reasonable suspicion that they are carrying contraband.

*Overton v. Bazzetta*, 2003 WL 21372482 (June 16, 2003), upheld restrictions on non-contact visits to prisoners that excluded visits by minor nieces and nephews and children as to whom parental rights had been terminated. The opinion did "not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant" to prisoner claims, but sustained the restrictions because they bore a rational relationship to legitimate penological interests and therefore were valid under the *Turner* test. The correctional officials had argued that the regulations promoted internal security by reducing the total number of visitors and by limiting the disruption caused by children. In addition, they protected children from exposure to sexual or other misconduct or from accidental injury.

*Bazzetta* also upheld a requirement that children be accompanied by a family member or legal guardian as reasonable to ensure that the child is supervised by adults who have the child's best interests in mind. The Court noted that visits were allowed between an inmate and her own children, grandchildren, and siblings. A 2-year ban on noncontact visits for inmates with two substance abuse violations was also upheld, despite the fact that it

relegated some inmates to brief and expensive phone calls. In other words, "*Turner* does not impose a least-restrictive alternative test." However, the Court recognized that if withdrawal of all visitation was permanent or for a much longer period, or arbitrarily applied, the result could be different.

After *Bazzetta*, visiting still remains important to ensure that children bond with their mothers, to facilitate family reintegration, and to encourage inmate rehabilitation. The decision does not prohibit or discourage the adoption of expansive visiting regulations of both a contact and noncontact nature. However, the scope and nature of those regulations are clearly within the discretion of the prison administrators as long as restrictions are reasonable.

**5. Do harsh sentencing policies combined with statutes terminating parental rights of incarcerated women violate due process or the Eighth Amendment ban on cruel and unusual punishment?** In the current litigation environment, it is quite unlikely that these claims violate constitutional norms. However, from a policy perspective, they raise issues that administrators should be aware of because they affect the incarcerated mother's mental outlook in prison and her ability to reintegrate into the community successfully.

Enactment of harsh drug laws, mandatory minimums, and repeat offender statutes has resulted in more women being incarcerated for longer sentences. The majority of incarcerated women are mothers, and many of these mothers are raising their children alone. Single mothers who are incarcerated are more likely to have their parental rights terminated than male prisoners who are fathers because the children of male inmates overwhelmingly reside with their natural mothers. In contrast, the children of female inmates are more likely to reside with grandparents or other family members, friends, or foster care providers.



Termination of parental rights is a major issue for incarcerated mothers. *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981), rejected any requirement that a state must provide a parent with an attorney in termination proceedings, although some states provide an attorney for the court appearance. The difficulty for incarcerated parents in contacting social workers, child protection agencies, and others responsible for parental rights determinations can be daunting without an attorney. Attempts to require the state to provide such legal advice, if not otherwise legislatively mandated, have not proved successful. *Glover v. Johnson*, 75 F.3d 264 (6th Cir.), cert. denied, 519 U.S. 816 (1996), held that the fundamental right of access to courts did not require the state to provide legal assistance for inmates in connection with custody matters.

State statutes concerning the termination of parental rights vary widely. While a few are based solely on incarceration for a stated time, most have additional requirements that are based on the timelines established by the Adoption and Safe Families Act of 1997 (ASFA). However, ASFA has imposed an incredibly costly collateral consequence of incarceration for single mothers who are incarcerated more than 15 months. Such women now not only lose their liberty but also may face early termination proceedings if their children are placed in nonkinship foster care. Moreover, welfare reform has made it more difficult for relatives to receive funding for children in their care without a finding that the child is subject to the jurisdiction of dependency court. Yet, state involvement increases the likelihood of eventual termination.

ASFA tightened the timeline for parental termination that existed in most states at the same time that sentences were also increasing. As a result, the vast majority of incarcerated mothers may face termination proceedings. This is

particularly true in federal court, which does not “ordinarily” permit “family ties” as an appropriate reason to lower a sentence. In other words, many of the nonviolent drug offenders who in the past would have been sentenced to probation or community correctional facilities now face lengthy incarceration and the possible loss of parental rights.

While ASFA became fully operative only in 1999, anecdotally there are already stories of terminations for children who have no families waiting to adopt them or who may be realistically nonadoptable. Such children will remain in foster care without any real possibility of adoption but without the ability of their relatives to obtain assistance to maintain family ties or of their mothers to reunify with them after their release. It is also likely that the low percentage of foster care placements for children of incarcerated mothers reported in prisoner surveys is actually substantially higher because many of the relatives caring for the children are actually providing kinship placements. Ironically, when children age out of foster care, some of them locate and return to the mothers who long ago had their parental rights terminated.

Although ASFA and termination statutes are not unconstitutional, they affect both the incarcerated mothers and their children. Typically, the mother feels guilty about the disruption to her child’s life caused by her incarceration and depressed about her potential loss of contact with her child. This may have a negative impact on her rehabilitation. Although the child is not punished according to the Eighth Amendment, which applies only to prisoners, in reality the child’s world may be devastated. Children not only lose contact with their mothers but also may be separated from siblings and placed in unsatisfactory living circumstances, whether with family, friends, or even foster care placements. Ultimately, such

children are at risk of becoming involved in the juvenile or adult correctional systems.

Programs to prevent intergenerational criminality have only recently begun to receive any widespread attention. Without a thorough reconsideration of the sentencing alternatives open to incarcerated mothers and the impact of incarceration on parental rights terminations, mothers and children will continue to suffer penalties that are not meted out to males.

Moreover, the collateral consequences of a mother's status may practically impact her ability to unite with her children. Even if a single mother avoids termination of parental rights, she may still be denied federal cash assistance and food stamps if she lives in a state that has not opted out of the provision of the Personal Responsibility and Work Opportunity Reconciliation Act, which bars anyone with a drug-related felony conviction from receiving such aid. Since women offenders are more likely than their male counterparts to be sentenced for drug-related crimes, this provision disproportionately penalizes them and their children.

A mother may face the lifetime 5-year limit for receiving Temporary Assistance for Needy Families, or she may be hampered in obtaining work if she requires drug treatment or cannot obtain child care. A drug conviction may affect her ability to obtain public housing or assistance to pay for private housing. Her immigration status may result in her deportation as a result of her conviction, regardless of whether her children are citizens. Even her educational opportunities may be limited by the Higher Education Act of 1998, which denies eligibility for students convicted of drug offenses.

Such consequences need to be understood by those who design programs and services for women offenders and by those who impose conditions of release on women who may not be able to meet them because of child-care constraints. Moreover, it is critical for administrators to focus on transitional reentry issues while women are incarcerated to prepare the women to succeed. Forging connections with governmental agencies to enable women to obtain the necessary documentation for housing, health care, child-related services, and other services before leaving the institution may be as critical to the rehabilitation of female offenders as effective programming.

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