

# WOMEN IN PRISON

SEEKING JUSTICE BEHIND BARS

BRIEFING  
REPORT



FEBRUARY 2020

U.S. COMMISSION ON CIVIL RIGHTS

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
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<sup>1</sup>42 U.S.C. §1975a.

# **Women in Prison: Seeking Justice Behind Bars**

Briefing Report Before  
The United States Commission on Civil Rights  
Held in Washington, D.C.

Briefing Report

February 2020

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## UNITED STATES COMMISSION ON CIVIL RIGHTS

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### Letter of Transmittal

February 26, 2020

President Donald J. Trump  
Vice President Mike Pence  
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Women in Prison: Seeking Justice Behind Bars*. The report is also available in full on the Commission’s website at [www.usccr.gov](http://www.usccr.gov).

This report examines the civil rights of women in United States prisons. The population of women in prison has increased dramatically since the 1980s, and this growth has outpaced that of men in prison, yet there have been few national-level studies of the civil rights issues incarcerated women experience. The Commission studied a range of issues that impact incarcerated women, including deprivations of women’s medical needs that may violate the constitutional requirement to provide adequate medical care for all prisoners; implementation of the Prison Rape Elimination Act (PREA); and the sufficiency of programs to meet women’s needs after release. The Commission also examined disparities in discipline practices for women in prison compared with men, and the impacts of incarcerated women being placed far from home or having their parental rights terminated.

The Commission majority approved key findings including the following: Many prison policies and facilities are not designed for women or tailored to their specific needs. Rather, many policies were adopted from men’s prison institutions without evaluating their application to women’s prison institutions. Incarcerated women report extremely high rates, and much higher rates than men, of histories of physical, sexual, and mental trauma. Notwithstanding federal statutory legal protections such as the Civil Rights of Institutionalized Persons Act (CRIPA) and the Prison Rape Elimination Act (PREA), aimed at protecting incarcerated people, many incarcerated women continue to experience physical and psychological safety harms while incarcerated and insufficient satisfaction of their constitutional rights. Department of Justice (DOJ) litigation against prison systems involving sexual abuse among other wrongs has secured important changes to safeguard incarcerated women’s rights.

Classification systems that are not calibrated for gender-specific characteristics have been shown to classify incarcerated women at higher security requirement levels than necessary for the safety and security of prisons; women classified at higher security levels may receive fewer vocational and educational, community placement, and reentry opportunities than they would have received had they been classified at lower security levels. Many incarcerated women are placed at facilities

far from their families, limiting visitation opportunities. Many prison policies do not prioritize family visits, such as by permitting extremely limited family visitation hours that often do not reflect distances visiting family must travel.

Some prisons provide adequate healthcare specific to women, such as gynecological and prenatal care, while others do not. The high rates at which incarcerated women report past trauma results in the need for mental health care and treatment while incarcerated. Sexual abuse and rape remain prevalent against women in prison. Incarcerated women who report sexual assault have experienced retaliation by their institutions and prison personnel in violation of the law.

The Commission majority voted for key recommendations, including the following: DOJ should continue to litigate enforcement of the civil rights of incarcerated women in states that violate these mandates and the rights of incarcerated women. Prison officials should adopt validated assessment tools, currently available, to avoid inaccurately classifying incarcerated women to a higher security level than appropriate. Prison officials should give strong preference to placing incarcerated women in as close proximity as possible with location of their family, provide free video and low-cost phone services to incarcerated persons, and not ban in-person visits for non-safety reasons.

Prison officials should implement policies to address women's specific healthcare needs, including gynecological and prenatal care, as is constitutionally required. Prisons should have adequate mental health care staff and treatment programs available to meet the needs of the many incarcerated women with mental health challenges, such as past trauma. Congress should enact stricter penalties for non-compliance with PREA standards focused on inmate safety and consistently appropriate funding sufficient to ensure correctional agencies comply with PREA.

Prisons should implement evidence-based, trauma-informed discipline policies to avoid harsh punishments for minor infractions, and recognizing the significant harms that can result from placement in restrictive housing. Prisons should ensure restrictive housing is not used against people of color, LGBT people, and people with mental health challenges in a discriminatory manner.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,



Catherine E. Lhamon  
Chair

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Commission State Advisory Committees in Arkansas, Montana, Nebraska, and New Hampshire, collected and provided testimony, findings, and recommendations to the Commission on related civil rights issues within their jurisdictions.

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## EXECUTIVE SUMMARY

This report studies the civil rights of women in the United States prison system. The Constitution and federal statutes require that men and women in prison receive equal treatment. A 2011 report from the Commission's New Hampshire Advisory Committee found that New Hampshire failed to meet the needs of incarcerated women in New Hampshire, which caused harm.<sup>1</sup> Other investigations have demonstrated that women in U.S. prisons can face particular challenge in a prison system not designed for them. The population of women in prison has increased dramatically since the 1980s, and this growth has outpaced that of men in prison, yet there have been few national-level studies of the civil rights issues women experience.

On February 22, 2019, the Commission held a briefing focused on the civil rights of women in prison, including deprivations of women's medical needs that may violate the constitutional requirement to provide adequate medical care for all prisoners; implementation of the Prison Rape Elimination Act (PREA); and the sufficiency of programs to meet women's needs after release. The Commission also examined disparities in discipline practices for women in prison compared with men, and in impacts of women being placed far from home or having their parental rights terminated. Commissioners heard testimony from state and federal corrections officials, women who have experienced incarceration, academic and legal experts, and advocates. The Commission also sent Interrogatories and Document Requests to the Federal Bureau of Prisons and the Department of Justice and analyzed their responses. Commission staff provided quantitative and qualitative research about the main issues facing women in prison.

As discussed in greater depth throughout this report, data suggest that women in prison have some unique needs distinct from men. Women have health needs that differ from men, which many prison systems are ill-prepared to address.<sup>2</sup> Data reflect that, compared with men, women entering prison are more likely to suffer from chronic or severe mental health issues, are more likely to be survivors of trauma and/or sexual violence, and have higher rates of substance abuse than their male counterparts.<sup>3</sup> While incarcerated, women are significantly more likely to be sexually

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<sup>1</sup> New Hampshire Advisory Committee to the U.S. Commission on Civil Rights, *Unequal Treatment: Women Incarcerated in New Hampshire's State Prison System*, Sept. 2011, p. 2. [https://www.usccr.gov/pubs/docs/Unequal\\_Treatment\\_WomenIncarceratedinNHStatePrisonSystem.pdf](https://www.usccr.gov/pubs/docs/Unequal_Treatment_WomenIncarceratedinNHStatePrisonSystem.pdf) (hereinafter New Hampshire Advisory Committee to USCCR, *Unequal Treatment: Women Incarcerated in New Hampshire's State Prison System*).

<sup>2</sup> See *infra* notes 83-102 and 590-629.

<sup>3</sup> Alix McLearen, Administrator for the Women and Special Populations Branch, Federal Bureau of Prisons, Written Statement for Women in Prison Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 1,3 (hereinafter McLearen Statement).

harassed and abused than are men.<sup>4</sup> Pregnant women in prison risk practices such as shackling during birth (where lawful) or failure to provide adequate pre- and post-natal care, and they generally face abrupt separation from their newborn babies.<sup>5</sup> The Commission heard bipartisan testimony decrying these practices.<sup>6</sup> LGBT incarcerated women often face challenges in receiving the medical care they need, in addition to often being subjected to harassment, abuse, and discriminatory treatment at the hands of prison officials and other inmates,<sup>7</sup> particularly if they are transgender women placed in men's prisons.<sup>8</sup>

Women who enter prison are also more likely than men who enter prison to be the primary caregiver to their children and are more likely to lose custody and parental rights upon incarceration.<sup>9</sup> Incarcerated women, as a group, have less education and lower income levels than their male counterparts, and these data suggest that disparities are harsher for women of color in the criminal justice system.<sup>10</sup> Once incarcerated, women often experience disparities in discipline, compared with male inmates,<sup>11</sup> and have less access to rehabilitative programs that would address their needs and ability to successfully re-enter society and avoid recidivism.<sup>12</sup> Our investigation illuminates the lack of opportunities to acquire a skill that would assist in post-incarceration employment opportunities for women versus men. For example, women in prison are often offered work or program opportunities such as cleaning, domestic work, and “female-coded” occupations,<sup>13</sup> rather than the same chances as incarcerated men to learn new skills.<sup>14</sup>

As discussed below, the vast majority—88 percent—of women in prison are serving time in state-run facilities. Although states have significant police powers and run their own state and local

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<sup>4</sup> See *infra* notes 668-89.

<sup>5</sup> See *infra* notes 619-45.

<sup>6</sup> See *infra* notes 646-56.

<sup>7</sup> See *infra* notes 668-89, 768-79, 790-98 and 806-23.

<sup>8</sup> Douglas Routh, Gassan Abess, David Makin, Mary Stohr, Craig Hemmens, and Jihye Yoo. “Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies,” *International Journal of Offender Therapy and Comparative Criminology*, vol. 61, no. 6 (2015): 645-666 at 646, <https://doi.org/10.1177/0306624X15603745> (hereinafter Routh et.al, “Transgender Inmates in Prisons”).

<sup>9</sup> See *infra* notes 464-73 and 474-88.

<sup>10</sup> See *infra* notes 74-81 and 1150.

<sup>11</sup> See *infra* notes 538-42, 768-79, 790-98 and 806-23.

<sup>12</sup> See *infra* notes 976-1008.

<sup>13</sup> Lori Kenschaft, Roger Clark, and Desiree Ciambone. *Gender Inequality in Our Changing World: A Comparative Approach* (London: Routledge, 2015), p. 52-3 (noting that female-coded occupations are positions that allow women to define themselves as helping other people. In comparison, the authors define male-coded occupations as positions that involve physical strength, tolerate discomfort, willingness to take risks, all of which allow men to display masculinity through their job).

<sup>14</sup> See *infra* notes 240-49.

prisons, the federal government not only runs federal prisons, but it is also the ultimate guarantor of constitutional rights of women institutionalized in the United States. It is charged with setting national standards and bringing enforcement actions when needed. Moreover, the federal government conditions federal grant monies and programs on compliance with basic civil rights laws. In that capacity, it also sets appropriate national standards, provides assistance in coming into compliance, and enforces the law.

Chapter 1 of this report provides background of critical data and research findings on the number of women in prison and demographic trends about their characteristics and place of incarceration. It also provides an overview of applicable civil rights law, including constitutional protections and relevant statutes such as the Civil Rights of Institutionalized Persons Act (CRIPA) and the Prison Rape Elimination Act (PREA), both of which the federal government enforces and may protect the rights of women in prison. This report then follows the path of women who are incarcerated and provides research about the obstacles they face. Chapter 2 discusses how women are classified upon entry into the prison system, how placement tools are being developed to address women's needs while incarcerated, and the implications of placement on women's roles in their family, and parenting. Chapter 3 provides an analysis of women's health issues and challenges, access to care, the situation of pregnant women, and the problem of sexual abuse impacting women in prison. Chapter 4 discusses the problem of sexual abuse impacting women in prison. Chapter 5 analyzes disparities in discipline that may impact women in prison, emerging practices and trends in how staff are trained to work with women prisoners, and whether women staff are necessary to protect them. Chapter 6 then studies rehabilitation, educational, and vocational training programs for women in prison and their impacts on life after prison. After this report's review of this broad swath of data, Chapter 7 analyzes and evaluates the Federal Bureau of Prisons and the Department of Justice's efforts in protecting the rights of women in prison.

Finally, the Commission sets forth findings and recommendations, key components of which are summarized below:

### **Highlighted Findings**

Notwithstanding federal statutory legal protections such as the Civil Rights of Institutionalized Persons Act (CRIPA) and the Prison Rape Elimination Act (PREA), aimed at protecting incarcerated people, many incarcerated women continue to experience physical and psychological safety harms while incarcerated and insufficient satisfaction of their constitutional rights.

Classification systems which are not calibrated for gender-specific characteristics have been shown to classify incarcerated women at higher security requirement levels than necessary for the safety and security of prisons. This classification results in some women serving time in more restrictive environments than is necessary and appropriate.

Incarcerated parents permanently lose parental rights at higher rates than parents whom courts find to have neglected or abused their children but are not incarcerated.

Incarcerated women generally have biological healthcare needs distinct from incarcerated men. They have a constitutional right to have these healthcare needs met.

Sexual abuse and rape remain prevalent against women in prison. This continuing prevalence has led to significant litigation involving several different institutions, at tremendous cost to taxpayers and providing strong evidence of the need for reform at the institutional level, even following passage of the Prison Rape Elimination Act (PREA) in 2003. Reports include abuse of incarcerated women by staff and other incarcerated women that is prevalent and pervasive.

Studies have shown incarcerated women are often given disproportionately harsh punishments for minor offenses while incarcerated compared to incarcerated men. This disproportionality results in such outcomes as placing women in segregation for minor violations of prison regulations, which denies them good time credits which would shorten their sentences and denies them programming privileges, among other restrictions. Reports indicate women are disproportionately punished harshly for offenses such as “being disorderly” where men tend more often to be punished for violence.

Prison officials, supervisors, and correctional officers are inconsistently trained on the prevalence of disproportionate punishment of incarcerated women and evidence-based disciplinary practices.

### **Highlighted Recommendations**

Prison officials should adopt validated assessment tools, currently available, to avoid inaccurately classifying incarcerated women to a higher security level than appropriate.

Prison officials should enforce policies that support parental rights and familial contact except where inconsistent with safety concerns. Such policies include keeping incarcerated parents apprised of family court proceedings, providing transportation to those proceedings, and assisting in locating counsel. Institutions should implement visitation policies with the goal of maintaining familial relationships.

Prison officials should implement policies to address women’s specific healthcare needs, including gynecological and prenatal care, as is constitutionally required.

All prisons should prohibit shackling pregnant women and placing them in solitary confinement, as these practices represent serious physical and psychological health risks.

The Department of Justice should rigorously enforce the PREA standards, including training and certifying auditors and investigating whether facilities are in fact in compliance. Congress should provide more funds for investigations and audits.

Prisons should implement evidence-based discipline policies that are trauma-informed to avoid harsh punishments for minor infractions, recognizing significant harms that can result from placement in restrictive housing. Prisons should ensure restrictive housing is not used against people of color, LGBT people, and people with mental health challenges in a discriminatory manner based on these characteristics.

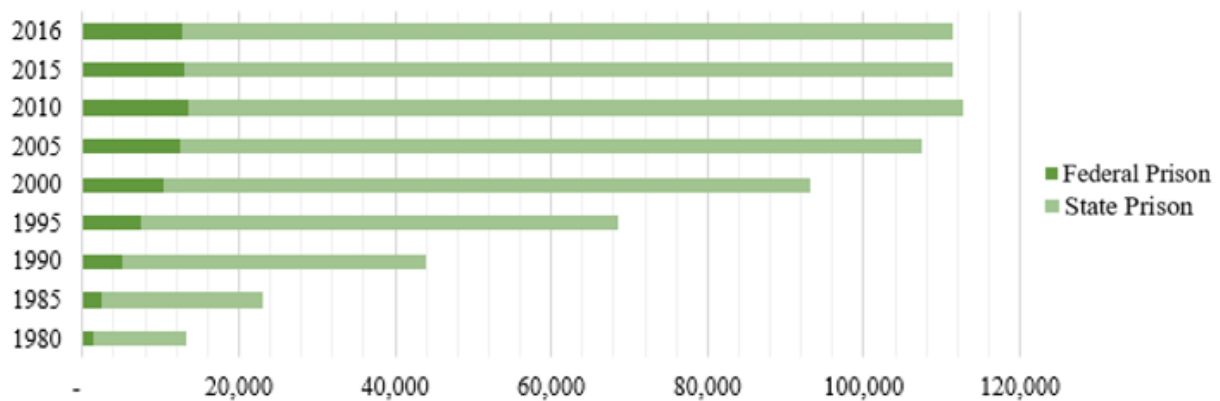
Prison officials should implement staff training to address the high rates of trauma among incarcerated women and adjust prison policies accordingly, including training on evidence-based discipline practices.

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## CHAPTER 1: INTRODUCTION AND BACKGROUND

This report examines the civil rights of women in prison in the United States.<sup>15</sup> Established in 1930, the Federal Bureau of Prisons has 29 facilities in which women who have been convicted of federal crimes or are pretrial detainees may be housed.<sup>16</sup> State departments of corrections run state prisons and typically house sentenced inmates serving time for felony offenses for a year or more, and parolees re-incarcerated for violating parole terms.<sup>17</sup> As demonstrated in Figure 1, state prisons house the lion's share of women prisoners. For instance, in 2016, approximately 112,000 women were incarcerated in state and federal prisons, but more than 88 percent of these women were serving time in state-operated facilities (see Figure 1).

*Figure 1: Women in Prisons, 1980 to 2016*



**Source:** Bureau of Justice Statistics Prisoner Series, Chart Made by Commission Staff

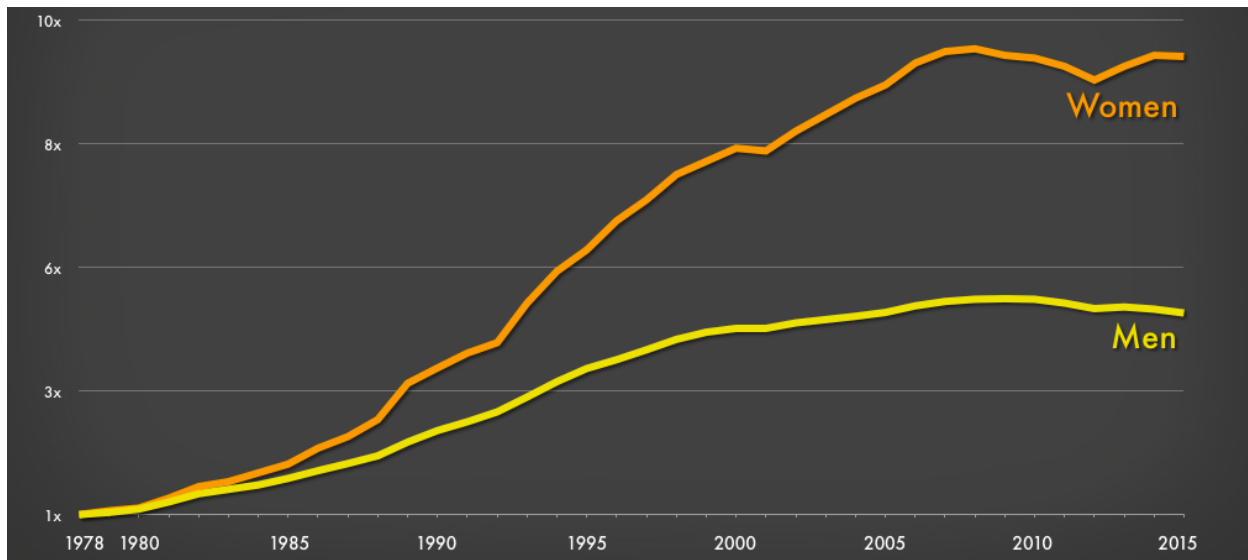
<sup>15</sup> While other analyses of the U.S. penal system often times include an examination of local jails, this report focuses on state and federal prisons. See “Local Jail Inmates and Jail Facilities, Terms and Definitions,” U.S. Department of Justice, Bureau of Justice Statistics, [https://www.bjs.gov/index.cfm?ty=tp&tid=12#terms\\_def](https://www.bjs.gov/index.cfm?ty=tp&tid=12#terms_def) (accessed Aug. 18, 2019) (noting that county or municipal officials run local jails, which incarcerate individuals prior to trial, and house persons serving shorter sentences, which are usually less than a year); see also U.S. Dep’t of Justice, Office of Justice Programs, Jail Inmates in 2016, by Zhen Zeng (2018) <https://www.bjs.gov/content/pub/pdf/ji16.pdf> (noting recent incarceration trends among jail inmates).

<sup>16</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Correctional Population in the United States, by Danielle Kaeble and Lauren Glaze (2015), p. 201, <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>; see also U.S. Dep’t of Justice, Federal Bureau of Prisons, *Legal Resource Guide to the Federal Bureau of Prisons 2014*, 2014, at 1, [https://www.bop.gov/resources/pdfs/legal\\_guide.pdf](https://www.bop.gov/resources/pdfs/legal_guide.pdf) (noting that “[t]he BOP also has custodial responsibility for District of Columbia felons sentenced to terms of imprisonment, and houses a number of state and military offenders on a contractual basis. The current inmate population exceeds 218,000 men and women, housed in both federal prisons and in private facilities under contract with the BOP”). See also McLearn Statement, at 2.

<sup>17</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Terms and Definitions: Corrections*, <https://www.bjs.gov/index.cfm?ty=tdtp&tid=1> (accessed Aug. 18, 2019); see also U.S. Dep’t of Justice, Bureau of Justice Statistics, Probation and Parole in the United States, by Danielle Kaeble (2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf> (noting the Bureau of Justice Statistics’s definition of probation and parole and recent supervision trends among probationers and parolees).

Since 1980, the growth of women in prison has increased dramatically—far outpacing that of men in prison (see Figure 2). In fact, from 1980 to 2016, the number of women in prison increased by more than 730 percent compared to a 410 percent increase for men.<sup>18</sup> The figure below demonstrates how, from 1978 to 2015, the number of women in state prisons grew much faster than the number of men.<sup>19</sup> But despite the rapid increase in the number of women in prison, women only constitute 7 percent of the overall prison population.<sup>20</sup>

**Figure 2:** Growth of State Prison Population, by Gender, 1978-2015<sup>21</sup>



**Source:** Prison Policy Initiative

<sup>18</sup> These figures were calculated by Commission Staff using the Bureau of Justice Statistics, National Prisoner Statistics data series. See Dep't of Justice, Bureau of Justice Statistics, *Publication & Products: Prisoners*, <https://www.bjs.gov/index.cfm?ty=pbse&sid=40> (accessed Aug. 18, 2019); U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2016*, by E. Anne Carson (Jan. 2018), p. 3, Table 1, (hereinafter DOJ, *Prisoners in 2016*). A number of other studies also note how the incarceration rate for women in prison have outpaced the incarceration rates of their male counterparts. See e.g., "Fact Sheet: Incarcerated Women and Girls," The Sentencing Project, <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (hereinafter "Fact Sheet: Incarcerated Women and Girls"); Gina Fedock, "Number of Women in Jails and Prison Soars," *The University of Chicago, School of Social Service Administrative Magazine*, vol. 25, no. 1 (Spring 2018), [https://ssa.uchicago.edu/ssa\\_magazine/number-women-jails-and-prisons-soars](https://ssa.uchicago.edu/ssa_magazine/number-women-jails-and-prisons-soars); "Incarceration of Women is Growing Twice as Fast as that of Men," Equal Justice Initiative, May 11, 2018, <https://eji.org/news/female-incarceration-growing-twice-as-fast-as-male-incarceration>; Wendy Sawyer, "The Gender Divide: Tracking Women's State Prison Growth," *Prison Policy Initiative*, Jan. 9, 2018, [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html) (hereinafter Sawyer, "The Gender Divide").

<sup>19</sup> Sawyer, "The Gender Divide" (note that the y-axis measures the growth in terms of the number of times greater than the group's 1978 baseline population).

<sup>20</sup> DOJ, *Prisoners in 2016*, p. 3.

<sup>21</sup> Sawyer, "The Gender Divide."



These data are partially explained by an increase in mass incarceration. A 2007 University of California study investigated why such a large number of Americans are in prison and offered two main causes: patterns of criminal activity and policy responses to crime.<sup>22</sup> On the one hand, criminal activity relates to the extent that individuals are arrested for a crime and subsequently serve time in prison for said crime, while policy responses relate to enforcement practices and sentencing laws that determine the duration of a person's sentence.<sup>23</sup> The authors' statistical analyses found that increased incarceration rates in the U.S. have more to do with legislative changes to sentencing policies since the 1980s, rather than increased criminal activity.<sup>24</sup> Moreover, the authors find that these public policy changes have increased the propensity to punish more offenders with lengthier prison sentences.<sup>25</sup> Although women generally serve shorter sentences than men, nearly 7,000 (nearly 1 in every 15 women in prison) are serving life sentences.<sup>26</sup>

Examining the data on women in prison, research studies posit that the increase in the number of incarcerated women is a result of more expansive law enforcement efforts and stiffer drug sentencing laws (e.g. mandatory minimums)—especially for low-level offenses.<sup>27</sup> According to one study, “since the only means of avoiding a mandatory penalty is generally to cooperate with the prosecution by providing information on higher-ups in the drug trade, women who have a partner who is a drug seller may be aiding that seller, but have relatively little information to trade in exchange for a more lenient sentence.”<sup>28</sup> Hence, women were often less likely to be in a position to offer information to police in exchange for less prison time than their male counterparts.<sup>29</sup>

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<sup>22</sup> Steven Raphael and Michael Stoll, “Why Are So Many Americans in Prison?”, *National Poverty Center Working Paper Series* (Mar. 2007), p.1-3, [http://www.npc.umich.edu/publications/u/working\\_paper07-10.pdf](http://www.npc.umich.edu/publications/u/working_paper07-10.pdf).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid., 9, 12, 35.

<sup>25</sup> Ibid., 12-13.

<sup>26</sup> “Fact Sheet: Women and Girls Serving Life Sentences,” *The Sentencing Project*, July 3, 2019, p. 1, <https://www.sentencingproject.org/publications/women-girls-serving-life-sentences/>.

<sup>27</sup> Marc Mauer, “The Changing Racial Dynamics of Women’s Incarceration,” *The Sentencing Project*, Feb. 2013, p. 5, <https://sentencingproject.org/wp-content/uploads/2015/12/The-Changing-Racial-Dynamics-of-Womens-Incarceration.pdf> (hereinafter Mauer, “The Changing Racial Dynamics of Women’s Incarceration”); see also Natalie J. Sokoloff, “Women Prisoners at the Dawn of the 21st Century,” *Women & Criminal Justice*, vol.16, no. 1-2 (2005), p. 127–37, [https://doi.org/10.1300/j012v16n01\\_06](https://doi.org/10.1300/j012v16n01_06) (hereinafter Sokoloff, “Women Prisoners at the Dawn of the 21<sup>st</sup> Century”).

<sup>28</sup> Sokoloff, “Women Prisoners at the Dawn of the 21<sup>st</sup> Century,” p. 128.

<sup>29</sup> Ibid., 130.

## Women in Prison Across U.S. States

As mentioned above, more than 88 percent of women in prison are serving time in state facilities (see Figure 1). Therefore, examining prison population growth at the state level provides important context, as changes in women's state prison incarceration rates have been modest in some states (e.g. Maine), but stark in other states (e.g. Arizona and Oklahoma) (see Figure 3).<sup>30</sup> A few states—California, New York, and New Jersey—that previously had high incarceration rates have recently decreased their respective state prison populations significantly.<sup>31</sup> Appendix A provides a state-level and gender analysis of how state prison populations have changed from 2000 to 2016 using data from the Bureau of Justice Statistics (BJS). These data demonstrate that from 2000 to 2016 the overall number of women in state prisons increased by 24 percent while the number of men in state prisons only increased by 9 percent.<sup>32</sup> In 25 states, from 2000 to 2016, the incarceration rate for women in state prisons increased by more than 50 percent and dramatically outpaced the incarceration rates of their male counterparts.<sup>33</sup> In 11 states, the incarceration rates of both men and women increased at similar rates,<sup>34</sup> and in seven states the incarceration rates of both men and women decreased at mostly similar rates.<sup>35</sup> These data also illustrate that in only 3 states—Delaware, Hawaii, and Louisiana—the incarceration rate increased for men in prison, but declined for women.<sup>36</sup> Lastly, there were four states—Alaska, Michigan, South Carolina, and Texas—where the incarceration rate increased for women, but decreased for their male counterparts.<sup>37</sup>

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<sup>30</sup> Sawyer, “The Gender Divide.”

<sup>31</sup> Ibid.

<sup>32</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, “Correctional Statistical Analysis Tool (CSAT)—Prisoners (Custom Tables), 2000 State Prison Population (Year-end Jurisdictional Population with Sentence Greater than 1 Year),” <https://www.bjs.gov/index.cfm?ty=nps> (accessed Aug. 17, 2019); see also U.S. Dep’t of Justice, Bureau of Justice Statistics, *Correctional Statistical Analysis Tool (CSAT)—Prisoners (Custom Tables), 2016 State Prison Population (Year-end Jurisdictional Population with Sentence Greater than 1 year)*, <https://www.bjs.gov/index.cfm?ty=nps> (accessed Aug. 17, 2019). The percent change was calculated by Commission staff.

<sup>33</sup> These 25 states are: Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wyoming. And in some of the aforementioned states, the male incarceration rate decreased by over 10% while the female incarceration increased over 50%. See Appendix A for more details.

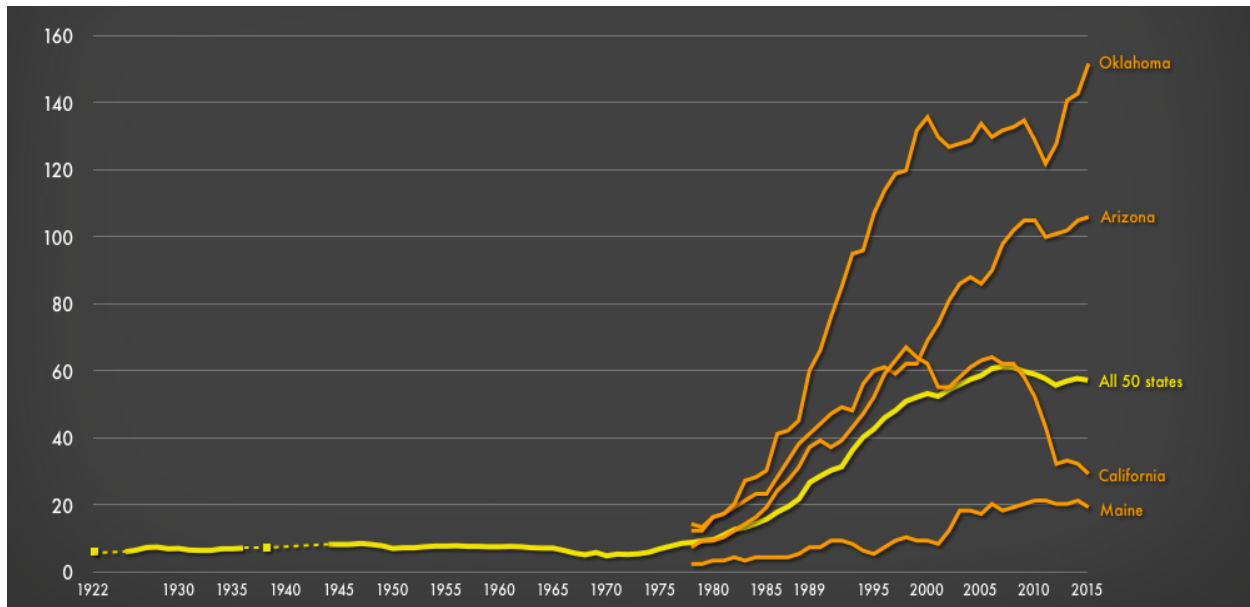
<sup>34</sup> These 11 states are: Alabama, Colorado, Georgia, Iowa, Montana, Nevada, Oklahoma, Rhode Island, Utah, Virginia, and Wisconsin. See Appendix A for more details.

<sup>35</sup> These 7 states are: California, Connecticut, Illinois, Maryland, Mississippi, New Jersey, and New York. See Appendix A for more details.

<sup>36</sup> See Appendix A for more details.

<sup>37</sup> Ibid.

**Figure 3:** Number of Women in State prisons (per 100,000 female residents), 1922-2015<sup>38</sup>



**Source:** Prison Policy Initiative

Research points to a number of policies and procedures that contribute to the gender differences observed in prison population growth.<sup>39</sup> For instance, women in prison often face a greater likelihood of disciplinary action and more severe consequences for similar behavior than their male counterparts.<sup>40</sup> Consequently, in comparison to men, women in prison may disproportionately lose good conduct credits that would reduce their sentence, causing women to spend more time behind bars.<sup>41</sup> A 2015 psychiatric study also found that women in prison with mental health, substance abuse, and co-occurring disorders face greater hurdles acclimating to incarceration than women without such disorders.<sup>42</sup> In addition, the study found that women with co-occurring disorders had higher odds of receiving an acute disciplinary response to minor misconduct when compared to incarcerated women with one disorder—mental illness or substance abuse—or those

<sup>38</sup> Sawyer, “The Gender Divide.”

<sup>39</sup> Ibid.

<sup>40</sup> Joseph Shapiro and Jessica Pupovac, “In Prison, Discipline Comes Down Hardest on Women,” *National Public Radio*, Oct. 15, 2018 (hereinafter Shapiro et al., “In Prison, Discipline Comes Down Hardest on Women”) <https://www.npr.org/2018/10/15/647874342/in-prison-discipline-comes-down-hardest-on-women>. This report will also be discussed further in Chapter 5.

<sup>41</sup> Ibid.

<sup>42</sup> Kimberly Houser and Steven Belenko, “Disciplinary Responses to Misconduct Among Female Prison Inmates with Mental Illness, Substance Use Disorders, and Co-occurring Disorders,” *Psychiatric Rehabilitation Journal*, vol. 38, no. 1 (2015), p. 23-34, <https://doi.org/10.1037/prj0000110>.

with no disorder.<sup>43</sup> Even when accounting for the total number of misconduct charges and other relevant factors, women with co-occurring disorders had over 4 times the odds of receiving a severe disciplinary sanction in comparison to women with no disorder.<sup>44</sup> Consequently, the authors' findings suggest that prison officials are responding punitively to incarcerated women's symptoms from co-occurring disorders.<sup>45</sup>

Another possible explanation for an increase in women's incarceration rates could be differences in the availability of prison diversion programs in men's and women's prisons. According to a 2018 Prison Policy Initiative study, in comparison to men, women have less access to diversion programs.<sup>46</sup> In Wyoming, for example, the Wyoming Youthful Offender Act allows first-time, male offenders under the age of 25 to participate in a boot camp in exchange for prison time.<sup>47</sup> In addition to the six-month boot camp, participants in the program also receive specialized classes, educational programs, and training aimed at rehabilitation.<sup>48</sup> Upon completion of the boot camp, participants are released to probation; or to Wyoming's Intensive Supervision Program,<sup>49</sup> which is a drug/alcohol program; or to an Adult Community Corrections Facility,<sup>50</sup> which provides a transition housing option, or a halfway house, for inmates.<sup>51</sup> Wyoming does not allow women to participate in this diversion program.<sup>52</sup>

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<sup>43</sup> Ibid., 28-30, Table 2.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid., 24.

<sup>46</sup> Sawyer, "The Gender Divide;" see also Natasha Camhi, "Women's Experience Behind Bars," *Brennan Center for Justice*, Aug. 24, 2018, <https://www.brennancenter.org/blog/womens-experience-behind-bars> (noting that "[m]ost facilities do not provide women with the same access to diversion programs as they do men, cutting off a vital pathway that can lead to shorter sentences and help women with reentry").

<sup>47</sup> Wyo. Rev. Stat. § 7-13-1003; see also Wyoming Department of Corrections, *Wyoming Honor Conservation Camp & Wyoming Boot Camp*, <http://corrections.wyo.gov/home/institutions/whcc?tmpl=%2Fsystem%2Fapp%2Ftemplates%2Fprint%2F&showPrintDialog=1> (accessed Aug. 18, 2019).

<sup>48</sup> Wyoming Department of Corrections, *Wyoming Honor Conservation Camp & Wyoming Boot Camp*.

<sup>49</sup> Wyoming Department of Corrections, *Intensive Supervision Program*, <http://corrections.wyo.gov/home/services-and-programs/intensive-supervision-program> (accessed Aug. 18, 2019).

<sup>50</sup> Wyoming Department of Corrections, *Adult Community Corrections*, <http://corrections.wyo.gov/home/services-and-programs/adult-community-corrections> (accessed August 18, 2019).

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

In July 2017, Taylor Blanchard and similarly situated women prisoners filed a lawsuit against the Wyoming Department of Corrections, alleging Equal Protection violations due to failure to permit women inmates to attend a boot camp program that was available to men.<sup>53</sup> Blanchard was subsequently transferred to a boot camp in Florida,<sup>54</sup> after which her case was dismissed.<sup>55</sup> However, she claimed that it was inferior to Wyoming's and caused her to be moved thousands of miles from her community, and filed an amended complaint,<sup>56</sup> yet that claim was also dismissed.<sup>57</sup>

From 2000 to 2016 in Wyoming, the male incarceration rate increased by 37 percent—but the women's incarceration rate in Wyoming increased by 83 percent, which is over two times the rate of their male counterparts.<sup>58</sup> While no known study has investigated the causal link between the lack of women's access to this boot camp and increases in women's incarceration rates in Wyoming, these data suggest that when these types of state and local policies do not consider including women participants they may not aid in decreasing the number of incarcerated women. For example, in 1993 a federal court in Arizona found that women prisoners lacked access to mental health and addiction programs that were available to male prisoners.<sup>59</sup> Specifically:

The Court finds the treatment of seriously mentally ill [female] inmates to be appalling. Rather than providing treatment for serious mental illnesses, ADOC punishes these inmates by locking them down in small, bare segregation cells for their actions that are the result of their mental illnesses. These inmates are left in segregation without mental health care. Many times the inmates, such as H.B. are in a highly psychotic state, terrified because of hallucinations, such as monsters, gorillas or the devil in her cell. Nor does it appear that H.B. is the exceptional case as seven to eight mentally ill women may be locked down at the Santa Maria Unit in Perryville at any one time and may remain there for months without care. In addition, such treatment is common for male inmates in other lockdown facilities or units in the state including SMU and CB6. The Court considers this treatment of any

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<sup>53</sup> *Blanchard v. Lampert*, Complaint, No. 17-CV-124 (D. Wyo., July 18, 2017).

<sup>54</sup> See *Blanchard v. Wyoming Dep't of Corrections Director*, Order Den. Def.'s Mot. to Dismiss, 2018 WL 4760521, \*2 (D. Wyo., Jan. 3, 2018).

<sup>55</sup> *Blanchard v. Lampert*, Judgment, No. 17-CV-124 (D. Wyo., Feb. 21, 2017).

<sup>56</sup> See *Blanchard v. Wyoming Dep't of Corrections Director*, Order Den. Def.'s Mot. to Dismiss, 2018 WL 4760521, \*2 (D. Wyo., Jan. 3, 2018).

<sup>57</sup> *Blanchard v. Lampert*, Order Granting Mot. to Dismiss Pl.'s First Am. Compl. and Den. Pl.'s Mot. for Recons., 2018 WL 4760520, \*6 (D. Wyo., Feb. 20, 2018).

<sup>58</sup> See Appendix A.

<sup>59</sup> *Casey v. Lewis*, 834 F. Supp. 1477, 1551-52 (D. Ariz. 1993) (holding that women prisoners must have access to the same levels of mental health treatment as male prisoners for the purposes of prison programs and services).

human being to be inexcusable and cruel and unusual punishment in violation of the eighth amendment of the Constitution.<sup>60</sup>

And further, the Court determined male inmates have access to treatment, while female inmates have less access:

As a result, chronically ill women who are stabilized are returned to general population; act out when then are provided little or no mental health care; are locked down [sometimes within 24 to 72 hours]; remain in lockdown where they decompensate and eventually, after a serious delay, return to Flamenco or ASH. Yet, chronically ill men who are not assaultive are allowed to progress back to general population, through the SPU facility.<sup>61</sup>

The most recent Bureau of Justice Statistics data available on women's incarceration rates at the federal and state level demonstrate that from 2015 to 2016 the female prison population decreased in federal BOP facilities and in 20 states, with the largest decreases occurring in Indiana and Alabama.<sup>62</sup> During the same time period, 26 states experienced increases in their respective female prison population, with the largest increases in Kentucky, Ohio, Oklahoma, and Washington.<sup>63</sup> In 2016, the number of women in prison sentenced to more than one year decreased in 17 states, while the number of men in prison sentenced to more than one year decreased in 31 states and in the BOP facilities.<sup>64</sup> The figure below shows how states compare in their women's incarceration rates as of December 2016. The state with the highest relative rate of women in prison is Oklahoma (149 women in prison per 100,000 female residents) and the lowest relative rate of women in prison are Massachusetts and Rhode Island, in which both states only incarcerated 13 women per 100,000 female residents (see Figure 4).

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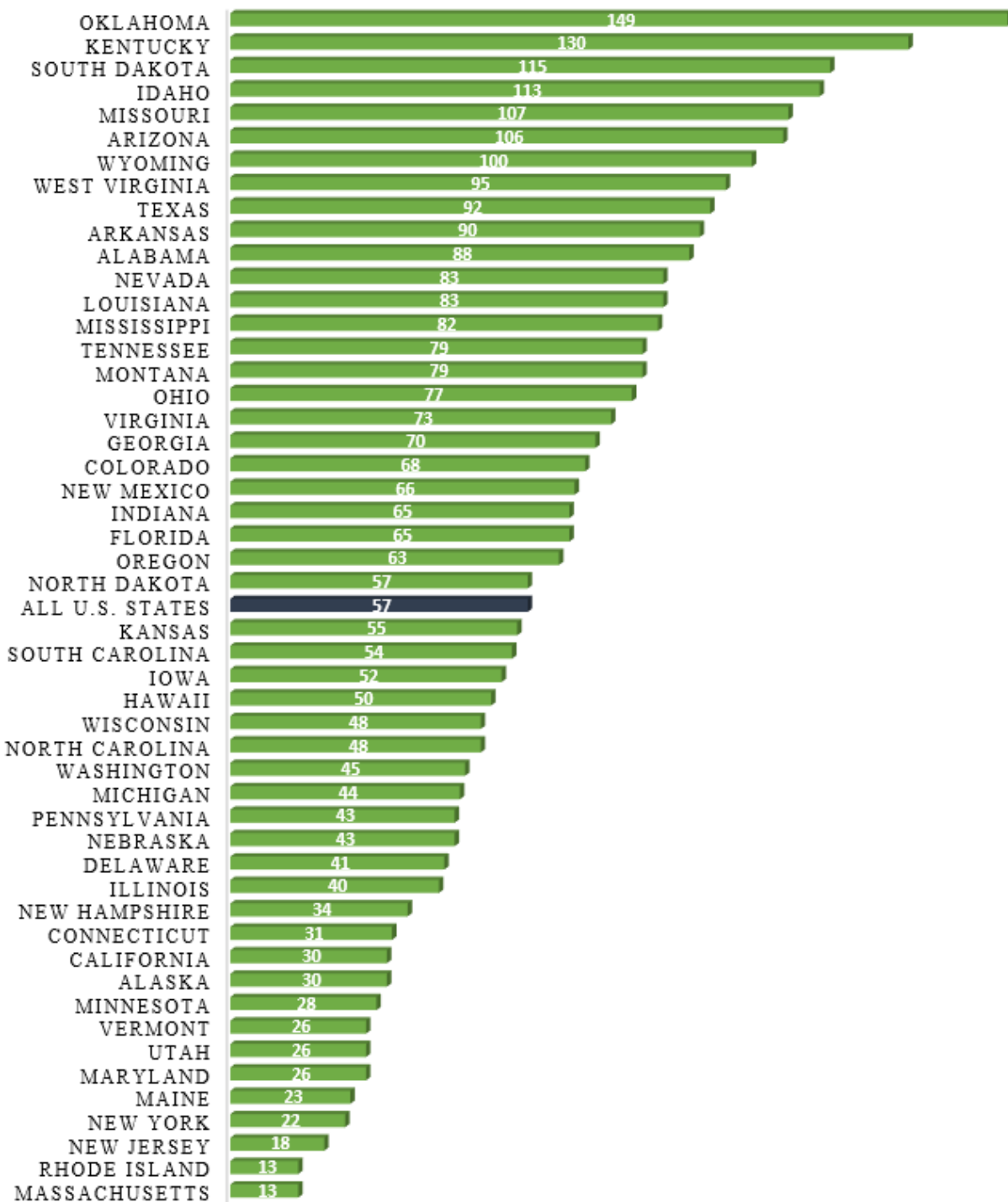
<sup>60</sup> *Id.* at 1150.

<sup>61</sup> *Id.* at 1151 (brackets in original).

<sup>62</sup> DOJ, *Prisoners in 2016*, p. 4, Table 2.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

**Figure 4:** *Women Imprisonment Rate, by Jurisdiction, 2016 (per 100,000 U. Residents)*<sup>65</sup>

**Source:** DOJ, *Prisoners in 2016*, Figure created by Commission staff

<sup>65</sup> Ibid., 9.

## Do Women in Prison Have Distinct Needs and Experiences from Men in Prison?

Since at least the 1990s, researchers and practitioners have examined whether the needs of women in prison are different than those of their male counterparts and whether a different approach for women in prison is required.<sup>66</sup> Evidence shows that women often enter prison with different offending histories and with life experiences distinct from their male counterparts, so they likely have different needs due to these differential factors.<sup>67</sup> Some of the factors discussed below are common to both women and men in prison, but they impact women in prison disproportionately. These similarities and differences are discussed below.

### *Gender Differences in Offense Type*

When compared to men, women are more likely to be sentenced to prison for non-violent drug and economic offenses. About 25 percent of women serving time in state prison were convicted of a non-violent drug offense compared to 14 percent of men.<sup>68</sup> Bureau of Justice Statistics data relied upon in the sources disaggregated violent offenses (i.e. murder, manslaughter) from non-violent offenses (i.e. drug, property offenses).<sup>69</sup> At the federal level, 56 percent of women in prison are serving sentences for a non-violent drug offense, compared to 47 percent of men in prison.<sup>70</sup> For instance, of the men and women convicted of property crimes such as (non-violent) larceny-theft or fraud, although men committed more of these types of crimes, women were more likely to be convicted of them.<sup>71</sup> Tables 1 and 2 below provide a detailed breakdown of how women and men in prison differ in the types of offenses they commit.

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<sup>66</sup> Patricia Van Voorhis, “On Behalf of Women Offenders: Women’s Place in the Science of Evidence-Based Practice,” *Criminology & Public Policy*, vol. 11, no. 2, (May 2012), p. 111-145 at 119, <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1745-9133.2012.00793.x>; see also Anadora Moss, Founder and Principal, The Moss Group, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 1 (hereinafter Moss Statement).

<sup>67</sup> McLearen Statement, at 1; Emily Mooney, Criminal Justice Policy Associate, R Street Institute, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 1-3 (hereinafter Mooney Statement); Emily Salisbury, Associate Professor of Criminal Justice, University of Nevada, Las Vegas, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 2-9 (hereinafter Salisbury Statement).

<sup>68</sup> DOJ, *Prisoners in 2016*, p. 3; see also Marc Mauer, Cathy Potler, and Richard Wolf, “Gender and Justice: Women, Drugs, and Sentencing Policy,” *The Sentencing Project*, Nov. 1999, p. 3, <https://www.sentencingproject.org/wp-content/uploads/2016/01/Gender-and-Justice-Women-Drugs-and-Sentencing-Policy.pdf> (noting that from 1986 and 1995, drug offenses accounted for 91% of the increase in the number of women sentenced to prison in New York State, 55% in California, and 26% in Minnesota).

<sup>69</sup> See Tables 1 and 2, below.

<sup>70</sup> DOJ, *Prisoners in 2016*, p. 13.

<sup>71</sup> Ibid., 13; see also “Crime in the United States, 2010, Larceny-Theft,” Federal Bureau of Investigation (FBI), Uniform Crime Report, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/property->



**Table 1: Percentage of Sentenced State Prisoners, by Most Serious Offense Type and Gender, 2015<sup>72</sup>**

Most Serious Offense		All Prisoners	Male	Female
	Total	100%	100%	100%
<b>Violent</b>		54.50%	55.90%	37%
	Murder	13.70%	13.80%	11.60%
	Manslaughter	1.30%	1.30%	2.40%
	Rape or sexual assault	12.50%	13.30%	2.40%
	Robbery	13.20%	13.60%	8.10%
	Aggravated or simple assault	10.50%	10.60%	8.60%
	Other	3.40%	3.30%	3.90%
<b>Property</b>		18%	17.30%	26.90%
	Burglary	9.70%	9.90%	7.30%
	Larceny-theft	3.70%	3.30%	8.80%
	Motor vehicle theft	0.70%	0.70%	0.80%
	Fraud	1.90%	1.50%	7.10%
	Other	2%	1.90%	3%
<b>Drug</b>		15.20%	14.40%	24.90%
	Drug possession	3.40%	3.20%	6.80%
	Other	11.70%	11.30%	18.10%
<b>Public Order</b>		11.60%	11.70%	10.20%
	Weapons	3.90%	4.10%	1.70%
	DUI	1.90%	1.90%	2.60%
	Other	5.70%	5.70%	5.90%
<b>Other/unspecified</b>		0.70%	0.70%	1%
		1,298,159	1,204,799	93,360

**Source:** Bureau of Justice Statistics, *Prisoners in 2016*

[crime/larcenytheftmain.pdf](#) (noting that larceny-theft is defined as “the unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Examples are thefts of bicycles, motor vehicle parts and accessories, shoplifting, pocket-picking, or the stealing of any property or article that is not taken by force and violence or by fraud. Attempted larcenies are included. Embezzlement, confidence games, forgery, check fraud, etc., are excluded”).

<sup>72</sup> DOJ, *Prisoners in 2016*, p. 18, Table 12.

**Table 2: Percentage of Sentenced Federal Prisoners, by Most Serious Offense Type and Gender, 2016<sup>73</sup>**

Most Serious Offense		All Prisoners	Male	Female
	Total	100%	100%	100%
<b>Violent</b>		7.70%	8%	4.50%
	Homicide	1.60%	1.60%	1.40%
	Robbery	3.80%	4%	1.70%
	Other	2.30%	2.40%	1.40%
<b>Property</b>		6.10%	5.20%	18.60%
	Burglary	0.20%	0.20%	0.20%
	Fraud	4.80%	4%	15.80%
	Other	1.10%	1%	2.70%
<b>Drug</b>		47.50%	46.80%	56.40%
<b>Public order</b>		38.20%	39.50%	19.70%
	Immigration	7.70%	8%	3.30%
	Weapons	16.70%	17.60%	4.10%
	Other	13.80%	13.90%	12.30%
<b>Other/unspecified</b>		0.50%	0.50%	0.70%
	Total	172,554	161,332	11,222

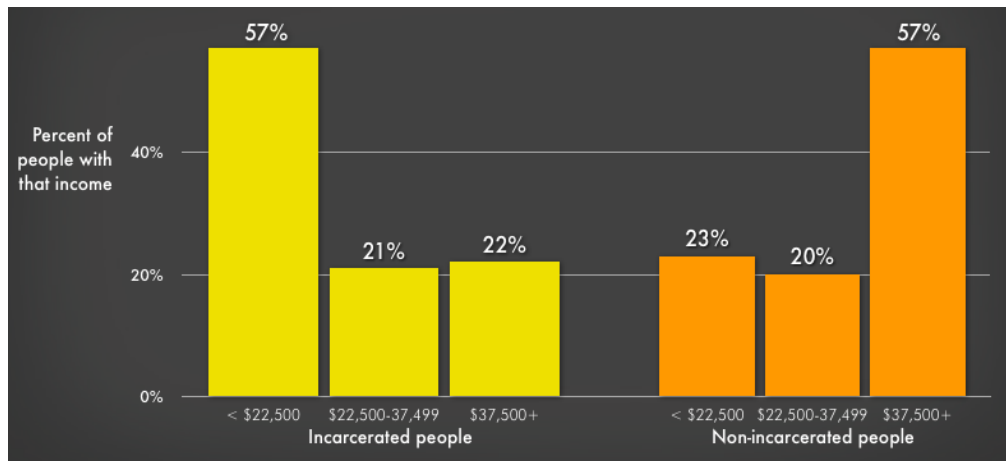
**Source:** Bureau of Justice Statistics, *Prisoners in 2016*

### *Socioeconomic Differences Between Women and Men in Prison*

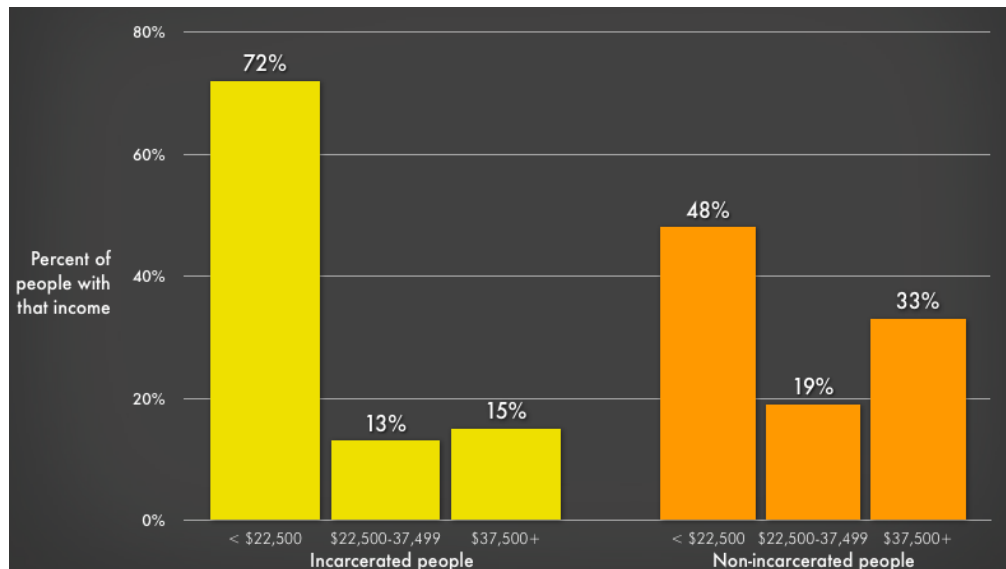
Prior to incarceration, people in prison are often some of the poorest individuals in the United States. Using data from the Bureau of Justice Statistics, the figures below demonstrate how incomes of men and women in state prisons differ from their non-incarcerated counterparts.<sup>74</sup>

<sup>73</sup> Ibid., Table 14.

<sup>74</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, "Data Collection: Survey of Inmates in State Correctional Facilities (SISCF)," Apr. 23, 2019, <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=275>; see also Bernadette Rabuy and Daniel Kopf, "Prison of Poverty: Uncovering the Pre-Incarceration incomes of the Imprisoned," *Prison Policy Initiative*, July 9, 2015, <https://www.prisonpolicy.org/reports/income.html> (hereinafter Rabuy and Kopf, "Prison of Poverty").

**Figure 5: Income for Incarcerated and Non- Incarcerated Men (Age 27 to 42)**

Source: Prison Policy Initiative

**Figure 6: Income for Incarcerated and Non- Incarcerated Women (Age 27 to 42)**

Source: Prison Policy Initiative

These data demonstrate that prior to incarceration, 58 percent of men in prison had incomes below \$22,500, while 72 percent of women in prison had incomes below \$22,500. Similarly, while 57 percent of non-incarcerated men had incomes more than \$37,500, only 33 percent of non-incarcerated women had incomes more than \$37,500.<sup>75</sup> While both incarcerated women and men are concentrated at the lowest ends of the earning distribution, a much larger percentage of incarcerated women have incomes below \$22,500.<sup>76</sup>

<sup>75</sup> Rabuy and Kopf, “Prison of Poverty.”

<sup>76</sup> Ibid.

According to a survey of men and women in state prisons, prior to their incarceration, women in state prisons were less likely than male counterparts to be employed full-time.<sup>77</sup> At the Commission’s briefing, Emily Mooney of R Street Institute provided written testimony stating that, “while both incarcerated men and women are often living in poverty prior to their time behind bars, women are even less likely to be employed full-time prior to their incarceration and report lower pre-incarceration incomes than males.”<sup>78</sup>

A 2015 study found that incarcerated people in all gender, race, and ethnic groups earned considerably less prior to incarceration than their non-incarcerated counterparts.<sup>79</sup> The table below demonstrates that while white men of both groups have the highest income, the gap in pay is most stark for white men, as non-incarcerated white men make 54 percent more than their white male incarcerated counterparts; non-incarcerated black men make 44 percent more than their black male incarcerated counterparts; non-incarcerated Latino men make 34 percent more than their Latino men incarcerated counterparts.<sup>80</sup> In contrast, Latina women experienced the smallest income gap. They had a 21 percent difference in income between their non-incarcerated and incarcerated populations. However, white women observed a 41 percent difference in pay between their non-incarcerated and incarcerated populations. Black women observe a 47 percent difference in pay between their non-incarcerated and incarcerated populations.<sup>81</sup>

**Table 3: Median Annual Income by Gender, Incarceration Status, and Race/Ethnicity<sup>82</sup>**

Race/Ethnicity	Incarcerated People (Income Prior to Incarceration)		Non-incarcerated People	
	Women	Men	Women	Men
<b>All Races</b>	\$13,890	\$19,650	\$23,745	\$41,250
<b>Black</b>	\$12,735	\$17,625	\$24,255	\$31,245
<b>Latino</b>	\$11,820	\$19,740	\$15,000	\$30,000
<b>White</b>	\$15,480	\$21,975	\$26,130	\$47,505

<sup>77</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Women in Prison*, by Tracy Snell and Danielle Morton (Mar. 1994) p. 2, Table 1, <https://pdfs.semanticscholar.org/3c52/24b1ac3490d62c4b91bf0cef65e0f43a8006.pdf> (hereinafter DOJ, *Women in Prison*).

<sup>78</sup> Mooney Statement, at 5.

<sup>79</sup> Rabuy and Kopf, “Prison of Poverty.”

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

### *Gender Differences with Experiences of Trauma, Mental Health, and Substance Abuse*

In comparison to men in prison, women in prison are more likely to report having experienced physical and/or sexual abuse as children and adults.<sup>83</sup> Research and expert testimony suggest that at least 50 percent of women entering prison report experiencing physical and/or sexual abuse prior to their incarceration.<sup>84</sup> Other studies suggest that as many as 90 percent of women in prison experienced traumatic events prior to their incarceration and the most common forms of traumatic experiences report included interpersonal or sexual violence.<sup>85</sup> In contrast, data reflect that men are reportedly less likely to have been direct victims of violence.<sup>86</sup> Another important difference between the reported abuse histories of men and women is the length of time in which they experience abuse. While the risk of abuse for men declines after childhood, the risk of abuse for women endures throughout their juvenile and adult lives.<sup>87</sup> For some women and men in prison, abuse can persist while they are incarcerated either at the hands of fellow inmates or prison staff.<sup>88</sup>

Trauma can lead to mental health and substance abuse issues.<sup>89</sup> A 2006 survey found that 55 percent of men in state prisons demonstrated signs of mental health challenges as compared to 73

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<sup>83</sup> DOJ, *Women in Prison*, p. 5, Table 8. See also Nancy Wolff, Jing Shi, and Jane Siegel, “Patterns of Victimization Among Male and Female Offenders and Evidence of an Enduring Legacy” *Violence Victimization*, vol. 24, no. 4 (2009), p. 469-84, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3793850>, (hereinafter Wolff et al., “Patterns of Victimization Among Male and Female Offenders”).

<sup>84</sup> Wolff et al., “Patterns of Victimization Among Male and Female Offenders,” see also Kaitlin Owens Testimony, Briefing before the U.S. Commission on Civil Rights, Women in Prison, Washington, D.C., Feb. 22, 2019, p. 90 (hereinafter Owens Testimony).

<sup>85</sup> U.S. Dep’t of Justice, Office of Inspector General, *Review of the Federal Bureau of Prisons’ Management of its Female Population*, Sept. 2018, p. 5, <https://oig.justice.gov/reports/2018/e1805.pdf>, (hereinafter DOJ, *Review of the Federal Bureau of Prisons’ Management of its Female Population*) (citing Niki A. Miller and Lisa M. Najavits, “Creating Trauma Informed Correctional Care: A Balance of Goals and Environment,” *European Journal of Psychotraumatology*, vol. 3 (2012) (noting that the BOP claims that the statistic 90% of women in prison experienced trauma prior to prison is a low estimate because a number of traumatic experiences are not reported)); see also McLearen Statement, at 1; Mooney Statement, at 4; Kaitlin Owens, Policy Analyst, The American Conservative Union, Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 6 (hereinafter Owens Statement); Wendy Still, Chief Probation Officer, Alameda County Probation Department, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 7 (hereinafter Still Statement); Brett Dignam, Vice Dean of Experiential Education and Clinical Professor of Law at Columbia Law School, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 5 (hereinafter Dignam Statement).

<sup>86</sup> DOJ, *Review of the Federal Bureau of Prisons’ Management of its Female Population*, p. 5.

<sup>87</sup> U.S. Dep’t of Justice, Bureau of Justice Assistance, *Women’s Pathways to Jail: The Roles & Intersections of Serious Mental Illness and Trauma*, by Shannon Lynch, Dana DeHart, Joanne Belknap, and Bonnie Green, 2012, p. 24, [https://www.bja.gov/publications/women\\_pathways\\_to\\_jail.pdf](https://www.bja.gov/publications/women_pathways_to_jail.pdf) (hereinafter DOJ, *Women’s Pathways to Jail*).

<sup>88</sup> Sexual abuse in prison will be discussed further in Chapter 4.

<sup>89</sup> Owens Statement, at 6.

percent of women in prison.<sup>90</sup> Women with mental health disorders also have higher disciplinary infraction rates than women who do not have mental health disorders while incarcerated,<sup>91</sup> which may cause them to serve disparately longer sentences.

### *Prison Policies and Gender Differences Among Inmates*

Since data reflect differences in women's pathways to prison compared to men's, some researchers and advocates argue that prisons should develop gender-responsive, trauma-informed programs and policies.<sup>92</sup> A 2005 National Institute of Corrections report explains the term "gender-responsive" as follows:

Gender-responsive means creating 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>93</sup>

At the Commission's briefing, Dr. Wendy Williams, Alabama Department of Corrections, Deputy Commissioner for Women's Services provided testimony stating that, "[m]ost correctional agency policy manuals focus on guidelines specific to the male offender population... However, operational practices in women's facilities should reflect the differences between men and women and inform policies that provide guidance to staff in their daily interactions with the population."<sup>94</sup> Dr. Williams also noted that Alabama has instituted over 60 gender-responsive policies, which she shared with the Commission. She particularly highlighted a policy change where feminine hygiene

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<sup>90</sup> U.S. Dep't of Justice, Office of Justice Programs, *Mental Health Problems of Prison and Jail Inmates*, by Doris James and Lauren Glaze, Dec. 12, 2006, p. 4, <https://www.bjs.gov/content/pub/pdf/mhppji.pdf> (hereinafter DOJ, *Mental Health Problems of Prison and Jail Inmates*).

<sup>91</sup> DOJ, *Women's Pathways to Jail*, p. 4.

<sup>92</sup> See *infra* notes 93-100.

<sup>93</sup> U.S. Dep't of Justice, National Institute Corrections, *Gender Responsive Strategies: A Summary of Research, Practice, and Guiding Principles for Women Offenders*, by Barbara Bloom, Barbara Owen, and Stephanie Covington, May 2005, p. 2, <https://www.centerforgenderandjustice.org/assets/files/bloomowensummaryofrpg.pdf>; Still Statement, at 8-9.

<sup>94</sup> Williams Testimony, p. 215.

products are freely available in an open cabinet, no longer requiring women to request these products from staff.<sup>95</sup>

A report from the National Resource Center on Justice Involved Women explains a “trauma-informed” culture in the context of incarceration as one in which:

1. Staff understand trauma’s pervasive effects on the brain and body,
2. Innovative programs are introduced to educate women on the effects of trauma and help them cope with its effects, and
3. Operational practices are specifically structured to help women manage difficult symptoms so they can safely engage in institutional programs and services.<sup>96</sup>

In addition, gender-responsive, trauma-informed programs and policies “promote safety by effectively addressing the underlying issues that promoted criminal activity and equip women with the tools to become productive citizens upon reentry.”<sup>97</sup> Similarly, Professor Emily J. Salisbury, Associate Professor of Criminal Justice at the University of Nevada, Las Vegas, posits that gender-responsive and trauma-informed policies do not coddle women in prison, but instead hold them accountable while providing them an opportunity to heal inside and outside of prison.<sup>98</sup> Moreover, the Commission received testimony arguing that not having gender-responsive, trauma-informed policies and procedures in place leads to harm for women in prison, as without them, women are likely to serve more time in prison due to discipline policies and classification systems that disserve women as a group, which do not accurately capture women’s attributes and behavior.<sup>99</sup> For example, research indicates harsh punishments given to incarcerated women for minor infractions, such as solitary confinement for being disrespectful, tend to be a gendered outcome that can be effectively addressed through training.<sup>100</sup> Other prison staff and administrators assert that while instituting programs for women in prison may be beneficial, these programs may be too costly or create resentment from men in prison or prison staff, or they may believe that their current policies

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<sup>95</sup> Ibid., 216; *see also*, Resnick Testimony, p. 222.

<sup>96</sup> Alyssa Benedict, “Using Trauma-Informed Practices to Enhance Safety and Security in Women’s Correctional Facilities,” *National Resource Center on Justice Involved Women*, <https://www.bja.gov/Publications/NRCJIW-UsingTraumaInformedPractices.pdf> (hereinafter Benedict, “Using Trauma-Informed Practices to Enhance Safety and Security in Women’s Correctional Facilities”) (accessed October 6, 2019).

<sup>97</sup> Mooney Statement, at 7.

<sup>98</sup> Salisbury Testimony, pp. 87-88.

<sup>99</sup> Salisbury Statement, at 4, 6, 9; *see also* Jessica Pupovac, Freelance Reporter, Written Statement for the Women in Prison Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019 at 1, 3, 4-5, 7 (hereinafter Pupovac Statement).

<sup>100</sup> Pupovac Testimony, pp. 207-210; Still Testimony, at 217.

and procedures work adequately for their female population.<sup>101</sup> In the few states that have instituted gender-responsive, trauma-informed policies and procedures for women in prison, these policies have often come about as a result of prison overcrowding, or when a state's Department of Corrections has been successfully sued after widespread instances of prison rape and subpar prison conditions have been uncovered.<sup>102</sup>

### ***Race, Ethnicity, and Women in Prison***

Several research studies have found racial disparities in arrests, pretrial treatment, admissions, and incarceration rates among women in prison.<sup>103</sup> For instance, a 2009 study found that despite their small population size, Native American women were admitted to prison at 6.7 times the rate of white women, and black women were admitted to prison at 3.9 times the rate of white women.<sup>104</sup> According to testimony received by the Montana State Advisory Committee to the U.S. Commission on Civil Rights, Native American women in Montana make up 3 percent of the state population but 36 percent of the incarcerated women population.<sup>105</sup>

In 2000, black women were imprisoned at over 6 times the rate of white women and over 3 times the rate of Latina women. Since 2000, the imprisonment rate for black women has declined over 52 percent, but increased by over 44 percent for white women and almost 12 percent for Latina women.<sup>106</sup> Despite these significant changes, in 2016, black women were still imprisoned (97 per 100,000 black female residents) at almost twice the rate of white women (49 per 100,000 white female residents).<sup>107</sup> The Bureau of Justice Statistics Prisoner Series added an "other" category in 2012, which includes persons identifying as Native American, Alaska Native, Asian, Native Hawaiian, other Pacific Islander, and persons identifying as two or more races.<sup>108</sup> The

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<sup>101</sup> Moss Statement, at 1; *see also* McLearn Testimony, pp. 80-83.

<sup>102</sup> Smith Testimony, p. 138.

<sup>103</sup> Stephanie S. Covington and Barbara E. Bloom, "Gendered Justice: Women in the Criminal Justice System," in *Gendered Justice: Addressing Female Offenders*, by Barbara E. Bloom (Durham: Carolina Academic Press, 2003), p. 3, <https://www.stephaniecovington.com/assets/files/4.pdf>.

<sup>104</sup> Christopher Hartney and Linh Vuong, "Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System," *National Council on Crime and Delinquency*, Mar. 2019, pp. 3, 16, [https://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](https://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf).

<sup>105</sup> Montana State Advisory Committee to the U.S. Commission on Civil Rights, "Bordertown Discrimination in Montana," May, 2019, p. 3 <https://www.usccr.gov/pubs/2019/05-29-Bordertown-Discrimination-Montana.pdf>.

<sup>106</sup> The Commission staff calculated these figures using data from DOJ, *Prisoners in 2016*, p. 3.

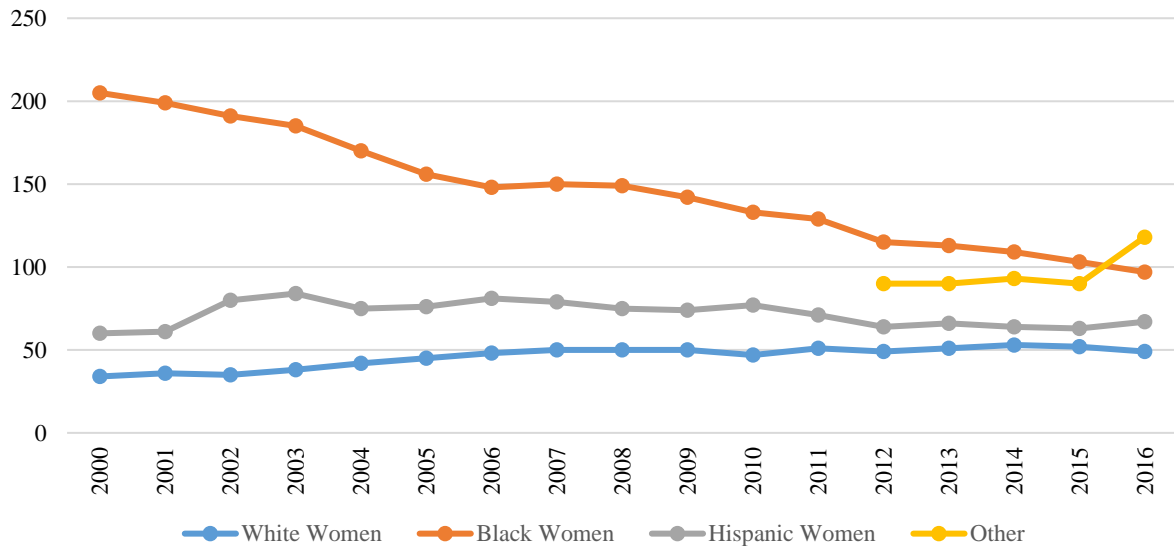
<sup>107</sup> *Ibid.*, 13.

<sup>108</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2012: Trends in Admission and Releases, 1991-2012*, by E. Ann Carson and Daniela Golinrlli (Sept. 2, 2014), p. 24, <https://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.



imprisonment rate of Native American, Alaska Native, Asian, Native Hawaiian, other Pacific Islander, and multiracial women remained around 90 per 100,000 female residents from 2012-2015, but that rate increased by over 31 percent in 2016.<sup>109</sup>

**Figure 7: Women Imprisonment Rate (per 100,000 U.S. Residents), by Race and Ethnicity, 2000-2016<sup>110</sup>**



**Source:** Bureau of Justice Statistics Prisoner Series, Chart Made by Commission Staff

These data demonstrate that while the overall number of black people in prison has declined since 2000, this decline is much more pronounced for black women. Since 2000, the incarceration rate for black men has declined over 30 percent, but incarceration rates for white and Latino men have stayed relatively the same.<sup>111</sup> In 2016, black men (2,417 per 100,000 black male residents) were still imprisoned at over 6 times the rate of white men (401 per 100,000 white male residents) and over twice the rate of Latino men (1,093 per 100,000 Latino male residents).<sup>112</sup> The imprisonment rate of Native American, Alaska Native, Asian, Native Hawaiian, other Pacific Islander, and multiracial men from 2012-2015 was, on average, around 958 per 100,000 male residents, but increased by over 36 percent in 2016 (See Figure 8).

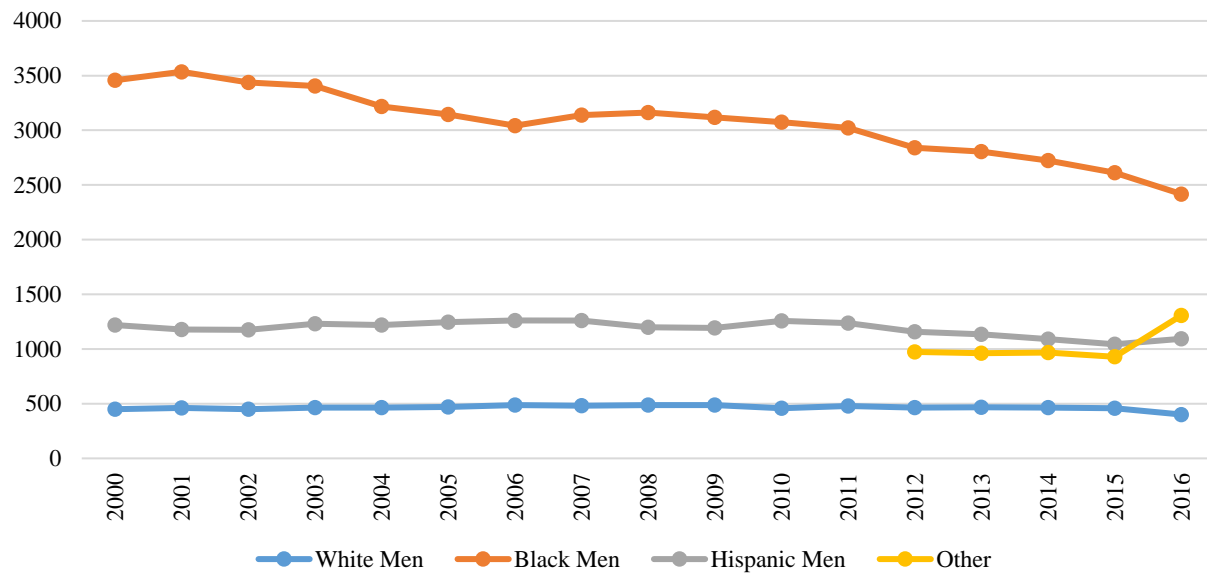
<sup>109</sup> Ibid., 25.

<sup>110</sup> DOJ, *Prisoners in 2016*, p. 27-28.

<sup>111</sup> Commission staff calculated these figures using data from DOJ, *Prisoners in 2016*, p. 3.

<sup>112</sup> Ibid., 13.

**Figure 8: Men Imprisonment Rate (per 100,000 U.S. Residents), by Race and Ethnicity, 2000-2016<sup>113</sup>**



**Source:** Bureau of Justice Statistics Prisoner Series, Chart Made by Commission Staff

There is no single explanation for the racial, ethnic, and gender differences observed in the aforementioned incarceration trends. In assessing the changes observed in incarceration rates, a 2013 study conducted by the Sentencing Project asserts that several factors may have contributed to changes observed in the racial and gender dynamics of incarceration rates. These include: changes in crime involvement (e.g. from 2000-2009 significant declines in violent, property, and drug offenses among black people); changes over time in offenses women are convicted of (e.g. rise in use of methamphetamine, which is disproportionately used by white and Latino people); changes in law enforcement or sentencing practices; and changes in socioeconomics (e.g. life expectancy of white women with less than a high school education—which is related to a number of socioeconomic factors that are also correlated with incarceration rates—fell more than 5 years from 1990 to 2008).<sup>114</sup> As mentioned above, some researchers also posit that stricter sentencing—especially for low-level drug offenses—helps explain changes observed in women’s incarceration rates.<sup>115</sup>

<sup>113</sup> The reports in this series did not start including “other” category—which includes American Indians, Alaska Natives, Asians, Native Hawaiians, other Pacific Islanders, and persons identifying two or more races—until 2012.

<sup>114</sup> Mauer, “The Changing Racial Dynamics of Women’s Incarceration,” pp. 6-10.

<sup>115</sup> Ibid.; see also Sokoloff, “Women Prisoners at the Dawn of the 21<sup>st</sup> Century.”

While the aforementioned studies present several plausible explanations for the recent changes in women's incarceration rates, they do not directly test whether the factors mentioned above statistically explained the racial differences observed in women's incarceration rates. In contrast, a 2011 study employed multivariate regression models to analyze economic and demographic factors that explained women's incarceration rates from all 50 states from 1981 to 2003.<sup>116</sup> In particular, Heimer and her colleagues argued that understanding women's imprisonment rates necessitates attention to race and ethnicity, as black women are incarcerated at higher rates than white women but few studies have employed regression techniques to study race differences in women's imprisonment rates using data over time.<sup>117</sup> The authors found that black women's imprisonment rates are positively associated with the concentration of black people in metropolitan areas, and that these rates increase as poverty grows.<sup>118</sup> Dissimilarly, non-black women's imprisonment rates are not impacted by poverty rates and decrease as the concentration of black populations in metropolitan areas grows.<sup>119</sup> These results were robust even when controlling for racial differences in arrests, crime statistics, and state-level economic factors such as gross state product.<sup>120</sup>

### ***LGBT Women in Prison***

Ascertaining which women in prison identify as lesbian, bisexual, or transgender is difficult because surveys of women in prison do not always inquire about sexual orientation and/or gender identity, and when they do, they do not always distinguish among sexual orientation, sexual identity, and sexual behavior.<sup>121</sup> In part, this is because not everyone who has a same-sex experience identifies as gay or lesbian.<sup>122</sup> According to Anadora Moss, an expert on women in prison issues for over three decades, “[m]ost women find close emotional relationships while incarcerated and those relationships may or may not be sexual in nature. The relationships can be healthy and healing or can drive considerable disruption and toxic behavior. Close emotional

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<sup>116</sup> Karen Heimer, Kecia R. Johnson, Joseph B. Lang, Andres F. Rengifo, and Don Stemen, “Race and Women’s Imprisonment: Poverty, African American Presence, and Social Welfare,” *Journal of Quantitative Criminology*, vol. 28, iss. 2, (June 2012), p. 221, <https://link.springer.com/article/10.1007/s10940-011-9144-8>.

<sup>117</sup> *Ibid.*, 220.

<sup>118</sup> *Ibid.*, 230-32.

<sup>119</sup> *Ibid.*, 231-32.

<sup>120</sup> *Ibid.*, 236.

<sup>121</sup> Moss Statement, at 6; *see also* Carolyn Crist, “LGBT individuals more likely to be Incarcerated,” *Reuters*, Dec. 23, 2016, <https://www.reuters.com/article/us-health-lgbt-incarceration-usa/lgbt-individuals-more-likely-to-be-incarcerated-idUSKBN14C1ZI> (hereinafter Crist, “LGBT individuals more likely to be incarcerated”).

<sup>122</sup> Crist, “LGBT individuals more likely to be incarcerated.”

attachments can incorrectly be perceived as a lesbian relationship.”<sup>123</sup> Despite this, the available data demonstrate that the LGBT populations are disproportionately incarcerated.<sup>124</sup> A 2017 public health study found that sexual minorities, defined as people who self-identify as lesbian, gay, or bisexual (LGB) and people who do not identify as LGB but reported same-sex sexual experiences, were disproportionately incarcerated: 42 percent of women in prison were sexual minorities—33 percent of these women identify as lesbian or bisexual.<sup>125</sup>

Transgender women, especially transgender women of color, are incarcerated at higher rates than other groups. For instance, a 2011 survey found that approximately 16 percent of transgender people—including 21 percent of transgender women—have been incarcerated in jail or prison at some point in their lives.<sup>126</sup> For comparison, DOJ reports the overall national incarceration rate is approximately 3 percent, although this number does not include people who are incarcerated in jails.<sup>127</sup> Among black transgender people, 47 percent have been incarcerated in jail or prison at some point,<sup>128</sup> which reflects equivalent overall racial disparities observed in national incarceration rates.<sup>129</sup> According to BJS, there were approximately 3,209 transgender prisoners in state and federal facilities in 2011-2012.<sup>130</sup> Of the more than 3,200 transgender prisoners, BOP houses

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<sup>123</sup> Moss Statement, at 7.

<sup>124</sup> Ilan H. Meyer, Andrew R. Flores, Lara Stemple, Adam P. Romero, Bianca Wilson, and Jody L. Herman, “Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012,” *American Journal of Public Health*, vol. 107 no. 2 (Feb. 2017), p. 267-273, at 234 (hereinafter Meyer et al., “Incarceration Rates and Traits of Sexual Minorities in the United States”); see also The National Center for Transgender Equality, “LGBTQ People Behind Bars: a Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights,” Oct. 2018, pp. 5, 16, <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf>, (hereinafter National Center for Transgender Equality, “LGBTQ People Behind Bars”).

<sup>125</sup> Meyer et al., “Incarceration Rates and Traits of Sexual Minorities in the United States,” p. 234.

<sup>126</sup> Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey.” *National Center for Transgender Equality & National Gay and Lesbian Task Force*, 2011, p. 163, [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf)

<sup>127</sup> Ibid.

<sup>128</sup> National Center for Transgender Equality, “LGBTQ People Behind Bars,” p. 5.

<sup>129</sup> “Transgender Rights Toolkit: A Legal Guide for Trans People and their Advocates. Transgender Incarcerated People in Crisis,” Lambda Legal, p. 1, [https://www.lambdalegal.org/sites/default/files/2015\\_transgender-incarcerated-people-in-crisis-fs-v5-singlepages.pdf](https://www.lambdalegal.org/sites/default/files/2015_transgender-incarcerated-people-in-crisis-fs-v5-singlepages.pdf) (accessed Aug. 18, 2019) (hereinafter Lambda Legal, “Transgender Rights Toolkit”).

<sup>130</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12 Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates, by Allen Beck (Dec. 2014), table 1, [https://www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf) (hereinafter DOJ, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12 Supplemental Tables*).

approximately 700 federal inmates who self-identify as transgender and more than 80 percent, or approximately 560, of these inmates have self-identified as transgender women.<sup>131</sup>

### ***LGBT Women in Prison, Housing, and Placement***

Housing and placement are of particular concern for lesbian, gay, and bisexual (LGB) prisoners. A 2015 restrictive housing report conducted by the Bureau of Justice Statistics also found that lesbian, gay, and bisexual prisoners are more likely to be housed in solitary confinement or segregation than heterosexual prisoners, with 28 percent of LGB prisoners being placed in solitary confinement in just the past year, compared to 18 percent of heterosexual prisoners.<sup>132</sup>

Research suggests that not only are the experiences of LGB inmates distinct from other inmates, but transgender women in prison face challenges that are distinct from their cisgender<sup>133</sup> women counterparts. The federal regulatory definition of transgender follows: “Transgender means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person’s assigned sex at birth.”<sup>134</sup> On May 11, 2018, BOP amended the transgender housing policy in its “Transgender Offender Manual” to instruct BOP’s Transgender Executive Council to use the biological sex of an inmate in initial housing determinations.<sup>135</sup> In addition, the new policy added that the placement in a facility of the “inmate’s identified gender would be appropriate *only in rare cases* after consideration of all of the above factors and where there has been significant progress towards transition as demonstrated by medical and mental health history.”<sup>136</sup> The previous Transgender Offender Manual allowed for housing decisions to be in accordance with an inmate’s gender identity, when appropriate.<sup>137</sup> At the Commission’s February 2019 briefing, Dr. Alix

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<sup>131</sup> McLearn Testimony, p. 93.

<sup>132</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12*, by Allen J. Beck (Oct. 2015), p. 5, <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> (hereinafter DOJ, *Use of Restrictive Housing*) (note that this report did not provide any information on transgender inmates); see also U.S. Dep’t of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, Jan. 2016, p. 11-2 <https://www.justice.gov/archives/dag/file/815551/download>.

<sup>133</sup> U.S. Commission on Civil Rights, *Working for Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans*, 2019, p. 20, [https://www.usccr.gov/pubs/docs/LGBT\\_Employment\\_Discrimination2017.pdf](https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf) (noting that cisgender is a term referring to individuals whose gender identity is congruent with the sex they were assigned at birth).

<sup>134</sup> 28 C.F.R. § 115.5 (Transgender).

<sup>135</sup> U.S. Dep’t of Justice, Federal Bureau of Prisons, *Change Notice to the Transgender Offender Memo*, by Mark S. Inch (May 11, 2018), <https://assets.documentcloud.org/documents/4459297/BOP-Change-Order-Transgender-Offender-Manual-5.pdf>.

<sup>136</sup> *Ibid.*, § 5 (emphasis added).

<sup>137</sup> U.S. Dep’t of Justice, Federal Bureau of Prisons, *Transgender Offender Manual*, Jan. 18, 2017, p. 6, <https://www.bop.gov/policy/progstat/5200.04.pdf>; see also McLearn Testimony, p. 92; see also 28 C.F.R. § 115.42 (c)(housing placement by gender identity should be done on a case-by-case basis, and “the agency shall consider on

McLearen, National Administrator, Women and Special Branch at Federal Bureau of Prisons, testified that the change was made to clarify the importance of “the safety of that individual and safety of everyone else,” as well as a variety of other factors in looking at housing designations.<sup>138</sup> In addition, she stated that:

In terms of what we consider, though, we still consider an individual’s wish as to where they wish to be housed, the safety of that individual, the safety of other individuals, and so the sex assigned at birth is simply a starting point.

We usually have a great deal more data beyond that. That’s just a starting point. Internally, our process is a Transgender Executive Council that I sit on along with general counsel, health services, psychiatry, psychology, and our correctional services people.<sup>139</sup>

[Biological sex] was always the starting point and so it just made that a little bit more clear, that in the absence of other information this would be the starting place for an individual but that would always be the case. And then when we have additional information about somebody’s transition, about their compliance with hormones or whether they’re taking them, about their mental health functioning and programming. And what their interest area is in terms of some people prefer to stay at a particular facility and we wouldn’t want to make a move that they didn’t support.<sup>140</sup>

While advocates stress the importance of transgender inmates being housed based on their gender identity, most prisons house transgender inmates either by their sex assigned at birth or according to their current genital characteristics.<sup>141</sup> This can be highly risky: “According to federal data, transgender people are nearly ten times more likely to be sexually assaulted than the general prison population, with an estimated 40% of transgender people in state and federal prisons reporting a sexual assault in the previous year.”<sup>142</sup> Studies have also shown that transgender women housed in

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a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems”).

<sup>138</sup> McLearen Testimony, p. 94.

<sup>139</sup> Ibid., 95.

<sup>140</sup> Ibid., 95-96.

<sup>141</sup> Cheema Testimony, p. 337; *see also* Lambda Legal, “Transgender Rights Toolkit,” p. 2-3.

<sup>142</sup> National Center for Transgender Equality, “LGBTQ People Behind Bars,” p. 6, *citing* U.S. Dep’t of Justice, *Sexual Victimization in Prisons and Jails*; U.S. Dep’t of Justice, Office of Justice Programs, *Sexual Victimization in Prisons and Jails Reported by Inmates, National Inmate Survey 2011-12*, by Allen Beck, Marcus Berzofsky, Rachel Caspar, and Christopher Krebs (May 2013), p. 17, <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (hereinafter DOJ, *Sexual Victimization in Prisons and Jails Reported by Inmates, National Inmate Survey 2011-12*).

men's prisons "are at especially high risk of sexual abuse."<sup>143</sup> Moreover, the National Center for Transgender Equality reports that "though practices are changing, many facilities still house transgender people strictly according to their genital anatomy or the gender they were thought to be at birth—often increasing their vulnerability to abuse."<sup>144</sup>

In 1994, in *Farmer v. Brennan*, the Supreme Court reviewed Eighth Amendment protections regarding a female transgender inmate who was allegedly abused by male inmates, due to being placed in a men's prison instead of a women's prison.<sup>145</sup> Dee Farmer had begun transitioning with estrogen therapy at age 14, had breast implants, and had been living as a woman for five years before being sent to federal prison, but had not "completed" her surgical transition.<sup>146</sup> In her case before the Supreme Court in 1994, BOP told federal courts that its practice was "to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual's new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual's original gender."<sup>147</sup> Further, although Judge Posner of the Seventh Circuit Court of Appeals wrote that "Farmer was put in with male prisoners — but without incident," the Supreme Court's opinion detailed that after being transferred to the United States Penitentiary in Terre Haute, Indiana:

Within two weeks, according to petitioner's allegations, petitioner was beaten and raped by another inmate in petitioner's cell. Several days later, after petitioner claims to have reported the incident, officials returned petitioner to segregation to await, according to respondents, a hearing about petitioner's HIV positive status.<sup>148</sup>

The Supreme Court held that the Eighth Amendment's protections against cruel and unusual punishment may be violated when "the official knows of and disregards an excessive risk to inmate health or safety."<sup>149</sup> The Court remanded Farmer's case to determine if that standard was met with regard to the facts in her case.<sup>150</sup> After a jury trial, her complaint alleging abuse was dismissed and verdict was entered in favor of the defendants.<sup>151</sup> However, the Eighth Amendment's protections

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<sup>143</sup> *Ibid.*, 13.

<sup>144</sup> *Ibid.*, 6.

<sup>145</sup> *Farmer v. Brennan*, 511 U.S. at 833 ("prison officials have a duty ... to protect prisoners from violence at the hands of other prisoners.") (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)).

<sup>146</sup> *Farmer v. Haas*, 990 F.2d at 319, 320 (7th Cir. 1993).

<sup>147</sup> *Farmer v. Haas*, 990 F.2d at 320.

<sup>148</sup> *Farmer v. Brennan*, 511 U.S. at 829.

<sup>149</sup> *Id.* at 837.

<sup>150</sup> *Id.* at 851.

<sup>151</sup> See Civil Docket for *Farmer v. Brennan*, Case No. 3:91-cv-00716 (W.D. Wis.) (discussing Jury Trial (Jan. 23, 1997)), Judgment Dismissing Plaintiff's Complaint with Prejudice and Costs (Jan. 23, 1997), PACER.gov (last



against deliberate indifference to higher risks of sexual abuse of transgender women placed in male prisons still stand, if deliberate indifference can be proven.<sup>152</sup> For example, in the 2015 case of *Diamond v. Owens*, a federal district court in Georgia held that a prison official was not immune from charges of deliberate indifference to the substantial risk of sexual assault that a transgender woman, Ashley Diamond faced while housed in a prison for male inmates.<sup>153</sup> The court recited federal and state regulations that had documented such a risk:

In her complaint, Diamond has covered the waterfront with her allegations tending to prove subjective awareness [of the risk]. She has alleged that a transgender inmate's vulnerability to assault at a closed-security male facility was obvious to Lewis and McCracken and that PREA [the federal Prison Rape Elimination Act of 2003] and GDOC [Georgia Department of Corrections] policies made clear transgender inmates are highly vulnerable to sexual assault.<sup>154</sup>

The Georgia court also found that despite the prison official being aware that Diamond was a transgender female who had previously been sexually assaulted numerous times while in a men's prison, the prison official took no reasonable measures to ensure Diamond's "clearly established right to be protected from sexual assault."<sup>155</sup>

Federal prison placement policy has changed since the *Farmer* case. Prison Rape Elimination Act (PREA) regulations belatedly issued by DOJ in 2012 require an individualized assessment as well as taking into account a transgender person's own views about their safety.<sup>156</sup> In particular, they require that, "[i]n deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems."<sup>157</sup> The National Center for Transgender Equity also argues that Eighth Amendment protections against deliberate indifference to the risk of violence would forbid prisons from housing transgender prisoners based on their genitalia alone, without consideration of other factors.<sup>158</sup> Lambda Legal reports that

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accessed Oct. 2, 2019); *see also* "Farmer Loses at Jury Trial," *Prison Legal News* (Sept. 15, 1997), <https://www.prisonlegalnews.org/news/1997/sep/15/farmer-loses-at-jury-trial/>.

<sup>152</sup> *Farmer v. Brennan*, 511 U.S. at 837; *see also infra* notes 152-54.

<sup>153</sup> *Diamond v. Owens*, 131 F.Supp. 3d 1346, 1379 (M.D. Ga. 2015).

<sup>154</sup> *Id.* at 1378.

<sup>155</sup> *Id.* at 1379-80.

<sup>156</sup> 28 C.F.R. § 115.42(c) – (f).

<sup>157</sup> 28 C.F.R. § 115.42(c).

<sup>158</sup> National Center for Transgender Equality, "LGBTQ People Behind Bars," p. 14.



“[u]sing surgery to measure whether or not someone has transitioned is counter to established medical thinking,” and that “[a]n increasing number of localities—including Cook County, IL, Cumberland, ME, Denver, CO and Washington, DC—have had success with policies that classify prisoners by gender identity rather than sex assigned at birth.”<sup>159</sup> This is in contrast to the new federal policy discussed above that was issued in 2018, in which gender identity (rather than surgical transition) could be used as the main prison placement criteria “only in rare cases.”<sup>160</sup>

Moreover, there are still cases of transgender women being misplaced in male prisons and subjected to higher risks of sexual abuse.<sup>161</sup> In 2016, a federal court in Texas found that:

Transgender inmates in particular face a shockingly high rate of sexual abuse in prison. The BJS reported that 34.6% of transgender inmates reported being the victim of sexual assault. That is nearly nine times the rate for all prisoners, which is 4.0%. The vulnerability of transgender prisoners to sexual abuse is no secret. For example, the National Institute of Corrections has stated that “research on sexual abuse in correctional facilities consistently documented that men and women with nonheterosexual orientations, transgender individuals, and people with intersex conditions were highly vulnerable to sexual abuse.”<sup>162</sup>

These cases and data document abuse of transgender women by men.<sup>163</sup> In another case, for nearly two years, Kanautica Zayre-Brown, a transgender inmate in Lillington, North Carolina who surgically transitioned from male to female, was placed in a men’s state prison.<sup>164</sup> According to reports, Ms. Zayre-Brown faced constant harassment and humiliation, as she is housed with, as well as showers with and gets dressed in front of, male inmates.<sup>165</sup> Ms. Zayre-Brown repeatedly requested to be moved to a women’s facility, but the state classified Ms. Zayre-Brown by her sex as assigned at birth and placed her in solitary confinement at the men’s facility.<sup>166</sup> This situation

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<sup>159</sup> Lambda Legal, “Transgender Rights Toolkit,” p. 2.

<sup>160</sup> See *supra* notes 134-5.

<sup>161</sup> See *Diamond v. Owens*, *supra* note 52, and see *Zollicoffer v. Livingston*, 169 F.Supp.3d 687

<sup>162</sup> *Zollicoffer v. Livingston*, 169 F.Supp.3d 687, 691 (S.D. Tex. 2016).

<sup>163</sup> *Id.*

<sup>164</sup> Shaffer, Josh. “Help is Coming for Transgender Inmate Housed at Men’s Prison, NC Governor’s Office Says,” *News & Observer*, Mar. 8, 2019, <https://www.newsobserver.com/news/politics-government/article227296014.html>, (hereinafter Shaffer, “Help is Coming”).

<sup>165</sup> *Ibid.*; see also Cheema Testimony, *WIP Briefing*, p. 338.

<sup>166</sup> Shaffer, “Help is Coming,” see also Cheema Testimony, *WIP Briefing*, p. 339.

was finally resolved when the North Carolina Department of Public Safety moved her to a women's facility in August 2019.<sup>167</sup>

However, a 2007 California study found that: “We know that transgender inmates are at high risk [of sexual assault] (as reported in this study), but we know very little about how that risk is statistically associated with specific housing assignments as opposed to other factors that might also be amenable to intervention, such as surveillance, programming, and physical features of the carceral environment in which they reside.”<sup>168</sup>

Many state facilities place transgender women inmates in solitary confinement (also called protective custody) within facilities designated for cisgender male populations in order to alleviate any potential for violence against them and, ostensibly, not for punitive purposes. Moreover, many transgender women in prison are placed in protective custody, “not because of their actions, but because of their identities.”<sup>169</sup> This weakens the requirement that, under the PREA, prisons may only use protective custody as a last resort.<sup>170</sup> PREA regulations indicate that prisons must take other steps to prevent abuse such as permitting transgender women to shower separately, and exploring alternatives such as moving an aggressor to another cell or facility before placing transgender women in solitary confinement.<sup>171</sup> Furthermore, research and expert testimony suggest that prolonged periods of isolation can have severe psychological and physical effects.<sup>172</sup> In addition, prolonged solitary confinement makes it difficult for inmates to have access to the same rehabilitative opportunities and services that result in good time credit as other inmates.<sup>173</sup> The

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<sup>167</sup> See Sneha Shah, “Kanautica Zayre-Brown Transferred to a Women’s Facility,” *ACLU of North Carolina*, Aug. 15, 2019, <https://www.acluofnorthcarolina.org/en/news/kanautica-zayre-brown-transferred-womens-facility>; “State Moves Transgender Inmate to Women’s Prison,” *WITN News*, Aug. 15, 2019, <https://www.witn.com/content/news/ACLU-threatens-to-sue-state-over-transgender-inmate-from-Wilson--506711701.html>.

<sup>168</sup> Valerie Jenness, Cheryl L. Maxson, Kristy N. Matsuda, Jennifer Macy Sumner, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, UC-Irvine, Center for Evidence-Based Corrections, 2007, p. 4, [http://ucicorrections.seweb.uci.edu/files/2013/06/PREA\\_Presentation\\_PREA\\_Report\\_UCI\\_Jenness\\_et\\_al.pdf](http://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf).

<sup>169</sup> Lambda Legal, “Transgender Rights Toolkit,” p. 3; Ginsberg Testimony, p. 139; U.S. Department of Justice, Office of Justice Programs, *Review Panel on Prison Rape: Report on Sexual Victimization in Prisons, Jails, and Juvenile Correctional Facilities*, Apr. 2016, p. 51, [https://ojp.gov/reviewpanel/pdfs/panel\\_report\\_prea\\_apr2016.pdf](https://ojp.gov/reviewpanel/pdfs/panel_report_prea_apr2016.pdf) (hereinafter DOJ, *Review Panel on Prison Rape: Report on Sexual Victimization in Prisons, Jails, and Juvenile Correctional Facilities*) (Professor Shay explained that jails cannot rely solely on holding non-heterosexual inmates in long-term isolation to “protect” them).

<sup>170</sup> 28 C.F.R. §§ 115.43, 115.68, 115.368.

<sup>171</sup> Lambda Legal, “Transgender Rights Toolkit,” p. 3 (noting that prisons must justify any use of isolated segregation for more than 30 days).

<sup>172</sup> Ginsberg Testimony, p. 139; Resnik Testimony, p. 197; Cheema Testimony, p. 337.

<sup>173</sup> Cheema Testimony, p. 337.

National Center for Transgender Equality states that the use of restrictive housing for transgender inmates—not based on in prison behavior or need for punishment, but instead based merely on transgender status—communicates discrimination and does not advance either rehabilitative or punitive prison goals.<sup>174</sup>

In addition to housing and placement issues, transgender women in prison also face other challenges such as sexual assault or harassment and misgendering,<sup>175</sup> negative interactions with staff and other inmates, and inadequate access to healthcare—including hormonal replacement therapy.<sup>176</sup>

## Overview of Applicable Federal Legal Protections for Women in Prison

The Supreme Court has long held that, despite their status as convicted persons held in custody, prisoners retain some of their constitutional rights while incarcerated. The Court wrote in 1974 that, “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”<sup>177</sup> Furthermore, the Court has said that most constitutional rights survive during incarceration, although in a diminished state.<sup>178</sup> These include the freedoms of speech and religion,<sup>179</sup> the right to petition courts for relief,<sup>180</sup> the right to be free from cruel and unusual punishment,<sup>181</sup> the right to due process,<sup>182</sup> and the right to be free from discrimination.<sup>183</sup> However, some of the rights

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<sup>174</sup> National Center for Transgender Equality, *Policies to Increase Safety and Respect for Transgender Prisoners: A Guide for Agencies and Advocates*, 2018, p. 17-18.  
<https://transequality.org/sites/default/files/docs/resources/PolicytoIncreaseSafetyandRespectforTransgenderPrisoners.pdf>.

<sup>175</sup> Misgendering is a term that refers to when a transgender or gender non-conforming person is referred to by a pronoun that does not match the person’s correct gender identity. See “Pronouns: A Resource,” GLSEN.org, <https://www.glsen.org/sites/default/files/GLSEN%20Pronouns%20Resource.pdf> (accessed Oct/21, 2019).

<sup>176</sup> Moss Statement, at 7; Lambda Legal, “Transgender Rights Toolkit,” *passim*. (relying on federal and state-level data); and *see infra* notes 324-26.

<sup>177</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

<sup>178</sup> *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (Restrictions on some rights of prisoners are necessary and permissible, however prisoners do not forfeit all Constitutional rights while incarcerated).

<sup>179</sup> U.S. CONST. amend. I.

<sup>180</sup> U.S. CONST. amend. I.

<sup>181</sup> U.S. CONST. amend. VIII.

<sup>182</sup> U.S. Const. amend. XIV § 1.

<sup>183</sup> U.S. Const. amend. XIV § 1; Michael B. Mushlin, *The Rights of Prisoners* § 2:2 (5th ed. 2018); See generally, *Wilson v. Seiter*, 501 U.S. 294, 296-97 (1991) (cruel and unusual punishment); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (same); *Turner v. Safley*, 482 U.S. 78, 84 (1987) (freedom of expression and right to marry); *O’Lone v.*

promised to most are necessarily curtailed for inmates, including for example some First Amendment rights such as the right to unionize<sup>184</sup> and other rights based on freedom of association,<sup>185</sup> and some, but not all privacy rights.<sup>186</sup> For the purposes of studying the civil rights of women in prison, this report focuses mainly on the Eighth Amendment right to be free from cruel and unusual punishment, and the Fourteenth Amendment rights of due process and equal protection, along with applicable statutes, regulations, and court decisions.<sup>187</sup> Although there are other legal theories that have sometimes been applied to the situation of women in prison, such as under the First and Fourth Amendments, civil rights claims often focus on the Eighth and Fourteenth Amendment.

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*Estate of Shabazz*, 482 U.S. 342, 348 (1987) (freedom of religion); *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) (right of access to courts); *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (racial discrimination).

<sup>184</sup> U.S. CONST. art. I; *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125-26 (1977):

The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration. We noted in *Pell v. Procunier* [417 U.S. 817 (1974)], *supra*, at 822:

[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison \*126 walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally as obvious, the inmate's "status as a prisoner" and the operational realities of a prison dictate restrictions on the associational rights among inmates.

<sup>185</sup> See *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (internal citations omitted):

The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. And, as our cases have established, freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context. We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners.

<sup>186</sup> U.S. CONST. amend. IV; *Katz v. United States*, 389 U.S. 347, 350-53 (1967).

<sup>187</sup> While women in prison have a legal right to an abortion, since 1983, the Commission's statute has prohibited "the Commission, its advisory committees, or any other person under its supervision or control to study and collect, make appraisals of, or serve as a clearinghouse for any information about the laws and policies of the Federal Government or any other governmental authority in the United States, with respect to abortion." See 42 U.S.C. § 1975a(f). Accordingly, the Commission does not further discuss abortion herein.

### *The Eighth Amendment*

The Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishments,”<sup>188</sup> and the Supreme Court has held that this language prohibits punishments involving wanton infliction of pain,<sup>189</sup> or disciplinary actions that are grossly out of proportion to the nature of the crime.<sup>190</sup> In 1976, in the case of *Estelle v. Gamble*, the Supreme Court held “that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”<sup>191</sup> The Court’s holding in *Estelle* also granted prisoners the right to needed medical care under the Eighth Amendment,<sup>192</sup> and further cases have defined other rights of prisoners, including for women. But the Supreme Court has also articulated strict standards for analyzing what constitutes cruel and unusual punishment. In 1987, the Court held that, “[w]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”<sup>193</sup> In applying these standards to women in prison, for example, a federal court has held that strip searches of juvenile female inmates upon admission to detention facilities are reasonably related to a legitimate penological interest.<sup>194</sup>

An inmate must also prove that prison officials have violated “contemporary standards of decency” in order to succeed on a prison conditions claim.<sup>195</sup> Standards of decency as determined by the courts have changed over time.<sup>196</sup> As discussed above, in 1979, in *Estelle v. Gamble*, the Court held that prisoners have a right to adequate medical care.<sup>197</sup> In 1991, in *Wilson v. Seiter*, the Court also included adequate food, warmth, exercise, and safety as essentials that cannot be denied to

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<sup>188</sup> U.S. Const. amend. VIII.

<sup>189</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>190</sup> *Id.*

<sup>191</sup> *Estelle v. Gamble*, 429 U.S. 97, 104-5 (1976) (quoting *Gregg*, 428 U.S. at 173); see also Andrew Cohen, “Cruel and Usual: The Eighth Amendment Turned Upside Down,” *Brennan Center for Justice*, Apr 10, 2019, <https://www.brennancenter.org/blog/cruel-and-usual-eighth-amendment-turned-upside-down>.

<sup>192</sup> See *Estelle*, 429 U.S. at 105; Kendra Weatherhead, “Cruel but Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States,” *Health Matrix*, vol. 13 iss. 2, 2003, p. 429, 436.

<sup>193</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987) (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child).

<sup>194</sup> *N.G. v. Connecticut*, 382 F.3d 225, 235 (2d Cir. 2004).

<sup>195</sup> *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992).

<sup>196</sup> Michael B. Mushlin, *The Rights of Prisoners* § 3:13 (5th ed. 2018).

<sup>197</sup> *Estelle*, 429 U.S. at 103-04.

prisoners.<sup>198</sup> In 1994, in *Farmer v. Brennan*, the Court extended standards of decency to include protection of a transgender inmate from abuse from other inmates.<sup>199</sup> This precedent has been held to apply to protecting women inmates from sexual harassment and abuse.<sup>200</sup>

Under another line of cases, the overall conditions of a prison may be taken into account, and courts may consider a prison “an unconstitutional place.”<sup>201</sup> In 1970, a federal court of appeals affirmed a lower court’s finding that the manner in which inmates were housed, in barracks containing more than 100 inmates with free access to one another at all times, condoned and in some cases encouraged sexual assault and violence.<sup>202</sup> The district court also criticized inadequate medical and dental facilities, unsanitary kitchen conditions, lack of anything but the barest of necessities which resulted in the inability to maintain personal hygiene, and lack of rehabilitation programs as conditions that, alone may not have constituted a violation, but when taken together, “aggravate the more serious defects and deficiencies.”<sup>203</sup> These conditions, when taken in totality, were held to be cruel and unusual, making the entire prison an unconstitutional place.<sup>204</sup> Since this decision, federal courts have identified several factors that have contributed to Eighth Amendment violations.<sup>205</sup> Contributing factors may include, *inter alia*, health and safety hazards created by the physical facilities,<sup>206</sup> overcrowding,<sup>207</sup> absence of an adequate classification system,<sup>208</sup> conditions

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<sup>198</sup> *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (“Some conditions of confinement may establish an Eighth Amendment violation “in combination” when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise”) (emphasis in original).

<sup>199</sup> *Farmer v. Brennan*, 511 U.S. at 833 (“prison officials have a duty ... to protect prisoners from violence at the hands of other prisoners.”) (quoting *Cortes–Quinones v. Jimenez–Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)).

<sup>200</sup> See, e.g., *infra* notes 702-12 and 1291-96.

<sup>201</sup> *Holt v. Sarver*, 309 F. Supp. 362, 383 (E.D. Ark., 1970), *aff’d*, 442 F.2d 304, 308-9 (8<sup>th</sup> Cir. 1971).

<sup>202</sup> *Holt*, 309 F. Supp. at 373, 376-78, *aff’d* and remanded, 442 F.2d 304 (8<sup>th</sup> Cir., 1971) (conditions of confinement in certain circumstances may constitute cruel and unusual punishment).

<sup>203</sup> *Id.* at 380 (inmates were issued only one toothbrush and one tube of toothpaste, no towels, insufficient socks and underclothing, and filthy bedding).

<sup>204</sup> *Id.* at 383.

<sup>205</sup> See Ira P. Robbins & Michael B. Buser, “Punitive Conditions of Prison Confinement: An Analysis of *Pugh v. Locke* and Federal Court Supervision of State Penal Administration Under the Eighth Amendment”, 29 STAN. L. REV. 893, 909-14 (1977).

<sup>206</sup> *Gates v. Collier*, 501 F.2d 1291, 1300 (5<sup>th</sup> Cir. 1974) (discussing fire hazards).

<sup>207</sup> *Pugh v. Locke*, 406 F. Supp. 318, 322, 325 (M.D. Ala. 1976) (showing that overcrowding may exacerbate other prison conditions)).

<sup>208</sup> *Gates*, 501 F.2d at 1308 (stating that classification systems can protect inmates by sequestering violent offenders).

in isolation and segregation cells,<sup>209</sup> substandard or lack of access to medical facilities and treatment,<sup>210</sup> lack of access to personal hygiene and sanitation,<sup>211</sup> incidences of violence and sexual assault,<sup>212</sup> insufficient quantity and training of prison personnel,<sup>213</sup> and lack of rehabilitation programs.<sup>214</sup>

Applying this line of reasoning to women, in 1994, a federal court found the conditions in the District of Columbia correctional facilities for women included repeated rape and sexual assault by prison guards; deprivation of obstetrical and gynecological care, basic sanitation needs, basic shelter needs; fire hazards; poor nutrition; lack of educational programs and work opportunities; lack of religious programs; lack of recreation; and lack of clean clothing.<sup>215</sup> The court found that the overall conditions of the place to be so egregious that it ordered injunctive relief to fix all of these unconstitutional prison conditions.<sup>216</sup> However, upon appeal, the D.C. Circuit Court limited the remedies to those that were clearly necessary to prevent constitutional violations.<sup>217</sup>

The Supreme Court has held that for victims of prison violence or neglect to prevail in demonstrating deliberate indifference, even in the case of sexual abuse, they must prove their case both objectively and subjectively.<sup>218</sup> To meet the objective standard, a plaintiff first must show that

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<sup>209</sup> *Pugh*, 406 F. Supp. at 327-28 (stating that indescribable conditions in solitary confinement cells resulted in torture).

<sup>210</sup> *Estelle*, 429 U.S. at 105.

<sup>211</sup> *Pugh*, 406 F. Supp. at 323 (M.D. Ala. 1976) (stating that inmates had insufficient provision of toothpaste, toothbrushes, shampoo, shaving cream, razors, or combs); *Miller v. Carson*, 401 F. Supp. 835, 869 (M.D. Fla. 1975) (stating that vomit, urine and feces were left on prison floors).

<sup>212</sup> *Pugh*, 406 F. Supp. at 324 (describing the daily occurrences of robbery, rape, extortion, and assault); *Holt* 309 F. Supp. at 376-78 (stating that inmates housed in common barracks were at constant risk of violence and sexual assault from other inmates).

<sup>213</sup> *Holt*, 309 F. Supp. at 373 (stating that the facility had 35 personnel in charge of almost 1,000 inmates).

<sup>214</sup> *Id.* at 379 (showing that lack of rehabilitation programs may make up a constitutional violation when combined with other infractions).

<sup>215</sup> *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 877 F. Supp. 634, 640 (D.D.C. 1994).

<sup>216</sup> *Women Prisoners*, 877 F. Supp. at 679 (D.D.C. 1994); and see *Id.* at 666-670 (approving remedies to correct deliberate indifference to risk of sexual assault, shackling of pregnant women, and of facility conditions that expose women prisoners to high levels of risk of illness or injury) and 671 ("The Court has located conditions which violate the Eighth Amendment not because they produce surroundings which are unattractive or food which is unappetizing. These conditions are cruel and unusual because they combine to create an unconstitutionally high exposure to illness or injury... Apart from the previously mentioned conditions, the Court is reluctant to find unconstitutional anything which simply increases "stress" unless it is truly egregious. For this reason the Court does not find that the daytime noise levels significantly threaten the health of women prisoners").

<sup>217</sup> *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 930-32 (D.C. Cir. 1996).

<sup>218</sup> Russell W. Gray, *Wilson v. Seiter*: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law, 41 Am. U. L. Rev. 1339, 1341 (1992).

she was “incarcerated under conditions posing a substantial risk of serious harm.”<sup>219</sup> To meet the subjective standard, she must show that prison officials acted with deliberate indifference to that risk, which requires a subjective inquiry into prison officials’ state of mind.<sup>220</sup> Although the Supreme Court has held that deliberate indifference may be found if a prison guard knew or should have known of an inmate’s risk of serious illness or injury,<sup>221</sup> it has made clear that negligence does not constitute deliberate indifference.<sup>222</sup> In *Farmer*, the Supreme Court stated that:

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.<sup>223</sup>

But the Court also stated that:

Because, however, prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.

In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official’s duty under the Eighth Amendment is to ensure “reasonable safety[.]”<sup>224</sup>

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<sup>219</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *See also* Michael B. Mushlin, *The Rights of Prisoners* § 3:6 (5th ed. 2018).

<sup>220</sup> *Farmer v. Brennan*, 511 U.S. at 838-39; *Hudson v. McMillan*, 503 U.S. 1, 8 (1992) (internal quotation marks omitted).

<sup>221</sup> *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

<sup>222</sup> *Farmer v. Brennan*, 511 U.S. at 835; *Estelle*, 429 U.S. at 106 (“Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”).

<sup>223</sup> *Farmer v. Brennan*, 511 U.S. at 842 (internal citations omitted).

<sup>224</sup> *Id.* at 844 (internal citations omitted).



At the Commission’s briefing on the status of women in prison, Cardozo Law Professor, Betsy Ginsberg testified she is concerned the subjective standard is too deferential to defendants, stating, “[t]he subjective standard also allows courts to pay tremendous deference to prison officials, often characterizing a prisoner’s Eighth Amendment claim as a disagreement with medical staff that doesn’t rise to the level of deliberate indifference.”<sup>225</sup> Professor Ginsberg testified that “the Eighth Amendment standard places a heavy burden on prisoners to show that prison officials had the requisite intent. This standard allows and even encourages prison officials to remain ignorant of health risks.”<sup>226</sup> Additionally, the litigation required to secure a remedy is costly, time consuming, and oftentimes out of reach for women in prison because they do not have the resources to hire an attorney.<sup>227</sup> She added that, “prisons are designed for men, they aren’t designed to provide healthcare, and women have distinct healthcare needs” and the Eighth Amendment standard can at times become more of a legal barrier that prevents women in prison from receiving adequate care.<sup>228</sup>

Prison officials often cite a lack of funding available to remedy alleged Eighth Amendment violations, or claim that prisoners should address their concerns to state legislatures in order to lobby for a budgetary increase.<sup>229</sup> While budget shortfalls are a legitimate legislative concern, federal courts have held that lack of funding is not a defense to a finding that a prison guard or official was deliberately indifferent to a prisoner’s condition, even if there was a lack of adequate funds to remedy the violation.<sup>230</sup>

In her testimony before the Commission, former chief of DOJ’s Special Litigation Section Julie Abbate stated that although real consent is impossible due to power imbalances between prison guards and female inmates, courts have allowed guards to use consent as a valid defense to allegations of sexual assault at trial.<sup>231</sup> This area of law is still in flux, as the Supreme Court has not yet ruled on the availability of the defense of consent to prison guards and officials, and circuit

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<sup>225</sup> Ginsberg Testimony, p. 137-38.

<sup>226</sup> Ginsberg Testimony, p. 137.

<sup>227</sup> *Ibid.*, 138-39.

<sup>228</sup> *Ibid.*, 135.

<sup>229</sup> Michael B. Mushlin, “The Rights of Prisoners” § 3:92 (5th ed. 2018).

<sup>230</sup> Russell W. Gray, *Wilson v. Seiter*: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law, 41 Am. U. L. Rev. 1339, 1381 (1992); *See, e.g., Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980) (“It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement. ...” (citations omitted)); *Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977) (a lack of financing is not defense for failure to provide minimum constitutional standards in Oklahoma’s prisons).

<sup>231</sup> Julie Abbate, National Advocacy Director, Just Detention International, Written Statement for the Women in Prison Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 5-7 (hereinafter Abbate Statement).

courts of appeal are split on the applicability of the defense. By allowing defendants to claim that a sexual encounter was consensual, federal courts in the Eighth and Tenth Circuits bring into question the woman's behavior around and during the alleged sexual act and may allow inquiry into the woman's past sexual history.<sup>232</sup> However, the Ninth Circuit Court, and recently the Sixth Circuit, have determined that incarcerated female plaintiffs are entitled to a rebuttable presumption that the sexual activity in question was not consensual due to the severe power imbalances that exist between inmates and guards.<sup>233</sup> Under the Ninth Circuit approach, the trial court will examine the defendant's conduct in greater depth, rather than questioning the plaintiff's behavior. There is a presumption that the plaintiff did not consent, and unless that is rebutted, proving custodial sexual contact will establish a constitutional violation.<sup>234</sup>

### ***The Fourteenth Amendment***

#### ***Equal Protection***

The Equal Protection Clause of the Fourteenth Amendment provides that no state may “deny to any person within its jurisdiction the equal protection of the laws.”<sup>235</sup> In order to bring a successful federal Equal Protection claim, a plaintiff must show that a governmental policy is discriminatory on its face or under a facially neutral policy.<sup>236</sup> Furthermore, the policy in question must have a discriminatory impact and the government must have had a discriminatory purpose in creating it, even if men and women are similarly situated.<sup>237</sup> Federal courts, however, have sometimes ruled that men and women prisoners are not in similarly situated positions while incarcerated; therefore the equal protection clause would not apply.<sup>238</sup> For example, courts have found that male and female inmates are not similarly situated in prison security levels, crimes committed, average

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<sup>232</sup> See *Graham v. Sheriff of Logan Cty.*, 741 F. 3d 1118 (10th Cir. 2013); *Hall v. Beavin*, No. 98-3803, 1999 WL 1045694 (6th Cir. 1999); *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997); see also, Abbate Statement, at 5.

<sup>233</sup> *Rafferty v. Trumbull Cnty.*, 915 F. 3d 1087, 1096 (6th Cir. 2019) (inmates are generally regarded as unable to consent to sexual relations with prison staff); *Wood v. Beauclair*, 692 F. 3d 1041, 1049 (9th Cir. 2012) (when a prisoner alleges sexual abuse by a prison guard... the prisoner is entitled to a presumption that the conduct was not consensual); see also Abbate Statement, at 5.

<sup>234</sup> Abbate Statement, at 6.

<sup>235</sup> U.S. CONST. amend. XIV § 1.

<sup>236</sup> Erwin Chemerinsky, Richard A. Epstein, et al. eds., *Constitutional Law: Principles and Policies* (new York: Aspen Publishers, 1997), p. 528-29.

<sup>237</sup> *Ibid.*

<sup>238</sup> Kendra Weatherhead, “Cruel but Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States,” *Health Matrix: The Journal of Law Medicine* 13, iss. 2, (2003): 429-472, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1401&context=healthmatrix>.

length of sentence, child care responsibilities, likelihood of being violent, or the likelihood of being victims of violence, including sexual abuse.<sup>239</sup>

Under the Equal Protection clause, women in prison arguably have the right to facilities and programs that are equal to facilities and programs available to men. For example, in 1979, a federal court held that women in prison must be afforded the same opportunities as men, holding that men in Michigan prisons had access to better educational opportunities, vocational training, work programs, and library facilities.<sup>240</sup>

But the D.C. Circuit Court of Appeals has ruled against Equal Protection claims relating to equal access to programs in prison, reasoning that in the District of Columbia, although women prisoners had access to fewer work and religious programs, because their numbers were smaller, and women were incarcerated for shorter periods than men.<sup>241</sup> Moreover, it implied that views of gender differences could be taken into account, reasoning that:

While certain programs (such as a work detail in auto mechanics) may be available only to male inmates, other programs (such as a life skills class) may be available only to female inmates. Under the program-by-program method of comparison embraced by the dissent, any divergence from an identity of programs gives rise to equal protection liability. Thus, if male inmates have access to a work detail that is unavailable to women, that violates equal protection. If men can spend an extra hour a day in a gymnasium, that violates equal protection. Conversely, if women had access to a parenting class unavailable to men, that violates equal protection. Such an approach completely eviscerates the deference that federal courts are obliged to give prison administrators.<sup>242</sup>

## *Title IX*

Title IX of the Education Amendments Act of 1972 prohibits discrimination on the basis of sex by educational programs receiving federal financial assistance, and is generally enforced by the federal government.<sup>243</sup> Title IX's protections extend to prisons that receive federal funding to offer

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<sup>239</sup> Ibid., 445-46; *See generally*, *Pargo v. Elliot*, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (male and female inmates are not similarly situated); *Klinger v. Dep't of Corrections*, 31 F.3d 727, 731-32 (8th Cir. 1994) (describing ways in which male and female inmates are not similarly situated); *Timm v. Gunter*, 917 F.2d 1093, 1103 (8th Cir. 1990) (different security concerns at male and female prisons means that male and female inmates are not similarly situated).

<sup>240</sup> *Glover v. Johnson*, 934 F. Supp. 703 (6th Cir. 1991).

<sup>241</sup> *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 926-7 (D.C. Cir. 1996).

<sup>242</sup> *Id.* at 926-7.

<sup>243</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1683, 1687; 20 U.S.C. § 1682 ("In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the

educational or vocational programs to inmates.<sup>244</sup> Title IX's protections are difficult to access for women in prison. As applied to educational programs in prisons, courts have held that there is a presumption that men and women's prisons are similarly situated for comparing whether equal opportunity is being provided.<sup>245</sup> Courts have further clarified that prison systems need not offer the same programs, one-to-one, to both men and women in prisons, so long as reasonable similar opportunities are available for women as are available to men.<sup>246</sup> Similarly, in 1997, in the case of *Klinger v. Department of Corrections* regarding Nebraska state prison programs, the Eighth Circuit stated that:

This is not to say that no comparison can be made [between women's and men's educational programs], consistent with Title IX, where there are significant differences between male and female prison populations within a state's correctional system, such as unequal population sizes and lengths of stay. Rather, equal opportunities must be afforded consistent with those differences.<sup>247</sup>

Courts have also questioned which programs fall under Title IX. For example, using the standard articulated by the Eighth Circuit in *Klinger*, the D.C. Circuit Court rejected the application of Title IX to work, recreational, and religious programs for women in prison, because it reasoned that men and women prisoners were not similarly situated.<sup>248</sup> Further, the D.C. Circuit judges "admit[ed] to grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of *educational* opportunities with which Title IX is concerned."<sup>249</sup>

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House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.").

<sup>244</sup> 45 C.F.R. § 86.31(a).

<sup>245</sup> *Klinger v. Department of Corrections*, 107 F.3d 609, 614 (8th Cir. 1997) ("Congress has indicated, by its enactment of § 1681(a) [Title IX] and by the specific language employed therein, that female and male participants within a given federally funded education program or activity are presumed similarly situated for purposes of being entitled to equal educational opportunities within that program or activity.").

<sup>246</sup> *Jeldness v. Pearch*, 30 F.3d 1220, 1228-1229 (9th Cir. 1994).

<sup>247</sup> *Klinger*, 107 F.3d at 616. In *Klinger*, the Title IX claim was lost on other grounds, as the court found that the Nebraska state women's prisons programs did not meet the definition of federally-funded programs falling under Title IX. *Id.*

<sup>248</sup> *Women Prisoners of the D.C. Dep't of Corrections*, 93 F. 3d at 927.

<sup>249</sup> *Id.* (emphasis in original).

*Substantive Due Process*

The Due Process clause of the Fourteenth Amendment states that no state may “deprive any person of life, liberty, or property, without due process of law.”<sup>250</sup> In 1974, the Supreme Court held that due process applies to disciplinary proceedings while incarcerated,<sup>251</sup> but because prison disciplinary proceedings are not part of a criminal prosecution, the “full panoply” of an incarcerated person’s rights are not available.<sup>252</sup> The Court held that the minimum procedures required are determined by balancing the prisoner’s interest against the interest of the prison in maintaining security in the institution, in protecting guards and incarcerated persons against retaliation by other incarcerated persons, and in reducing prison tensions.<sup>253</sup> The Court held that the prison must grant incarcerated persons who are the subject of a disciplinary proceeding “advance written notice of the claimed violation and a written statement of the fact findings as to the evidence relied upon and the reasons for the action taken.”<sup>254</sup> The Supreme Court has also held that there must be a “valid, rational connection” between a prison regulation and a legitimate governmental interest put forward to justify it.<sup>255</sup>

Due process also provides prisoners’ rights to be placed in the least restrictive environment. In 2005, the Supreme Court held that inmates had a liberty interest in avoiding haphazard and erroneous assignment to a state’s highest security prison.<sup>256</sup> However, these rights must be balanced with legitimate security interests, with deference to the judgment of prison officials. For example, when women incarcerated persons challenged being placed in Pennsylvania’s maximum security prison, the D.C. Circuit Court applied the following standard from a 1987 Supreme Court case: “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if ‘prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations.’”<sup>257</sup> The court then held that the prisons’ concern with the capacity for

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<sup>250</sup> U.S. CONST. amend. XIV § 1.

<sup>251</sup> *Wolff*, 418 U.S. at 556.

<sup>252</sup> *Id.* at 556.

<sup>253</sup> *Id.* at 562-63.

<sup>254</sup> *Id.* at 563.

<sup>255</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>256</sup> *Wilkinson v. Austin*, 545 U.S. 209 (2005).

<sup>257</sup> *Baraldini v. Thornburgh*, 884 F.2d 615, 618 (D.C. Cir. 1989).

escape lead to placing the incarcerated persons in high-security confinement, with “a clear basis,” that was therefore reasonable.<sup>258</sup>

### ***Civil Rights of Institutionalized Persons Act (CRIPA)***

The Civil Rights of Institutionalized Persons Act (CRIPA) was enacted in 1980 to protect the constitutional and federal statutory rights of people confined to residential institutions, including prisons, jails, and juvenile facilities, run by or on behalf of state or local governmental entities.<sup>259</sup> CRIPA is somewhat limited, as it only permits DOJ to investigate conditions at state and local facilities, not at federal facilities.<sup>260</sup> The facilities covered include jails and prisons, as well as pre-trial detention centers, juvenile correctional facilities, nursing homes, long-term care facilities, and institutions for persons with psychiatric or developmental disabilities.<sup>261</sup> CRIPA authorizes DOJ to investigate general conditions and practices within state and local correctional institutions, and to file suit upon reasonable cause that inmates are systemically and flagrantly being deprived of their civil rights.<sup>262</sup> CRIPA requires certification before a lawsuit may be filed,<sup>263</sup> and its main feature is that unlike in individual claims, DOJ must show “pattern or practice” of civil rights violations, and therefore the remedies that may be ordered are also systemic. The relevant statutory language provides that:

Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, as defined in section 1997 of this title, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure

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<sup>258</sup> *Id.* at 620.

<sup>259</sup> 42 U.S.C. § 1997-42 U.S.C. § 1997j; *see also* U.S. Dep’t of Justice, Department of Justice, “Activities Under the Civil Rights of Institutionalized Persons Act, Fiscal Year 2018,” Apr. 23, 2019, at 2, <https://www.justice.gov/crt/case-document/file/1160466/download>.

<sup>260</sup> 42 U.S.C. § 1997a(a).

<sup>261</sup> 42 U.S.C. § 1997(1)(B)(ii).

<sup>262</sup> 42 U.S.C. § 1997a(a).

<sup>263</sup> 42 U.S.C. § 1997(b)(a).

the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities[.]<sup>264</sup>

Under this statutory language, DOJ may initiate a lawsuit if it certifies that it has found a pattern or practice of the alleged civil rights violations, the facts supporting the allegations, the remedies required, and that they have notified the Governor as well as the appropriate officials, who have been given reasonable time to correct the violations.<sup>265</sup> DOJ's Special Litigation Section of the Civil Rights Division handles all CRIPA investigations and litigation on behalf of the federal government.<sup>266</sup> As discussed in Chapter 7 of this report (which evaluates DOJ's enforcement efforts), DOJ has brought two recent enforcement actions against women's prisons, two against juvenile facilities for girls, and various other enforcement actions against entities that house both men and women prisoners.<sup>267</sup>

A CRIPA investigation and settlement can have positive effects on conditions for women in prison. For example, in 2015, a federal district court issued a consent decree to resolve pervasive sexual harassment and assault of women prisoners by male staff at Julia Tutwiler Prison in Wetumpka, Alabama, requiring that the state submit to periodic monitoring reports and, among other things, to implement gender responsive policies and staff training, a new camera management plan to ensure inmate safety and privacy, increase staffing levels, educate inmates about their right to be free from sexual harassment and abuse, implement a gender-responsive classification system, and appropriately discipline staff members found to have violated prison policies regarding sexual assault and abuse.<sup>268</sup> This DOJ case and others brought to protect women in prison are discussed in Chapter 7.

Although CRIPA remedies may be systemic and subject to ongoing federal monitoring, more may be needed. The Commission received written testimony from consultant Anadora Moss criticizing CRIPA and stating that the law is only a remedial measure, not designed to detect, protect against, or prevent future civil rights violations.<sup>269</sup> She stated that:

Typically, until a civil lawsuit is filed, most facility staff and agency leadership may have little if any knowledge of the 8th Amendment. Those who do may not believe that the 8th

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<sup>264</sup> 42 U.S.C. § 1997a(a) (emphasis added).

<sup>265</sup> 42 U.S.C. § 1997a(b).

<sup>266</sup> U.S. Dep't of Justice, Special Litigation Section, "Rights of Persons Confined to Jails and Prisons," <https://www.justice.gov/crt/rights-persons-confined-jails-and-prisons> (last updated Aug. 8, 2015).

<sup>267</sup> See *infra* notes 1289-1381.

<sup>268</sup> Settlement Agreement, *United States v. Alabama*, No. 2:15-cv-00368 (M.D. Ala. 2015).

<sup>269</sup> Moss Statement, at 15.

Amendment's prohibition against cruel and unusual punishment would apply to a female inmate's allegation of sexual abuse, as they lack understanding that the conditions of supervision and confinement, to include ignoring the conditions that led to the abuse, can make up an 8th Amendment claim. Like the 8th Amendment, most facility line staff have no real knowledge about CRIPA, or that it is used as an action by the federal government to sue facilities and agencies for unconstitutional conditions of confinement. Until such a suit is filed, CRIPA has no enforcement power, nor is it used as any sort of standard of care that can guide inmate protection. Both of these [CRIPA and PREA] are after-the-fact causes of action, not prevention, protection, or detection of sexual abuse strategies.<sup>270</sup>

### ***Prison Rape Elimination Act (PREA) of 2003 and Subsequent Regulations***

The Prison Rape Elimination Act (PREA)<sup>271</sup> was passed by unanimous votes in both houses of Congress in 2003.<sup>272</sup> It sets national standards for eliminating rape in correctional institutions. These standards can only be enforced by the federal government, and the highest penalty is loss of a small fraction (5 percent) of federal funding.<sup>273</sup> PREA directed the Department of Justice's Bureau of Justice Statistics to analyze incidences of prison rape in federal, state, and local custodial institutions, and to provide information on preventing prison rape.<sup>274</sup> When initially introduced in 1998, the first draft of the bill exclusively addressed sexual abuse between male inmates.<sup>275</sup> Later, Congress included protections for inmates subjected to sexual abuse by prison guards and officials, which occurs to incarcerated women at a much higher rates than incarcerated men.<sup>276</sup> PREA also created the National Prison Rape Elimination Commission, which from 2003 through 2009 studied the issue of prison rape and presented their findings to Congress and the DOJ.<sup>277</sup> After the PREA Commission findings were issued, Congress then added legislative findings that "[t]he total number of inmates who have been sexually assaulted in the past 20 years likely exceeds

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<sup>270</sup> Ibid.

<sup>271</sup> Prison Rape Elimination Act of 2003, Pub. L. 108-70, 117 Stat. 972 (Codified as 34 U.S.C. § 30301 *et seq.*).

<sup>272</sup> See S. 1435, 108<sup>th</sup> Cong. (as passed by Senate on July 21, 2003), <https://www.congress.gov/bill/108th-congress/senate-bill/1435/actions>; S. 1435 108<sup>th</sup> Cong. (as passed by House on July 25, 2003).

<sup>273</sup> See *infra* notes 306-8.

<sup>274</sup> U.S. Dep't of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape, 28 C.F.R. § 115; see also "Prison Rape Elimination Act," National PREA Resource Center, <https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> (accessed Oct. 4, 2019) (hereinafter "Prison Rape Elimination Act," *National PREA Resource Center*).

<sup>275</sup> Brenda V. Smith, Professor of Law and Senior Associate Dean for Faculty and Academic Affairs, American University, Written Statement for the Women in Prison Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 6 (hereinafter Smith Statement).

<sup>276</sup> Smith Statement, at 6.

<sup>277</sup> "Prison Rape Elimination Act," *National PREA Resource Center*.



1,000,000.”<sup>278</sup> Congress found that prisoners who are young, first-time offenders as well as inmates with mental illness are at increased risk of sexual assault,<sup>279</sup> and that “[t]he frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions[.]”<sup>280</sup> There were no findings on gender, but the PREA Findings and Congress also acknowledged that there was still insufficient research on the characteristics of perpetrators and victims.<sup>281</sup> However, considering the high incidence of sexual abuse of women in prison and the systemic conditions associated with it (discussed in Chapter 4 of this report), PREA’s comprehensive standards are needed to protect women’s rights in prison.<sup>282</sup>

After several years’ delay, taking the PREA Commission’s findings and recommendations into account, DOJ promulgated its recommended PREA national standards as federal regulations in 2012.<sup>283</sup> These PREA regulations provide detention rules for all state and federal public correctional institutions, as well as institutions that are administered by a private organization on behalf of the federal government.<sup>284</sup>

The PREA national standard regulations include a number of provisions that, if implemented, may help protect women in prison. Overall, the PREA statute already mandated prevention, detection, and reporting requirements.<sup>285</sup> The more specific PREA regulations more broadly and clearly define what are prohibited forms of sexual abuse (by both staff and other inmates), and sexual harassment (by staff or contractors only).<sup>286</sup> PREA regulations require having a “written policy of maintaining zero tolerance toward all forms of sexual abuse and sexual harassment and outlining an agency’s approach to preventing, detecting, and responding to such conduct.”<sup>287</sup> The regulations

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<sup>278</sup> 34 U.S.C. § 30301(2).

<sup>279</sup> 34 U.S.C. § 30301(3) and (4).

<sup>280</sup> 34 U.S.C. § 30301(2).

<sup>281</sup> *Id.* (more research needed); *see* 34 U.S.C. § 30303(1)(in acknowledgment of a lack of data, requiring the Bureau of Justice Statistics to annually collect and analyses “the incidence[s] and effects of prison rape.”).

<sup>282</sup> *See infra* notes 664-85.

<sup>283</sup> The PREA national standards promulgated by the U.S. Department of Justice are codified at 28 C.F.R. § 115 *et seq.*

<sup>284</sup> Routh et al., “Transgender Inmates in Prisons,” at 9-10; The White House, Office of the Press Secretary, “Presidential Memorandum – Implementing the Prison Rape Elimination Act,” May, 17, 2010, <http://www.whitehouse.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act> (extending PREA to federal facilities); “Private Prisons in the United States,” *The Sentencing Project*, Aug. 2, 2018, <https://www.sentencingproject.org/publications/private-prisons-united-states/> (accessed Oct. 4, 2019).

<sup>285</sup> Moss Statement, at 15.

<sup>286</sup> 28 C.F.R. § 115.6.

<sup>287</sup> *Id.* at §§ 115.211(a).

also include requirements for: keeping and publicizing facility-level data of sexual abuse in custody;<sup>288</sup> requiring audits of every correctional facility within a three-year period;<sup>289</sup> ending cross-gender supervision of women in custody, including viewing and searches;<sup>290</sup> providing greater protection for sexual minorities in custody;<sup>291</sup> creating a mechanism for confidential reporting of abuse in custody;<sup>292</sup> providing access to sexual assault and victim services;<sup>293</sup> training on effective communication strategies;<sup>294</sup> and mandating that facilities must in good faith consider the inmate's gender identification and take associated risks into account when making assignments, including allowing the inmate to shower separately if requested.<sup>295</sup> Furthermore, medical staff are required to have specialized training to address women's health issues.<sup>296</sup>

PREA regulations cover every agency, with agency defined as follows:

Agency means the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents, including the implementation of policy as set by the governing, corporate, or nonprofit authority.<sup>297</sup>

Not only these agencies, but also any entities that an agency contracts for the confinement of residents, must adopt and comply with the PREA regulations.<sup>298</sup> The regulations also state that agencies may not impose a time limit for inmates to file a grievance with allegations of sexual abuse, but they also state that agencies may impose a time limit for any other allegations (such as sexual harassment or other noncompliance).<sup>299</sup> Agencies must ensure that inmates can file grievances alleging sexual abuse without requiring that it be filed with the accused, or letting it be referred to the person accused of sexual assault,<sup>300</sup> and issue a final decision within 90 days after

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<sup>288</sup> *Id.* at § 115.87.

<sup>289</sup> *Id.* at § 115.93.

<sup>290</sup> *Id.* at § 115.15.

<sup>291</sup> *Id.* at §§ 115.41, 115.42 and 115.43.

<sup>292</sup> *Id.* at § 115.51.

<sup>293</sup> *Id.* at § 115.53.

<sup>294</sup> *Id.* at § 115.31.

<sup>295</sup> *Id.* at § 115.42.

<sup>296</sup> Moss Statement, at 3; *see also* 28 C.F.R. §§ 115.31 and 115.35.

<sup>297</sup> 28 C.F.R. § 115.6 (definition of “agency”).

<sup>298</sup> *Id.* at § 115.212.

<sup>299</sup> *Id.* at § 115.52(b)(1) and (2).

<sup>300</sup> *Id.* at § 115.52(c).

the complaint is filed.<sup>301</sup> Agencies must also provide for emergency grievances if there is an imminent risk of sexual abuse, which they must refer to a level of review which allows for immediate corrective action for these grievances agencies must also provide an initial written response within 48 hours and a final agency decision within 5 days.<sup>302</sup> The final agency decision on those grievances must be issued in five days.<sup>303</sup> The grievance regulations also provide that “[t]he agency may discipline an inmate for filing a grievance related to alleged sexual abuse only where the agency demonstrates that the inmate filed the grievance in bad faith,”<sup>304</sup> and that “[n]othing in this section shall restrict the agency’s ability to defend against an inmate lawsuit on the ground that the applicable statute of limitations has expired.”<sup>305</sup>

However, PREA regulations specifically do not require compliance. When DOJ published the final PREA regulations, it clarified that:

For State agencies that receive grant funding from the Department to support their correctional operations, Congress has provided that the Department shall withhold 5 percent of prison-related grant funding to any State that fails to certify that it “has adopted, and is in full compliance with, the national standards,” or that fails to alternatively provide “an assurance that not less than 5 percent” of the relevant grant funding “shall be used only for the purpose of enabling the State to adopt, and achieve full compliance with, those national standards, so as to ensure that a certification [of compliance] may be submitted in future years 42 U.S.C. 15607(c)(2).” For county, municipal, and privately run agencies that operate confinement facilities, PREA lacks any corresponding sanctions for facilities that do not adopt or comply with the standards.<sup>306</sup>

As discussed in Chapter 7, these regulations can lead to a five percent reduction in federal funding, but they rarely do. Moreover, states like Texas have rejected the relevant funding to avoid compliance,<sup>307</sup> and there is no enforcement mechanism against county, municipal or private prisons.<sup>308</sup>

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<sup>301</sup> *Id.* at § 115.52(d).

<sup>302</sup> *Id.* at § 115.52(f)(2).

<sup>303</sup> *Id.* at § 115.52(f)(2).

<sup>304</sup> *Id.* at § 115.52(g).

<sup>305</sup> *Id.* at § 115.52(b)(4).

<sup>306</sup> National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg., 37106, 37196 (June 20, 2012) (codified at 28 C.F.R. § 115).

<sup>307</sup> See *infra* notes 1256-60.

<sup>308</sup> See *supra* note 306; see also 28 C.F.R. § 115.501.

PREA national standard regulations include specific provisions for Lesbian, Gay, Bisexual, Transgender,<sup>309</sup> Intersex<sup>310</sup> (LGBTI) and Gender Nonconforming Inmates,<sup>311</sup> which DOJ describes as follows:

The standards account in various ways for the particular vulnerabilities of inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations. The standards require training in effective and professional communication with LGBTI and gender nonconforming inmates and require the screening process to consider whether the inmate is, or is perceived to be, LGBTI or gender nonconforming. The standards also require that post-incident reviews consider whether the incident was motivated by LGBTI identification, status, or perceived status. In addition,... the final standards do not allow placement of LGBTI inmates in dedicated facilities, units, or wings in adult prisons, jails, or community confinement facilities solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates... such placement is not allowed at all in juvenile facilities.<sup>312</sup>

Based on the findings of the PREA Commission including data showing factors that increase risk of sexual assault, to protect against risk of sexual assault and to protect privacy rights, PREA national standards regulations limit cross-gender viewing and body searches or pat-downs.<sup>313</sup> But if a prison system improperly classifies a transgender inmate, that inmate could be subjected to cross-gender viewing and searches.<sup>314</sup> The PREA standards do, however, state that prison officials are prohibited from searching a transgender inmate for the sole purpose of determining that inmate's genital status.<sup>315</sup> If the prison facility has need to know of the inmate's genital status, it

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<sup>309</sup> Under the regulatory definitions: "Transgender means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person's assigned sex at birth." 28 C.F.R. § 115.5.

<sup>310</sup> The regulations provide that: "Intersex means a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development." 28 C.F.R. § 115.5.

<sup>311</sup> 28 C.F.R. § 115.5 ("Gender nonconforming means a person whose appearance or manner does not conform to traditional societal gender expectations.").

<sup>312</sup> National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg., 37106, 37109-110 (June 20, 2012) (codified at 28 C.F.R. § 115).

<sup>313</sup> For further discussion of the relevant caselaw, *see infra* notes 915-67.

<sup>314</sup> 28 C.F.R. § 115.15(a).

<sup>315</sup> *Id.* at § 115.15(e).

may only learn that information through conversations with the inmate, medical records, or as part of a broader medical examination conducted by a medical professional in private.<sup>316</sup> Furthermore:

In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, an agency may not simply assign the inmate to a facility based on genital status. Rather, the agency must consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems, giving serious consideration to the inmate's own views regarding his or her own safety. In addition, transgender and intersex inmates must be given the opportunity to shower separately from other inmates.<sup>317</sup>

PREA further restricts the practice of placing inmates who have reported being the victim of a sexual assault in protective custody, which is also known as “segregation,” or solitary confinement, under the rationale that such measures will protect the inmate from further contact with the alleged assailant or harasser.<sup>318</sup> Inmates may only be placed in protective custody if all other available alternatives to protect the inmate have been assessed and deemed inadequate.<sup>319</sup>

These rights are specific and comprehensive, but when passing PREA, Congress did not create a private cause of action through which victims of sexual assault in prison could easily bring a lawsuit against specific officials or agencies that have not fully or effectively implemented PREA reforms.<sup>320</sup> In order to file a lawsuit, inmates must claim another violation, which is typically made under the Eighth Amendment or Section 1983.<sup>321</sup> As discussed above, that constitutional violation requires proof of intent (deliberate indifference), a higher standard.<sup>322</sup> Also, DOJ has used evidence of PREA violations in its CRIPA lawsuits against institutions with a pattern or practice of violations.<sup>323</sup>

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<sup>316</sup> *Id.*

<sup>317</sup> 77 Fed. Reg. 37,110.

<sup>318</sup> 28 C.F.R. § 115.43.

<sup>319</sup> *Id.*

<sup>320</sup> Lena Palacios, “The Prison Rape Elimination Act and the Limits of Liberal Reform,” *University of Minnesota, The Gender Policy Report*, Feb. 17, 2017, <https://genderpolicyreport.umn.edu/the-prison-rape-elimination-act-and-the-limits-of-liberal-reform/> (hereinafter Palacios, “The Prison Rape Elimination Act and the Limits”).

<sup>321</sup> Billy Scaltsas, “The Prison Litigation Reform Act (PLRA): Shielding Prisons from Accountability for Sexual Abuse,” *Lambda Legal*, June 13, 2015, [https://www.lambdalegal.org/blog/20150613\\_humphrey-plra](https://www.lambdalegal.org/blog/20150613_humphrey-plra).

<sup>322</sup> *See supra* notes 191 and 218-26.

<sup>323</sup> *See infra* Table 11 and notes 1287-90.

The Gender Policy Report states that some prison officials have been misinterpreting PREA standards to discipline prisoners for consensual sexual activity or non-gender conforming sexual behavior, sometimes resulting in criminal prosecutions.<sup>324</sup> Also, in response to PREA, some prisons have implemented a blanket ban on any sexual activity, which disproportionately affects LGBT inmates.<sup>325</sup> Conversely, some prison staff have been misinterpreting PREA by claiming that transgender inmates consented to sexual activity, when in fact they had been victims of sexual assault.<sup>326</sup>

At the Commission's briefing, American University Law Professor Brenda Smith provided testimony that PREAs' effectiveness has been limited in part by the Violence Against Women Act of 1994 (VAWA).<sup>327</sup> The 1994 VAWA and its 2000 Reauthorization have prohibited federal funding of any services helping any person with a felony conviction,<sup>328</sup> meaning that organizations specializing in assisting women in prison were forced in some cases to choose between accepting federal VAWA funds and assisting female inmates who have been victims of custodial sexual abuse.<sup>329</sup> Professor Brenda Smith published a law review article finding that:

While initially enacted to prevent male perpetrators from gaining access to funds meant to assist female victims, the prohibition found in both VAWA I and VAWA II on the use of funds for any individual in custody, means that the significant number of women in prison with histories of physical and sexual abuse both prior to and during imprisonment are ineligible for services funded by VAWA II, the largest source of funding nationally for these programs.<sup>330</sup>

The 2019 VAWA Reauthorization Act, H.R. 1585, would, if enacted, allow funding to be used for services for women prisoners who have been abused, but the assistance could only be provided while in a custodial setting, not after they have left prison.<sup>331</sup> Further, the proposed legislation as

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<sup>324</sup> Palacios, "The Prison Rape Elimination Act and the Limits."

<sup>325</sup> Ibid.

<sup>326</sup> See, *Battista v. Clarke*, 645 F. 3d 449, 452 (1st Cir. 2011); see also Palacios, "The Prison Rape Elimination Act and the Limits."

<sup>327</sup> Smith Statement, at 7; The Violence Against Women Act, Title IV of P.L. 103-322, 108 Stat. 1796 (1994) (Codified at 34 U.S.C. § 12291 *et seq.*).

<sup>328</sup> 34 U.S.C. § 20101; 67 Fed. Reg. 56444 (Sept. 3, 2002); see also Brenda V. Smith, "Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery," 33 Fordham Urb. L. J. 571, 592 (2006) (hereinafter Smith, "Sexual Abuse of Women in United States Prisons.>").

<sup>329</sup> Smith Statement, at 7.

<sup>330</sup> Smith, "Sexual Abuse of Women in United States Prisons," p. 592.

<sup>331</sup> Smith Statement, at 7; see also Violence Against Women Reauthorization Act of 2019, H. R. 1585, 116th Cong. (2019) (passed House, awaiting vote in the Senate), <https://www.congress.gov/bill/116th-congress/house->

passed in the House would introduce additional data collection about women in prison.<sup>332</sup> As of this writing, the bill has not yet been taken up in the Senate.<sup>333</sup>

### ***Further Federal Legal Protections for Women in Prison, and Barriers to Enforcement***

Inmates' constitutional and statutory rights can also be upheld through federal statutes prohibiting deprivation of civil rights, including under 42 U.S.C. § 1983 ("Section 1983"), which is a modern codification of the post-Reconstruction Enforcement Acts that prohibit deprivation of civil rights.<sup>334</sup>

Section 1983 permits prisoners to sue local or state officials whom they believe to have violated the federal rights of the prisoners in some way.<sup>335</sup> Section 1983 has been successfully used by female prisoners to hold prison officials liable for their actions, such as in *Giron v. Corrections Corp. of America*, when a corrections official was found liable for the rape of a female prisoner.<sup>336</sup>

Prisoners' constitutional rights can be enforced against federal government officials in a type of lawsuit called *Bivens* actions. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court allowed individuals to hold federal officials acting under the color of law liable for money damages for violating an individual's constitutional rights.<sup>337</sup> However, *Bivens* does not allow for lawsuits against federal agencies or entities, as it only applies to the

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[bill/1585/text#toc-HB83E7824A6FF4289868F260536D49D1D](https://www.congress.gov/bills/116/congress/house-bill/1585/text#toc-HB83E7824A6FF4289868F260536D49D1D) (text of bill), <https://www.congress.gov/bill/116th-congress/house-bill/1585/actions> (accessed Oct. 1, 2019).

<sup>332</sup> Violence Against Women Reauthorization Act of 2019, H. R. 1585, at § 1103.

<sup>333</sup> *Id.*

<sup>334</sup> 42 U.S.C. § 1983; *see also* 42 U.S.C. § 1985 (conspiracy to deprive civil rights).

<sup>335</sup> *Monroe v. Pape*, 365 U.S. 167 (1961); *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978).

<sup>336</sup> *Giron v. Corrections Corp. of America*, 14 F. Supp. 2d 1245, 1247-51 (D.N.M. 1998) ("[Defendant] forced [plaintiff] to have sex with him under color of state law because he exercised coercive authority over her through his employment, and because he used his employment to gain access to her—he used his state-conferred authority as a corrections officer to accomplish the deed").

<sup>337</sup> *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397-98 (1971) (holding that the Constitution implicitly creates a private cause of action against federal government officials who violate Constitutional rights).

individual officials.<sup>338</sup> And while a *Bivens* action does allow for prisoners to recover monetary damages, it does not permit a court to order injunctive relief.<sup>339</sup>

Additionally, legal doctrines of immunity provide formidable shields from liability for prison officials. The doctrine of sovereign immunity provides that federal and state entities (and officials acting in their official capacity for such entities) are immune from liability unless it is specifically waived.<sup>340</sup> For example, some prison officials have been sued by women under the Federal Tort Claims Act, which provides that they may be held liable in the same manner as a private person for negligence.<sup>341</sup> However, the Act specifically did not waive the exception for discretionary activities, which are those falling outside of actions taken on behalf of the entity.<sup>342</sup> In several cases, prison officials have successfully utilized the discretionary defense to avoid liability for failure to protect women in prison against abuse.<sup>343</sup>

Another form of immunity, qualified immunity, is also available to government officials who are acting in their official capacity at the time and did not or could not have reasonably known that their conduct would violate clearly established constitutional or statutory rights.<sup>344</sup> Qualified immunity can be overcome by a plaintiff if she is able to establish that, 1) a constitutional right was violated due to the officer, and 2) the violated right was clearly established.<sup>345</sup> Put differently, in addition to a constitutional right existing, a prison official must have had notice that his or her actions would clearly result in a violation of constitutional rights.<sup>346</sup>

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<sup>338</sup> Rachel Meeropol and Ian Head, eds., *Jailhouse Lawyer's Handbook*, (Center for Constitutional Rights and the National Lawyers Guild, 5th ed. 2010), ch. 2, <http://jailhouselaw.org/bivens-actions-federal-injunctions/>; (hereinafter Meeropol and Head, *Jailhouse Lawyer's Handbook*); Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 325 (2012) [https://scholarship.law.uci.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1049&context=faculty\\_scholarship](https://scholarship.law.uci.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1049&context=faculty_scholarship).

<sup>339</sup> *Bivens*, 403 U.S. at 410 (1971) (“It is damages or nothing.”).

<sup>340</sup> See *infra* notes 724-40 (discussing sovereign immunity defense in cases brought by women in prison).

<sup>341</sup> Federal Tort Claims Act of 1946, Pub. L. 80-773, 62 Stat. 869 (codified as 28 U.S.C. § 1346(b)(1); see also *infra* notes 722-23.

<sup>342</sup> See *infra* note 724.

<sup>343</sup> See *infra* notes 725-34.

<sup>344</sup> See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

<sup>345</sup> *Id.* and see *Saucier v. Katz*, 533 U.S. 194, 201-2 (2001).

<sup>346</sup> See *Saucier*, 533 U.S. at 202 (“If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” See *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law’)).



Enacted in 1996, the Prison Litigation Reform Act<sup>347</sup> also imposes restrictions on prisoners' ability to pursue legal claims in an effort to reduce the number of suits filed in the courts by inmates. It requires that prisoners exhaust all available administrative remedies before bringing any federal civil rights claims.<sup>348</sup> Moreover, the statutory provisions permit federal judges to directly dismiss an action that is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."<sup>349</sup> Such cases may be dismissed after a motion by defense counsel or by the court itself.<sup>350</sup> Research indicates that the Prison Litigation Reform Act limits meritorious claims as well as frivolous ones, counter to the framer's objective.<sup>351</sup> Moreover, unlike any other action brought under Section 1983 to enforce civil rights, the Prison Litigation Reform Act also requires that inmates suffer a physical injury in order to file a lawsuit, unless there was a prior sexual act.<sup>352</sup> This is evident in the following statutory language: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act."<sup>353</sup>

The Prison Litigation Reform Act also limits attorneys' fees to 25 percent of the total judgment for plaintiffs, and the hourly rate that their attorneys may receive is limited to 150 percent of that of public defenders.<sup>354</sup> Legal scholarship has noted the fees prohibition is contrary to the stated intent of the law – to deter frivolous cases – because it only applies to meritorious cases.<sup>355</sup> The Commission received testimony from Cardozo Law Professor Betsy Ginsberg that two of these

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<sup>347</sup> The Prison Litigation Reform Act is codified in part at 42 U.S.C. § 1997e(a) (requiring that inmates exhaust all administrative remedies before filing suit); 42 U.S.C. § 1997e(d) (limiting attorneys' fees); 42 U.S.C. § 1997e(e) (proof of purely mental or emotional injury is not enough to recover damages, inmates must show physical injury in order to recover); 28 U.S.C. § 1915(b) (requiring that plaintiffs pay court fees in full, court fees cannot be waived); 28 U.S.C. § 1915(g) (implementing the 'three strikes rule' requiring that each lawsuit or appeal filed by an inmate that is dismissed for being frivolous, malicious, or fails to state a claim counts as a 'strike.' After three strikes, inmates are no longer allowed to file additional lawsuits *in forma pauperis* meaning that all court filing fees must be paid up front).

<sup>348</sup> 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

<sup>349</sup> 42 U.S.C. § 1997e(c) (as amended by the Prison Litigation Reform Act of 1996, Pub. L. 104-134, 110 Stat. 1321-71).

<sup>350</sup> *Id.*

<sup>351</sup> See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. no. 6, p. 155, (2003).

<sup>352</sup> 42 U.S.C. § 1997e(e).

<sup>353</sup> *Id.*

<sup>354</sup> 42 U.S.C. § 1997e(d) (as amended by the Prison Litigation Reform Act of 1996, Pub. L. 104-134, 110 Stat. 1321-71) (attorneys' fees limited to 25% of judgment for plaintiff, with excess to be paid by the defendant but only up to 150% of the judgment, and the hourly fees being limited to 150% of that of public defenders).

<sup>355</sup> See, e.g., David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453-1462, at 1456 (2010).

hurdles, the administrative exhaustion provision and the attorneys' fees provision, make it particularly difficult for prisoners to have their cases heard in court.<sup>356</sup> Ginsberg explained that the exhaustion of administrative remedies requirement allows prison officials to control inmates' access to the courts by making grievance forms unavailable, making the process complicated and technical, and retaliating against prisoners who file grievances.<sup>357</sup> Prisons may also require that inmates begin the administrative process within a short window after the alleged incident, sometimes in as few as 15-30 days.<sup>358</sup> Law Professor Gabriel Arkles asserts that, "Particularly for survivors reeling from the trauma of sexual abuse and reasonably fearful of retaliation for complaining about it, a two-week timeline is often not feasible."<sup>359</sup>

By limiting attorneys' fees, the Prison Litigation Reform Act makes it more difficult for prisoners to hire lawyers to represent them,<sup>360</sup> and most inmates are forced to represent themselves (pro se), thus making the unrepresented incarcerated less likely to succeed.<sup>361</sup> Former San Quentin warden and California corrections director Jeanne Woodford has stated, "[private] litigation is probably the only thing that allows us to do our jobs as professionals...I said to the judge, 'if it wasn't for this litigation, I wouldn't be able to do my job as a warden, and my job as a warden is to keep everyone safe.'"<sup>362</sup> In her testimony before the Commission, Professor Betsy Ginsberg stated that "[t]he attorneys' fees provision essentially guts fees-shifting that is otherwise available in civil rights actions by drastically reducing the fees that lawyers can recover after bringing a successful prisoners' right case, which is a provision that further compounds the access to counsel problem."<sup>363</sup>

The following chapters will examine how the above civil rights law framework does or does not protect the fundamental rights of women in prison through the various stages of their incarceration.

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<sup>356</sup> Ginsberg Testimony, at 137.

<sup>357</sup> Ibid.

<sup>358</sup> Billy Scaltsas, "The Prison Litigation Reform Act (PLRA): Shielding Prisons from Accountability for Sexual Abuse," *Lambda Legal Blog*, June 13, 2015, [https://www.lambdalegal.org/blog/20150613\\_humphrey-plra](https://www.lambdalegal.org/blog/20150613_humphrey-plra) (hereinafter Scaltsas, "The Prison Litigation Reform Act (PLRA): Shielding Prisons from Accountability for Sexual Abuse").

<sup>359</sup> Gabriel Arkles, *Prison Rape Elimination Act and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. OF LEGIS. AND PUB. POL'Y 801, 810 (2014), <https://www.nyujlpp.org/wp-content/uploads/2015/03/Arkles-Prison-Rape-Elimination-Act-Litigation-17nyujlpp801.pdf> (hereinafter Arkles, *Prison Rape Elimination Act and the Perpetuation of Sexual Harm*).

<sup>360</sup> Scaltsas, "The Prison Litigation Reform Act (PLRA): Shielding Prisons from Accountability for Sexual Abuse."

<sup>361</sup> Ibid.

<sup>362</sup> David Fathi, "No Equal Justice: The Prison Litigation Reform Act in the United States," *Human Rights Watch*, June 16, 2009, <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states#8f215f>.

<sup>363</sup> Ginsberg Testimony, p. 137; U.S. Dep't of Justice, *Objective Prison Classification: A Guide*, p. xviii.

## CHAPTER 2: CLASSIFICATION, PLACEMENT, FAMILY DISRUPTION, AND PARENTING

### Background on Women in Prison and Custodial Classification

Prior to or when a woman first enters the prison system, she will be subject to custodial classification. Classification and needs/risk assessment tools are used at all levels of corrections, and they determine where an individual will be housed and consequently, conditions of confinement, including what programs may be available to the individual. Custodial classification uses actuarial tools to predict factors such as a prisoner's likelihood of re-offending, and whether prisoners will pose security risks to themselves, fellow inmates, and prison staff.<sup>364</sup> The literature on custodial classification also stresses the importance of using both static factors, which are unchangeable aspects of a person (e.g. criminal record), and dynamic factors, which are aspects of the individual that are amendable and can be addressed through treatment (e.g. drug or alcohol abuse and other criminogenic needs), in developing classification systems.<sup>365</sup> Valid and equitable classification is critical because how inmates are classified impacts decisions regarding their programming, housing, and work assignments.<sup>366</sup> According to a 2004 National Institute of Corrections publication on objective prisoner classifications, which included guidelines for facilities, providing accurate classification assignments is also vital to allowing for prisoners to live in the least restrictive environment possible and have access to suitable programs, which allows them more opportunities to return to their community rehabilitated.<sup>367</sup> In addition to custodial classification, many prison facilities also assess an individual's needs for rehabilitative

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<sup>364</sup> Salisbury Statement, at 3; see also U.S. Dep't of Justice, National Institute of Corrections, *Classification of Women Offenders: Gender-Responsive Approaches to Risks/Needs Assessment*, by Patricia Van Voorhis, 2004, pp. 2-3, 5, <https://nicic.gov/classification-women-offenders-gender-responsive-approach-riskneeds-assessment>; (hereinafter DOJ, *Classification of Women Offenders: Gender-Responsive Approaches*.); see also U.S. Dep't of Justice, National Institute of Corrections, *Objective Prison Classification: A Guide for Correctional Agencies*, by James Austin and Patricia Hardyman, 2004, p. 4,

<https://s3.amazonaws.com/static.nicic.gov/Library/019319.pdf> (hereinafter DOJ, *Objective Prison Classification: A Guide*).

<sup>365</sup> U.S. Dep't of Justice, National Institute of Corrections, *Developing Gender-Specific Classification Systems for Women Offenders*, by Patricia L. Hardyman and Patricia Van Voorhis (2004) p.viii-ix, <https://nicic.gov/developing-gender-specific-classification-systems-women-offenders> (hereinafter DOJ, *Developing Gender-Specific Classification Systems for Women Offenders*.); see also Salisbury Statement, at 4-5 (defining criminogenic needs as factors that are "statistically predictive of future criminal behavior and, when treated, reduce an individual's likelihood of engaging in criminal behavior (e.g., substance abuse, antisocial attitudes, lack of employable skills, educational needs)").

<sup>366</sup> DOJ, *Classification of Women Offenders: Gender-Responsive Approaches*, p 4.

<sup>367</sup> DOJ, *Objective Prison Classification: A Guide*, p. 4; see also Salisbury Statement, at 4.

programs, treatment, and services upon entering prison through needs assessment tools, which will also be discussed in this chapter.<sup>368</sup>

In the late 1990s to the late 2000s, the National Institute of Corrections, a division of the Department of Justice's Federal Bureau of Prisons (BOP), funded several cooperative agreements and published related reports intended to better understand the landscape and efficacy of custodial classification practices for women in prison in the U.S.<sup>369</sup> The aforementioned cooperative agreements and reports demonstrated that most of the state Departments of Corrections and the BOP primarily use the same classification system for both men and women in prison.<sup>370</sup> Researchers and practitioners have come to different conclusions concerning the appropriateness of using the same classification system for both men and women in prison. On the one hand, some experts argue that women entering prison generally have trauma histories and needs that are distinct from men, which, they argue, requires correctional institutions to develop and implement gender-responsive programming, policies, and classification systems for women in prison.<sup>371</sup> On the other hand, other experts assert that prisons often, and should, take a gender-neutral approach

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<sup>368</sup> Salisbury Statement, at 5.

<sup>369</sup> National Institute of Corrections uses cooperative agreements to execute much of the agency's strategic plan. These agreements are a form of assistance relationship whereby National Institute of Corrections is involved during the performance of award. See U.S. Dep't of Justice, National Institute of Corrections, *About NIC Overview*, <https://nicic.gov/about-us> (accessed Aug.19, 2019); see also DOJ, *Developing Gender-Specific Classification Systems for Women Offenders*, p. 9, 12-14. (noting that the aforementioned classification cooperative agreements were administered by Dr. Patricia Van Voorhis, at the Center for Criminal Justice Research at the University of Cincinnati, who provide technical assistance to Colorado, Hawaii, and Nebraska and Dr. Patricia Hardyman at the Institute on Crime, Justice and Corrections at George Washington University, who provided technical assistance to Florida, Idaho, West Virginia, and Wisconsin); see also Patricia Van Voorhis, Jennifer Peiler, Lois Presser, Georgia Spiropoulis, and Jennifer Sutherland, *Classification of Women Offenders: A National Assessment of Current Practices and the Experiences of Three States*, The Center for Criminal Justice Research, University of Cincinnati, pp. 2, 10-11, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.124.448&rep=rep1&type=pdf> (accessed Oct.18, 2019) (noting results of the cooperative agreements on women in prison and classification systems) (hereinafter Van Voorhis et al., *Classification of Women Offenders: A National Assessment of Current Practices and the Experiences of Three States*).

<sup>370</sup> See, e.g. U.S. Dep't of Justice, National Institute of Corrections, *Women Offenders: Programming Needs and Promising Approaches*, by Merry Morash, Timothy Bayum, and Barbara Koons (Aug. 1998), p. 3 <https://www.ncjrs.gov/pdffiles/171668.pdf> (hereinafter DOJ, *Women Offenders: Programming Needs and Promising Approaches*) (noting that "[d]espite women's different needs, circumstances, and risk profiles, the same classification instrument was used for women and men in 39 [s]tates; in 7 [s]tates the instrument for men was adapted for women, and in 3 [s]tates a special instrument was used"); see also Salisbury Statement, at 4.

<sup>371</sup> Barbara Owen, James Wells, and Jocelyn M. Pollock, *In Search of Safety: Confronting Inequality in Women's Imprisonment*, (Oakland: University of California Press, 2017), p. 36-8 (hereinafter Owen et al., *In Search of Safety*); see also DOJ, *Developing Gender-Specific Classification Systems for Women Offenders*, p. 11, 27.; see also Salisbury Statement, at 4; see also Mooney Statement, at 7-8.

to their classification tools and other policies in order to avoid disparities issues or legal challenges, and to maximize efficiency in their classification process.<sup>372</sup>

### *Custodial Classification and Women in State Prisons*

In 2001, the National Institute of Corrections published the results of a national survey of state correctional classification directors finding that only 14 states validated<sup>373</sup> their respective classification systems on women in prison for accuracy in assigning them to an appropriate risk level.<sup>374</sup> According to the survey, classification directors believed that the gender-neutral systems were creating problems of over-classification—defined as placing a person in a higher risk or custodial classification than is necessitated based on the actual level of threat posed by his or her behavior—for women in prison.<sup>375</sup> Professor Emily J. Salisbury, Associate Professor of Criminal Justice at the University of Nevada, Las Vegas, testified regarding the impact that over-classification may have on women in prison. In particular, Dr. Salisbury stated that:

[t]hese custody systems often violate the legal mandate for holding prisoners in the least restrictive environment. Even if women are held in a single prison despite their custody levels (as is the case in many state departments of corrections) the proscriptive labels of maximum, medium, and minimum custody determine nearly every subsequent decision made on behalf of the imprisoned person (e.g., assigned housing unit, freedom of movement throughout the prison facility, types of restraints required while transporting, access to programming and visitation, access to personal property, etc.). *In other words, if custody classification on the front end of the intake process goes wrong, it goes wrong throughout the rest of her sentence, potentially even affecting her community placement and reentry opportunities upon release.*<sup>376</sup>

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<sup>372</sup> Tim Brennan, “Institutional Classification of Females: Problems and Some Proposals for Reform,” in *Female Offenders: Critical Perspectives and Effective Intervention*, ed. Ruth T. Zaplin, (New York: Aspen Publishers, 1998), p. 179-20 (hereinafter Brennan, “Institutional Classification of Females: Problems and Some Proposals for Reform”).

<sup>373</sup> See DOJ, *Objective Prison Classification; A Guide*, p. 7 (noting that classification validation refers to the “accuracy of the classification system in predicting a prisoner’s behavior and assigning him or her to an appropriate risk level.”).

<sup>374</sup> Van Voorhis et al., *Classification of Women Offenders: A National Assessment of Current Practices and the Experiences of Three States*, p. 12.

<sup>375</sup> Ibid., 12 ; see also U.S. Dep’t of Justice, National Institute of Corrections, *Achieving Accurate Pictures of Risk and Identifying Gender Responsive Needs: Two New Assessments for Women Offenders*, by Patricia Van Voorhis, Emily Salisbury, Emily Wright, and Ashley Bauman (Jan. 2008), p. 2, <https://s3.amazonaws.com/static.nicic.gov/Library/022844.pdf>.

<sup>376</sup> Salisbury Statement, at 4 (emphasis added); see also Salisbury Statement, p. 34 (noting that “[t]he cost of treating women like men are vast and exacerbated in confinement settings. A body of research shows that when we use offender risks and needs assessments designed for men with women, they most typically end up over-classifying women. This means that they over-predict women’s likelihood of engaging in misconducts in prison and recidivism

Some state departments of corrections make modifications to their gender-neutral classification systems in an effort to provide more suitable classification assignments for women in prison. This is because among other factors, on average, women in prison score lower on risk assessment scales than their male counterparts and have lower base rates of criminal history.<sup>377</sup> These systems typically employ one of three modification strategies to better address the needs of women in prison: override scored custodial levels, adjust risk factors, or develop distinct classification systems for women in prison.<sup>378</sup> First, prison officials may use classification and assessment score overrides or different cutoff scores to correct for the over-classification of women in prison, such that a woman's score must be higher than a man's before a given custodial classification will show analogous predicted rates of recidivism.<sup>379</sup> Research suggests that while this common modification may be beneficial as a short-term resolution for addressing a state's concerns about gender over-classification, long-term problems may be presented as often, these classification decisions are based on subjective overrides rather than statistically corroborated risk factors.<sup>380</sup> A second method is to adjust the current risk factors for women in prison.<sup>381</sup> This strategy is usually employed by state prisons that have studied and found a statistically significant difference in the predictive power of the risk factors for their male and female inmates.<sup>382</sup> In particular, the most common risk factors modified to better measure the potential risk posed by women in prison include: criminal history, current offense, institutional adjustment, education, history of substance abuse, and mental health issues.<sup>383</sup> Third, on rare occasions, state prisons use entirely separate systems for assessing risk amongst men and women in prison.<sup>384</sup>

In its 2004 guidelines issued to facilities, based on the following reasoning, the National Institute of Corrections concluded that the first option, modifying risk factors, was best for women:

NIC has long advocated for the validation of any classification system within the population to which it is to be applied. The analyses highlighted in this chapter should be

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in the community. This over prediction causes prisons to keep women in more severe prison conditions and to put more restrictions on them than is warranted by their behavior compared to men.”)

<sup>377</sup> Brennan, “Institutional classification of females: Problems and some proposals for reform,” p. 188-9.

<sup>378</sup> DOJ, *Objective Prison Classification: A Guide*, p. xviii.

<sup>379</sup> Ibid.; see also Brennan, “Institutional classification of females: Problems and some proposals for reform,” pp. 188-9.

<sup>380</sup> DOJ, *Objective Prison Classification: A Guide*, p. xviii; see also Brennan, “Institutional classification of females: Problems and some proposals for reform,” p. 188-9.

<sup>381</sup> DOJ, *Objective Prison Classification: A Guide*, p. xviii.

<sup>382</sup> Ibid.

<sup>383</sup> Ibid., 51.

<sup>384</sup> Ibid., 55-6.

replicated in other jurisdictions before final conclusions are drawn. Nevertheless, modifying current risk factors and/or scale cut points is the best option for making classification systems more responsive to the risk and needs of women prisoners because it refines risk factors and tests them in the population to which they will be applied. This strategy also provides the opportunity to develop and test new factors to assess the risk posed by women prisoners. The other two strategies, which do not rely on objective, reliable assessments, are at best short-term options for managing women prisoners during the development and pilot testing of a more gender-responsive system.<sup>385</sup>

Several state Departments of Corrections have used some of the aforementioned modifications to their classification system to attempt to better address the needs of women in prison. These classification changes have usually come about as a result of litigation or a federal court mandate regarding parity and conditions of confinement for women in prison.<sup>386</sup> Others have come about through federally funded initiatives such as cooperative agreements with the National Institute of Corrections that provided technical assistance to seven state Departments of Corrections (i.e. Colorado, Florida, Hawaii, Idaho, Nebraska, West Virginia, and Wisconsin).<sup>387</sup> While each state Department of Corrections had a unique set of issues and questions regarding the classification of its women inmates, distinct patterns arose across all states that participated in the cooperative agreements.<sup>388</sup> With the assistance of the National Institute of Corrections, the aforementioned state Departments of Corrections modified their classification systems using tested methods to avoid over-classification.<sup>389</sup> This included introducing dynamic risk factors – as opposed to static demographic or criminal history data – into their assessment tools.<sup>390</sup> By including such factors as age, education, employment, and performance in institutional programs and work, institutions were able to more accurately classify women in their systems.<sup>391</sup>

Leann Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation testified that many women in North Dakota prison are mothers of young children. She shared that Native American women are disproportionately imprisoned, as they are only 5 percent of the

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<sup>385</sup> Ibid.

<sup>386</sup> Moss Statement, at 14.

<sup>387</sup> DOJ, *Developing Gender-Specific Classification Systems for Women Offenders*, p. xi; see also Salisbury Statement, at 5.

<sup>388</sup> DOJ, *Developing Gender-Specific Classification Systems for Women Offenders*, p. 12.

<sup>389</sup> Ibid., xi-xiv.

<sup>390</sup> Ibid.

<sup>391</sup> Ibid.

population, but make up 34 percent of women in prison in her state.<sup>392</sup> She stated that “Native American women have specific family, cultural, spiritual, and criminogenic needs that the [North Dakota Department of Corrections and Rehabilitation] ND DOCR must provide,” and in particular, being far from reservations has been problematic, but they will soon move to a more central location closer to reservations and therefore closer to services.<sup>393</sup>

Several other state Departments of Corrections have begun to make amendments to their classification systems to better address the needs of women in prison (e.g., Alabama, California, Connecticut, Massachusetts, Missouri, Nevada, Oregon, and Rhode Island).<sup>394</sup> For example, Wendy Still, Chief Probation Officer of Alameda County, California testified at the Commission’s February 2019 briefing that California updated its Penal Code to include classification and programmatic changes for women in prison. Ms. Still stated that:

what the Penal Code required was that, for each woman coming into prison, that there would be an individual treatment and rehabilitative plan that was aligned services that the Department would review and update, and create a system of classifications specifically related to women prisoners, women inmates. Also, that there would be a staffing review; that specialized training for officers would take place, working in women’s prisons; that programs would be created that were gender-responsive and trauma informed.<sup>395</sup>

Dr. Salisbury suspects that these changes in prisons always run the danger of being eradicated when a prison’s administration changes.<sup>396</sup> This is why, in addition to the changes in their policies and procedures on behalf of women in prison, many experts also stress the importance of cultural changes in women’s prisons, and the most cogent way to sustain cultural changes in women’s prisons is for leadership to illustrate these changes and to properly train their staff on new policies and procedures.<sup>397</sup>

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<sup>392</sup> Bertsch Testimony, p. 204 -5.

<sup>393</sup> Bertsch Testimony, p. 205.

<sup>394</sup> Salisbury Statement, at 5.

<sup>395</sup> Still Statement, p. 267.

<sup>396</sup> Salisbury Statement, at 5.

<sup>397</sup> Moss Statement, at 15; *see also* Williams Statement, p. 216, Bertsch Testimony, p. 248.



### *Custodial Classification and Women in Federal Prisons*

BOP states that upon sentencing by a federal district court, it has sole responsibility for where a prisoner will serve the prisoner's sentence, according to its internal rules set forth in a Program Statement consistent with federal statutory authority.<sup>398</sup> Moreover:

The expected results of this Program Statement are:

- a. Each inmate will be placed in a facility commensurate with their security and program needs through an objective and consistent system of classification which also allows staff to exercise their professional judgment; and,
- b. Staff will systematically and objectively review an inmate's classification making the environment in which they are housed safer for both inmates and staff while protecting the public from undue risk.<sup>399</sup>

In most circumstances, initial BOP custodial classification designations are made by BOP staff at the Designation and Sentence Computation Center, who enter inmates' information into SENTRY, a BOP database, from the sentencing court, U.S. Marshals Service, U.S. Attorney's Office or other prosecuting authority and the U.S. Probation Office.<sup>400</sup> The SENTRY database collects important information on federal inmates including their location, medical history, and released data,<sup>401</sup> and calculates a score for each inmate, which is then matched with a commensurate security level institution.<sup>402</sup> BOP's internal regulations rate males and females differently in some respects. According to BOP's Program Statement, the following security point score system applies for men and women in prison:

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<sup>398</sup> U.S. Dep't of Justice, *Federal Bureau of Prisons, Inmate Security Designation and Custody Classification, Program Statement P5100.08*, Sept. 12, 2006, at ¶ 1, [https://www.bop.gov/policy/progstat/5100\\_008.pdf](https://www.bop.gov/policy/progstat/5100_008.pdf) ("The Bureau's classification, designation and redesignation procedures are consistent with the statutory authority contained in 18 U.S.C. § 3621(b). All classification, designation and redesignation decisions are made without favoritism given to an inmate's social or economic status") (hereinafter DOJ, *Inmate Security Designation and Custody Classification, Program Statement*).

<sup>399</sup> U.S. Dep't of Justice, *Inmate Security Designation and Custody Classification, Program Statement*, at ¶ 2.

<sup>400</sup> *Ibid.*, 8.

<sup>401</sup> U.S. Dep't of Justice, Office of the Inspector General, *Select Application Controls Review of the Federal Bureau of Prisons's Sentry Database System*, July 2003, p. i, <https://oig.justice.gov/reports/BOP/a0325/final.pdf>.

<sup>402</sup> *Ibid.*

**Table 4: BOP Custodial Classification Point System<sup>403</sup>**

Security Level	Men	Women
<b>Minimum</b>	0 – 11 points	0 – 15 points
<b>Low</b>	12 – 15 points	16 – 30 points
<b>Medium</b>	16 – 23 points	Not Applicable
<b>High</b>	24 or more	31 or more points
<b>Administrative</b>	All point totals	All point totals

Source: BOP Program Statement, Inmate Security Designation and Custody Classification

The BOP has five security classification levels for inmates: minimum, low, medium (for male inmates only), high, and administrative.<sup>404</sup> BOP's classification security levels are based on features such as the presence of external patrols, security barriers, the type of housing within the facility, and staff-to-inmate ratio.<sup>405</sup> BOP considers other factors such as the inmate's home residence, overcrowding at an institution, security level or program recommended by the sentencing court, and additional security measures to ensure the protection of witnesses and the public.<sup>406</sup>

Women convicted of federal crimes are housed in one of the 29 BOP facilities for women, and there are 111 federal facilities for men.<sup>407</sup> BOP states that it attempts to assign women in prison to

<sup>403</sup> Ibid.

<sup>404</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, *Prison Security Levels*, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_sec\\_levels.jsp](https://www.bop.gov/about/statistics/statistics_inmate_sec_levels.jsp) (accessed Aug. 19, 2019) (Inmates that have not been assigned a security level are categorized as "unclassified"); See also DOJ, *Inmate Security Designation and Custody Classification, Program Statement*, p. 7, 9 (noting that women in federal prison are only classified as minimum, low, high and administrative); see also Appendix B.

<sup>405</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, *About Our Facilities*, [https://www.bop.gov/about/facilities/federal\\_prisons.jsp](https://www.bop.gov/about/facilities/federal_prisons.jsp) (accessed Aug. 19, 2019).

<sup>406</sup> DOJ, *Inmate Security Designation and Custody Classification, Program Statement*, p. 7.

<sup>407</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, *Female Offenders*, [https://www.bop.gov/inmates/custody\\_and\\_care/female\\_offenders.jsp](https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp) (accessed Aug. 19, 2019) (hereinafter U.S. Dep't of Justice, *Female Offenders*); see also U.S. Dep't of Justice, Office of Inspector General, *Review of the Federal Bureau of Prisons' Management of its Female Population*, p. 3, <https://oig.justice.gov/reports/2018/e1805.pdf> (hereinafter DOJ, *Review of the Federal Bureau of Prison's Management of Its Female Inmate Population*) (noting that 8 of these female institutions are a part of larger facilities that also contain at least one other female institution. As a result, BOP's female institutions are in 16 locations throughout the country); U.S. Dep't of Justice, Federal Bureau of Prisons, *Our Locations*, <https://www.bop.gov/locations/list.jsp> (accessed Oct. 4, 2019) (regarding 111 facilities for men); see also Email

facilities that correspond with their security level and programmatic needs (e.g. specific educational, vocational or substance abuse programs).<sup>408</sup> Most women in federal prison are classified as low or minimum security.<sup>409</sup> In fact, as of February 23, 2019, 50 percent of sentenced women in federal prison were classified as low security and 43 percent of sentenced women in prison were classified as minimum security.<sup>410</sup>

### *Needs Classification and Women in Prison*

For the last three decades, in addition to custodial classification, facilities may also classify women and men in prison based on their programming needs.<sup>411</sup> Early versions of risk/needs assessments were typically developed by correctional agencies, through their own research departments or in collaboration with academic researchers.<sup>412</sup> More recently, these assessments have been developed and validated by researchers and academics and assess both static and dynamic risk factors.<sup>413</sup> The most common of risk/needs assessment are the Level of Service Inventory - Revised (LSI-R) developed by Don Andrews and James Bonta and the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) developed by Tim Brennan and colleagues.<sup>414</sup>

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conversation between Alix McLearn, , and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights (Oct. 15, 2019) (on file with U.S. Commission on Civil Rights) (noting that there are also some Federal Bureau of Prisons facilities that are operated by private companies).

<sup>408</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, *Custody & Care, Designations*, [https://www.bop.gov/inmates/custody\\_and\\_care/designations.jsp](https://www.bop.gov/inmates/custody_and_care/designations.jsp) (accessed Aug. 19, 2019) (hereinafter DOJ, *Custody & Care, Designations*).

<sup>409</sup> BOP Response to USCCR Interrogatory No. 3; see also DOJ, Review of the Federal Bureau of Prison's Management of Its Female Inmate Population, p. 4.

<sup>410</sup> BOP Response to USCCR Interrogatory No. 3 (percentages calculated by the Commission staff).

<sup>411</sup> Patricia Van Voorhis, Emily M. Wright, Emily Salisbury and Ashley Bauman, "Women's Risk Factors and Their Contributions to Existing Risk/Needs Assessment: The Current Status of Gender-Responsive Assessment," *Criminal Justice and Behavior*, vol. 37, iss. 3, (2010), p. 261-288, <https://doi.org/10.1177/0093854809357442>.

<sup>412</sup> "Women's Risk Needs Assessment Research," University of Nevada, Las Vegas, <https://www.unlv.edu/ccjp/assessment/wrna> (accessed Aug. 19, 2019) (The Women's Risk Needs Assessment Research was created via a cooperative agreement between the National Institute of Corrections and the University of Cincinnati through research conducted by Patricia Van Voorhis, Emily Salisbury, Emily Wright, and Ashley Bauman. The center is now run by Dr. Emily Salisbury at UNLV) (hereinafter "Women's Risk Needs Assessment Research," University of Nevada, Las Vegas).

<sup>413</sup> Sarah Desmarais and Jay Singh, "Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States," *Council of State Governments Justice Center*, Mar. 27, 2013.

<sup>414</sup> Ibid.; see also "Use of Valid Actuarial Assessments of Risks and Needs," National Parole Resource Center, <https://nationalparoleresourcecenter.org/action-guide-use-of-valid-actuarial-assessments-of-risks-and-needs/selecting-and-validating-an-assessment-instrument.htm> (accessed Oct. 4, 2019).

Sometimes needs assessment tools drive custodial classification decisions, but it depends on the jurisdiction, and availability and capacity of rehabilitative programs.<sup>415</sup> Needs assessments are used for case management purposes and referring individuals to various treatment rehabilitation programs available in the facility.<sup>416</sup>

In the late 2000s, the National Institute of Corrections and its partners through cooperative agreements developed and released the Women's Risk Needs Assessment, which is a statistically validated risk/needs assessment device for women in prison.<sup>417</sup> The Women's Risk Needs Assessment was first developed through a pilot study with the Colorado Department of Corrections.<sup>418</sup> The Women's Risk Needs Assessment was later developed and validated during research projects with women under supervision in Maui County, Hawaii, and state departments of corrections in both Minnesota and Missouri.<sup>419</sup> According to Dr. Salisbury, one of the researchers who helped to develop and validate the Women's Risk Needs Assessment:

WRNA allows prison staff to measure and case-plan around the specific areas of risk and need that justice-involved women have, and the manner in which the assessment is conducted is intentionally designed to be delivered in a collaborative, gender-responsive and trauma-informed way with women.<sup>420</sup>

Since its development, the Women's Risk Needs Assessment has been implemented in almost a dozen state departments of corrections as well as several countries.<sup>421</sup> Some of the correctional departments implemented the Women's Risk Needs Assessment through trainings and technical assistance on gender-responsive corrections delivered by the National Institute of Corrections, while other correctional departments have adopted them based on prison executive staff interested

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<sup>415</sup> Salisbury Testimony, p. 52.

<sup>416</sup> Ibid.

<sup>417</sup> "Women's Risk Needs Assessment Research," University of Nevada, Las Vegas; *see also* Salisbury Statement, at 7; there are other less robust gender-responsive assessments available. *See also* Orbis Partners, "Service Planning Instrument for Women (SPIn-W™)," <https://orbispartners.com/wp-content/uploads/2014/07/SPin-W-DataSheet.pdf> (accessed Aug. 19, 2019) (SPIn-W is assessment tool is comprised of approximately 100 items that assess risk, needs, and protective factors relevant for increasing responsiveness in casework with justice-involved women. This tool was selected for use as part of the Women Offender Case Management Model); *see also* "COMPAS Women Risk/Needs Assessment and Case Planning," NorthPointe <http://www.northpointeinc.com/files/downloads/Womens.pdf> (accessed Oct. 18, 2019) (noting that COMPAS Women's Instrument is a computerized tool which includes an integrated case planning feature).

<sup>418</sup> Salisbury Statement, at 7.

<sup>419</sup> Ibid.

<sup>420</sup> Salisbury Testimony, p. 33.

<sup>421</sup> Ibid.; *see also* Salisbury Statement, at 1.

in using gender-responsive tools, with some also seeking to shrink the number of women in prison due to overcrowding.<sup>422</sup>

Evidence out of Alabama Department of Corrections suggests that the Women's Risk Needs Assessment can more accurately assess the custodial classification for women in prison than risk assessments designed for men in prison that are also applied to women in prison.<sup>423</sup> According to Dr. Wendy Williams, Deputy Commissioner for Women's Services for the Alabama Department of Corrections, prior to implementing the Women's Risk Needs Assessment, more than 30 percent of women in Alabama Department of Corrections were classified as moderate or high risk and 47 percent of women in Alabama Department of Corrections were classified as low risk.<sup>424</sup> However, two years after implementing the Women's Risk Needs Assessment, only 20 percent of women in prison in Alabama were classified as moderate or high risk and more than 70 percent of women were classified as low risk.<sup>425</sup> According to Dr. Williams, the custodial classification breakdown after the implementation of the Women's Risk Needs Assessment more accurately depicts women in prison and the potential risk they may pose to the institution and public safety.<sup>426</sup>

According to Dr. Salisbury, BOP has not implemented the Women's Risk Needs Assessment in federal prisons.<sup>427</sup> According to its own guidelines issues for correctional institutions in 2004, BOP should at least use the "best option" among those identified in 2004, "modifying current risk factors and/or scale cut points" to make "classification systems more responsive to the risk and needs of women prisoners."<sup>428</sup> Furthermore, the current internal rules seem to include weighting of different risk factors differently for men and women.<sup>429</sup> At the briefing, the Commission asked a BOP representative why the Women's Risk Needs Assessment was not implemented in federal prisons for women, as National Institute of Corrections, a division of the BOP, funded the development of the Women's Risk Needs Assessment.<sup>430</sup> Dr. McLearn of the BOP stated that:

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<sup>422</sup> Emily Salisbury, Professor, University of Nevada, Las Vegas, Follow-up Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Apr. 5, 2019, at 1 (hereinafter Salisbury, Follow-up Statement).

<sup>423</sup> Williams Testimony, p. 218.

<sup>424</sup> Ibid.

<sup>425</sup> Ibid.

<sup>426</sup> Ibid.

<sup>427</sup> Salisbury Testimony, pp. 33-4.

<sup>428</sup> Ibid.

<sup>429</sup> Ibid.

<sup>430</sup> Commissioner Adegbile, *WIP Briefing*, p. 82.

Bureau of Prisons uses a custody classification system that's been validated on our population using data specific to our population. And men and women were evaluated and validated separately. There are different cutting scores and values applied so that the tool is predictive for women that are in Bureau of Prisons custody. That's primarily to the risk portion [of the classification process] although there are need pieces like substance abuse that are woven into that tool.

And then we do individualized assessments that I referenced earlier with individuals from there. So that is our current process but I believe people have mentioned that under the First Step Act, we're working expeditiously to implement the provisions of that as required.<sup>431</sup>

Some experts contend that there is significant harm to women in prison when classifications systems are not specifically gender-responsive and trauma-informed (as the Women's Risk Needs Assessment is).<sup>432</sup> Moreover, they contend that when gender-responsive classification systems are not in place, the likelihood that women are over-classified increases, which, they argue, causes prisons to keep women in more restrictive conditions than is warranted by their behavior.<sup>433</sup> Dr. Salisbury stated that the Women's Risk Needs Assessment should be more accessible and that funding cuts by the National Institute of Corrections were compromising the ability of state and local institutions to implement it.<sup>434</sup>

## **Family Separation, Parenting, and Women in Prison**

### ***Placement and Women in Prison***

This section discusses how the distance and amount of women's facilities create barriers to family visitations, parenting, and maintaining familial relationships. As mentioned above, BOP houses female federal inmates in one of their 29 facilities, which means that there is an average of fewer than one women's federal facility per state. Women's facilities are especially lacking in the Northwestern and Central parts of the United States (see Figure 9). The figure below and Appendix C detail the locations and types of facilities that women in federal prison are housed in.

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<sup>431</sup> McLearen Testimony, p. 79-80.

<sup>432</sup> Salisbury Testimony, p. 32-37.

<sup>433</sup> Ibid.

<sup>434</sup> Salisbury Follow-up Statement, at 1-2.

**Figure 9: Map of BOP Institution Female Inmates**<sup>435</sup>

**Source:** Federal Bureau of Prisons

Moreover, BOP's placement policy states that the agency attempts to place all inmates in a facility within 500 miles of their home.<sup>436</sup> The First Step Act of 2018 now also requires housing prisoners "as close as practicable to the prisoner's primary residence as possible, and to the extent practicable, in a facility within 500 driving miles of that residence."<sup>437</sup> Federal law now also requires that prisoners may transfer to facilities that are closer to their primary residence, subject to bed availability and security concerns, including recommendations of the sentencing court, the prisoner's programmatic, mental and medical health needs, any expressed faith-based needs, and

<sup>435</sup> DOJ, "Female Offenders."

<sup>436</sup> DOJ, "Custody & Care, Designations;" see also McLearen Testimony, p. 62; see also Nathan James, "The First Step Act of 2018: An Overview," *Congressional Research Service*, Mar. 4, 2019, p. 17, <https://crsreports.congress.gov/product/pdf/R/R45558>. (noting that The First Step Act of 2018 "amends 18 U.S.C. Section 3621(b) to require BOP to house prisoners in facilities as close to their primary residence as possible, and to the extent practicable, within 500 driving miles, subject to a series of considerations. When making decisions about where to house a prisoner, BOP must consider bedspace availability, the prisoner's security designation, the prisoner's programmatic needs, the prisoner's mental and medical health needs, any request made by the prisoner related to faith-based needs, recommendations of the sentencing court, and other security concerns. BOP is also required, subject to these considerations and a prisoner's preference for staying at his/her current facility or being transferred, to transfer a prisoner to a facility closer to his/her primary residence even if the prisoner is currently housed at a facility within 500 driving miles.")

<sup>437</sup> The First Step Act of 2018, P. L. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C. § 3621(b) deals specifically with the 500 mile residence requirement).



whether the prisoner wants a transfer.<sup>438</sup> These same factors must also be taken into account when placing a prisoner for the first time.<sup>439</sup>

In addition, BOP's Female Offender Manual states that the location of female inmates' children and families should be considered and discussed when deciding where to place women in federal custody.<sup>440</sup> However, placing women in prison near their families is challenging given the limited number of women's facilities. In fact, more than 25 percent of women in federal prisons are housed in facilities further than 500 miles from their legal residence.<sup>441</sup> By way of comparison, a recent study that analyzed data for the *Survey of Inmates in State Correctional Facilities* found that only 10 percent of people in state prisons lived over 500 miles from their homes.<sup>442</sup> The issue of prison placement and distance from families therefore impacts women inmates significantly more than men inmates, if for no other reason than that there are fewer facilities in which to house incarcerated women, which increases their likelihood of distance from home. By comparison, BOP has 127 facilities—an average of over 2 men's prisons per state, in which men who have been convicted of federal crimes or are pretrial detainees may be housed.<sup>443</sup>

At the Commission's February briefing, BOP's representative Dr. Alix McLearen stated that:

there's 29 [women's] facilities and I don't think that we're here to suggest that we build more prisons, but that means that just by math, if you're spreading those across the country, there may not be a facility right near somebody's home.

[P]art of our process towards re-entry is the residential re-entry center, or what you might think of as a halfway house. We call them RRCs and those are the facilities that are community-based that somebody transitions into on their way out of the system where they can continue to do programs. And we have more than 200 of those facilities so it's much more likely that somebody would be placed in their local community or very close to their

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<sup>438</sup> 18 U.S.C. § 3621(b).

<sup>439</sup> *Id.*

<sup>440</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, *Female Offender Manual*, Jan. 2, 2018, [https://www.bop.gov/policy/progstat/5200.02\\_cn1.pdf](https://www.bop.gov/policy/progstat/5200.02_cn1.pdf); see also McLearen Testimony, p. 62.

<sup>441</sup> BOP Response to USCCR Interrogatory No. 3; see also Appendix C provides a breakdown of the number of women in federal prison housed over 500 miles from their listed legal residence, by institution.

<sup>442</sup> Bernadette Rabuy and Daniel Kopf, "Separation by Bars and Miles: Visitation in State Prisons," *Prison Policy Initiative*, Oct. 20, 2015, Figure 3, <https://www.prisonpolicy.org/reports/prisonvisits.html> (hereinafter Rabuy and Kopf, "Separation by Bars and Milestones").

<sup>443</sup> Email conversation between Alix McLearen, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019 (on file with U.S. Commission on Civil Rights) (noting that 11 of the 127 BOP facilities that house men are private prisons).



local community at that end part [of their sentence] before they are completely released from the system.<sup>444</sup>

Inmates serving lengthy sentences can mean that during the bulk of incarceration an inmate might lack visits and connection to family that can support rehabilitation. Kaitlin Owens of the American Conservative Union told the Commission that “[a]ccess to visits and calls with loved ones help maintain a healthy mental state while incarcerated, and those who received visitors are 13 percent less likely to recidivate.”<sup>445</sup>

Many state departments of corrections also have a small number of facilities for women inmates.<sup>446</sup> Also, women’s prisons are often located in rural areas that lack public transportation and lodging, which are far away from the urban communities where many of the women in prison lived prior to their incarceration and may create cultural barriers.<sup>447</sup> This means that, in practice, many women are imprisoned a long distance from their homes, which reduces the possibility for family contact and maintaining familial relationships and hinders opportunities for rehabilitation.<sup>448</sup> The distance and location where women are placed also adds significant financial costs and may even render the likelihood of prison visits impossible for some families.<sup>449</sup>

Washington, D.C. residents in prison face unique placement and family separation challenges in comparison to other U.S. inmates. Since the late 1990s, women and men in Washington, D.C. convicted under D.C. law of felony offenses and sentenced by D.C. courts are housed in federal prisons.<sup>450</sup> Under federal statute, these local responsibilities of the D.C. government were

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<sup>444</sup> McLearen Testimony, p. 62.

<sup>445</sup> Owens Testimony, p. 30.

<sup>446</sup> DOJ, *Developing Gender-Specific Classification Systems*, p. xviii.

<sup>447</sup> Jade Laughlin, Bruce Arrigo, Kristie Blevins, and Charisse Coston, “Incarcerated Mothers and Child Visitation: A Law, Social Science and Policy Perspective,” *Criminal Justice Policy Review*, vol. 19, no. 2 (June 2008), p. 215-238 (hereinafter Laughlin et al., “Incarcerated Mothers and Child Visitation: A Law, Social Science and Policy Perspective;” see also DOJ, *Developing Gender-Specific Classification Systems*, p. xviii ; see also Lashonia Thompson-El, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 5 (hereinafter Thompson-El Statement)).

<sup>448</sup> Rabuy and Kopf, “Separation by Bars and Milestones,” at Figure 3; see also Laughlin et al., “Incarcerated Mothers and Child Visitation: A Law, Social Science and Policy Perspective,” p. 215-6.

<sup>449</sup> Ibid.

<sup>450</sup> National Capital Revitalization and Self-Government Improvement Act of 1997, 24 D.C. Code § 24-101, Pub. L. No. 105-33, 111 Stat. 734; see also District of Columbia Government, Dep’t of Corrections, *Department of Corrections Closes Final Prison and Accomplishes Major Milestone*, Nov. 19, 2001, <https://doc.dc.gov/release/departments-corrections-closes-final-prison-and-accomplishes-major-milestone> (noting that several of the facilities on the Lorton Correctional Complex in Lorton, Virginia closed before the congressional mandate and the women’s facility closed in 1998, and the remaining facilities closed over the next few years).

transferred to the federal government.<sup>451</sup> As of November 2018, there were 161 female D.C. residents housed in federal prisons.<sup>452</sup> About 24 percent of these women are serving time at the Federal Correctional Institution Hazelton in Bruceton Mills, West Virginia, which is about 185 miles from D.C., and more than 9 percent of these women are serving time at the Federal Detention Center Philadelphia in Philadelphia, Pennsylvania, which is about 141 miles from D.C.<sup>453</sup> While the two aforementioned federal prisons are well within BOP's 500-mile radius, some D.C. women complete their sentences as far as the Federal Correctional Institution Dublin in Dublin, California, which is more than 2,800 miles from D.C.<sup>454</sup>

Native American women in prison also face unique placement needs. At the Commission's February briefing, Ms. Leann Bertsch, Director of Corrections and Rehabilitation, North Dakota testified that:

about 34 percent of our female population is Native American. That's our largest minority population in North Dakota. And despite Native Americans composing just under five percent of the population, we have that high percentage incarcerated in our system. Native American women have specific family, cultural, spiritual, and criminogenic needs that the [Director of Corrections and Rehabilitation] DOCR must provide.

Currently, the women's facility is far from most of the reservations in the state, as well as the cultural services provided in major cities. Moving to a more central location closer to both the reservations and these services will allow the [Director of Corrections and Rehabilitation] DOCR to provide for Native American women in custody.<sup>455</sup>

The Commission received testimony from Ms. Lashonia Thompson-El, Executive Director of Women Involved in Reentry Efforts, and a formerly incarcerated woman who served more than 18 years in various federal prisons. Ms. Thompson-El spoke first-hand about the difficulty that women in prison face in maintaining contact with their children and families while they are incarcerated.<sup>456</sup> In particular, Ms. Thompson-El stated that:

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<sup>451</sup> D.C. Code § 24-101. Note that BOP designates that women serving short-term felony sentences be housed at the Correctional Treatment Facility in D.C. See Washington Lawyers' Committee for Civil Rights & Urban Affairs, *D.C. Women in Prison: Continuing Problems and Recommendations for Change*, Mar. 25, 2016, p. 9 [http://www.washlaw.org/pdf/dc\\_women\\_in\\_prison\\_report.PDF](http://www.washlaw.org/pdf/dc_women_in_prison_report.PDF); see also Thompson-El Statement, at 1.

<sup>452</sup> Thompson-El Testimony, p. 185.

<sup>453</sup> Ibid. (percentages calculated by Commission staff).

<sup>454</sup> Ibid.

<sup>455</sup> Bertsch Testimony, p. 205.

<sup>456</sup> Thompson-El Statement, at 1.

It is a nice gesture to mandate that everyone in the FBOP is at least [within] 500 [m]iles [of] their home. However, this is not nearly close enough for women in prison. Many of them were the primary caregiver of their children prior to incarceration and they have most likely left their children with elderly grandparents and extended family members. Many of these families are largely from disenfranchised, impoverished communities and cannot afford the cost of travel, and lodging required for visitation. Especially since FBOP facilities are almost always located in rural areas with no access to public transportation and sometimes lodging.<sup>457</sup>

Advancements in technology have allowed for the introduction of email capability. Video conferencing services at prisons have helped incarcerated men and women contact their family, friends and community members, but there are significant costs associated with this technology, and it is not always available. For instance, while the BOP offers telephone services at all of their facilities, video communication services are only available at 55 percent of its female facilities.<sup>458</sup> According to the BOP, the cost of a video session is \$6.00 for 25 minutes and inmates incur a \$3.00 charge for no-shows.<sup>459</sup> The following chart details the costs that federal inmates incur for phone services:

**Table 5: BOP Costs Charged to Inmates for Telephone Services**

Debit Calling Per Minute Rates		Prepaid Calling Per Minutes Rates (With No Connection Fee)		Collect Calling Per Minute Rate (With No Connection Fee)	
Local	\$0.06	Local	\$0.06		
Long Distance	\$0.21	Long Distance	\$0.21	Long Distance	\$0.25
Canada	\$0.35	Canada	\$0.35		
Mexico	\$0.55				
International	\$0.99				

**Source:** BOP Response to USCCR Interrogatory No. 40

While many state prisons and local jails charge similar rates for telephone calls or video conferencing, a few state prisons and jails have made efforts to significantly reduce the cost of

<sup>457</sup> Ibid., 5.

<sup>458</sup> BOP Response to USCCR Interrogatory No. 40 (noting that the following 16 female facilities have video services: FDC Alderson, FCI Aliceville, FPC Bryan, FMC Carswell, FPC Coleman, FPC and FSL Danbury, FCI Dublin, FPC Greenville, SFF Hazelton, FPC Lexington, FPC Marianna, FPC Pekin, FPC Phoenix, FCI Tallahassee, FPC Victorville, and FCI Waseca).

<sup>459</sup> BOP Response to USCCR Interrogatory No. 40.

phone calls (e.g. Texas),<sup>460</sup> or make phone calls free for inmates (e.g. New York City, San Francisco).<sup>461</sup> Improving the cost of calls from prisons and jails may assist incarcerated men and women in having more contact with their family and friends. Some experts say telephone calls or video conferencing can supplement, rather than replace, in-person visits—especially for incarcerated parents.<sup>462</sup> Some institutions have banned in-person visits after implementing video visitation technology.<sup>463</sup>

### *Parenting in Prisons*

A 2010 BJS report entitled *Parents in Prison and Their Minor Children* shows that the majority of men and women in prison were parents of minor children prior to their incarceration.<sup>464</sup> While most parents in prison are fathers, the number of mothers in prison is growing more rapidly (from

<sup>460</sup> Lauren McGaghy, “Texas Prisons Slash Inmate Phone Call Rates From 26 to 6 Cents Per Minute,” *Dallas News*, Aug. 24, 2018, <https://www.dallasnews.com/news/crime/2018/08/24/texas-prisons-slash-inmate-phone-call-rates-26-6-cents-per-minute>.

<sup>461</sup> Roxanne Squires, “New York City Makes All Inmate Phone Calls Free of Charge,” *Correctional News*, July 25, 2018, <http://correctionalnews.com/2018/07/25/new-york-city-makes-inmate-phone-calls-free-charge/>; see also Dominic Fracassa, “SF to Allow Free Calls for Inmates, No Markups on Products Sold in Jail,” *San Francisco Chronicle*, June 12, 2019, <https://www.sfchronicle.com/bayarea/article/SF-to-allow-free-calls-for-inmates-no-markups-on-13974972.php>.

<sup>462</sup> Emily Mooney and Steven Felton, “Family Through the Plexiglass Window,” *The American Conservative*, Oct. 16, 2018, <https://www.theamericanconservative.com/articles/family-through-the-plexiglass-window/> (hereinafter Mooney and Felton, “Family Through the Plexiglass Window”); see also Sarah Beller, “Worlds Apart: Video-only ‘Visitation’ Shrouds the Reality of Life in Custody,” *Real Life Magazine*, Nov. 14, 2016, <https://reallifemag.com/worlds-apart/>; see also Leon Digard, Margaret diZerega, Allon Yaroni, and Joshua Rinaldi, “A New Role for Technology? Implementing Video Visitation in Prison,” *Vera Institute of Justice*, Feb. 2016, p. 10, [https://storage.googleapis.com/vera-web-assets/downloads/Publications/video-visitation-in-prison/legacy\\_downloads/video-visitation-in-prison\\_02.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/video-visitation-in-prison/legacy_downloads/video-visitation-in-prison_02.pdf).

<sup>463</sup> Bernadette Rabuy and Peter Wagner, *Screening Out Family Time: The For-Profit Video Visitation Industry in Prisons and Jails*, Prison Policy Initiative, Jan. 2015, p. 11, [https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime\\_January2015.pdf](https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf) (noting that while almost state prisons banned in-person visitation, 74 percent of jails banned in-person visits when they implemented video visitation). The one state prison exception that uses video visitation instead of in-person visitation, Milwaukee Secure Detention Facility in Wisconsin, considers itself to be very similar to a jail, writing on its website that it “functions in a similar manner to that of a jail operation.” See Wisconsin Dep’t of Corrections, *Milwaukee Secure Detention Facility*, <https://doc.wi.gov/Documents/OffenderInformation/AdultInstitutions/MSDFVisitingInformationEnglish.pdf> (accessed Aug. 19, 2019).

<sup>464</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Parents in Prison and Their Minor Children” by Laura Glaze and Laura Maruschak, (Mar. 30, 2010), p. 1, <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> (hereinafter DOJ, “Parents in Prison and Their Minor Children.”); “Fact Sheet: Parents in Prison,” *The Sentencing Project*, Sept. 2012, p. 1, <https://www.sentencingproject.org/wp-content/uploads/2016/01/Parents-in-Prison.pdf> (hereinafter, “Parents in Prison,” *The Sentencing Project*); see also Becki Ney, Principal of the Center for Effective Public Policy and Director of the National Resource Center on Justice Involved Women, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019 at 7 (hereinafter Ney Statement).

1991 to 2007, the number of fathers increased by 76 percent while the number of mothers increased by 122 percent).<sup>465</sup> For example, as mentioned in Chapter 1, the number of women in prison in Oklahoma has increased substantially since 1980 and the state has the highest per capita women's incarceration rate in the country.<sup>466</sup> What is also relevant is that 85 percent of incarcerated women in Oklahoma are mothers.<sup>467</sup> As in Oklahoma, across the country, women in state prisons (41 percent) were more likely than their male counterparts (29 percent) to report having more than one child.<sup>468</sup> In federal prisons, comparable percentages of mothers (36 percent) and fathers (39 percent) reported having several children.<sup>469</sup> In addition, incarcerated women disproportionately shouldered childcare responsibilities prior to their incarceration. In particular, only 18 percent of mothers in state prisons reported sharing the daily childcare of their children, compared to 63 percent of fathers in state prisons.<sup>470</sup> Approximately 10 percent of fathers in state prisons relied on someone to provide daily childcare for their children prior to their incarceration, compared to 5 percent of mothers. Analogous results were found amongst parents in federal institutions.<sup>471</sup> Data also demonstrate that while men in prison primarily relied on the child's mother to provide care for their children, incarcerated women primarily relied on the child's grandparents—especially the child's grandmother—to provide care (see Table 6).<sup>472</sup>

The table below provides a summary of survey responses of the childcare arrangements of incarcerated parents by gender.<sup>473</sup>

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<sup>465</sup> DOJ, "Parents in Prison and Their Minor Children," p. 2.; *see also* "Parents in Prison," *The Sentencing Project*, p. 1.

<sup>466</sup> *See supra* notes 62-64 and Figure 4.

<sup>467</sup> Sarah Stillman, "America's Other Family Separation Crisis," *New Yorker*, Oct. 28, 2018, <https://www.newyorker.com/magazine/2018/11/05/americas-other-family-separation-crisis> (hereinafter Stillman, "America's Other Family Separation Crisis").

<sup>468</sup> DOJ, "Parents in Prison and Their Minor Children," p. 2.

<sup>469</sup> *Ibid.*

<sup>470</sup> *Ibid.*, 5

<sup>471</sup> *Ibid.*

<sup>472</sup> Mooney Testimony, p. 41; *see also* Thompson-El Statement, at 5; Mooney Statement, at 10.

<sup>473</sup> DOJ, "Parents in Prison and Their Minor Children," p. 10.

**Table 6: Current Caregiver of Minor Children of Parents in State Prison in 2004, by Gender**

	Total	Children's Caregiver	
		Men	Women
<b>Estimated Number of Parents in State Prisons</b>	636,300	585,200	51,100
<b>Other Parent</b>	84.2%	88.4%	37.0%
<b>Grandparent</b>	15.1%	12.5%	44.9%
<b>Grandmother</b>	14.0%	11.6%	42.1%
<b>Grandfather</b>	4.3%	3.6%	12.0%
<b>Other Relatives</b>	6.2%	4.7%	22.8%
<b>Foster Home or Agency</b>	2.9%	2.2%	10.9%
<b>Friends, Others</b>	2.9%	2.4%	7.8%

**Source:** Bureau of Justice Statistics

In addition, the aforementioned Bureau of Justice Statistics report demonstrates that when compared to men, incarcerated women who were the primary caretaker prior to incarceration were almost 5 times more likely to have their children be placed in foster care or state agency care (see Table 6)<sup>474</sup> and were likely to have their parental rights taken away more often.<sup>475</sup> When a child goes into the foster care system, the child not only risks multiple placements with various families; each time, the child may live in a new community, attend a new school, and possibly lose contact with parents who are incarcerated.<sup>476</sup> In addition, under the federal Adoption and Safe Families Act,<sup>477</sup> termination of parental rights is possible for parents of a minor child who spends 15 out of the past 22 months in foster care.<sup>478</sup> Adoption, after a termination of parental rights, could thus ensue because of a parent's incarceration—even if the parent is participating in rehabilitative services or parenting classes.<sup>479</sup> However, there are statutory exceptions to the possibility of termination of parental rights, including when adoption may not be in the best interests of the

<sup>474</sup> Ibid.; see also Owens Testimony, p. 26; Mooney Testimony, pp. 42-43.

<sup>475</sup> Eli Hager and Anna Flagg, "How Incarcerated Parents Are Losing Their Children Forever," *The Marshall Project*, Dec. 12, 2018, <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> (hereinafter Hager and Flagg, "How Incarcerated Parents Are Losing Their Children Forever").

<sup>476</sup> Steve Christian, "Children of Incarcerated Parents," *National Conference of State Legislatures*, Mar. 2009, p. 2, <https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf> (hereinafter Christian "Children of Incarcerated Parents").

<sup>477</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.)

<sup>478</sup> 42 U.S.C. § 675(5)(E).

<sup>479</sup> Christian "Children of Incarcerated Parents," p. 5.

child.<sup>480</sup> Data regarding how many children have been impacted since the Adoption and Safe Families Act was enacted in 1997 are complex, because termination of parental rights due to incarceration was on the rise before then.<sup>481</sup> Moreover, courts' interpretation of the Adoption and Safe Families Act depends on state law, and several states (Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, and Oklahoma) have enacted laws prohibiting termination of parental rights solely on the basis of incarceration.<sup>482</sup> More than one-third of minor children whose parent or parents are incarcerated will turn 18 years old while a parent is incarcerated.<sup>483</sup> The Adoption and Safe Families Act may impact many incarcerated parents, as the vast majority of parents in state and federal prisons serve sentences that are a year or longer.<sup>484</sup>

Additionally, the Commission received testimony that prison and state child welfare systems may not consistently work together to facilitate incarcerated women's efforts to keep their parental rights. Emily Mooney testified that although courts will take into account communication and visitation in making a parental rights determination, social workers and correctional officers may not communicate, making visitation and communication difficult or impossible.<sup>485</sup> For example, a social service agency may not know where a parent is incarcerated.<sup>486</sup> Incarcerated parents also may not be provided transportation to hearings regarding their children.<sup>487</sup> There is no right to be provided counsel for parents, and incarcerated women have reported they lack information about

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<sup>480</sup> 42 U.S.C. § 675a (state agencies must implement procedures to ensure that at each permanency hearing, the administrative body must make a judicial determination about why it is not in the best interests of the child to return home or be placed with a legal guardian or a fit and willing relative).

<sup>481</sup> Christian "Children of Incarcerated Parents," p. 5.

<sup>482</sup> Ibid. at note 21, citing Mass. Gen. Laws Ann. ch. 210, §3; Mo. Rev. Stat. § 211.447; Neb. Rev. Stat. §43-292.02; N.H. Rev. Stat. Ann. §170-C:5; N.M. Stat. Ann. §32A-4-28; Okla. Stat. tit. 10, §7006-1.1.

<sup>483</sup> DOJ, "Parents in Prison and Their Minor Children," p. 3.

<sup>484</sup> "Parents in Prison," *The Sentencing Project*, p. 3.

<sup>485</sup> Mooney Testimony, p. 98.

<sup>486</sup> Ibid.

<sup>487</sup> Eli Hager and Anna Flagg, "Parenthood Lost: How Incarcerated Parents Are Losing Their Children Forever," *Washington Post*, Dec. 3, 2018, [https://www.washingtonpost.com/national/parenthood-lost-how-incarcerated-parents-are-losing-their-children-forever/2018/12/02/e97ebcfe-dc83-11e8-b3f0-62607289efee\\_story.html](https://www.washingtonpost.com/national/parenthood-lost-how-incarcerated-parents-are-losing-their-children-forever/2018/12/02/e97ebcfe-dc83-11e8-b3f0-62607289efee_story.html) (noting that correctional departments are not obligated to drive inmates to family court, and county child-welfare agencies rarely have the resources to bring children to faraway prisons for visits with Mom or Dad.); see also "Transportation to Court for Hearings Affecting Prisoners' Parental Rights," Legal Services for Prisoners with Children, July, 2003, <https://www.prisonerswithchildren.org/wp-content/uploads/2013/07/Transportation-to-Court-2013.pdf> (noting in California, parents have a right to request transportation to non-termination hearings, but not a right to transportation).



the legal process and resources explaining how to connect with their children's social service provider.<sup>488</sup>

At the Commission's briefing, Kaitlin Owens, a Policy Analyst from the American Conservative Union, testified that:

Prior to incarceration, women are three times more likely than men to be the primary caretaker of children. Roughly 65,000 incarcerated women were mothers of 147,000 minor children. Considering there are only 29 federal women's prisons as opposed to 93 prisons for men, women are disproportionately sent farther away from homes. Additionally, 11 percent of incarcerated mothers reported that their children had to be placed in foster care because they were not able to take care [of] their children just because they were incarcerated, as opposed to 2 percent of men. The Adoption and Safe Families Act requires termination of parental rights after a child spends 15 to 22 months in foster care, effectively guaranteeing the loss of their children.<sup>489</sup>

A Marshall Project study of over three million child welfare cases nationwide found that from 2006 to 2016 at least 32,000 incarcerated parents (men and women) had their children taken from them without being accused of abuse, and that:

In about 1 in 8 of these cases, incarcerated parents lose their parental rights, regardless of the seriousness of their offenses, according to the analysis of records maintained by the U.S. Department of Health and Human Services between 2006 and 2016. That rate has held steady over time.<sup>490</sup>

A 2001 study by University of California researchers found that:

Gender of parent is a major factor in patterns of incarceration; fathers account for 90% of incarcerated parents. However, the number of mothers in prison grew at a faster rate than the number of incarcerated fathers across the decade 1991-2000. There was an 87% increase for mothers, but only a 61% increase for fathers. Not surprisingly, in view of their unequal rates of incarceration, the parents' ethnicity matters, too. As expected, in both state and federal prisons, there are more African American parents (47% and 49% in state and federal prisons respectively) than either Hispanic parents (19% and 30%) or white non-Hispanic parents (29% and 22%). Stating this racial disparity in terms of minor-age

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<sup>488</sup> Wear Simmons, Charlene and Emily Danker-Feldman, *Parental Incarceration, Termination of Parental Rights and Adoption: A Case Study of the Intersection Between the Child Welfare and Criminal Justice Systems*, 25 JUSTICE POL'Y, (2018), [http://www.cjcj.org/uploads/cjcj/documents/Parental\\_Incarceration.pdf](http://www.cjcj.org/uploads/cjcj/documents/Parental_Incarceration.pdf).

<sup>489</sup> Owens Testimony, pp. 29-30; Owens Statement, at 3.

<sup>490</sup> Hager and Flagg, "How Incarcerated Parents Are Losing Their Children Forever."



children, nearly 7% of African American children, 3% of Hispanic children, and 1% of white children of the total population of children in the United States had an incarcerated parent.<sup>491</sup>

The University of California researchers also found that a majority of “mothers in either state (64%) or federal (84%) prisons were living with their children at the time of admission to prison. In contrast, only half of the fathers were living with their children at the time of their incarceration (44% for state and 55% for federal prison).”<sup>492</sup> Moreover, when fathers are in prison, mothers most typically are primary caretakers, but when mothers go to prison, fewer fathers and more grandparents become caretakers. However, they found that in 2001, “fewer than 10% of the children of mothers in state prisons and fewer than 4% of the children of mothers in federal prisons are in foster care.”<sup>493</sup>

### ***Impact of Parental Incarceration and Women in Prison***

Along with these data mentioned above, the Commission also received testimony stating that women’s incarceration often disrupts family ties, since many women entering prison have been the primary caretakers of their children.<sup>494</sup>

While many experts encourage prison visits between incarcerated parents and their children, studies and personal anecdotes have also demonstrated how incarceration has a profoundly negative impact on the children of incarcerated parents.<sup>495</sup> In particular, children of incarcerated parents have an increased risk of mental health problems and economic difficulty.<sup>496</sup> These

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<sup>491</sup> U.S. Dep’t of Health and Human Services, “Effects of Parental Incarceration on Young Children” by Ross D. Parke and K. Alison Clarke-Stewart, paper presented at From Prison to Home: The Effects of Incarceration and Reentry on Children, Families and Communities Conference, pp. 1-2 <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF> (accessed October 18, 2019).

<sup>492</sup> Ibid.

<sup>493</sup> Ibid.

<sup>494</sup> DOJ, “Parents in Prison and Their Minor Children,” p. 5; *see also* Mooney Statement, at 10; Thompson-El Statement, at 5.

<sup>495</sup> Eric Martin, “Hidden Consequences: The Impact of Incarceration on Dependent Children,” *National Institute of Justice Journal*, iss. 278, (May 2017) pp. 3-4, <https://www.ncjrs.gov/pdffiles1/nij/250349.pdf>; *see also* Rosalyn Lee, Xiangming Fang, and Feijun Luo, “The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults,” *Pediatrics*, vol. 131 iss. 4 (2013), p. 1188-95 (hereinafter Lee et al., “The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults”).

<sup>496</sup> Stillman, “America’s Other Family Separation Crisis;” *see also* Susan Phillips, Alaattin Erkanli, Gordon Keeler, E. Jane Costello, and Adrian Angold, “Disentangling the Risks: Parent Criminal Justice Involvement and Children’s Exposure to Family Risks,” *Criminology and Public Policy*, vol. 5, iss. 4, (Nov. 2006), p. 677-702 (noting that children of incarcerated parents often live in households that struggle economically and may move frequently); *see also* Mooney and Felton, “Family Through the Plexiglass Window.”

financial difficulties are a result of loss of income from the incarcerated parent (which exacerbates prior inequities),<sup>497</sup> and the cost of staying in contact with the incarcerated parent (e.g. cost of prison visits).<sup>498</sup> Families of the incarcerated may also have to move more frequently and have more difficulty retaining jobs as compared to the general population.<sup>499</sup> When children of incarcerated parents grow up, they face an increased risk of various health problems such as disproportionately higher rates of asthma, migraines, high bad cholesterol, increased risk of contracting HIV/AIDs, and are more likely to have substance abuse issues.<sup>500</sup> The National Conference of State Legislators stated that:

One major challenge confronting researchers is disentangling the effects of parental incarceration from the effects of other factors that could have existed long before incarceration, such as child maltreatment, parental use of alcohol or drugs, parental mental illness and domestic violence. Because many studies fail to account for these background risk factors and include other methodological flaws, some claims about how parental incarceration affects children that appear in the research, advocacy and policy literature might not be supported by empirical evidence. One such claim is that children of incarcerated parents are six times more likely than other children to be incarcerated as adults. No empirical data currently support this claim.<sup>501</sup>

Regarding maternal incarceration, research in this area suggests that long-term effects on children include: questioning of maternal authority, negative perceptions of the legal system, and the inability to cope with trauma.<sup>502</sup> Children of mothers in prison have higher rates of crime involvement and imprisonment than those adolescents whose mothers have not spent time in

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<sup>497</sup> See *supra* notes 74-92.

<sup>498</sup> Charles Colson Task Force on Federal Corrections, “Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections,” Jan. 2016, p. 15, <http://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf>; (hereinafter Charles Colson Task Force on Federal Corrections, “Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections”); see also Brenda P. Murray, Co-Chair Women in Prison Committee, National Association of Women Judges, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 6 (hereinafter Murray Statement); see also Ney Statement, at 7.

<sup>499</sup> Charles Colson Task Force on Federal Corrections, “Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections,” p. 15.

<sup>500</sup> *Ibid.*; see also Lee et al., “The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults,” p. 1191.

<sup>501</sup> Christian, “Children of Incarcerated Parents,” p. 5.

<sup>502</sup> Laughlin et al., “Incarcerated Mothers and Child Visitation: A Law, Social Science and Policy Perspective,” p. 221.

prison.<sup>503</sup> In addition, some studies found that maternal incarceration has a unique and independent effect on children's behavioral and emotional development and children's crime involvement in adulthood.<sup>504</sup>

### ***Prison Parent-Child Policies and Maintaining Familial Relationships While in Prison***

The majority of incarcerated men and women have some contact with their children while they are incarcerated.<sup>505</sup> At the state prison level, 56 percent of mothers reported having at least weekly contact of any type with their minor children in comparison to 39 percent of fathers.<sup>506</sup> A higher percentage of parents in federal prison reported contact with their children: 85 percent reported contact with their minor children via telephone, 84 percent had exchanged letters via postal mail with their children, and 55 percent reported having had in-person visits with their children.<sup>507</sup> Mothers and fathers were equally likely to report having had in-person visits with their children, but mothers reported having more frequent contact of any type.<sup>508</sup>

Mothers in prison face unique barriers to parent-child visits, as many prisons require that a legal guardian accompany children, and since children of incarcerated mothers are often in the care of grandparents or other extended family, they may be unable to visit if they are not official legal guardians via a court order.<sup>509</sup> Appendix E provides a detailed breakdown of the frequency of contact that incarcerated parents have with their minor children by gender and type of contact.

The distance and location of prison facilities, the rules and policies of prisons, and how prison facilities are designed make it difficult to parent from behind bars.<sup>510</sup> Previous research on the impact of parent-child visits has come to different conclusions. Some experts argue that incarcerated women who maintained close relationships with their family and receive visits from

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<sup>503</sup> Ibid.

<sup>504</sup> Beth Huebner and Regan Gustafson, "The Effect of Maternal Incarceration on Adult Offspring Involvement in the Criminal Justice System," *Journal of Criminal Justice*, vol. 35 no. 3 (2007), p. 283-296; see also Mooney Statement, at 11.

<sup>505</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Parents in Prison and Their Minor Children*, by Laura Glaze and Laura Maruschak, revised Mar. 30. 2010, p. 6, <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> (hereinafter DOJ, *Parents in Prison and Their Minor Children*).

<sup>506</sup> Ibid., 18; see also Appendix E.

<sup>507</sup> DOJ, *Parents in Prison and Their Minor Children*, p. 6.

<sup>508</sup> See Appendix E.

<sup>509</sup> Chesa Trevor Stutz Boudin and Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE POL'Y REV. 1, 149-89 (2013).

<sup>510</sup> Ney Statement, at 7.

their children were less likely to recidivate.<sup>511</sup> However, other experts found that the rules, regulations, and design of prisons can have a negative impact on a child's growth and development.<sup>512</sup> As a 2017 Urban Institute report on the parent-child practices of prisons put it, the previous research in this area suggests, "parent-child visiting is neither innately harmful nor therapeutic. A confluence of family dynamics and systematic issues determines whether visits mitigate or exacerbate the separation and trauma a child experiences when their parent is incarcerated."<sup>513</sup>

Few studies have empirically tested the relationship between type of caregiver and likelihood of prison visitation between children and their incarcerated parents. However, a recent dissertation research study by Melinda Tasca, funded by the Department of Justice's National Institute of Justice, examined the predictors of child visitation and what factors determine a positive or negative impact for the child.<sup>514</sup> The study surveyed 600 incarcerated mothers and fathers in the Arizona Department of Corrections.<sup>515</sup> The author and research team also conducted in-depth interviews with 100 caregivers who facilitated the visits of 218 children from Maricopa County, Arizona.<sup>516</sup> Tasca found that mother and grandmother caretakers were the most likely to encourage visitation because they have an interest in seeing the incarcerated parent return to a supportive role in the child's life upon reentry, especially if that parent was involved with the child's life prior to incarceration.<sup>517</sup> Children in state placements (e.g. foster care or group homes), on the other hand, may not have the same incentive for familial reunification and thus may not be able or motivated to arrange in-facility visitation.<sup>518</sup> According to Tasca, visitation patterns also differed based on custodial classification and distance to the facility. That is, visits to incarcerated mothers were

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<sup>511</sup> Owens Testimony, p. 27; *see also* Creasie Finney Hairston, "Mothers in Jail: Parent-Child Separation and Jail Visitation," *Women and Social Work*, vol. 6 no. 2 (Jul. 1, 1999), pp. 9–27.

<sup>512</sup> Joyce Arditti, "Locked Doors and Glass Walls: Family Visiting at a Local Jail," *Journal of Loss and Trauma*, no. 8, p.115-138 (Jan. 7, 2011), <https://www.tandfonline.com/doi/abs/10.1080/15325020305864>.

<sup>513</sup> Lindsey Cramer, Margaret Goff, Bryce Peterson, and Heather Sandstrom, "Parent-Child Practices in Prisons and Jails: A Synthesis of Research and Practice," *Urban Institute*, Apr. 2017, p. 9, [https://www.urban.org/sites/default/files/publication/89601/parent-child\\_visiting\\_practices\\_in\\_prisons\\_and\\_jails.pdf](https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails.pdf).

<sup>514</sup> Melinda Tasca, "It's Not All Cupcakes and Lollipops: An Investigation of the Predictors and Effects of Prison Visitation for Children During Maternal and Paternal Incarceration," *AZ State U.*, May 2014, p. i, 8-9. <https://www.ncjrs.gov/pdffiles1/nij/grants/248650.pdf> (hereinafter Tasca, "It's Not All Cupcakes and Lollipops").

<sup>515</sup> *Ibid.*, 64.

<sup>516</sup> *Ibid.*, 76.

<sup>517</sup> *Ibid.*, 6, 119-20.

<sup>518</sup> *Ibid.*, 128.

more likely to occur if they were housed at low-level security facilities and were adjacent to the child's home.<sup>519</sup> The National Conference of State Legislators also reported that:

Ironically, though contact and visitation are most important for incarcerated parents whose children are in foster care [to avoid termination of parental rights], some evidence suggests that such children are the least likely to visit their parents in prison. That is because visits must be authorized and arranged by child welfare caseworkers who carry high caseloads and who may be inclined to “abandon” the prospect of reunification with an imprisoned parent.<sup>520</sup>

These are some of the major issues impacting women and their families upon incarceration. The Commission's research shows that classification is vitally important and may impact whether a woman in prison receives family visits and has an opportunity to keep custody of her children.

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<sup>519</sup> Ibid., 92, 97.

<sup>520</sup> Christian “Children of Incarcerated Parents,” p. 6.

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## CHAPTER 3: AN ANALYSIS OF WOMEN'S HEALTH AND PERSONAL DIGNITY IN THE U.S. PRISON SYSTEM

### Overview of Women's Care in Prison

As will be discussed below, access to health care may vary significantly for women in prison.<sup>521</sup> This may be related to the vagueness of some of the current legal standards, or the lack of federal oversight. For example, while shackling during pregnancy is now clearly prohibited in federal prisons except in exceptional circumstances, other standards discussed below such as the requirement that there be “adequate access to health care” are less precise and in some areas, such as accreditation for health care in state prisons, no standards exist at all.

### *Legal Standards for Providing Healthcare to Women in Prison*

The federal First Step Act of 2018 has two clear provisions for women's health in prison. It bans shackling during pregnancy and lifts restrictions on access to menstrual products to women in federal facilities.<sup>522</sup> These are discussed in further detail below.

But at the state level, while some state prisons may be mandated by their respective state government to obtain health care accreditation, there is no one organization or agency that provides accreditation or a standard of health care for all state prisons.<sup>523</sup> Several organizations such as the National Commission on Correctional Health Care,<sup>524</sup> and the American Correctional Association<sup>525</sup> offer voluntary accreditation programs for state prisons, but the lack of standardized health care results in significant variance in the quality of care in state prisons.<sup>526</sup> Other

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<sup>521</sup> See *infra* notes 602-61.

<sup>522</sup> Anjana Samant, “The First Step Act Is a Small Step for Incarcerated Women,” *ACLU*, Dec. 27, 2018, <https://www.aclu.org/blog/prisoners-rights/women-prison/first-step-act-small-step-incarcerated-women>.

<sup>523</sup> McCaa Baldwin, Katherine and Jacquelyn Jone, *Health Issues Specific to Incarcerated Women: Information for State Maternal and Child Health Programs*, Women's and Children's Health Policy Center at Johns Hopkins University, May 2000, p. 3 (hereinafter McCaa Baldwin and Jones, *Health Issues Specific to Incarcerated Women: Information for State Maternal and Child Health Programs*).

<sup>524</sup> “NCCHC Accreditation: National Recognition from the Most Respected Name in Correctional Health Care,” *National Commission on Correctional Health Care*, <https://www.ncchc.org/filebin/Accreditation/Accreditation-flier-2017.pdf> (accessed May 29, 2019).

<sup>525</sup> “Manual of Accreditation Policy and Procedure,” *American Correctional Association*, Mar. 15, 2017, [https://www.aca.org/ACA\\_Prod\\_IMIS/docs/standards%20and%20accreditation/ALM-1-3\\_15\\_17-Final.pdf](https://www.aca.org/ACA_Prod_IMIS/docs/standards%20and%20accreditation/ALM-1-3_15_17-Final.pdf).

<sup>526</sup> Sufrin Testimony, p. 171; see also McCaa Baldwin and Jones, *Health Issues Specific to Incarcerated Women: Information for State Maternal and Child Health Programs*, p. 3.

organizations like the American College of Obstetricians and Gynecologists offer guidance for what services should be provided in prisons.<sup>527</sup> At the federal level, Federal Medical Centers are accredited and routinely surveyed by the Federal Joint Commission on Accreditation in Health Care Organizations.<sup>528</sup> BOP also provides detailed guidelines for common preventive health care services and infectious disease prevention, detection, and treatment of inmates and correctional staff who face exposure to infectious diseases in correctional facilities.<sup>529</sup> BOP also has programs for pregnant women, discussed herein. However, in 2018 the Office of Inspector General of DOJ found that BOP's programming and policy "may not fully consider the needs of female prisoners."<sup>530</sup> The DOJ Inspector General found that BOP has not adequately staffed its trauma treatment program for women, there was a lack of staff awareness and training regarding the needs and resources available for pregnant inmates, and feminine hygiene products were not sufficiently accessible and distributed.<sup>531</sup>

Under the precedent set in 1976 by the Supreme Court in *Estelle*, prisons are required to provide adequate medical care to all prisoners while in a custodial setting.<sup>532</sup> Prisoners are one of the few groups in the United States who have a constitutionally protected right to adequate healthcare.<sup>533</sup> Furthermore, the Court held that cruel and unusual punishment can be found to have occurred when doctors are indifferent to a prisoner's health needs, when there is an intentional denial or delay in access to care, or when prison officials interfere with a prisoner's treatment.<sup>534</sup> In a 2011 Supreme Court decision stemming from the *Coleman* litigation against a series of California Governors,<sup>535</sup> Justice Kennedy wrote that "for years the medical and mental health care provided

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<sup>527</sup> Sufrin Testimony, p. 171.

<sup>528</sup> Dep't of Justice, Federal Bureau of Prisons, Medical Care, [https://www.bop.gov/inmates/custody\\_and\\_care/medical\\_care.jsp](https://www.bop.gov/inmates/custody_and_care/medical_care.jsp) (accessed May 29, 2019).

<sup>529</sup> "Health Management Resources," U.S. Dep't of Justice, Federal Bureau of Prisons, [https://www.bop.gov/resources/health\\_care\\_mngmt.jsp](https://www.bop.gov/resources/health_care_mngmt.jsp) (accessed May 30, 2019).

<sup>530</sup> DOJ, Review of the Federal Bureau of Prison's Management of Its Female Inmate Population, p. 18.

<sup>531</sup> *Ibid.*, 18-32.

<sup>532</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>533</sup> *See supra* notes 191-92.

<sup>534</sup> *Estelle*, 429 U.S. at 104-05.

<sup>535</sup> In 1990, in *Coleman v. Schwarzenegger*, a federal court issued an injunction requiring reforms to ensure access to care for California prisoners with mental health issues, but 12 years later, severe overcrowding had led to deteriorating mental health care, and in another case, *Brown v. Plata*, the state conceded that there were deficiencies in prison medical care that violated prisoners' Eighth Amendment rights. *See Brown v. Plata*, 563 U.S. 493 (2011) (summarizing procedural history). These cases were consolidated, *See Coleman v. Schwarzenegger*, 2010 WL 99000 (E.D. and N.D. Cal. 2010), and the decision was appealed directly to the Supreme Court, which found that crowding was the primary cause of constitutional violations. *Brown v. Plata*, 563 U.S. 493 (2011) (summarizing procedural history).



by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result."<sup>536</sup> The Court agreed that whatever remedy was needed to improve conditions should be ordered.<sup>537</sup>

In 1993, a federal court in Arizona found that the Equal Protection Clause of the Fourteenth Amendment may require that women in prison receive the same level and access to health care, as compared to similarly situated men in prison.<sup>538</sup> The Arizona federal court first found Eighth Amendment violations in women's prisons across the state and in particular:

The Court finds the treatment of seriously mentally ill inmates to be appalling. Rather than providing treatment for serious mental illnesses, ADOC punishes these inmates by locking them down in small, bare segregation cells for their actions that are the result of their mental illnesses. These inmates are left in segregation without mental health care.<sup>539</sup>

The court also found an Equal Protection violation, noting that the state prisons provided fewer mental health resources for women as compared to men, and that the lack of services "resulted in more egregious cases of deliberate indifference to women's mental health needs."<sup>540</sup> It also noted the qualitative differences in mental health care. For example:

At Flamenco [state prison], men are provided more advanced programming and facilities than women. Men can progress in a phase program from the acute unit to the sub-acute unit and then into SPU or general population. Women of all levels are treated in G [general] ward. Men have better access to occupational therapy with more equipment and supplies. In addition, mental health activities logs indicate that men are offered more substantive programs such as computer training, communication training, stress management and anger control. However, at the same time, women are offered aerobics, board games, movies and 'Women Who Love Too Much.'<sup>541</sup>

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<sup>536</sup> *Brown*, 563 U.S. at 501.

<sup>537</sup> *Id.* at 502. Due to this continuing injury, the Supreme Court held that the lower court properly ordered a reduction in prison population as severe overcrowding had "overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve." *Id.*

<sup>538</sup> See *Casey v. Lewis*, 834 F. Supp. 1477, 1551-52 (D. Ariz. 1993) (holding that women prisoners must have access to the same levels of mental health treatment as male prisoners for the purposes of prison programs and services).

<sup>539</sup> *Id.* at 1550.

<sup>540</sup> *Id.* at 1551.

<sup>541</sup> *Id.*

The state argued that additional mental health services, including separate treatment facilities as compared to being returned to the general prison population, were necessary for men because they “are more predatory,” but the court found that this argument did not justify the unequal treatment.<sup>542</sup>

In contrast, in 1994, the Eighth Circuit Court of Appeals concluded that women and men in prison were not similarly situated for purposes of prison programs and services in Nebraska, because the men’s prisons housed six times more inmates whose average length of stay was longer, the men’s prisons were higher security, and further, “plaintiffs’ witnesses also testified at trial that female inmates as a class have special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims. Male inmates, in contrast, are more likely to be violent and predatory than female inmates.”<sup>543</sup> Because “as a matter of law” female inmates were not considered to be similarly-situated to male inmates in Nebraska prison system, the Eighth Circuit therefore dismissed their Equal Protection claim.<sup>544</sup>

In recent years, Colorado,<sup>545</sup> Connecticut,<sup>546</sup> Kentucky,<sup>547</sup> Maryland,<sup>548</sup> and Virginia<sup>549</sup> have passed legislation to ensure that female inmates have access to menstrual products, in some cases appropriating funds to allow sanitary napkins and/or tampons to be provided to inmates for free. Additionally, in April of 2019, Senators Elizabeth Warren and Cory Booker along with Representatives Pramila Jayapal and Karen Bass reintroduced the Dignity for Incarcerated Women Act in Congress, which aims to allow women in prison to receive trauma informed care and basic

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<sup>542</sup> *Id.*

<sup>543</sup> *Klinger v. Dep’t of Corrections*, 31 F. 3d 727, 731 (8th Cir. 1994).

<sup>544</sup> *Id.* at 733.

<sup>545</sup> COLO. SESS. L. Ch. 131 (Apr. 25, 2019), <https://leg.colorado.gov/bills/hb19-1224>.

<sup>546</sup> CONN. PUB. ACT. No. 18-4 § 3 (May 14, 2018), <https://www.cga.ct.gov/2018/ACT/pa/pdf/2018PA-00004-R00SB-00013-PA.pdf>.

<sup>547</sup> Ky. S.B. 133 (Apr. 10, 2018), <https://www.billtrack50.com/BillDetail/947301>; see also “Kentucky Dignity Bill: A Game-Changer for Women Behind Bars,” *Public Service News*, Mar. 28, 2018, <https://www.publicnewsservice.org/2018-03-28/criminal-justice/kentucky-dignity-bill-a-game-changer-for-women-behind-bars/a61970-1>.

<sup>548</sup> Dodd, Cameron. “Governor Signs Prison Menstrual Pads Bill,” *The Frederick News-Post*, Apr. 24, 2018, [https://www.fredericknewspost.com/governor-signs-prison-menstrual-pads-bill/article\\_3d5b8f47-24e5-5765-b416-6dcd68677440.html](https://www.fredericknewspost.com/governor-signs-prison-menstrual-pads-bill/article_3d5b8f47-24e5-5765-b416-6dcd68677440.html); see also “Chapter 255, Senate Bill 588,” [http://mgaleg.maryland.gov/2018RS/chapters\\_noln/Ch\\_255\\_sb0598T.pdf](http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_255_sb0598T.pdf) (accessed Oct. 18, 2019).

<sup>549</sup> “Virginia Law Requiring Jails to Supply Tampons, Pads Passes,” *Associated Press*, Apr. 26, 2018, <https://www.apnews.com/d0e4b939e7ab4e179f382b1c351d1b8d>.

hygienic products for free while incarcerated.<sup>550</sup> The bill, originally introduced in 2017, in part prompted the Federal Bureau of Prisons to change their policy and require federal custodial institutions to provide menstrual hygiene products to female inmates free of charge.<sup>551</sup>

CRIPA investigations at times result in settlements or consent decrees, by which the Department of Justice can attempt to ensure that women and girls in prison are receiving adequate healthcare. But CRIPA can only be enforced by DOJ, when it can prove a pattern or practice of constitutional violations.<sup>552</sup> For example, to address unconstitutional conditions at Julia Tutwiler prison for women in Alabama that included widespread “staff-on-prisoner sexual abuse and harassment,”<sup>553</sup> the consent decree between Tutwiler and the U.S. listed a number of substantive policies to improve the mental and medical health care available to Tutwiler prisoners. According to the consent decree information regarding access to mental and physical health services must be made available to inmates upon intake.<sup>554</sup> Specific services must be made available to inmates who have been sexually abused, including “timely, unimpeded access to emergency medical and mental health care and treatment and crisis intervention services... medical and mental health evaluation[s]... mental health counseling and emotional support services.”<sup>555</sup> Furthermore, Tutwiler and ADOC must provide DOJ with information regarding investigations into and reports about the medical and/or mental health of Tutwiler inmates.<sup>556</sup>

Additionally, DOJ found that Tutwiler inmates often performed sex acts on prison staff in exchange for receiving necessary hygienic products, including tampons, pads, and toilet paper.<sup>557</sup>

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<sup>550</sup> Frazin, Rachel. “Warren, Booker reintroduce Dignity for Incarcerated Women Act.” *The Hill*, Apr. 3, 2019, <https://thehill.com/homenews/senate/437271-warren-booker-reintroducing-dignity-for-incarcerated-women-act>.

<sup>551</sup> Chandler, Michael A. “Federal Prisons Must Now Provide Free Tampons and Pads to Incarcerated Women,” *The Washington Post*, Aug. 24, 2017, [https://www.washingtonpost.com/local/social-issues/federal-prisons-must-provide-free-tampons-and-pads-to-incarcerated-women/2017/08/23/a9e0e928-8694-11e7-961d-2f373b3977ee\\_story.html?utm\\_term=.58eb49082de6](https://www.washingtonpost.com/local/social-issues/federal-prisons-must-provide-free-tampons-and-pads-to-incarcerated-women/2017/08/23/a9e0e928-8694-11e7-961d-2f373b3977ee_story.html?utm_term=.58eb49082de6).

<sup>552</sup> Civil Rights of Institutionalized Persons Act of 1980, Pub. L. 96-247, 94 Stat. 349 (codified as 42 U.S.C. § 1997(a)).

<sup>553</sup> Letter from U.S. Dep’t. of Justice, Civil Rts. Div., Acting Assistant Attorney General Jocelyn Samuels to Governor Robert Bentley (Jan. 17, 2014), at 1, [https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler\\_findings\\_1-17-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf).

<sup>554</sup> Consent Decree, *United States v. Alabama*, No. 2:15-cv-368 (M.D. Ala., June 18, 2015), at 49-50.

<sup>555</sup> *Id.* at 80-83.

<sup>556</sup> *Id.* at 114.

<sup>557</sup> Letter from U.S. Dep’t. of Justice, Civil Rts. Div., Acting Assistant Attorney General Jocelyn Samuels to Governor Robert Bentley (Jan. 17, 2014), at 14.

Often this was Tutwiler inmates' only means of securing these products.<sup>558</sup> DOJ described the conditions as follows:

Thirty-one percent of the correspondence we received [during the DOJ investigation] reported a lack of basic hygiene and laundry services, especially for indigent prisoners. Prisoners reported that hygiene products were not evenly distributed and alleged that staff either took supplies for themselves or provided additional supplies to their 'favorites.' Several prisoners reported going two to three months without supplies...and others reported having to borrow supplies.<sup>559</sup>

The limited supply created a bartering system, a "black market," and increased inmate risk of sexual assault and abuse from both other prisoners and staff.<sup>560</sup> The consent decree between the U.S. and Alabama requires that Tutwiler provide these hygienic necessities to the inmates.<sup>561</sup>

### ***Health Care in Prisons***

As discussed, the Supreme Court has held that prisons must provide needed medical care for inmates, reasoning that "[a]n inmate must rely on prison authorities to treat his [or her] medical needs; if the authorities fail to do so, those needs will not be met."<sup>562</sup> The Commission received testimony that because of prior unmet medical needs, prisons often become a "healthcare provider of last resort" for incarcerated people.<sup>563</sup> Also, because the vast majority of men and women in prison will eventually be released, incarceration can be a "'moment of opportunity' to identify and treat people's health conditions, thereby, improving individual and public health outcomes."<sup>564</sup> However, providing quality care to incarcerated men and women is challenging for prisons because of the significant financial and logistical costs associated.

While prisons are not designed principally for delivery of health care, men and women enter prison with disproportionately higher than average physical and mental health issues.<sup>565</sup> For instance, mental health problems among men and women in prison range from 44 to over 60 percent

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<sup>558</sup> *Id.* at 14-15.

<sup>559</sup> *Id.*

<sup>560</sup> *Id.*

<sup>561</sup> *Id.* at 24.

<sup>562</sup> *Estelle*, 429 U.S. at 103; *see also supra* notes 540-45.

<sup>563</sup> Dr. Jaimie Meyer, Assistant Professor of Medicine and Assistant Clinical Professor of Nursing, Yale School of Medicine, Written Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 2 (hereinafter Meyer Statement).

<sup>564</sup> Meyer Statement, at 3.

<sup>565</sup> Meyer Statement, at 2.

compared to 11 percent in the general population.<sup>566</sup> In addition, substance abuse occurs in 30 to 70 percent of the incarcerated population compared to only 3 to 6 percent in the general population.<sup>567</sup> Also, more than 40 percent of prisoners reported having chronic medical issues such as diabetes, heart-related problems, and high blood pressure compared to 31 percent of the general population.<sup>568</sup> Infectious diseases such as Hepatitis B and C, and sexually transmitted diseases are especially high amongst prisoners, as over 20 percent of prisoners reported having an infectious disease compared to 5 percent of the general population.<sup>569</sup> A 2011 survey conducted by the National Survey of Prison Health Care found that the proportions of prison admissions occurring in states that tested at least some inmates for the following conditions were: 77 percent tested for Hepatitis A, 82 percent tested for Hepatitis B, 87 percent tested for Hepatitis C, 40 percent tested for traumatic brain injury, 83 percent tested for cardiovascular conditions and risk factors, 70 percent tested for elevated lipids, and almost all of the prisons in the study tested for high blood pressure, tuberculosis, and mental health conditions and suicide risk.<sup>570</sup>

The National Survey of Prison Health Care also found that prisons use a combination of on-site and off-site care facilities to deliver inpatient and outpatient medical procedures.<sup>571</sup> Most prisons provide the following service on-site: mental health care, treatment for chronic diseases, nursing home care, and hospice care.<sup>572</sup> However, psychiatric, diagnostic, or radiologic tests are often completed off-site.<sup>573</sup> When health services and procedures are provided off-site this adds additional costs to providing care, as prisons have to pay for transportation to and from the location, and have guards monitor the patient at all times.<sup>574</sup>

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<sup>566</sup> U.S. Dep't of Justice, Office of Justice Programs, *Mental Health Problems of Prison and Jail Inmates*, by Doris James and Lauren Glaze, Dec. 14, 2006, p. 3-5, <https://www.bjs.gov/content/pub/pdf/mhppji.pdf> at 3-4, <https://pdfs.semanticscholar.org/027e/5dc61e426b10e850bf60a5b29930bcce9e46.pdf>.

<sup>567</sup> Peters, Rogers, Paul Greenbaum, John Edens, Chris Carter, and Madeline Ortiz. "Prevalence of DSM-IV Substance Abuse and Dependence Disorders Among Prison Inmates." *Am J Drug Alcohol Abuse* 24 (1988):573-587.

<sup>568</sup> U.S. Dep't of Justice, Office of Justice Programs, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12* by Laura Maruschak and Marcus Berzofsky, Oct. 4, 2016, p. 1, <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>.

<sup>569</sup> Ibid.

<sup>570</sup> Chari, Karishma, Alan E. Simon, Carol J. DeFrances, and Laura Maruschak. "National Survey of Prison Health Care: Selected Findings," *National Health Statistics Reports* no. 96, (July 28, 2016): 3-5 <https://www.cdc.gov/nchs/data/nhsr/nhsr096.pdf>.

<sup>571</sup> Ibid.

<sup>572</sup> Ibid.

<sup>573</sup> Ibid., 5-6.

<sup>574</sup> Huh, Kil, Alex Boucher, Stephen Fehr, Frances McGaffey, Matt McKillop, and Maria Schiff, "State Prisons and the Delivery of Hospital Care," *The Pew Charitable Trusts*, July 2018, <https://www.pewtrusts.org/>

In 2015, states spent almost \$8.1 billion in health care costs for men and women in prison, which accounted for approximately 20 percent of prison expenditures.<sup>575</sup> In examining the cost of providing health care in prison, most prison systems do not absorb the raw costs of treatment.<sup>576</sup> Prison health care expenses are often offset by partial or complete coverage by Medicaid or Medicare, depending on how these programs are administered and their availability in each state.<sup>577</sup> States can also allay their health care costs through the federal Health Resources and Services Administration's (HRSA) 340B pricing, centralizing statewide purchasing drugs, using Medicaid for high-cost treatments, and passing some cost to inmates via copays.<sup>578</sup>

A 2016 survey fielded by Pew Charitable Trusts and the Vera Institute of Justice found that 16 state DOCs worked with eligible hospitals and other health care providers to receive high-cost drugs through discounted drug pricing programs with eligible providers, or nominal pricing negotiation strategies regarding medications for specific diseases at reduced costs for bulk purchases (e.g. Hepatitis C or HIV).<sup>579</sup> How prisons deliver health care to inmates can also impact the costs of care and drugs, as states either provide care via a direct-provision model, where all or most care is provided by DOC clinicians (17 states)<sup>580</sup> or contracted-provision model, where all or

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[/media/assets/2018/07/prisons-and-hospital-care\\_report.pdf](/media/assets/2018/07/prisons-and-hospital-care_report.pdf) (hereinafter Huh et al., "State Prisons and the Delivery of Hospital Care").

<sup>575</sup> Huh, Kil, Alex Boucher, Stephen Fehr, Frances McGaffey, Matt McKillop, and Maria Schiff. "Prison Health Care: Costs and Quality How and Why States Strive for High-Performing Systems," *The Pew Charitable Trusts*, Oct. 2017, p. 3, (hereinafter Huh et al., "Prison Health Care: Costs and Quality How and Why States Strive for High-Performing Systems") [http://www.pewtrusts.org/~media/assets/2017/10/sfh\\_prison\\_health\\_care\\_costs\\_and\\_quality\\_final.pdf](http://www.pewtrusts.org/~media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf).

<sup>576</sup> Dr. Jaimie Meyer, Assistant Professor of Medicine and Assistant Clinical Professor of Nursing, Yale School of Medicine, Follow-up Statement for the *Women in Prison: Seeking Justice Behind Bars* Briefing before the U.S. Commission on Civil Rights, Apr. 10, 2019, at 2 (hereinafter Meyer Follow-up Statement).

<sup>577</sup> Huh et al., "State Prisons and the Delivery of Hospital Care," p. 4, Table 1; *see also* "How Correctional Facilities Could Lower Drug Prices," *The Pew Charitable Trusts*, June 2018, [https://www.pewtrusts.org/-/media/assets/2018/11/correctional-facilities-lower-drug-prices\\_factsheet\\_nov2018\\_final.pdf](https://www.pewtrusts.org/-/media/assets/2018/11/correctional-facilities-lower-drug-prices_factsheet_nov2018_final.pdf); *see also* Meyer Follow-up Statement, at 1.

<sup>578</sup> Huh, Kil, Alex Boucher, Frances McGaffey, and Maria Schiff. "Pharmaceuticals in State Prisons: How Department of Corrections Purchase, Use, and Monitor Prescription Drugs," *The Pew Charitable Trusts*, Dec. 2017, p. 8-12 (hereinafter Huh et al., "Pharmaceuticals in State Prisons") <https://www.pewtrusts.org/~media/assets/2017/12/pharmaceuticals-in-state-prisons.pdf>.

<sup>579</sup> Huh et al., "Pharmaceuticals in State Prisons, p. 2, 8, 17, Figure 3;" *see also* Meyer Follow-up Statement, at 1, 4.

<sup>580</sup> These 17 states that have a direct-provision health care model are: Alaska, California, Hawaii, Iowa, North Carolina, North Dakota, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, and Wisconsin.

most care is delivered by clinicians employed by a private vendor (20 states)<sup>581</sup> and a handful of states either use a state university model<sup>582</sup>—care provided by state's public school medical staff—or hybrid model<sup>583</sup> that uses a combination of the aforementioned models to provide health care to inmates.<sup>584</sup>

According to available data, the estimates of health care costs vary significantly across state prisons, which can impact the quality of care delivered to women and men in prison.<sup>585</sup> For instance, in 2015, the annual per-inmate prison healthcare expenditures ranged from \$2,173 (Louisiana) to \$19,796 (California).<sup>586</sup> According to experts, cheaper health care is not always better in terms of health outcomes.<sup>587</sup> But as mentioned earlier, how state prisons design their respective health care systems may contribute to spending differences observed across states as well as several other factors including: pre-incarceration access to adequate community care, regional medical prices, staff capacity and compensation levels, facility capacity and related economies of scale, and incidences of high-risk behaviors and associated disease prior to incarceration.<sup>588</sup>

Another consideration is the cost of care that inmates incur, as some prisons require inmates to pay \$2.00 to \$5.00 copays for each medical visit.<sup>589</sup> If inmates cannot afford the copay at the time of service, these fees are added to their accounts, which would result in a negative balance.<sup>590</sup> If a family member or friend adds money to their account or if an inmate earns income from prison

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<sup>581</sup> These 20 states that have a contracted-provision health care model are: Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Mexico, Tennessee, Vermont, West Virginia, and Wyoming.

<sup>582</sup> These 4 states are: Connecticut, Georgia, New Jersey, and Texas.

<sup>583</sup> These 8 states are: Colorado, Louisiana, Michigan, Minnesota, Montana, Pennsylvania, Rhode Island, and Virginia.

<sup>584</sup> Huh et al., "Prison Health Care: Costs and Quality How and Why States Strive for High-Performing Systems," p. 58.

<sup>585</sup> Meyer Follow-up Statement, at 1.

<sup>586</sup> Huh et al., "Prison Health Care: Costs and Quality," p. 6 (also finding that "According to data submitted to Pew and Vera, in fiscal 2015 the typical state department of corrections spent \$5,720 per inmate to provide health care services including medical, dental, mental health, and substance use treatment. However, departments in four states (California, New Mexico, Vermont, and Wyoming) spent more than \$10,000 per inmate, while five (Alabama, Indiana, Louisiana, Nevada, and South Carolina) spent less than \$3,500 per inmate").

<sup>587</sup> Meyer Follow-up Statement, at 1.

<sup>588</sup> U.S. Department of Justice, Office of Justice Programs, *State Prison Expenditures, 2001*, by J.J. Stephan (2004), p. 6, <https://www.bjs.gov/content/pub/pdf/spe01.pdf>; see also Meyer Statement, at 5-6.

<sup>589</sup> Harner, Holly, Brian Wyant, & Fernanda Da Silva. "Prison Ain't Free Like Everyone Thinks," *Qualitative Health Research* 25, no. 5 (2017): 688-99 at 689, <https://doi.org/10.1177/1049732316664460>.

<sup>590</sup> Ibid.

work, some of the funds are applied to their medical debt.<sup>591</sup> These costs can add up over time and research suggests that incarcerated women use health care services at higher rates than their male counterparts.<sup>592</sup> A 2017 study examined the financial concerns that women in prison confront through conducting approximately 100 interviews with women serving time in medium and maximum security prisons.<sup>593</sup> The authors found that over 70 percent of women in prison in their study reported not seeking medical care because of the associated copay.<sup>594</sup> Of the women who reported not seeking medical care because of the related costs, the vast majority of them reported not seeking care at least two or three other times in the last three months.<sup>595</sup> Instead, women reported making tradeoffs by not seeking medical treatment in order to use their limited funds to purchase hygiene products or stay in contact with their family members.<sup>596</sup> Of the women who reported being seen by prison health professionals, many reported that they did not feel heard by the staff, they received erroneous billing charges, or were never informed of their test results.<sup>597</sup>

The National Commission on Correctional Health Care recommend that prisons discontinue charging inmates for health-related co-pays.<sup>598</sup> The authors stated that, “Our findings... provide evidence to support the elimination of mandatory medical co-payment fees for incarcerated women.”<sup>599</sup> In addition, the authors state that while a fee for service health care model does appear to reduce usage of health care services, it is difficult to ascertain if decreased utilization is the result of less frivolous complaints or if individuals who truly need care have reduced their use of health care services.<sup>600</sup>

### ***Women in Prison and Their Unique Health Care Needs***

The Commission received testimony, including data, showing that some of the health problems and conditions that impact all prisoners occur with greater frequency among women in prison

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<sup>591</sup> Ibid.

<sup>592</sup> Owens, Gary. “Gender Differences in Health Care Expenditures, Resource Utilization, and Quality of Care,” *Journal of Managed Care Pharmacy* 14, no. 3 Supp A (2008) 2-6 at 2, <https://doi.org/10.18553/jmcp.2008.14.s3-a.2>.

<sup>593</sup> Harner, Holly, Brian Wyant & Fernanda Da Silva. “Prison Ain’t Free Like Everyone Thinks,” *Qualitative Health Research* 25, no. 5 (2017): 688-99, <https://doi.org/10.1177/1049732316664460>.

<sup>594</sup> Ibid., 692.

<sup>595</sup> Ibid.

<sup>596</sup> Ibid., 693-4.

<sup>597</sup> Ibid., 693.

<sup>598</sup> Ibid., 698.

<sup>599</sup> Ibid., abstract.

<sup>600</sup> Ibid. at 692.



compared to their male counterparts.<sup>601</sup> Women in prison report higher rates of serious psychological distress than men (20 percent vs 14 percent).<sup>602</sup> Women entering prison are more likely than their male counterparts to report a history of mental health problems (66 percent vs 35 percent).<sup>603</sup> This more significant reported history is also based upon significantly higher reported levels of trauma, especially in juvenile and adult years.<sup>604</sup> There is also a statistically significant difference in the rates of chronic diseases amongst men and women in prison, as 63 percent of women in prison report having a chronic health condition in comparison to 50 percent of men in prison.<sup>605</sup> Women in prison report disproportionately higher rates of infectious diseases in comparison to men in prison (25 percent vs 21 percent), but these results are not statistically significant.<sup>606</sup> In addition, twice as many women in prison are living with HIV than their male counterparts, which is likely tied to substance use and engagement in high risk sex prior to incarceration.<sup>607</sup>

In its 2014 evaluation of Alabama's Julia Tutwiler Prison for women, DOJ reported that "repeated sexually explicit and threatening language coupled with pervasive sexual misconduct, 'mutually heighten the psychological injury of women prisoners'... The health problems created by sexual harassment include significant depression, nausea, frequent headaches, insomnia, fatigue, anxiety, irritability, nervousness, and a loss of self-esteem."<sup>608</sup> The consent decree between Tutwiler and the U.S. listed a number of substantive policies needed to improve the mental health services available to Tutwiler prisoners. For example, information regarding access to these services must be made available to inmates upon intake.<sup>609</sup> Specific services must be made available to inmates who have been sexually abused, including "timely, unimpeded access to emergency medical and mental health care and treatment and crisis intervention services... mental health evaluation[s]...

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<sup>601</sup> Moss Statement, at 2; *see also* Meyer Statement, at 2.

<sup>602</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-2012*, by Jennifer Bronson and Marcus Berzofsky, June 2017, p. 1, <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf> (hereinafter DOJ, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-2012*).

<sup>603</sup> *Ibid.*, 4 (noting that the aforementioned comparisons are statistically significant at the 95 percent confidence interval, which means that these results were unlikely due to chance).

<sup>604</sup> *See supra* notes 83-87.

<sup>605</sup> DOJ, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-2012*, p. 5.

<sup>606</sup> *Ibid.*, 5.

<sup>607</sup> Salisbury Testimony, p. 122.

<sup>608</sup> U.S. Department of Justice, *Investigation of the Julia Tutwiler Prison for Women and Notice of Expanded Investigation*, prepared by J. Samuels for the Civil Rights Division (2014), p. 13, [https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler\\_findings\\_1-17-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf).

<sup>609</sup> Consent Decree, *United States v. Alabama*, No. 2:15-cv-368 (M.D. Ala., June 18, 2015), at ¶¶49-50.

mental health counseling and emotional support services.”<sup>610</sup> Furthermore, Tutwiler must provide DOJ with information regarding investigations into and reports about the mental health of women inmates.<sup>611</sup> Similar fact patterns, which led to similar remedies and monitoring requirements, were also documented in DOJ findings about the situation of incarcerated girls.<sup>612</sup>

In addition to disparities in health, women have certain unique health needs. The Commission received testimony that sanitary napkins are just as essential as clothes, bed sheets, or toilet paper.<sup>613</sup> In addition, menstrual products are important to women’s dignity and health, as inadequate access to sanitary napkins may force women to reuse feminine products and risk acquiring pelvic infections, or some women just bleed through their clothes, which may risk the spread of infectious diseases.<sup>614</sup> It costs women in some state prisons two weeks’ pay to buy one box of feminine products and if there is a lack of feminine products, possibly more.<sup>615</sup> Some state prisons, like the Alabama Department of Corrections (ADOC), allow women in prison to have unlimited access to personal hygiene items and other toiletry items without permission from staff, storing the products in cabinets in all bathroom areas.<sup>616</sup> According to Dr. Wendy Williams, Deputy Commissioner for Women’s Services at ADOC, “[t]his may sound like a minor change. But this

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<sup>610</sup> *Id.* at ¶¶ 80-83.

<sup>611</sup> *Id.* at ¶ 114.

<sup>612</sup> *Id.* at ¶¶ 33-4 (in 2010 DOJ found serious constitutional violations in the facilities’ mental health care procedures at two juvenile facilities for girls, Indiana’s Indianapolis Juvenile Correctional Facility and New York’s facilities of the Office of Children and Family Services. Some of the most significant deficiencies at Indiana were inadequate mental health and suicide screenings, assessments of inmates upon intake to determine inmates’ risk categorizations, “grossly inadequate” staffing of the mental health department, and “confusing and contradictory” and “inconsistent” systems of record keeping.) *See also* Settlement Agreement, *United States v. New York*, No. 1:10-CV-0858, (N.D.N.Y. Jul. 14, 2010) at ¶¶ 19, 23, 26 (noting that in 2010, in New York, DOJ found high levels of mental health needs, but the institutional response was insufficient treatment and programming for inmates with substance abuse issues, inappropriate medication procedures, and a failure to provide adequate treatment planning. Finally, DOJ reported that the facility disregarded the young women inmates’ substance abuse issues.) *See Id.* at 10-1, 16, 18 (noting that Because of these failures and deficiencies, the consent decree between New York and the U.S. detailed a number of remedial measures intended to ameliorate the lack of adequate mental health care at the facilities for girls. These measures included implementing a behavioral treatment program, providing adequate services for mental health crises, sufficiently evaluating inmates’ mental health needs, creating adequate treatment planning procedures, and ensuring appropriate transition planning for inmates with mental health or substance abuse issues.

<sup>613</sup> Owens Testimony, p. 29.

<sup>614</sup> *Ibid.*; *see also* Dr. Carolyn Sufrin, Written Statement for the *Women in Prison: Seeking Justice Behind Bars* Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 3 (hereinafter Sufrin Statement).

<sup>615</sup> Owens Testimony, p. 29.

<sup>616</sup> William Testimony, p. 216.

policy alone began a cultural shift in operational practices in the department's women's facilities."<sup>617</sup>

Women also have other distinct health concerns such as menopause, need for cervical and breast cancer screenings, reproductive medical care, and pregnancy needs—including pre-natal and post-partum care—that are distinct from needs of men in prison.<sup>618</sup>

The available data on women in prison suggests that between 3 to 5 percent of incarcerated women are pregnant and approximately 1,500 to 2,000 prison births happen each year.<sup>619</sup> However, according to Dr. Carolyn Sufrin, who is an Obstetrician/Gynecologist and Researcher at Johns Hopkins School of Medicine, these statistics may be inaccurate, as these data are old and the scope and methodology utilized to gather this information is limited.<sup>620</sup> At the Commission's briefing, Dr. Sufrin stated that:

We have no idea how many pregnant incarcerated women there are and what happens to these pregnancies.

Women who don't count don't get counted. That is, the lack of any comprehensive or updated statistics about pregnancy among women behind bars signals the systematic disregard in the carceral system, and indeed our country, for incarcerated pregnant people.<sup>621</sup>

Dr. Sufrin and her research team recently published an article on pregnancy outcomes in all federal and 22 state prison systems from 2016 to 2017.<sup>622</sup> The article studies the pregnancy outcomes of 1,396 pregnant women in prison.<sup>623</sup> According to this study, almost 4 percent of newly admitted incarcerated women and 0.6 percent of all incarcerated women were pregnant in December 2016.<sup>624</sup>

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<sup>617</sup> Ibid.

<sup>618</sup> Sufrin Statement, at 2-3; *see also* Meyer Statement, at 3.

<sup>619</sup> Sufrin Testimony, p. 127.

<sup>620</sup> Ibid., 128.

<sup>621</sup> Ibid.

<sup>622</sup> Carolyn Sufrin, Lauren Beal, Jennifer Clarke, Rachel Jones, and William Mosher. "Pregnancy Outcomes in US Prisons, 2016–2017," *American Journal of Public Health* 109, no. 5 (May 2019): 799–805 <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305006> (hereinafter Sufrin, et al., "Pregnancy Outcomes in US Prisons, 2016–2017"). The following 22 state prisons participated in this study: Alabama, Arizona, Colorado, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin.

<sup>623</sup> Carolyn Sufrin et al., "Pregnancy Outcomes in US Prisons, 2016–2017," p. 801.

<sup>624</sup> Ibid.

There were 753 live births (92 percent of pregnancy outcomes)—685 births occurred among women in state prisons and 68 among women in BOP’s custody, 46 miscarriages (6 percent), 4 stillbirths (0.5 percent), 3 newborn deaths, and no maternal deaths.<sup>625</sup> Six percent of live births were preterm and 32 percent were cesarean (or C section) deliveries.<sup>626</sup> According to the authors, these percentages vary across prisons, as for example, in Arizona, as many as 20 percent of pregnancies ended in miscarriages.<sup>627</sup> The authors note, however, that differences observed in pregnancy outcomes across prisons may be due to other factors such as individual patient attributes, prison health care policies and procedures, and access to community reproductive health care prior to incarceration.<sup>628</sup>

Comparing pregnancy outcomes and births in prisons to the general population has limitations, as these data are collected differently and in the general population. Given their confinement, pregnant women in prison are distinct from pregnant women who are not in prison in ways that are not captured in these comparisons. Notwithstanding that comparison challenge however, the authors find important differences between these groups.<sup>629</sup> First, the authors find that the national fertility rate in 2016, a measure of the number of live births among women 15 to 44 years of age, was 62 per 1000 women in the United States,<sup>630</sup> but for incarcerated women, the fertility rate was much lower, 18 per 1000 imprisoned women 18 to 44 years old.<sup>631</sup> According to the authors, notwithstanding that women incarcerated for long periods are not likely to become pregnant, this lower rate of live births speaks to the need to “address the numerous complexities of birth in custody, such as the medically unsafe practices of placing pregnant women in solitary confinement and shackling women in labor, ensuring proper pregnancy and postpartum care, and determining who will care for the infants born to mothers in custody.”<sup>632</sup>

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<sup>625</sup> Sufrin et al., “Pregnancy Outcomes in US Prisons, 2016–2017,” p. 801. Of note, abortion as a pregnancy outcome is not included because since 1983, the Commission’s statute has prohibited “the Commission, its advisory committees, or any other person under its supervision or control to study and collect, make appraisals of, or serve as a clearinghouse for any information about the laws and policies of the Federal Government or any other governmental authority in the United States, with respect to abortion.” 42 U.S.C. § 1975a(f). Accordingly, the Commission does not further discuss abortion herein.

<sup>626</sup> Sufrin et al., “Pregnancy Outcomes in US Prisons, 2016–2017,” p. 801.

<sup>627</sup> Ibid., 803.

<sup>628</sup> Ibid.

<sup>629</sup> Ibid.

<sup>630</sup> U.S. Department of Health and Human Services, National Center for Health Statistics, *Births in the United States*, 2017, by Joyce Martin, Brady Hamilton, and Michelle Osterman, no. 318 (Aug. 2018), <https://www.cdc.gov/nchs/data/databriefs/db318.pdf>.

<sup>631</sup> Sufrin et al., “Pregnancy Outcomes in US Prisons, 2016–2017,” p. 803.

<sup>632</sup> Ibid.

Next, nationally 10 percent of live births were preterm, as compared with 6 percent of live births in prisons.<sup>633</sup> While there is significant variability in access to and quality of prenatal care across prisons, according to the authors, this lower preterm birth proportion in the prisons in this study may be partially related to the relative presence of prenatal care, food, and shelter and the limited access to illicit substances, conditions that may be different for some pregnant women not in custody.<sup>634</sup> Moreover, the authors assert that some state prison systems had preterm birth rates that are higher than the national rate, which suggests that the context of the individual prison system and pre-incarceration conditions may play a role in pregnancy outcomes,<sup>635</sup> and may be a result of the lack of standardization of care.

At the Commission's briefing, Ms. Pamela Winn, a registered nurse, Executive Director of RestoreHER, and a formerly incarcerated woman, shared her experience suffering a miscarriage while in federal custody.<sup>636</sup> When Ms. Winn entered federal prison, she was 6 weeks pregnant, and anytime she was transported, she was shackled, which meant that she was chained at her ankles with another chain around her belly that bound her hands in front of her waist with a black box.<sup>637</sup>

According to Ms. Winn:

While shackled, attempting to step up into a van, I fell. A couple days later I begin spotting with streaks of blood, which I reported to the medical staff for approximately two weeks with no response. The initial reply I finally received was that bleeding was normal with pregnancy. Then they informed me that the prison was structured for men and had literally 'no' means of caring for me and would have to get approval from the US Marshals to take me to the emergency room. The turnaround time for the request and approval ended up being 4 weeks. At that point, it was no longer an 'emergency,' so I was turned away and unable to be treated at the emergency room. The ER physician recommended an obstetrician but was told by the transporting officers that I was only approved for an emergency room visit. I then required a second approval for an obstetrician, which took 4 more weeks. The obstetrician would need an ultrasound which was not performed on site, therefore requiring a third approval. Once I received the ultrasound, follow-up was

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<sup>633</sup> Ibid.

<sup>634</sup> Ibid.

<sup>635</sup> Ibid.

<sup>636</sup> Pamela Winn, Written Statement for the *Women in Prison: Seeking Justice Behind Bars* Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 2 (hereinafter Winn Statement).

<sup>637</sup> Winn Statement, at 2.

required, and a fourth approval was requested. I ended up miscarrying at approximately 20 weeks without any formal or proper prenatal care.<sup>638</sup>

Ms. Winn testified that after her miscarriage, she was placed in solitary confinement, which meant that she was locked in a 6' by 9' room with a bed, toilet, sink, and no window for 23 hours a day, for "medical observation."<sup>639</sup> Also at the briefing, Dr. Carolyn Sufrin of Johns Hopkins School of Medicine, who provides clinical care for incarcerated women, researches their reproductive health needs, and advises prisons across the country, stated that data showing that 1,500-2,000 women per year give birth in custody is "decades old and limited in scope and methodology."<sup>640</sup> She told the Commission this is because BJS "rigorously and routinely collects data about incarcerated people and their demographics, but they do not collect any information about pregnancy. This is profound elision."<sup>641</sup> Further, Dr. Sufrin stated that:

The paucity of this data means that no one is paying attention. Anything can happen to them, as Ms. Winn movingly and harrowingly described. They can be placed in solitary confinement, shackled, they can receive sub-standard pregnancy care and nutrition, their symptoms of contractions or bleeding can be ignored.<sup>642</sup>

Reports of possible mistreatment of incarcerated pregnant women and unsafe birth conditions include a Denver woman, Diana Sanchez, who has alleged in a lawsuit she was denied medical treatment while in labor and gave birth alone in her cell, including security camera footage which appears to confirm her account.<sup>643</sup> Although the case is ongoing and officials deny any wrongdoing, the department has changed its policies to require immediate emergency transportation to the hospital for women in any stage of labor.<sup>644</sup> Dr. Sufrin added that the fact that only 26 states have prohibited shackling during pregnancy is troubling, because shackling increases many medical risks for both the mother and the child.<sup>645</sup> Kaitlin Owens of the American Conservative Union

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<sup>638</sup> Ibid.

<sup>639</sup> Ibid.

<sup>640</sup> Sufrin Testimony, p. 128-29.

<sup>641</sup> Ibid.

<sup>642</sup> Ibid., 130.

<sup>643</sup> Chiu, Allyson. "'Nobody Cared': A Woman Gave Birth Alone in a Jail Cell After Her Cries for Help Were Ignored, Lawsuit Says." *The Washington Post*, Aug. 29, 2019, <https://www.washingtonpost.com/nation/2019/08/29/pregnant-woman-diana-sanchez-birth-alone-jail-cell-denver/>.

<sup>644</sup> Ibid.

<sup>645</sup> Sufrin Testimony, p. 130.

agreed that given the high number of births in prison, more states should ban “this barbaric practice.”<sup>646</sup>

BOP stated that it banned the practice in 2008, but women's rights groups have found that shackling at BOP institutions continued past the BOP ban.<sup>647</sup> The First Step Act of 2018 permanently banned the shackling of incarcerated women during pregnancy and childbirth and for a period thereafter, in the federal prison system.<sup>648</sup> At the Commission's briefing, several experts testified that despite the passage of the First Step Act, some women in state prisons or women who are housed in a private facility that contracts with BOP, are still shackled during pregnancy and delivery.<sup>649</sup> Harvard Law School's Journal of Civil Rights and Civil Liberties published an essay stating that the First Step Act's exceptions to the rules against shackling for “when (i) the woman “is an immediate and credible flight risk that cannot reasonably be prevented by other means;” or (ii) “poses an immediate and serious threat of harm to herself or others that cannot reasonably be prevented by other means,” are too broad and open to abuse.”<sup>650</sup>

According to medical experts, shackling women in prison at any point in pregnancy can increase the risk of falls, which can lead to placental separation, hemorrhage, and still birth.<sup>651</sup> Moreover, shackling women in prison may impede routine and emergency medical interventions when there is fetal distress, maternal hemorrhage, the baby gets stuck in the birth canal, or if an emergency caesarian section needs to be performed during labor and delivery.<sup>652</sup> There is extensive research showing a lack of safety concerns if shackling is not used on women prisoners when they give

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<sup>646</sup> Owens Testimony, p. 31.

<sup>647</sup> See Jessica Jackson, How the First Step Act Would Restore Dignity to Incarcerated Women, 31 Fed. Sent. R. 116, 2018 WL 6928323 (Dec. 2018); see also “Mothers Behind Bars,” *Rebecca Project for Human Rights and National Women's Law Center*, 2010, <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.

<sup>648</sup> See 18 U.S.C. § 4322 (as amended by the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5217); see also Smith Statement, at 8; see also James, Nathan. *The First Step Act of 2018: An Overview*, Congressional Research Service, Mar. 4, 2019, p. 17 <https://crsreports.congress.gov/product/pdf/R/R45558>.); see also United Nations, *Convention against torture and Other Cruel, In human or Degrading Treatment or Punishment*, (Dec. 2014), p. 12, [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/USA/CO/3-5&Lang=En](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/USA/CO/3-5&Lang=En), (noting that US should “[r]evise the practice of shackling incarcerated pregnant women, bearing in mind that the prison regime should be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children.” (emphasis in original).

<sup>649</sup> Winn Testimony, p. 49; see also Owens Testimony, p. 68; see also Sufrin Testimony, p. 129.

<sup>650</sup> “Barbaric Beyond Bans: How the First Step Act's Provision Fails to Protect Women,” *Harvard Civil Rights Civil Liberties Law Review*, Feb. 14, 2019, <https://harvardcrcl.org/barbaric-beyond-bans-the-first-step-acts-shackling-provision-may-not-protect-women/>; see also 18 U.S.C. § 4322 (b) (exceptions to the shackling ban).

<sup>651</sup> Sufrin Testimony, p. 129.

<sup>652</sup> *Ibid.*, 130.

birth.<sup>653</sup> In addition, the vast majority of women in prison are classified as low security,<sup>654</sup> and therefore, under the First Step Act, shackling would be inappropriate in the vast majority of cases.<sup>655</sup>

Some pregnancies may result from sexual abuse. For example, DOJ found that in Tutwiler prison, widespread rape of prisoners had resulted in pregnancies.<sup>656</sup> Though only one pregnancy was reported in the three years prior to DOJ's investigation, DOJ had reason to believe that this number was inaccurate, possibly due to inadequate investigative procedures.<sup>657</sup> To address this occurrence, Tutwiler agreed to abide by a number of policies intended to reduce the risk of pregnancy and care for women who become pregnant, including documenting and reporting the pregnancy of individuals transferring from other correctional facilities (especially if the pregnancy is suspected to be the result of rape);<sup>658</sup> providing, when medically appropriate, information about and access to pregnancy tests, emergency contraception, and lawful pregnancy-related medical procedures and services;<sup>659</sup> and monitoring the number pregnant Tutwiler prisoners.<sup>660</sup>

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<sup>653</sup> McLearn Testimony, p. 59-60; *see also* Still Testimony, p. 297.

<sup>654</sup> DiNardo, Chris. Pregnancy in Confinement, Anti-Shackling Laws and the “Extraordinary Circumstances” Loophole, 25 DUKE J. OF GENDER LAW & POL’Y, 271, 280 (2018).

<sup>655</sup> 18 U.S.C. § 4322 (b) (exceptions to the shackling ban).

<sup>656</sup> Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice to Governor Robert Bentley, Jan. 17, 2014, [https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler\\_findings\\_1-17-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf), at 10.

<sup>657</sup> *Ibid.*

<sup>658</sup> Consent Decree, *United States v. Alabama*, No. 2:15-cv-368, 56, 83(M.D. Ala., June 18, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/tutwiler\\_agreement\\_6-18-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/tutwiler_agreement_6-18-15.pdf).

<sup>659</sup> *Id.* at 83.

<sup>660</sup> *Id.* at 104.



## CHAPTER 4: AN ANALYSIS OF WOMEN IN PRISON AND SEXUAL ABUSE IN THE U.S. PRISON SYSTEM

### Women in Federal Prison and Sexual Assault & Abuse

Some men and women in prison experience sexual abuse by other inmates and prison staff. Although prevalence is difficult to measure, as explained below, assault and abuse are a significant problem for incarcerated women, and prison officials have an obligation to protect incarcerated people from assault and abuse. The Prison Rape Elimination Act (PREA) was passed in 2003 to provide additional tools to keep incarcerated people safe. The Commission received testimony that the sexual assault and abuse remain a serious concern.

Under PREA regulations issued in 2012, the definition of what is considered sexual abuse is very broad. It includes:

- (1) Sexual abuse of an inmate, detainee, or resident by another inmate, detainee, or resident; and
- (2) Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer.

Sexual abuse of an inmate, detainee, or resident by another inmate, detainee, or resident includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse:

- (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;
- (3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and
- (4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation.

Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer includes any of the following acts, with or without consent of the inmate, detainee, or resident:

- (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;

- (3) Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (6) Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in paragraphs (1)-(5) of this section;
- (7) Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, and
- (8) Voyeurism by a staff member, contractor, or volunteer. Voyeurism by a staff member, contractor, or volunteer means an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions.<sup>661</sup>

In addition, the regulations implementing PREA define sexual harassment as:

- (1) Repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another; and
- (2) Repeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.<sup>662</sup>

In 2015, three years after the PREA national standards were implemented, Department of Justice's Bureau of Justice Statistics reported that there were 24,661 allegations of sexual abuse in prison,

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<sup>661</sup> 28 C.F.R. § 115.6.

<sup>662</sup> *Id.*

only 1,473 of which were substantiated after investigation.<sup>663</sup> To clarify, 91 percent of the claims were investigated, and those that were considered “unsubstantiated” meant that there wasn’t enough evidence to determine whether sexual abuse had occurred or not.<sup>664</sup> The report doesn’t discuss why there is such a large gap between the number of allegations and the number substantiated by prison officials. It does state that allegations tripled from 2011 to 2015, coinciding with the release of the national PREA standards.<sup>665</sup> But concurrently, the number of substantiated incidents also rose, with the annual number of substantiated incidents of sexual victimization increasing by 63 percent from 2011 to 2015.<sup>666</sup> Another Bureau of Justice Statistics survey found that women in prisons and jails reported higher rates of prisoner-on-prisoner sexual victimization than their male counterparts (6.9 percent vs 1.7 percent) and these differences were found to be significantly different.<sup>667</sup>

While men and women in prison report similar rates of staff-on-inmate misconduct (2.4 percent vs 2.3 percent),<sup>668</sup> nearly 82 percent of the female victims in prison said they were pressured by staff to engage in sexual activity, compared to 55 percent of male victims in prison.<sup>669</sup> For both male and female inmates, the perpetrator of staff sexual misconduct was most often of the opposite sex.<sup>670</sup> In 2017, of 100 (out of 122) federal institutions participating, there were 417 allegations of inmate-on-inmate sexual abuse, of which only 26 were substantiated—four of which involved women in prison.<sup>671</sup> In 2016, of 94 (out of 122) federal institutions participating, there were 334 allegations of inmate-on-inmate sexual abuse, of which only 25 were substantiated—six of which involved women in prison.<sup>672</sup> In 2015, of 121 (out of 122) federal institutions participating, there were 365 allegations of inmate-on-inmate sexual abuse, of which only 15 were substantiated—three of these victims were women in prison.<sup>673</sup>

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<sup>663</sup> U.S. Department of Justice, Office of Justice Programs, *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15*, by Ramona Rantala, July 2018, p. 1, <https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>.

<sup>664</sup> Ibid.

<sup>665</sup> Ibid.

<sup>666</sup> Ibid., 9.

<sup>667</sup> DOJ, *Sexual Victimization in Prisons and Jails Reported by Inmates*, National Inmate Survey 2011-12, p. 17.

<sup>668</sup> Ibid.

<sup>669</sup> Ibid.

<sup>670</sup> Moss Statement, at 12.

<sup>671</sup> U.S. Department of Justice, Federal Bureau of Prisons, *Federal Bureau of Prisons Annual PREA Report*, by Hugh Hurwitz, p. 4, 6-8, [https://www.bop.gov/inmates/custody\\_and\\_care/docs/prea\\_2017.pdf](https://www.bop.gov/inmates/custody_and_care/docs/prea_2017.pdf).

<sup>672</sup> Ibid., 4, 5-9.

<sup>673</sup> Ibid., 4-7.

**Table 7: Sexual Assault/Abuse Allegations Against BOP Staff in Female Facilities, 2014–2018, by Institution<sup>674</sup>**

Facility	2014	2015	2016	2017	2018	Total
FPC Alderson	3	0	0	2	0	5
FCI Aliceville	3	4	3	0	0	10
MDC Brooklyn	0	1	2	0	0	3
FPC Bryan	3	3	1	3	0	10
FMC Carswell	10	8	6	8	3	35
MCC Chicago	1	0	0	2	0	3
FCC Coleman	6	2	0	1	4	13
FCI Danbury	2	1	0	1	0	4
FCI Dublin	4	4	3	1	0	12
FCI Greenville	0	2	1	0	1	4
MDC Guaynabo	0	0	1	0	0	1
FCC Hazelton	1	1	1	0	1	4
FDC Honolulu	0	0	0	0	0	0
FDC Houston	0	1	1	1	0	3
FMC Lexington	0	1	0	3	1	5
MDC Los Angeles	1	0	0	0	0	1
FCI Marianna	0	0	3	0	0	3
FDC Miami	3	1	3	1	0	8
MCC New York	0	1	1	1	0	3
FTC Oklahoma	0	0	1	0	0	1
FCI Pekin	0	0	0	0	0	0
FDC Philadelphia	4	0	1	0	0	5
FI Phoenix	0	4	0	0	0	4
MCC San Diego	1	0	2	0	0	3
FDC SeaTac	0	1	1	0	0	2
FCI Tallahassee	7	2	3	1	0	13
FCC Tucson	0	0	0	1	0	1
FCC Victorville	0	0	0	3	0	3
FCI Waseca	5	3	4	1	0	13
Total	54	40	38	30	10	172

The relatively low numbers in BJS reports are contradicted by findings of widespread sexual abuse in certain institutions. For example, the Department of Justice received letters from roughly one-quarter of the inmates at Julia Tutwiler prison describing concerns regarding sexual assault and

<sup>674</sup> BOP Response to USCCR Interrogatory No. 25.

harassment, dehumanizing behavior, and discriminatory conduct by staff.<sup>675</sup> Forty-four of the 233 letters were about sexual abuse and harassment.<sup>676</sup> The investigation uncovered a culture of sexual abuse and harassment of prisoners by prison guards developed over two decades.<sup>677</sup> After its investigation, DOJ filed a complaint in federal court alleging that “[d]efendants have allowed a sexualized environment to exist at Tutwiler, such that sexual abuse and sexual harassment are constant, and prisoners must sometimes submit to unlawful sexual advances from staff in order to obtain necessities or to avoid punishment.”<sup>678</sup> The complaint further alleged that prison staff did not maintain an adequate grievance filing system, and that women who did attempt to report sexual harassment and abuse were met with retaliation, including being placed in solitary confinement.<sup>679</sup>

According to Professor Brenda V. Smith, of the American University Washington College of Law and Former Commissioner of the National Prison Rape Commission (2003-2009):

It is evident that sexual abuse is still a serious contemporary issue facing women in custody. Sexual victimization of women in custody is an enduring theme in the history of women in custody. Over the last twenty years, I have been called to testify and present on the issue of women in custody multiple times. Generally, that testimony occurred when there had been a major scandal such as the ones in Alabama, California, Michigan, DC, Washington, Oregon, and Florida. They are not outliers; there have been scandals related to the treatment of women in custody in every jurisdiction. While legislation, such as PREA, has furthered dialogue on the issue, we, as a nation, need a comprehensive and durable strategy for improving the treatment of women and girls in custody.<sup>680</sup>

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<sup>675</sup> See Acting Assistant Attorney General Jocelyn Samuels, letter to Governor Robert Bentley, Jan. 17, 2014, at p. 5, [https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler\\_findings\\_1-17-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf).

<sup>676</sup> *Id.* at 7.

<sup>677</sup> See Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice to Governor Robert Bentley, (Jan. 17, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler\\_findings\\_1-17-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf) at 5.

<sup>678</sup> Complaint, *U.S. v. Alabama*, 2:15-cv-00368 (M.D. Ala., May 28, 2015).

<sup>679</sup> *Id.*

<sup>680</sup> Smith Statement, at 3-4.

### *Women in State Prison and Sexual Assault & Abuse*

In 2012, BJS published a survey of more than 18,000 former state prisoners,<sup>681</sup> of whom 9.6 percent reported one or more incidents of sexual victimization<sup>682</sup> during their most recent period of incarceration—and the rate of inmate-on-inmate sexual victimization reported was three times higher for women (13.7 percent) than for men (4.2 percent).<sup>683</sup> Furthermore:

- Female heterosexual inmates reported lower rates of inmate-on-inmate victimization (13%) and staff sexual misconduct (4%) than female bisexual inmates (18% and 8%, respectively).
- Among female homosexual or lesbian inmates, the rate of inmate-on-inmate sexual victimization was similar to that for female heterosexual inmates (13%), while the rate of staff sexual victimization was at least double (8%) that for female heterosexual inmates (4%).
- Among victims of staff sexual misconduct, 79% were males reporting sexual activity with female staff.
- Following their release from prison, 72% of victims of inmate-on-inmate sexual victimization indicated they felt shame or humiliation, and 56% said they felt guilt.
- The majority of victims of staff sexual misconduct involving unwilling activity said they felt shame or humiliation (79%) and guilt (72%) following their release from prison.
- More than half (54%) reported having difficulty feeling close to friends or family members as a result of the sexual victimization.<sup>684</sup>

Ms. Leann Bertsch, Director of North Dakota Department of Corrections and Rehabilitation, reported to the Commission what happens to incarcerated women in the North Dakota Department of Corrections and Rehabilitation (ND DOCR) who report sexual assault and/or harassment, stating that:

[T]he ND DOCR adheres to the PREA guidelines which call for a coordinated response. The PREA coordinated response procedure is used to coordinate actions taken in response

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<sup>681</sup> U.S. Department of Justice, Office of Justice Programs, *Sexual Victimization Reported by Former State Prisoners, 2008*, by Allen Beck and Candace Johnson, (2012), p. 7, <https://www.bjs.gov/content/pub/pdf/svrfsp08.pdf>.

<sup>682</sup> Ibid., 13. (noting that sexual victimization was defined as “all types of unwanted sexual activity with other inmates (e.g., oral, anal, or vaginal penetration, hand jobs, or touching of the inmate’s buttocks, thighs, penis, breasts, or vagina in a sexual way), abusive sexual contacts with other inmates, and both willing and unwilling sexual activity with staff.”)

<sup>683</sup> Ibid., 5-6.

<sup>684</sup> Ibid.

to an incident of sexual abuse, among staff first responders, medical and behavioral health practitioners, investigators, and facility leadership. The first staff member responding to an allegation of sexual abuse must separate the alleged victim from the alleged abuser; notify the shift supervisor and preserve and protect any crime scene. The shift supervisor contacts external victim advocate services, if there is no need for external medical services. Behavioral health staff are notified and requested to immediately assess the victim to counsel and support. The behavioral health staff may sit in on the interviews with the victim if requested to do so by the victim or by a law enforcement officer. Medical staff are notified and the alleged victim is escorted to the medical department. Medical staff reassure the alleged victim medical services are involved only to ensure that the proper evaluation and treatment of any injuries is obtained and psychological support is offered. If a sexual assault examination is appropriate, one is performed by a trained [Sexual Assault Nurse Examiner] SANE or [Sexual Assault Forensic Examiner] SAFE. Any use of segregated housing to protect an incarcerated person who is alleged to have suffered sexual abuse are subject to the requirements of standard 115.43 Protective Custody of PREA. Adults in custody at high-risk for sexual victimization may not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made and a determination has been made there not available alternative means of separation from likely abusers. Individuals placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. Incarcerated individuals will only be assigned to involuntary segregated housing until an alternative means of separation from the abuser can be arranged. The assignment may not exceed a period of 30 days. Every effort shall be made to keep the victim in the victim's normal housing unit to prevent re-traumatization.<sup>685</sup>

Several reports found that prison staff often do retaliate or threaten to retaliate against women who report assault and proper procedures are not always followed.<sup>686</sup> According to an Amnesty International report regarding women in U.S. prisons, female prisoners are often reluctant to complain about sexual misconduct for a variety of reasons, including the following:

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<sup>685</sup> Leann Bertsch, Director of North Dakota Department of Corrections and Rehabilitation, Follow-up Statement for the *Women in Prison: Seeking Justice Behind Bars* Briefing before the U.S. Commission on Civil Rights, Apr. 2, 2019, at 2 (hereinafter Bertsch Follow-up Statement).

<sup>686</sup> "The Very Basics About Sexual Abuse in Detention," *Just Detention International*, Oct. 2019, <https://justdetention.org/wp-content/uploads/2019/05/Fact-sheet-The-Very-Basics-about-Sexual-Abuse-in-Detention.pdf>; see also Law, Victoria. "For People Behind Bars, Reporting Sexual Assault Leads to More Punishment," *Just Detention International*, Sept. 30, 2018, <https://justdetention.org/for-people-behind-bars-reporting-sexual-assault-leads-to-more-punishment/>; see also "All Too Familiar: Sexual Abuse of Women in U.S. State Prisons," *Human Rights Watch*, Dec. 1996, <https://www.hrw.org/reports/1996/Us1.htm>.

1. The difficulty of proving an allegation, particularly when the only evidence is the prisoner's account;
2. The possibility that making a complaint may place a prisoner in protective segregation while the complaint is investigated, which many have said they find punitive;
3. Fear of retaliation.<sup>687</sup>

The Commission also received testimony that women in prison who are victims of sexual assault often experience trauma and fear retaliation if they pursue legal remedies.<sup>688</sup>

### ***Related Litigation by Private Parties***<sup>689</sup>

At the Commission's briefing, Cardozo Law Professor Betsy Ginsberg testified that current legal protections against sexual abuse of women in prison are inadequate due, for example, to issues such as limits on damages and attorneys' fees in private cases.<sup>690</sup> Moreover, as discussed in Chapter 1, the 1996 Prison Litigation Reform Act requires that prisoners exhaust all available administrative remedies before bringing any federal civil rights claims,<sup>691</sup> permits federal judges to dismiss actions based on the doctrine of qualified immunity of state officials,<sup>692</sup> limits damages by requiring a showing of physical (not mental or emotional) injury,<sup>693</sup> and severely limits attorneys' fees.<sup>694</sup> The Commission received extensive testimony from federal civil rights litigators

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<sup>687</sup> "Women in Custody," *Amnesty International*, <https://www.amnestyusa.org/pdf/custodyissues.pdf> (accessed Oct. 18, 2019); see also "Women in Prison: A Fact Sheet," *Amnesty International*, [https://www.prisonpolicy.org/scans/women\\_prison.pdf](https://www.prisonpolicy.org/scans/women_prison.pdf) (accessed Oct. 18, 2019).

<sup>688</sup> Moss Statement, at 11.

<sup>689</sup> The work of DOJ in enforcing federal protections against sexual assault of women in prison is discussed in Chapter 7 of this report.

<sup>690</sup> Ginsberg Testimony, p. 137.

<sup>691</sup> Prison Litigation Reform Act of 1995, P.L. 104-134, 110 Stat. 1321 (codified as 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."))

<sup>692</sup> See *supra* note 349, citing 42 U.S.C. § 1997e(c) (as amended by the Prison Litigation Reform Act of 1996, Pub. L. 104-134, 110 Stat. 1321-71).

<sup>693</sup> See *supra* note 352, citing 42 U.S.C. § 1997e(e) (as amended by the Prison Litigation Reform Act of 1996, Pub. L. 104-134, 110 Stat. 1321-72. ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."))

<sup>694</sup> See *supra* note 354, citing 42 U.S.C. § 1997e(d) (as amended by the Prison Litigation Reform Act of 1996, Pub. L. 104-134, 110 Stat. 1321-71) (attorneys' fees limited to 25 percent of judgment for plaintiff, with excess to be paid by the defendant but only up to 150 percent of the judgment, and the hourly fees being limited to 150 percent of that of public defenders).



that these limits diminish access to constitutional protections for women in prison, including in cases of rape.<sup>695</sup> For example, the Commission received testimony that states may impose short timelines for making any complaints and under the requirement that administrative remedies must be exhausted, if a victim is too traumatized or intimidated or does not know her rights to file a grievance within that short time period, the PRLA does not permit her to bring a private lawsuit to enforce her civil rights.<sup>696</sup>

The Commission also received written testimony from Julie Abbate, the former chief of the DOJ section charged with enforcing the civil rights of women facing sexual abuse in prison. Regarding litigation in general and private litigation in particular, Abbate stated that:

Litigation can address some of the most public and egregious sexual abuses of women prisoners. But litigation is not the solution. Litigation is expensive, time consuming, and not always successful due to misunderstanding concerning ‘consent’ in custody. Even when large scale litigation is successful, the Prison Litigation Reform Act limits meaningful injunctive relief. And too many women prisoners will continue to suffer sexual abuse, behind bars as in the free world, unseen and unheard. Even when survivors of custodial sexual abuse are heard, too often they are not believed.<sup>697</sup>

Nonetheless, since the early 1970s, prisoners and civil rights advocates have had success in obtaining injunctions from federal courts to rectify poor, and in some cases unconstitutional, conditions in prisons.<sup>698</sup> These Eighth Amendment cases require a showing that state officials inflicted cruel and unusual punishment,<sup>699</sup> or that the quality of conditions in the prison was so poor that it was unconstitutional.<sup>700</sup> This law was further developed in 1994, in the landmark case of

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<sup>695</sup> See *supra* notes 356-63.

<sup>696</sup> See *supra* notes 357-9.

<sup>697</sup> Abbate Statement, at 11.

<sup>698</sup> Margo Schlanger, Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders, 81 N.Y.U. L. Rev. 550, 552 (2006).

<sup>699</sup> *Holt v. Sarver*, 442 F.2d 304, 308-09 (8th Cir. 1971).

<sup>700</sup> *Id.* at n. 4; and see, e.g., *Inmates of Suffolk County Jail v. Eisenstat*, 360 F.Supp. 676, 684 (D. Mass. 1973) (“During the past few years, due largely to the courage of young poverty-program lawyers, the soul-chilling inhumanity of conditions in American prisons has been thrust upon the judicial conscience... Twice last year the Supreme Court reversed lower federal court decisions dismissing state prisoner complaints because they were thought by the lower courts to be in the area that should be left “to the sound discretion of prison administration” and ordered that the complaints be heard on the merits. *Haines v. Kerner*, 1972, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 and *Cruz v. Beto*, 1972, 405 U.S. 319 at 321, 92 S.Ct. 1079, at 1081, 31 L.Ed.2d 263, (commenting *per curiam* in the latter case, “Federal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons’ which include prisoners.”); *aff’d*, 494 F.2d 1196 (1st Cir. 1974); *cert denied*, *Hall v. Inmates of Suffolk County Jail*, 419 U.S. 977 (1974).

*Farmer v. Brennan* brought by a transgender woman allegedly abused by other prisoners in a men's prison, who argued that prison officials violated the Eighth Amendment by being deliberately indifferent to this risk.<sup>701</sup> Farmer argued that they should have known that "a transsexual who 'projects feminine characteristics,' would be particularly vulnerable to sexual attack."<sup>702</sup> Her case was eventually lost on the facts, and similar cases in which transgender women have alleged deliberate indifference to high risks of sexual assault in male prisons have also had mixed results based on the factual record.<sup>703</sup> However, *Farmer v. Brennan* established and has been used to show that prison officials who are deliberately indifferent to known risks of sexual assault may be in violation of the Eighth Amendment, because in that case, the Supreme Court held that placing a prisoner in an environment where the prisoner is exposed to a "sufficiently substantial risk of serious damage to [her] future health" by failing to protect her from the threat of sexual assault violates the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>704</sup> Based on this precedent, in recent decades, several high-profile private cases have been won by female prisoners who suffered sexual abuse in women's prisons.

In 1994, women in three prisons in Washington, D.C. filed a class action lawsuit alleging that they had been sexually harassed and assaulted in custody, that women in D.C. prisons had unequal access to educational, vocational, and religious opportunities, and that female prisoners had inadequate access to obstetrical and gynecological care in violation of the Eighth Amendment.<sup>705</sup> The federal trial court found in plaintiffs' favor. Among other relevant findings, the federal court found Eighth Amendment violations as follows:

Defendants have violated the subjective standard of the Eighth Amendment by acting with 'deliberate indifference' to the condition of sexual harassment which women prisoners at the three facilities must endure. The Court finds that Defendants knew of and disregarded an excessive risk of sexual assaults and harassment of women prisoners. The evidence demonstrated that the women prisoners filed complaints with the police and they sent

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<sup>701</sup> *Farmer v. Brennan*, 511 U.S. 825, 831 (1994).

<sup>702</sup> *Id.* at 829-30.

<sup>703</sup> See, e.g., *Richardson v. District of Columbia*, 322 F.Supp.3d 175, 183-84 (D.D.C. 2018)("[T]he record more plausibly supports Richardson's second theory: that Warden Smith acted with deliberate indifference by failing to prevent transgender female inmates from being housed with heterosexual male inmates, period. But the Court finds that, even if the Eighth Amendment barred Smith from allowing Richardson to be housed with male inmates generally, he is entitled to qualified immunity on a claim to that effect. The defense of qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions" by "protect[ing] 'all but the plainly incompetent or those who knowingly violate the law.'").

<sup>704</sup> *Id.* at 843 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)) (internal quotation marks omitted).

<sup>705</sup> See *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994); see also Smith Statement, at 4.

[Inmate Grievance Procedure forms] IGP's and letters of complaint to prison administrators. The circumstantial evidence allows at least the inference of deliberate indifference since the harassment was so obvious. Indeed, assaults are widely known by [D.C. Department of Corrections] DCDC staff, vulgar comments are made openly and women are fondled publicly.<sup>706</sup>

The litigation was long and arduous, as after appeal the D.C. Circuit Court of Appeals overturned and ruled against the women's Equal Protection claims, which were brought about unequal access to programming.<sup>707</sup> However, the defendants did not challenge, and so the court of appeals did not overturn, the ruling that sexual harassment, living conditions and fire hazards rose to the level of Eighth Amendment violations.<sup>708</sup> Citing *Farmer v. Brennan*, the court reasoned that violent assault is unacceptable, and reviewed the lower court's finding that the pattern of sexual assault coupled with invasions of the inmates' privacy rose to the level of Eighth Amendment violations and that there was a pattern of deliberate indifference to it at the three facilities at issue.<sup>709</sup> But the court of appeals then reviewed the remedies ordered, and only upheld those related to Inmate Grievance Procedures and retaliation against inmates, rejecting the lower court's order for a Special Officer and monitors.<sup>710</sup> The Supreme Court rejected plaintiffs' petition to hear the case.<sup>711</sup>

In 2009, the state of Michigan settled a class action lawsuit for \$100 million after over 800 women prisoners alleged that they had been sexually harassed or abused while incarcerated.<sup>712</sup> The case, initially filed in 1996, alleged that between the years of 1993 and 2009 female prisoners "had been raped, groped and peeked at by male members of the corrections staff."<sup>713</sup> The litigation progressed in several stages over 13 years, also resulting in a court order in 2000 requiring training reforms and improvements in the prison system's investigations process into complaints of sexual abuse

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<sup>706</sup> *Women Prisoners*, 877 F. Supp. at 665-66.

<sup>707</sup> See *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 926-27 (D.C. Cir. 1996).

<sup>708</sup> *Id.* at 928.

<sup>709</sup> *Id.* at 929.

<sup>710</sup> *Id.* at 932.

<sup>711</sup> *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 520 U.S. 1196 (1997).

<sup>712</sup> Miller, Rina. "\$100 million settlement to sexually abused prisoners won't be delayed," *Michigan Radio*, Nov. 11, 2001, <https://www.michiganradio.org/post/100-million-settlement-sexually-abused-prisoners-wont-be-delayed>; see also Smith Statement, at 5.

<sup>713</sup> "Michigan: Prisoners' Lawsuit," *New York Times*, Aug. 21, 2009, [https://www.nytimes.com/2009/08/21/us/21brfs-PRISONERSLAW\\_BRF.html](https://www.nytimes.com/2009/08/21/us/21brfs-PRISONERSLAW_BRF.html).

by prison guards.<sup>714</sup> The Sixth Circuit federal court of appeals also upheld a policy change prompted in part by the class action suit that prohibited male prison guards from being assigned to areas where they could view women prisoners while they were partially dressed or nude.<sup>715</sup> But in the Ninth Circuit, plaintiffs in a Nevada women's prison were not able to prove that the state correctional institution's lax oversight by supervisors caused sexual abuse, especially as the institution was in the process of improving its policies.<sup>716</sup>

Cases against federal officials have also raised challenges under the doctrine of sovereign immunity. In *Doe v. United States*, a woman prisoner in Hawaii alleged that she was working when a floor buffer machine she was using blew up and burned her stomach; and was later raped by the electrician hired by BOP to repair the machine.<sup>717</sup> She sued the electrician and they entered into a settlement agreement.<sup>718</sup> She also sued the supervisor who hired the electrician and permitted him to require her to enter the closet with him, even after she refused. She alleged that the male supervisor was negligent in unlocking and opening the closet, allowing the door to automatically shut, knowing there was no camera, and letting the electrician sexually assault her.<sup>719</sup> The federal court found that the supervisor did not act with deliberate indifference, as he did not believe that letting the electrician go into the closet with the prisoner placed her at any risk of harm, so he had not violated her rights under the Eighth Amendment.<sup>720</sup>

As discussed in Chapter 1, the Federal Tort Claims Act grants federal courts jurisdiction over damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment."<sup>721</sup> However, under the statutory language of the Act, the federal government is not liable for "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."<sup>722</sup>

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<sup>714</sup> Reutter, David M. "\$100 Million Settlement in Michigan Prisoners' Sexual Abuse Suit," *Prison Legal News*, Dec. 15, 2009, <https://www.prisonlegalnews.org/news/2009/dec/15/100-million-settlement-in-michigan-prisoners-sexual-abuse-suit/>.

<sup>715</sup> *Everson v. Michigan Dep't of Corrections*, 391 F. 3d. 737, 753-54 (6th Cir. 2004).

<sup>716</sup> *Breiner v. Nevada Department of Corrections*, 610 F. 3d 1202, 1204-05 (9th Cir. 2010).

<sup>717</sup> *Doe v. United States*, 2011 WL 251445, \*1 (D. Haw. 2011).

<sup>718</sup> *Id.* (based on the settlement, the parties stipulated to dismissing the claims against the electrician).

<sup>719</sup> *Id.*

<sup>720</sup> *Doe*, 2011 WL 251445 at \*10-11.

<sup>721</sup> See *supra* note 341, discussing Federal Tort Claims Act of 1946, Pub. L. 80-773, 62 Stat. 869 (codified as 28 U.S.C. § 1346(b)(1)).

<sup>722</sup> 28 U.S.C. § 2674; 28 U.S.C. § 2680(a).

But under the doctrine of sovereign immunity, only claims for which immunity is waived by legislation can be considered, and the Federal Tort Claims Act clearly does not waive immunity in the realm of discretionary functions.<sup>723</sup> Therefore, in the case of Ms. Doe, the federal court reasoned that under the doctrine of sovereign immunity, her claims that had to do with “discretionary” functions must be dismissed.<sup>724</sup> “Furthermore, [federal] courts have held that decisions relating to the supervision of employees are discretionary.”<sup>725</sup> Considering all these legal obstacles, including that Ms. Doe could not point to any statute or regulations requiring better protection, the court found that the supervisor’s actions or inaction was discretionary, and despite her allegations that he locked her in a closet with a rapist, dismissed her claims against him.<sup>726</sup>

The case of *Robinson v. United States* similarly demonstrates the difficulty of holding federal prison officials accountable in private litigation. Angela Robinson was a federal inmate housed in a correctional institution in Tallahassee, Florida.<sup>727</sup> The state government hired two private individuals to transport her to and from the court house when she was ordered to make an appearance in state court.<sup>728</sup> Upon her return, she was accompanied by only one of the individuals, a man who coerced her into sex with him.<sup>729</sup> The warden, a federal employee, did not conduct a background check on these transporters before releasing her to them, and Ms. Robinson sued under the Federal Tort Claims Act.<sup>730</sup> The court ruled that the doctrine of sovereign immunity prevented holding the federal government liable for the rape.<sup>731</sup> The federal court also took into account Supreme Court precedent broadly interpreting what is considered discretionary, and found that the warden’s decisions about whether to release Ms. Robinson to the state transporters and about whether to run a background check was not obligatory but instead discretionary; therefore, the federal warden was immune from liability.<sup>732</sup> The decision was also affirmed by the Eleventh

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<sup>723</sup> *Doe*, 2011 WL 251445 at \*4 (D. Haw. 2011) (“The United States, as sovereign, can only be sued to the extent it has waived its sovereign immunity. The FTCA is such a waiver.” but also noting: “The discretionary function exception to the FTCA “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (quoting *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984)) (quotation marks omitted”).

<sup>724</sup> *Doe*, 2011 WL 251445 at \*4-5.

<sup>725</sup> *Id.*, \*5 (citing cases).

<sup>726</sup> *Id.*, \*5-6.

<sup>727</sup> *Robinson v. United States*, WL 9045857 at \*1 (N.D. Fla. 2016).

<sup>728</sup> *Id.*

<sup>729</sup> *Id.*

<sup>730</sup> *Id.*

<sup>731</sup> *Id.*

<sup>732</sup> *Id.*, at \*1-2 (applying *United States v. Gaubert*, 499 U.S. 315, 322 (1991)).

Circuit court of appeals, which held that “the district court correctly found that the United States was entitled to discretionary-function immunity.”<sup>733</sup>

To be clear, sovereign immunity may also apply to some state prison officials sued under similar circumstances.<sup>734</sup> In *Newsome v. Lee County, Alabama*, Ms. Newsome claimed that a deputy “intentionally subjected her to a series of sexual assaults by male inmates,” that officers conspired to prevent her from reporting the rapes and retaliated against her, and that Lee County provided inadequate physical facilities and monitoring to prevent them.<sup>735</sup> A federal court found that she was two months pregnant when taken into custody, and that three men with whom she was placed in a cell repeatedly raped her,<sup>736</sup> and that Deputy Tabb’s response was to threaten her with indefinite incarceration if she reported the attacks.<sup>737</sup> She was hospitalized for her injuries and reported the rapes to hospital officials; after being sent back to the jail, officers allegedly retaliated by not letting her make phone calls and not letting her three children visit her.<sup>738</sup> The federal court held that under the Eleventh Amendment of the U.S. Constitution, the officers who had acted in their official capacity, including Deputy Tabb, were entitled to sovereign immunity.<sup>739</sup>

State prison officials may also be sued in their individual capacities, although they are entitled to qualified immunity in that capacity, if they are performing a discretionary function.<sup>740</sup> For a plaintiff to prevail in these types of cases, they must show that there was a constitutional violation, and the Supreme Court has held that “[f]or a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.”<sup>741</sup> In Ms. Newsome’s case, the court considered that some of the conduct of some of the Lee County officers was clearly prohibited by the First Amendment, which prohibits retaliation against grievances.<sup>742</sup> The court also held that some officers were not immune from liability for violations of the Fourteenth Amendment, which incorporates Eighth Amendment law as to the states and clearly prohibited the “malicious and sadistic” conduct of Officer Tabb; the

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<sup>733</sup> *Robinson v. United States*, 683 Fed. Appx. 914, 914-15 (11th Cir. 2017)(memorandum decision).

<sup>734</sup> *Alfaro-Garcia v. Henrico County*, 2106 WL 5388946 \*5 (E.D. Va. 2016); see also *Brooks v. George County, Mississippi*, 84 F.3d 157 (5th Cir. 1996).

<sup>735</sup> *Newsome v. Lee County, Alabama*, 431 F. Supp. 1189, 1192 (M.D. Ala. 2006).

<sup>736</sup> *Id.*

<sup>737</sup> *Id.*

<sup>738</sup> *Id.* at 1193.

<sup>739</sup> *Id.* at 1194-95.

<sup>740</sup> *Id.* at 1195.

<sup>741</sup> *Id.* at 1196 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

<sup>742</sup> *Id.*

court held that it is a matter of “obvious clarity” that intentionally subjecting her to repeated sexual assaults is prohibited.<sup>743</sup> However, the court held that Ms. Newsome did not produce any direct evidence of gender discrimination or conspiracy by other officials to deprive her of her civil rights.<sup>744</sup> Moreover, her claims against the county were subject to state immunities under Alabama law,<sup>745</sup> because as in several states, particularly in the south, sheriffs have independent authority and are not considered employees of the county for purposes of governmental liability.<sup>746</sup>

At the Commission’s briefing, Julie Abbate testified that, in addition to the above types of legal limitations:

More importantly, litigation and investigations occur after women have already suffered abuse. Prisons need to prevent abuses before they occur, by fully implementing the National PREA Standards and by establishing trauma-informed and gender-responsive practices in women’s prisons. Women prisoners are more vulnerable to sexual abuse when prisons fail to meet women’s unique in-custody needs and fail to address the underlying issues that can lead to incarceration, including untreated trauma, addiction, mental health issues, and involvement in unhealthy relationships. Agencies can significantly reduce the risk of sexual harm to women prisoners by both staff and other prisoners through trauma-informed, gender-responsive practices and policies.<sup>747</sup>

PREA may also impact private litigation. Chapter 7 on the federal government’s protection of women in prison discusses federal audits under PREA.<sup>748</sup> Abbate also testified that even when facilities receive passing PREA audits, they may still have problems with prisoner sexual safety and even problems that may violate prisoners’ constitutional rights.<sup>749</sup> This may be in part because some courts have interpreted PREA standards strictly and inflexibly. A law review article by Professor Gabriel Arkles identified various such cases, with one involving sexual assault and potential constitutional violations due to prison officials’ failure to protect against it. In *Crane v. Allen*, a federal district court in Oregon dismissed a case brought by a woman alleging that she was raped by a prison guard and supervisory officials failed to protect her in custody; the basis for

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<sup>743</sup> *Id.* at 1199.

<sup>744</sup> *Id.* at 1200-05.

<sup>745</sup> *Id.* at 1207-08.

<sup>746</sup> *Id.* at 1207; *see also Alfaro-Garcia*, 2106 WL 5388946 at \*5; *see also Brooks*, 84 F.3d at 157.

<sup>747</sup> Abbate Statement, at 11.

<sup>748</sup> *See infra* notes 1231-44.

<sup>749</sup> Abbate Testimony, p. 110.

the court's dismissal was that the facility had shown compliance with PREA standards.<sup>750</sup> Prison officer Allen was convicted of sexual misconduct due to having sexual relations with an inmate, Ms. Allen, who alleged that she was raped and that prison officials failed to protect her.<sup>751</sup> The court held that prison officials were unaware of the conduct and so under the standards of the Eighth Amendment, they were not deliberately indifferent to abuse.<sup>752</sup> Ms. Crane also alleged that two higher officers retaliated against her for her complaints of abuse, but the court held that she had not properly exhausted administrative remedies in a timely manner, as required under the Prison Litigation Reform Act.<sup>753</sup> And regarding her claim that the county failed to properly train its employees, the court found that: "The record shows MCSO policies and procedures comply with the Prison Rape Elimination Act ("PREA"), 42 U.S.C. § 15602, set forth the rights of inmates, prohibit harassment and sexual misconduct by MCSO employees, require employees and inmates to report all suspected sexual activity, and preclude retaliation against inmates who report discrimination or sexual misconduct."<sup>754</sup>

PREA and Eighth Amendment protections have been a lynchpin for protecting rights of women in prison. Because this area of law is the most developed and the most regulated, it may be seen as a starting point to win larger reforms for women in prison. For example, the Commission heard testimony that PREA audits or litigation to protect women against sexual assault have led to the ability to win reforms such as better health services.<sup>755</sup> On the other hand, as Professor Brenda Smith has noted, PREA enforcement has been over-focused on sexual abuse and has not yet resolved other structural disparities.<sup>756</sup> Moreover, as evidenced by the litigation analyzed throughout this report, the other types of civil rights issues that women in prison may experience, such as disproportionate use of solitary confinement,<sup>757</sup> or lack of equal access to rehabilitation programs, have not resulted in clear case law upholding the rights of women prisoners, nor are there clear regulations to protect them.<sup>758</sup>

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<sup>750</sup> Arkles, *Prison Rape Elimination Act and the Perpetuation of Sexual Harm*, at note 104, (citing *Crane v. Allen*, 2012 WL 602432 at \*7 (D. Or. Feb. 22, 2012)).

<sup>751</sup> *Crane v. Allen*, 2012 WL 602432 at \*1 (D. Or. Feb. 22, 2012).

<sup>752</sup> *Id.* at \*3.

<sup>753</sup> *Id.* at \*5.

<sup>754</sup> *Id.* at \*9.

<sup>755</sup> Salisbury Testimony, pp. 98-100.

<sup>756</sup> Brenda V. Smith Testimony, Briefing before the Review Panel on Prison Rape Hearings on Sexual Victimization in U.S. Prisons, Jails, and Juvenile Correctional Facilities, D.C., Jan. 9, 2014, p. 2 (hereinafter Smith Testimony, *Review Panel on Prison Rape Briefing*), <https://ojp.gov/reviewpanel/pdfs/WrittenTestimonyofBrendaSmith.pdf>.

<sup>757</sup> See *infra* notes 839-40 (solitary confinement cases).

<sup>758</sup> See *infra* notes 708, 1401 and 1404 (disparities and rehabilitation access cases).



## CHAPTER 5: USE OF DISCIPLINE AND STAFF TRAINING

### Use of Discipline Measures and Women in Prison

Discipline and behavioral sanctions are essential components to upholding order, safety, and security in prisons.<sup>759</sup> In many prisons, disciplinary infractions may result in the loss of privileges such as using the phone or receiving prison visits, accessing rehabilitative prison programs, ability to purchase food or supplies, which in some prisons include women's hygiene products, or place some inmates in solitary confinement.<sup>760</sup> Moreover, disciplinary infractions in prison often result in loss of good conduct credits that would shorten an inmate's sentence or assist in an inmate's parole eligibility and review.<sup>761</sup> Although the Supreme Court has held that the full range of due process rights are not available in prison and there is a need to maintain security, prisoners still retain some due process rights, including protection from solitary confinement without substantial evidence of misconduct.<sup>762</sup>

A recent investigation by National Public Radio, Medill School of Journalism at Northwestern University, and The Chicago Reporter gathered discipline data from both women's and men's prisons.<sup>763</sup> The authors requested data from 26 state correctional systems, but they only received data from 15 states,<sup>764</sup> as the other 11 states either did not collect discipline data by gender or

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<sup>759</sup> Benedict, Alyssa, Becki Ney, and Rachelle Ramirez. "Gender Responsive Discipline and Sanctions Policy Guide for Women's Facilities, Section 1: Overview: The Rationale for Revising Discipline and Sanctions for Women Inmates," *National Resource Center for Justice Involved Women*, Sep. 2015, p.1 (hereinafter Benedict et al., "Gender Responsive Discipline.") <https://cjininvolvedwomen.org/wp-content/uploads/2015/09/DisciplineGuideSection1Overview.pdf>.

<sup>760</sup> Pupovac Statement, at 5; *see also* Benedict et al., "Gender Responsive Discipline;" *see also* Ney Statement, at 4; *see also* Resnik Statement, at 4.

<sup>761</sup> Pupovac Statement, at 5 (noting that "[i]n California, between January 2016 and February 2018, 2,913 female inmates had a total of 17.9 years added to their sentences through good-credit revocations, and a higher rate than men (1.3 vs. 1 day per inmate throughout the state)"); *see also* Benedict et al., "Gender Responsive Discipline."

<sup>762</sup> *See supra* notes 252-54 (in Ch. 1, due process section, discussing *Wolff v. McDonnell*, 418 U.S. 539 (1974); *see also Sandin v. Connor* 515 U.S. 472 (1995)).

<sup>763</sup> Shapiro et al., "In Prison, Discipline Comes Down Hardest on Women."

<sup>764</sup> *Ibid.* The authors received data from the following states: California, Colorado, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Oklahoma, Pennsylvania, Rhode Island, Vermont, and Wisconsin. Only two of those states (Louisiana and Oklahoma) showed women with lower rates of low-level offenses. All of the data is available at: <https://drive.google.com/file/d/1f8GcRHJpiTcoxwmmUTu6c86ZgMP8seq/view>.

claimed that these data were too onerous to assemble.<sup>765</sup> In addition to the quantitative data the authors gathered, the researchers conducted qualitative interviews at five women's prisons around the country, and interviewed women in prison and formerly incarcerated women along with past and present prison staff.<sup>766</sup> According to Jessica Pupovac, Freelance Reporter and lead reporter of the investigation:

Our primary finding was that, although female inmates are less likely than their male counterparts to act out violently in prison, in the vast majority of states, women receive a disproportionate number of disciplinary tickets for lower level offenses—things like being disruptive, being “insolent,” disobeying orders, cursing, and altering clothing. Women also are more likely to receive harsher punishments for these minor infractions.

The reason for this disparity, we were told time and again, lies in the ways that the female prison population is distinct from the male population, and the fact that prison rules and staff training are designed with the male population in mind.<sup>767</sup>

In addition, women of color in prison and those who identify as LGBT face specific discipline disparities<sup>768</sup>—especially related to solitary confinement, which is discussed later in this chapter.<sup>769</sup> Many of the current discipline practices in prison are difficult for women inmates who have mental health challenges, as these practices can worsen mental health conditions and may even produce mental health challenges where they did not exist prior to incarceration.<sup>770</sup> The Nebraska State Advisory to the Commission held a meeting in which Amy Miller, of the American Civil Liberties Union of Nebraska stated that, “According to national experts, Nebraska is the second most overcrowded system in the country at this point. As an under-resourced, understaffed and

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<sup>765</sup> States that did not fulfill the request for disciplinary data by gender, stating that it either did not exist or would be overly burdensome to compile include: Alabama, South Carolina, Georgia, Oregon, Texas, Arizona, Michigan, New York, Maine, North Carolina, and Maryland.

<sup>766</sup> Shapiro et al., “In Prison, Discipline Comes Down Hardest on Women.”

<sup>767</sup> Pupovac Statement, at 5 (emphasis in original).

<sup>768</sup> Benedict Testimony, pp. 334-35; see also U.S. Department of Justice, Office of Justice Programs, Use of Restrictive Housing in U.S. Prisons and Jails, 2011-2012, by Allen Beck, Oct. 2015, p. 4, <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> (hereinafter DOJ, *Use of Restrictive Housing*); see also U.S. Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, Jan. 2019, <https://www.justice.gov/archives/dag/file/815551/download>.

<sup>769</sup> Judith Resnik, Anna VanCleave, Kristen Bell, Alexandra Harrington, and Gregory Conyers, “Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell,” *The Association of State Correctional Administrators (ASCA) and the Liman Center for Public Interest Law at Yale Law School*, (Oct. 2018), p. 17 (hereinafter Resnik et al., “Reforming Restrictive Housing”) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3264350](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264350); see also Resnik Statement, at 8.

<sup>770</sup> Benedict Testimony, p. 335.

overcrowded system, then, for mental health care, we're seeing either delays in care or a lack of care, and then the conditions, especially for solitary confinement, impact people's mental health quite badly."<sup>771</sup> Researchers Jennifer M. Reingle Gonzalez and Nadine M. Connell published a study finding that:

The limited treatment options in many prison settings are directly reflected in the greater number of disciplinary problems, rule violations, and physical assaults among those who have mental health disorders, often compounded by the resulting solitary confinement as punishment for these behaviors. Although all prisons are required to provide some level of health care, we know very little about whether mental health treatment is actually available to inmates on a case-by-case basis.<sup>772</sup>

The researchers also found that, "crowded living quarters, lack of privacy, increased risk of victimization, and solitary confinement within the institution have been identified as strong correlates for self-harm and adaptation challenges for those with mental health conditions in prison settings."<sup>773</sup>

As mentioned in Chapter 1, women's pathways to prison are often distinct from men's and the vast majority of women report experiencing more trauma than men prior to their incarceration.<sup>774</sup> According to some experts, the routine practices of prisons (e.g. strip searches, or solitary confinement) and the physical environment and design of prisons (e.g. limited light, loud noises, clanking metal doors, and often extreme temperatures) can create or recreate the damaging experiences of trauma for women in prison.<sup>775</sup> Moreover, operating procedures often operate as triggers and make it very difficult for traumatized women to manage in the environment.<sup>776</sup> And, according to Ms. Pupovac, some women cope with these triggers by talking back to prison staff or exhibiting other behaviors that often lead to low-level disciplinary infractions.<sup>777</sup> Ms. Pupovac testified that prisons, when effectively run, can accomplish their punitive and rehabilitative goals

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<sup>771</sup> Amy Miller Testimony, Briefing before Nebraska State Advisory Committee to the U.S. Commission on Civil rights, Civil Rights, Prisons, and Mental Health Services in Nebraska, Lincoln, NE, June 13, 2019, p.10.

<sup>772</sup> Reingle, Jennifer M, Gonzalez, Nadine M Connell. "Mental health of prisoners: identifying barriers to mental health treatment and medication continuity." *American Journal of Public Health* 104, no.12 (2014): 2328-33, at 2328 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4232131/>.

<sup>773</sup> Ibid., 2329.

<sup>774</sup> See *supra* notes 83-87.

<sup>775</sup> Owen et al., *In Search of Safety*, pp. 64-65; see also Moss Statement, at 4; see also Pupovac Statement, at 2.

<sup>776</sup> Moss Statement, at 4.

<sup>777</sup> Pupovac Statement, at 2.

without encouraging such predictable, and maladaptive, behavioral responses from women inmates by instead using trauma informed responses.<sup>778</sup> She offered the following data:

According to the most recent federal data, in state prison, 58% of women reported past physical or sexual abuse, compared to 16% of men. In some state studies, the incidence of past trauma among the female population was as high as 98 percent. Incarcerated women also have a higher incidence of PTSD than any other studied demographic, including combat veterans.<sup>779</sup>

Pupovac also reported that several women in state correctional leadership positions have driven positive changes observed in correctional systems, based on recognizing distinct needs of women in prison and developing gender-responsive, trauma-informed training.<sup>780</sup> She added that these types of trainings remain the exception, not the standard.<sup>781</sup>

According to Alyssa Benedict, Executive Director of Core Associates and a consultant on the discipline report conducted by National Public Radio and Northwestern University, many of the disciplinary procedures in women's prisons are incongruent with fundamental psychological principles.<sup>782</sup> Trauma-informed environments can maintain security but also "facilitate psychological and physiological regulation; inmates who feel safe in their environment are less likely to be triggered into self-protective responses that complicate facility operations."<sup>783</sup> With this in mind, in 2015, Ms. Benedict along with Ms. Becki Ney and Ms. Rachelle Ramirez worked with the National Resource Center for Justice Involved Women to publish a comprehensive discipline and sanctions guide for women's prisons, which was designed to assist corrections staff in revising their approach to discipline and sanctions to become more trauma-informed and create safer and more secure facilities.<sup>784</sup> While this report has contributed significantly to National Public Radio's and Northwestern University's 15-state study on disparate discipline practices that women in prison face,<sup>785</sup> it is unclear how much it this guide is being used by corrections officials.<sup>786</sup>

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<sup>778</sup> Ibid.

<sup>779</sup> Ibid.

<sup>780</sup> Ibid.

<sup>781</sup> Ibid., 7.

<sup>782</sup> Benedict Testimony, pp. 332-33.

<sup>783</sup> Benedict, "Using Trauma-Informed Practices to Enhance Safety and Security in Women's Correctional Facilities," p. 4.

<sup>784</sup> Benedict, Rey, and Ramirez, "Gender Responsive Discipline;" *see also* Pupovac Statement, at 7-8.

<sup>785</sup> Benedict Testimony, p. 334.

<sup>786</sup> Pupovac Statement, at 7.

### *Discipline Policy in State Prisons*

This section highlights state department of corrections that have made recent changes in their discipline practices and policies for women in their custody.

#### *Alabama Department of Corrections*

In its 2014 findings letter, the Department of Justice reported that the Tutwiler Prison for Women's disciplinary practices included unconstitutionally arbitrary and discriminatory actions taken against women prisoners based on their gender identity, sexual orientation, and national origin.<sup>787</sup> Additionally, DOJ found that there was an "inconsistent application of facility rules and disciplinary sanctions [that] cause[d] many prisoners to believe that acceding to staff sexual abuse will engender improved treatment."<sup>788</sup> The Department's findings letter stated that:

According to our expert consultant, Tutwiler's extremely restrictive and punitive environment forces women to submit to sexual demands as a means of navigating institutional landmines. Prisoner reports support this conclusion. As one woman explained: 'if you exchange[] sexual favors you are treated better. If you don't you are treated like crap.' We received thirty-seven reports from prisoners concerning the inconsistent application of prison rules at Tutwiler. According to the reports we received, rules often differ by shift, staff, and supervisor, and staff often threaten prisoners with disciplinary action and segregation. In order to find a safe balance, prisoners justify submission to sexual advances with staff in order to become one of 'the favorites.' According to one prisoner, "if you are not one of the favorites, you can be written up for petty offenses and may be given a maximum sentence."<sup>789</sup>

DOJ also found that inmates at Tutwiler often did not report sexual abuse out of fear of retaliation and punishment by guards, which came in the form of segregation, forced administration of polygraph tests, threatened write-ups, and verbal abuse.<sup>790</sup> The consent decree between the United States and Alabama mandated that officials inform inmates of their right to be free from sexual

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<sup>787</sup> Acting Assistant Attorney General Jocelyn Samuels, letter to Governor of Alabama Robert Bentley, Jan. 17, 2014, Re: Investigation of the Julia Tutwiler Prison for Women and Notice of Expanded Investigation, at n. 22, [https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler\\_findings\\_1-17-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf). (For instance, DOJ "received reports of officers compelling Latina prisoners to solely speak English and threatening to discipline them if they spoke Spanish. According to one prisoner, when a Spanish-speaking prisoner asked her to fill out a sick call slip, Officer H would not allow it, stating that the prisoner needed to ask in English herself.").

<sup>788</sup> *Id.* at 3.

<sup>789</sup> *Id.* at 14.

<sup>790</sup> *Id.* at 14.

harm (including their right to report harm without retaliation),<sup>791</sup> and create policies that ensure that inmates can report their abuse without retaliation.<sup>792</sup>

While under the consent decree, in January 2018, Alabama Department of Corrections, along with consultants and National Resource Center for Justice Involved Women representatives, issued a new discipline policy for women in Alabama Department of Corrections that is gender-responsive and trauma-informed.<sup>793</sup> Under this policy, staff follow a strengths-based model to deter behavior requiring discipline, and limited the use of restrictive housing to incidents involving violence.<sup>794</sup> Prior to implementation of the new policy, Tutwiler initiated well over 600 major disciplinary actions or tickets a year with an average population of only 850 women.<sup>795</sup> After implementing the new discipline policy, Tutwiler initiated only 316 major disciplinary actions—which is a 47 percent decrease in infractions from the previous year.<sup>796</sup> The new discipline policy at Tutwiler also led to a reduction in the use of restrictive housing, and less inmate-on-inmate and inmate-on-staff violence was observed.<sup>797</sup>

### *Iowa Correctional Institution for Women*

The National Public Radio and Northwestern study documented that at the Iowa Correctional Institution for Women, Warden Sheryl Dahm, who is from the small town, Mitchellville, Iowa,<sup>798</sup> where the prison is located and previously served as a prison counselor, recently began training her prison staff in gender-responsive and trauma-informed approaches, and instructed her staff to not dole out disciplinary tickets for minor infractions (e.g. rolled up sleeves).<sup>799</sup> Now, when prison staff issue disciplinary tickets, Warden Dahm speaks with her staff about the tickets, and discusses whether there may have been a better way to resolve problems through a gender-responsive,

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<sup>791</sup> Consent Decree, *United States v. Alabama*, No. 2:15-cv-368 (M.D. Ala., June 18, 2015), at 49.

<sup>792</sup> *Id.* at 66.

<sup>793</sup> Williams Testimony, p. 217.

<sup>794</sup> *Ibid.*

<sup>795</sup> *Ibid.*

<sup>796</sup> *Ibid.*

<sup>797</sup> *Ibid.*

<sup>798</sup> American Fact Finder, U.S. Census, Community Facts, Mitchellville City, Iowa, Census 2010 Total Population, [https://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml?src=bkmk](https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk) (accessed Oct. 3, 2019).

<sup>799</sup> Joseph Shapiro, “In Iowa, A Commitment to Make Prison Work Better for Women,” National Public Radio, Oct. 17, 2018, <https://www.npr.org/2018/10/17/656972806/in-iowa-a-commitment-to-make-prison-work-better-for-women> (hereinafter Shapiro, “In Iowa, A Commitment to Make Prison Work Better for Women”); *see also* Pupovac Statement, at 8.

trauma-informed lens.<sup>800</sup> According to Warden Dahm's interview, the objective is to make prison a place where women feel safe and supported, and where they can be equipped to return to their communities rehabilitated.<sup>801</sup> Some of Warden Dahm's staff welcome the change to gender-responsive corrections, while other staff members say they have more important issues to deal with such as staff capacity.<sup>802</sup> One prison staff member opposed to the new discipline policy changes stated that this new approach made her feel like "the inmates are running the prison."<sup>803</sup> According to National Public Radio's interview with Warden Dahm, she has heard this criticism from staff members before, and she says that, "Well, they do. There's one of you to 96 women. Sox let's talk about how that looks. And how do we get the 96 to not cause problems. And what does that look like."<sup>804</sup>

### *Kansas: Topeka Correctional Facility*

Like the Alabama example, Kansas's Topeka Correctional Facility shows a correlation between women prisoners reporting sexual abuse and receiving threats of disciplinary actions. In 2012, DOJ found that unfair disciplining of women Topeka Correctional Facility inmates occurred as a means of coercing prisoners into relinquishing their allegations of abuse against correctional staff; inmates stated that "certain officers [would] threaten to file disciplinary reports in retaliation for submitted grievances unless the prisoner agree[d] to destroy/retract the grievance."<sup>805</sup> The resulting out-of-court settlement agreement between the United States and Kansas required Topeka Correctional Facility to provide inmates access to information regarding the facility's disciplinary process and their right to be free from retaliation when reporting sexual abuse,<sup>806</sup> to implement a system for staff to report retaliation,<sup>807</sup> and to employ protective practices for inmates who fear retaliation after reporting abuse.<sup>808</sup>

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<sup>800</sup> Pupovac Statement, at 8.

<sup>801</sup> Shapiro, "In Iowa, A Commitment to Make Prison Work Better for Women;" *see also* Pupovac Statement, at 8.

<sup>802</sup> Shapiro, "In Iowa, A Commitment to Make Prison Work Better for Women."

<sup>803</sup> *Ibid.*

<sup>804</sup> *Ibid.*

<sup>805</sup> Assistant Attorney General Thomas E. Perez, letter to Governor of Kansas Samuel D. Brownback, Sept. 6, 2012, Re: Investigation of the Topeka Correctional Facility, at p. 15, [https://www.justice.gov/sites/default/files/crt/legacy/2012/09/10/topeka\\_findings\\_9-6-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/09/10/topeka_findings_9-6-12.pdf).

<sup>806</sup> Settlement Agreement, *United States v. Kansas* (Dec. 22, 2014) at ¶¶ 18, 19, [https://www.justice.gov/sites/default/files/crt/legacy/2015/03/19/topeka\\_agreement\\_12-22-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/03/19/topeka_agreement_12-22-14.pdf).

<sup>807</sup> *Id.* at ¶ 22.

<sup>808</sup> *Id.* at ¶ 24.



*Indianapolis Juvenile Correctional Facility*

In 2010, DOJ found that there were a number of unfair disciplinary tactics used against female juvenile inmates at the Indianapolis Juvenile Correctional Facility.<sup>809</sup> In particular, the DOJ described one incident at length stating that:

Officer A reported that an [Indianapolis Juvenile Correctional Facility] IJCF youth had made allegations of sexual misconduct to Officer A against Officer B. Officer A, however, did not refer the matter for investigation, nor did the officer complete a Report of Alleged Child Abuse or Neglect (the facility's official form for reporting abuse and neglect allegations). Instead, Officer A and Officer B together confronted the youth about her allegations. The youth then recanted, and Officer B wrote a conduct report charging her with "false accusations," which resulted in disciplinary action against the girl. Under these circumstances, there is no way of knowing whether the youth's allegations were false or whether, when confronted by the very staff member who reportedly assaulted her, she was too afraid to press the matter. In any case, the handling of her complaint was grossly inappropriate and well outside the bounds of what is generally accepted in the field.<sup>810</sup>

DOJ also condemned the use of segregation at the Indiana women's facility, reasoning that this practice should only be used "in the most extreme circumstances, and only when less restrictive interventions have failed or are not practicable," and "according to accepted juvenile practices" be limited to a maximum of five days of isolation.<sup>811</sup> However, Indianapolis Juvenile Correctional Facility had used this tactic against dozens of individuals, for periods up to more than ten times the maximum length of five days (in 2008, three inmates each spent 53 consecutive days in isolation, two spent 48 days).<sup>812</sup> According to DOJ, "[t]hese long lengths of stay serve no rehabilitative or therapeutic purpose and are a short-sighted way to attempt to control behavior. In the long run, placing a youth in isolation for an excessive period is likely only to exacerbate the existing problem and to create additional adjustment problems when the youth finally is released from segregation."<sup>813</sup> DOJ also found that Indianapolis Juvenile Correctional Facility's use of a restraint chair on a juvenile inmate led to "increasing both the risk of injury to the youth and the

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<sup>809</sup> Assistant Attorney General Thomas E. Perez, letter to Indiana Governor Mitch Daniels (Jan. 29, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Indianapolis\\_findlet\\_01-29-10.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Indianapolis_findlet_01-29-10.pdf).

<sup>810</sup> *Id.* at 11.

<sup>811</sup> *Id.* at 21-22.

<sup>812</sup> *Id.* at 22.

<sup>813</sup> *Id.*



risk that the youth was subjected to an abusive disciplinary technique.”<sup>814</sup> Moreover, DOJ found that correctional staff’s use of a restraint chair defied state policy:

Contrary to [Indiana Department of Corrections] IDOC policy, the incident was not preserved on video...[T]he staff members involved in the incident submitted confusing and inconsistent written reports...Moreover, it is not clear how long the youth was in the restraint chair before she was evaluated by a medical professional, or when the youth was released. When we inquired as to how long the restraint actually lasted, a staff member told us that it had been one hour. Some of the written reports, however, suggest that the youth was not released for several hours. Thus, the facility failed to follow its own policy regarding the restraint chair, and neither we nor [Indianapolis Juvenile Correctional Facility] IJCF administrators have any way of knowing whether or to what extent the chair may have been misused.<sup>815</sup>

Additionally, DOJ found that staff deployment of Oleoresin Capsicum (OC or “pepper”) spray—a chemical agent that burns and causes shortness of breath—was in violation of standards.<sup>816</sup> According to DOJ, pepper spray should only be used when “absolutely necessary for the safety and security of the facility, residents, and staff, and only when less drastic measures have been attempted and failed.”<sup>817</sup> However, in one incident, staff used the weapon against two girls for merely refusing orders, though neither girl presented a threat to herself or others.<sup>818</sup> DOJ documented its concerns about this incident, even though facility policy would not have condoned the use of pepper spray in this particular scenario.<sup>819</sup>

Similarly, in 2009, DOJ found that New York’s Office of Children and Family Services facilities for girls consistently used inappropriate force to control juvenile inmate behavior.<sup>820</sup> In particular, the DOJ described one instance as essentially a disciplinary procedure:

[A] youth was restrained eight times between April 24 and June 25, 2008. This youth was assigned to a mental health unit and has a history of engaging in self-mutilation and suicidal gestures. In nearly every one of the eight incidents, the youth was engaging in behaviors

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<sup>814</sup> *Id.* at 20.

<sup>815</sup> *Id.* at 21.

<sup>816</sup> *Id.* at 19.

<sup>817</sup> *Id.*

<sup>818</sup> *Id.* at 20.

<sup>819</sup> *Id.*

<sup>820</sup> Acting Assistant Attorney General Loretta King, letter to Governor of New York David A. Paterson, Aug. 14, 2009, Re: Investigation of the Lansing Residential Center, Louis Gossett, Jr. Residential Center, Tryon Residential Center, and Tryon Girls Center, at p. 6, [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/NY\\_juvenile\\_facilities\\_findlet\\_08-14-2009.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/NY_juvenile_facilities_findlet_08-14-2009.pdf).

such as head banging, putting paper clips in her mouth, tying a string around her neck, etc.; behaviors that, due to her mental illness, were beyond her control. Each of those incidents resulted in a full prone restraint, which is essentially punishment for exhibiting symptoms of her illness. Our experts (both in protection from harm and mental health) agreed that behavioral interventions<sup>821</sup> would be more appropriate in these types of situations.<sup>822</sup>

The settlement agreement between New York and the United States included provisions that required the creation of policies that would limit the use of excessive force against inmates,<sup>823</sup> as well as the implementation of procedures that would reduce retaliation against inmate girls who reported incidents of abuse.<sup>824</sup>

## Promising New Practices

### *Massachusetts Correctional Institution for Women at Framingham*

According to a 2014 report, the Massachusetts Correctional Institution for Women at Framingham, a medium security reception and diagnostic center housing females serving criminal sentences, awaiting trial, or who are civilly committed, adopted the National Resource Center for Justice Involved Women's trauma-informed correctional practice.<sup>825</sup> This change in policy resulted in significant decreases in prison violence, as measured by a 62 percent decrease in staff assaults, a 54 percent decrease in inmate-on-inmate assaults, and 46 percent reduction in inmate fights.<sup>826</sup> The change in policy at the Massachusetts Correctional Institution for Women at Framingham also resulted in 23 percent less segregation placements, 6 percent disciplinary reports, 60 percent less suicide attempts, and 13 percent less self-injury incidents.<sup>827</sup>

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<sup>821</sup> The DOJ also found that there was a "failure to provide adequate behavioral management," and that:

Generally accepted professional standards require that juvenile justice facilities establish individualized behavior management programs to address the problematic behavior of youths with mental illness. Behavior management programs should include plans and strategies to address mental health crises and reduce their potential for recurrence. Staff employed at juvenile justice facilities should be trained in crisis intervention and de-escalation techniques, and should utilize the least restrictive measures necessary when a youth with mental illness acts out. Physical restraints should be used as an infrequent last resort. *Id.* at 15.

<sup>822</sup> *Id.* at 9.

<sup>823</sup> Settlement Agreement, *United States v. New York*, No. 1:10-CV-0858. (N.D.N.Y. July 14, 2010) at 7.

<sup>824</sup> *Id.* at 9.

<sup>825</sup> Benedict, Ney, and Ramirez, "Gender Responsive Discipline;" *see also* "MCI-Framingham, Overview," <https://www.mass.gov/locations/mci-framingham> (accessed June 12, 2019).

<sup>826</sup> *Ibid.*, 3.

<sup>827</sup> *Ibid.*, 6.

*New Practices Developing in North Dakota*

At February 2019 briefing, the Commission heard testimony from Ms. Leann Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation and Dr. Wendy Williams of Alabama Department of Corrections regarding how they can tell whether or not the discipline infractions they are handing out are fair to women.<sup>828</sup> Since 2010, the North Dakota Department of Corrections and Rehabilitation includes in its review positive write-ups in addition to the negative write-ups, as the positive write-ups give inmates' positive reinforcement and reduce bad behavior among inmates.<sup>829</sup> According to Ms. Bertsch, the positive behavior reports try to catch people doing the right thing, and their system tries to give out four positives write-ups to every negative write-up, as a strategic management path to encourage appropriate prison behavior.<sup>830</sup> According to Dr. Williams, when Alabama Department of Corrections began implementing their new discipline policy they consulted via focus groups with and received feedback from women serving time in their system as well as their correctional staff on the new policy.<sup>831</sup>

*Restrictive Housing*

As mentioned earlier, disciplinary infractions can cause some inmates to serve time in restrictive housing (or solitary confinement). At the Commission's briefing, Yale Law Professor Judith Resnik testified that solitary confinement or restrictive housing is defined as "a practice encompassing what some systems term segregation, isolation, room confinement, special housing units (SHU), control units or special management units."<sup>832</sup> The Association of State Correctional Administrators and the Arthur Liman Center for Public Interest Law that Professor Resnik heads, conducted a national survey defining restrictive housing as "separating prisoners from the general population and holding them in their cells for an average of 22 or more hours per day for 15 or more continuous days."<sup>833</sup> The internationally accepted Mandela Rules consider this to be "prolonged confinement" that should be prohibited as a form of "torture or cruel, inhuman or degrading treatment or punishment."<sup>834</sup> Professor Resnik reports that 43 out of 50 states responded, and using that definition, found that 1.2 percent of women in prison and 4.6 percent of men in

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<sup>828</sup> Commissioner Kladney, *WIP Briefing*, p. 226.

<sup>829</sup> Bertsch Testimony, pp. 226-27.

<sup>830</sup> Bertsch Testimony, p. 226.

<sup>831</sup> Williams Testimony, p. 227.

<sup>832</sup> Resnik Statement, at 5.

<sup>833</sup> *Ibid.*

<sup>834</sup> Sharon Shalev, "United Nations Minimum Rules on the Treatment of Prisoners (Nelson Mandela Rules)," *Solitaryconfinement.org*, <http://solitaryconfinement.org/mandela-rules> (accessed Oct.18, 2019) (prohibiting indefinite solitary confinement, and prolonged solitary confinement (no longer than 15 days)).

prison were in restrictive housing for more than 15 days.<sup>835</sup> She added that solitary confinement isolates both men and women in prison, which can undermine their physical and mental health.<sup>836</sup> The isolation of restrictive housing can be especially difficult for men and women in prison who have already been victims of sexual abuse.<sup>837</sup> Though the outcome depends on the particular facts, in several cases from the 1890s onward, the Supreme Court has held that the overuse of solitary confinement may be unconstitutional.<sup>838</sup> For example, it has upheld a 30-day judge-imposed limit on solitary confinement.<sup>839</sup>

Using another measure, based on surveying inmates about any time they had spent in restrictive housing in the past 12 months or since coming to the facility, a 2015 Bureau of Justice Statistics report found that in 2011 - 2012, nearly 20 percent of state and federal inmates, including both men and women, were held in administrative segregation or solitary confinement during the previous 12 months.<sup>840</sup> Of the 20 percent of inmates who were held in restrictive housing, half of them stayed for 30 days or longer.<sup>841</sup> A higher proportion of women in prison than men reported being held in restrictive housing, but these differences were not statistically significant.<sup>842</sup> Among both men and women, black inmates in prisons (21 percent) were somewhat more likely than white inmates (16 percent) to have spent time in restrictive housing, and these differences were statistically significant.<sup>843</sup> Native American, Alaska Native, Asian, Native Hawaiian, other Pacific Islander, and multiracial inmates (20 percent) were also more likely than white inmates (16 percent) to have spent time in restrictive housing and these differences were statistically significant.<sup>844</sup> Latino inmates were just as likely as white inmates in prison to report having spent time in restrictive housing.<sup>845</sup> Inmates who identified as lesbian, gay, or bisexual (28 percent) were

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<sup>835</sup> *Ibid.*, 6.

<sup>836</sup> Resnik Statement, at 4.

<sup>837</sup> *Ibid.*

<sup>838</sup> See, e.g., *In re Medley*, 134 U.S. 160 (1890); *Weems v. United States*, 217 U.S. 349 (1910); *Brooks v. Florida*, 389 U.S. 413 (1967).

<sup>839</sup> *Hutto v. Finney*, 437 U.S. 678 (1978) (upholding 30-day judge-imposed limit on solitary confinement and recognizing it as a type of punishment subject to Eighth Amendment standards).

<sup>840</sup> DOJ, *Use of Restrictive Housing*, p. 1.

<sup>841</sup> *Ibid.*, 3.

<sup>842</sup> *Ibid.*, 4.

<sup>843</sup> *Ibid.*

<sup>844</sup> *Ibid.*

<sup>845</sup> *Ibid.*

more likely than heterosexual inmates (18 percent) to have spent some time in restrictive housing.<sup>846</sup>

According to the Bureau of Justice Statistics report, on every measure of past mental health challenges, women and men in prison who reported a mental health challenge were also more likely than other inmates to report that they had spent time in restrictive housing in the past 12 months, and each of these differences was statistically significant.<sup>847</sup> In particular, approximately 14 percent of prison inmates who reported no history of mental health problems spent some time in restrictive housing, but 26 percent of prison inmates who reported a history of mental health problems spent some time in restrictive housing.<sup>848</sup> As discussed above, female inmates are more likely to have mental health challenges than their male counterparts,<sup>849</sup> yet they may also have less access to mental health programs while in prison.<sup>850</sup>

Previous research studies on restrictive housing have primarily centered on incarcerated men, as there are more incarcerated males in restrictive housing than their female counterparts.<sup>851</sup> A 2017 survey fielded by the Association of State Correctional Administrators and Arthur Liman Public Interest Program at Yale Law School found that in the 32 jurisdictions that reported data, over 4 percent of men were held in restrictive housing compared to only 1.2 percent of incarcerated women.<sup>852</sup>

The figure below demonstrates the overall results regarding women, showing how the percentage of female prisoners in restrictive housing varies across state and federal prisons.

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<sup>846</sup> Ibid.

<sup>847</sup> Ibid.

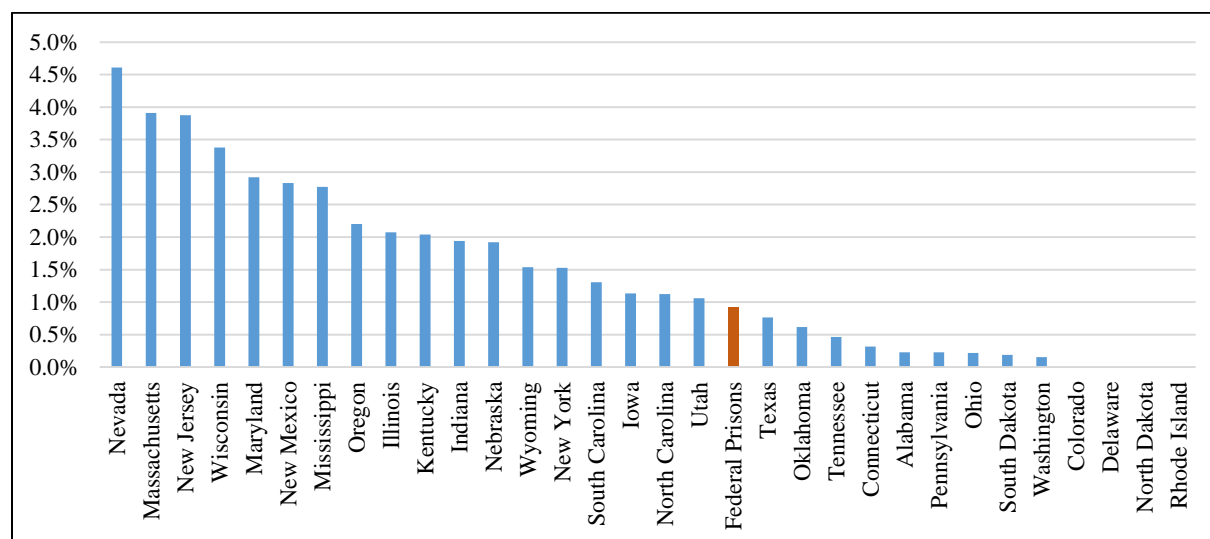
<sup>848</sup> Ibid., 6.

<sup>849</sup> See *supra* notes 83-87 and 602-4.

<sup>850</sup> See *supra* notes 609-13.

<sup>851</sup> Jessi LaChance, “Women in Segregation, June 2018 Fact Sheet,” *Vera Institute of Justice*, June 2018, (hereinafter LaChance, “Women in Segregation”) [https://storage.googleapis.com/vera-web-assets/downloads/Publications/women-in-segregation/legacy\\_downloads/women-in-segregation-fact-sheet.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/women-in-segregation/legacy_downloads/women-in-segregation-fact-sheet.pdf).

<sup>852</sup> Resnik et al., “Reforming Restrictive Housing,” p. 17.

**Figure 10: 2017–2018 Number and Percentage of Women in Restrictive Housing**<sup>853</sup>

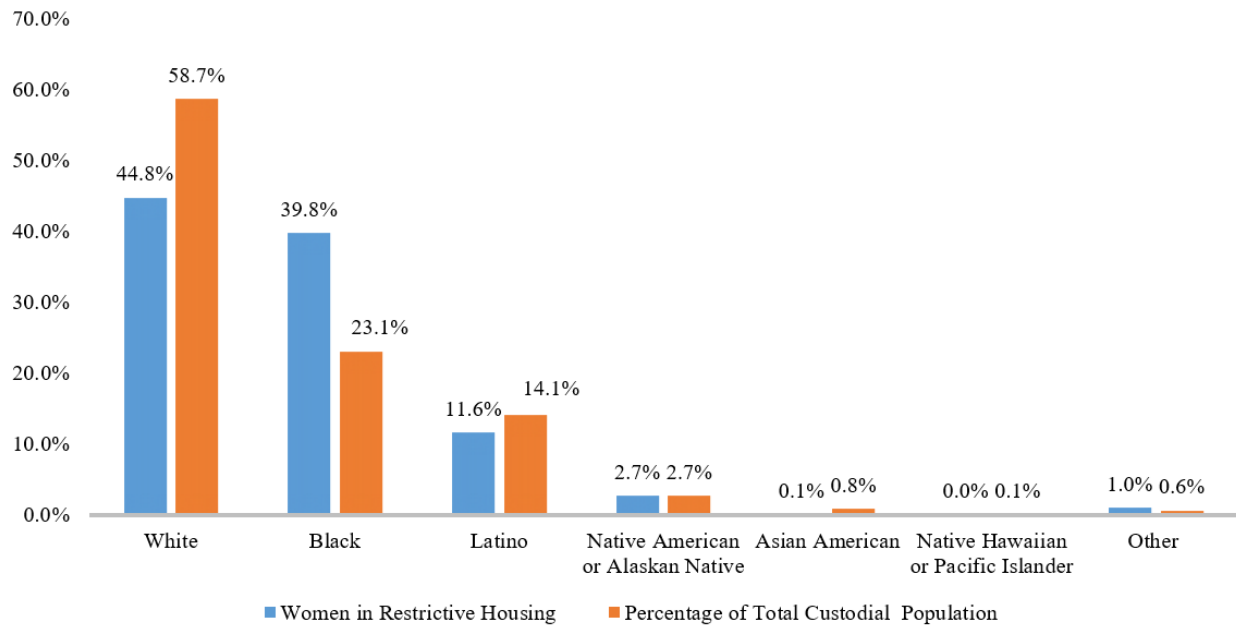
According to the data in the figure above, of the 32 reporting jurisdictions, Nevada had the highest percent of women in restrictive housing at 4.6 percent and Colorado, Delaware, North Dakota, and Rhode Island reported no women in restrictive housing. Similarly, a 2018 Vera Institute of Justice report examined the patterns of women in solitary confinement across on six states—Louisiana, Nebraska, Nevada, North Carolina, Oregon, and Utah.<sup>854</sup> The percent of women in restrictive housing in this study ranged from 3 to 12 percent: Louisiana (12.1 percent), Nebraska (4.8 percent), Nevada (5.7 percent), North Carolina (5 percent), Oregon (3.4 percent), and Utah (4 percent).<sup>855</sup> According to Figures 12 and 13, black women and men inmates were disproportionately placed in restrictive housing.

<sup>853</sup> Ibid., 20 (note that these data includes information from 31 states and the Federal Bureau of Prisons—19 states (Alaska, Arizona, Arkansas, California, Florida Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, New Hampshire, Vermont, Virginia, and West Virginia) did not report data on women in restrictive housing); *see also* Resnik Statement, at 6.

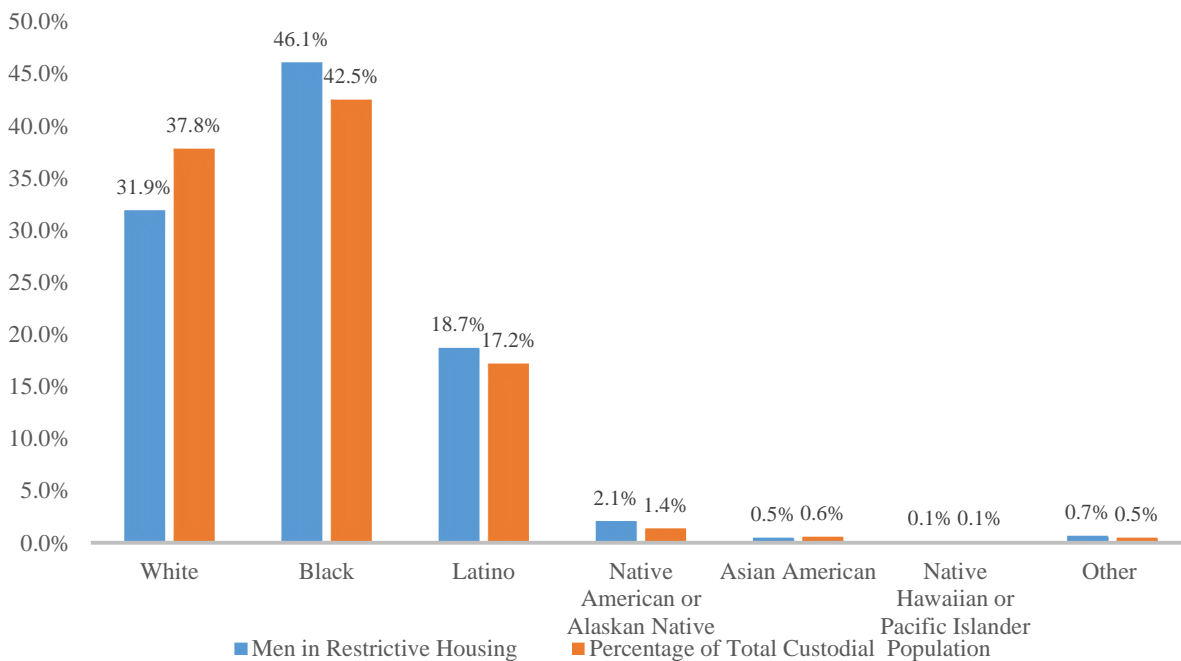
<sup>854</sup> LaChance, “Women in Segregation.”

<sup>855</sup> Ibid.

**Figure 11: 2017–2018 Racial and Ethnic Composition of Female Prisoners in Total Custodial Population and in Restrictive Housing Population**<sup>856</sup>



**Figure 12: 2017–2018 Racial and Ethnic Composition of Male Prisoners in Total Custodial Population and in Restrictive Housing Population**<sup>857</sup>



<sup>856</sup> Resnik et al., “Reforming Restrictive Housing,” p. 20.

<sup>857</sup> Ibid., at 23

For instance, black women made up almost 40 percent of the restrictive housing population but were only about 23 percent of the total female prison population (See Figure 12). By comparison, white women were almost 45 percent of the restrictive housing population among women, but almost 59 percent of the population (See Figure 12). Commission staff also calculated the odds of black women in prison serving time in restrictive housing compared to white women, and found that black women were over 2 times more likely than white women to serve time in restrictive housing.<sup>858</sup> For Latina women, Native American women, Alaska Native women, Asian women, Native Hawaiian women, other Pacific Islander women, and multiracial women their respective populations in restrictive housing were less than or equal to their general custodial population (see Figure 12).

Black men made up over 46 percent of the male restrictive housing population, as compared to 42.5 percent of the total male prison population. By comparison, white men were almost 32 percent of the restrictive housing population among men, but nearly 38 percent of the population (See Figure 13). In calculating the odds of black men in prison serving time in restrictive housing compared to white men, the odds ratio was a little over 1, which means black men were slightly more likely than white men to serve time in restrictive housing.<sup>859</sup> In comparison, the odds ratio for black women was 2. The percent of Latino men, Native American men, Alaska Native men, and multiracial men their respective populations in restrictive housing was slightly more than their general custodial population (see Figure 13). However, for Asian, Native Hawaiian, and other Pacific Islander men, their respective populations in restrictive housing were less than or equal to their general custodial population (see Figure 13).

#### *Restrictive Housing and Women in Federal Prison*

According to BOP's responses to the Commission's interrogatories and document requests, in 2018, there were 2,297 female federal inmates in segregation at some point.<sup>860</sup> The average length of stay in segregated housing for women in federal custody was 22 days, and the median length of stay was 12 days.<sup>861</sup> Since the mean of length of stay in segregated housing (22 days) is larger than the median (12 days), the distribution of length of stay in segregated housing for women is skewed to the right, which suggests that a small number of women in prison serve more than 22 days in restrictive housing.

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<sup>858</sup> Ibid., at 22-4 (figure was made by Commission staff).

<sup>859</sup> Ibid.

<sup>860</sup> BOP Response to USCCR Interrogatory No. 50.

<sup>861</sup> Ibid.



BOP notes that these data used do not allow the ability to differentiate the reason why the inmate went to segregated housing (e.g. administrative, disciplinary, or protective custody).<sup>862</sup> Hence, these data also do not allow an identification of the disciplinary incident that may have led to a stay in segregated housing.<sup>863</sup> Equal protection violations could arise if there is no legitimate governmental justification for unfairly disciplining women prisoners, as compared to similarly situated men.<sup>864</sup>

### *Restrictive Housing and Women in State Prisons*

The 2018 discipline policy change at Tutwiler Prison for Women in Alabama referenced above reduced the use of restrictive housing for women in prison to those behaviors where inmates exhibit violence against other inmates or staff, or as a last resort when all other forms of behavior intervention have failed.<sup>865</sup> This change in policy reduced the average stay for an inmate who was sanctioned for restrictive housing to nine days, and on several occasions, there were no women in restrictive housing.<sup>866</sup> According to Dr. Williams, prior to the new discipline policy, the average stay in restrictive housing was much higher than nine days.<sup>867</sup> She now expects a continued decrease in major disciplinary actions and the use of restrictive housing as their new discipline policy ripens.<sup>868</sup>

In her statement to the Commission, Ms. Wendy Still, Chief Probation Officer in Alameda County, California discussed how prisons can create an environment where staff understand how to effectively manage disciplinary issues within a balanced system of support and accountability.<sup>869</sup> Moreover, Ms. Still further explained at the briefing that:

So, you're just not correcting behavior with incentives, and the incentives can be very small, but they are very meaningful. That helps to change the culture. And then, also, in terms of the way that disciplinaries are looked at. What's driving the disciplinary? Does the woman have a mental health condition? Is there a trauma trigger that's been triggered

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<sup>862</sup> Ibid.

<sup>863</sup> Ibid.

<sup>864</sup> See *supra* notes 237-42 (equal protection) and 253-55 (substantive due process).

<sup>865</sup> Williams Testimony, p. 217; see also Williams Statement, at 6.

<sup>866</sup> Williams Testimony, p. 217.

<sup>867</sup> Williams Statement, at 6.

<sup>868</sup> Williams Testimony, p. 218.

<sup>869</sup> Still Statement, at 6.

by whatever created the rule violation? Those are all things, if you're creating a strength-based system to address disciplinaries, that you look at.

And then, also, the officers, the reviewing officer, rules violation, we call them hearing lieutenants in California; that they're highly trained to look and to add value and weight to all of those factors. And instead of in a punishing way sending somebody off to solitary or taking their visits away or doing other things, that there is perhaps a resolution to it. Maybe the woman participates in additional training or mental health programming or a Beyond Violence type of program that's going to actually correct whatever the issue is versus just punishing and taking things away.<sup>870</sup>

Some women in prison are moved into restrictive housing because of behavioral issues related to mental health challenges.<sup>871</sup>

### **Staffing and Staff Training**

Multiple research studies suggest that men and women in prison have some different needs,<sup>872</sup> but few studies have examined the staffing and training related to these distinct needs. A 2004 survey fielded by DOJ's National Institute of Corrections (NIC) questioned state departments of corrections on their staffing needs, policies, procedures, and best practices for their female population.<sup>873</sup> The NIC received responses from 36 state departments of corrections and their responses revealed that, for the most part, their approaches to staffing for their female population did not differ much from how they staffed their male prisoners.<sup>874</sup> In particular, over 94 percent of survey respondents reported that there is no person assigned with directing staffing processes specifically for women's prisons; over 83 percent of respondents reported that they do not have gender-specific methods to govern the number of staff required to support women's facilities; over 88 percent of respondents denoted that they do not regularly conduct a specific review of the security post plans for women's facilities separately from the reviews they already conduct for their men's facilities; and 80 percent of respondents said that they do not use any gender-specific

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<sup>870</sup> Still Testimony, p. 316-17.

<sup>871</sup> See *supra* notes 42-45.

<sup>872</sup> See *supra* notes 66-131.

<sup>873</sup> U.S. Department of Justice, National Institute of Corrections, *Prison Staffing Analysis: A Training Manual with Staffing Considerations for Special Populations*, by P.L. Hardyman (2008), pp. 201-206, <https://info.nicic.gov/nicrp/system/files/022667.pdf>.

<sup>874</sup> *Ibid.*, 109.

guidance for analyzing staff capacity or making adjustments to the number of staff members at a certain post.<sup>875</sup>

In analyzing the survey responses from the 36 jurisdictions, the authors found that respondents highlighted three important staffing needs for women's facilities: 1) medical and mental health needs, 2) program services and transportation for pregnant women in prison, and 3) family and friend visitations.<sup>876</sup> Prison staff perspectives on the medical and mental health needs of women in state prisons were as follows: over 83 percent of survey respondents stated that mental health staff capacity for female inmates were significantly affected by needs associated with trauma and abuse; almost 67 percent agreed that medical staffing levels were impacted by their needs for greater staff time and attention; and 58 percent agreed women in prison overall required more trips to special medical clinics.<sup>877</sup> All survey respondents agreed that pregnant women should receive prenatal care, but only 39 percent of respondents thought that pregnant women should have special housing during their last trimester.<sup>878</sup> Lastly, over 97 percent of survey respondents believed that women in prison have greater needs for family and social services than their male counterparts, and over 80 percent of survey respondents thought that women need to visit with their children more often than their male counterparts or for longer periods of time.<sup>879</sup> As the data in Chapter 1 shows, this may be because of women's greater childcare and family responsibilities, as compared to men.<sup>880</sup> Another study, analyzing an earlier version of these survey responses, posits that because of the disparate mental health needs of female prisoners, prisons would benefit from hiring staff with qualifications or interests in serving the mental health and medical needs of women in prison.<sup>881</sup>

### ***Federal Prisons and Staff Training for Women's Facilities***

BOP reported to the Commission that 11 out of its 16 current executive staff have worked in a federal prison and six have worked in a woman's prison.<sup>882</sup> Moreover, as "the result of an OIG audit, Executive Staff in the Bureau will be required to complete basic training on female offenders

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<sup>875</sup> Ibid., 110.

<sup>876</sup> Ibid.

<sup>877</sup> Ibid., 111-12.

<sup>878</sup> Ibid., 114.

<sup>879</sup> Ibid., 115.

<sup>880</sup> See *supra* notes 464-73 and Table 6.

<sup>881</sup> U.S. Department of Justice, National Institute of Corrections, *Staffing Analysis for Women's Prisons and Special Prison Populations*, by Camille Graham Camp, Patricia L. Harding, Robert May, George M. Camp, (Dec. 2008), <https://info.nicic.gov/nicrp/system/files/022667.pdf> (hereinafter DOJ, *Staffing Analysis for Women's Prisons and Special Prison Populations*).

<sup>882</sup> Email conversation between Alix McLearen, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Apr. 1, 2019 (on file with U.S. Commission on Civil Rights).

provided to staff that [sic] work at female facilities.”<sup>883</sup> In its report, OIG stated, “We are concerned that, without such training, members of the National Executive Staff who are in a position to make decisions that affect the female inmate population may not be fully aware of female inmates’ unique needs.”<sup>884</sup> In addition, according to BOP, all staff are required to take an annual training that addresses symptoms of mental illness, and appropriate responses to mental illness and suicide risk.<sup>885</sup> Staff at female facilities receive the Trauma-informed Correctional Care Module training, which is reportedly aimed at informing and educating all BOP staff about trauma and how to prevent re-traumatization, including an overview of what trauma-informed care means, what staff can do to abide by the principles of trauma-informed care, and the benefits and outcomes of using this approach.<sup>886</sup> All staff at institutions housing female offenders are required to complete Managing Female Offenders within 60 days of their start date, as well as annual training on requirements of the Prison Rape Elimination Act, including training on assessments for potential victimization.<sup>887</sup>

### *Staff Composition*

BOP also provided the number of male and female staff who are employed at its women’s facilities, which is depicted in the figure below.<sup>888</sup>

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<sup>883</sup> Ibid.

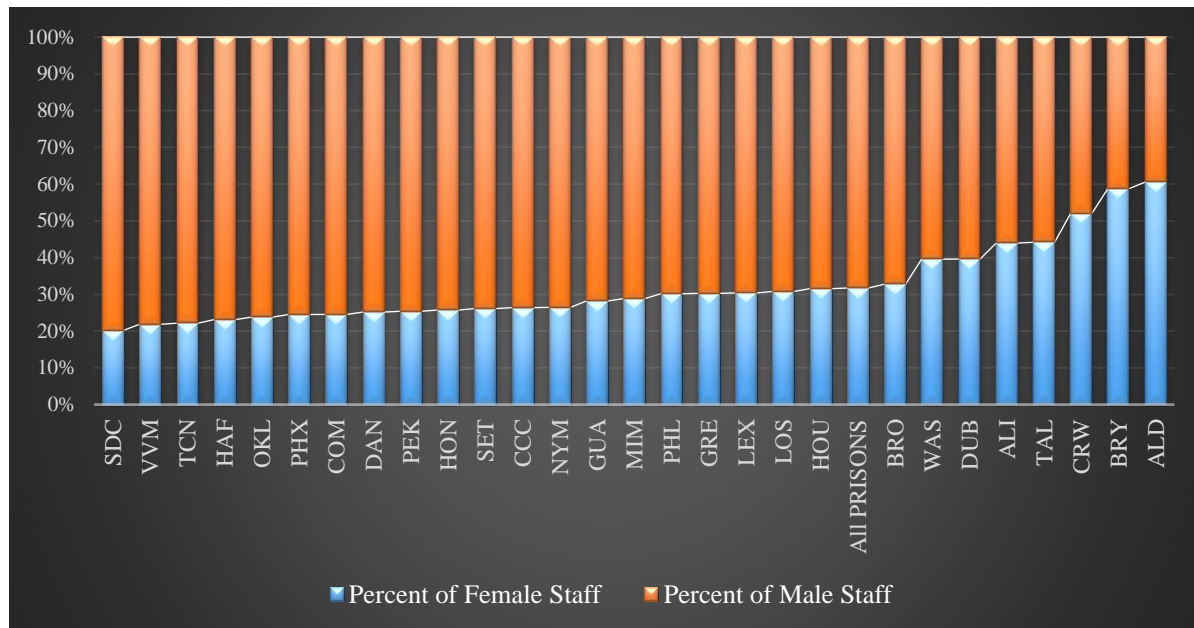
<sup>884</sup> U.S. Dep’t of Justice, *Review of the Federal Bureau of Prison’s Management of Its Female Inmate Population*, p. 18.

<sup>885</sup> BOP Response to USCCR Interrogatory No. 36.

<sup>886</sup> Ibid.

<sup>887</sup> BOP Response to USCCR Interrogatory No. 36.

<sup>888</sup> BOP Response to USCCR Interrogatory No. 3 (percentages and chart calculated and created by Commission staff).

**Figure 13: Gender Breakdown of Prison Staff at Women's Federal Prisons**

**Source:** BOP Response to USCCR Interrogatory No. 3

As of February 23, 2019, 32 percent of all BOP prison staff at women's facilities were women, and 68 percent of BOP staff at women's facilities were men, which means that at women's prisons, BOP male staff outnumbered female employees by a ratio of 2.15 to 1.<sup>889</sup> The percentages of female staff at female BOP institutions ranges from 20 percent at the Metropolitan Correctional Center San Diego in San Diego, California to 61 percent at the Federal Prison Camp Alderson in Alderson, West Virginia.<sup>890</sup> See the table and Appendix F for more details of the gender BOP staff breakdown of female facilities.

### Gender-Based Staffing in Women's Prisons

It is generally in contravention to civil rights protections under Title VII to restrict hiring for positions based on protected characteristics such as sex. However, courts have recognized a tangible defense to such charges, known as making a justification based on a bona fide occupational qualification. This section discusses BOP's position regarding gender-based staffing in women's prisons through Bona Fide Occupational Qualifications (BFOQs), data about the

<sup>889</sup> BOP Response to USCCR Interrogatory No. 3, Attachment 2 (percentages and chart calculated and created by Commission staff).

<sup>890</sup> BOP Response to USCCR Interrogatory No. 3, attachment 2 (percentages and chart calculated and created by Commission staff).

number of women guards in women's prisons, and relevant federal law as to whether some positions or functions should be assigned to women.

### ***BOP's Position***

BOP reported to the Commission that it “does not use BFOQs [Bona Fide Occupational Qualifications] for hiring or retaining employees.”<sup>891</sup> BOP explained that Title VII of the Civil Rights Act of 1964 permits hiring and employing “on the basis of sex where sex is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise.”<sup>892</sup> But BOP went on to explain that “[h]owever, employment decisions that have only a de minimus effect on the employment opportunities... do not require a BFOQ analysis.”<sup>893</sup>

BOP explained that:

The BOP has several reasons for not establishing a BFOQ. Traditionally, the legal standards to establish a BFOQ have been very high, requiring a showing that is necessary to the essence or central function of the facility. The BOP can address considerations of privacy and other aspects of cross gender supervision through assignments of specific duties to a staff member based on gender, rather than have blanket prohibition of serving on a particular post or at particular institution. This approach - to manage cross gender supervision through specific work assignment rules - is consistent with the Department of Justice's regulations under the Prison Rape Elimination Act. See 28 C.F.R. § 115.15.

Other factors considered by the BOP include the ability to appropriately staff facilities, and the possibility of converse litigation concerning female staff working in male facilities. In summary, the BOP's approach balances gender responsive correctional needs, in a manner that has a de minimis impact on employment opportunities under Title VII.<sup>894</sup>

### ***Applicable PREA Regulations***

The 2012 federal PREA regulations limit cross-gender body searches and other contact.<sup>895</sup> These regulations are the result of the studies of the PREA Commission, which was required “to carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States, and to recommend national standards to

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<sup>891</sup> BOP Response to the Commission's Interrogatories, Question 5.

<sup>892</sup> *Ibid.*, citing 42 U.S.C. § 2000e-2(e)(1).

<sup>893</sup> *Ibid.* (no citation provided).

<sup>894</sup> BOP Response to the Commission's Interrogatories, Question 6.

<sup>895</sup> See 28 C.F.R. § 115.5 (General Definitions).

the Attorney General and to the Secretary of Health and Human Services.”<sup>896</sup> The PREA Commission’s resulting report was reviewed by a PREA Working Group in the Department of Justice, after which the Attorney General recommended legal limits to cross-gender viewing or searching.<sup>897</sup> The PREA Commission’s 2009 findings report had cautioned against persons of the opposite sex performing bodily searches or viewing of incarcerated persons in circumstances involving nudity,<sup>898</sup> stating that “cross-gender supervision is an area in which the Commission has set clear standards.”<sup>899</sup> The Commission’s reasoning was based on the following facts and legal framework:

Some of the widespread abuse that occurred in women’s prisons across Michigan in the 1990s was facilitated by rules that required officers, including men, to meet a daily quota of pat-down searches for weapons, drugs, or other contraband. Physical searches are necessary security procedures. *The potential for abuse is heightened, however, when staff of the opposite gender conduct them.* In the Commission’s view, the risks are present whether the officers are female or male. Historically, few women worked in corrections, but this is rapidly changing. The Commission understands that cross-gender supervision can have benefits for incarcerated persons and staff. The Commission’s standard on this issue is not intended to discourage the practice generally or to reduce employment opportunities for men or women. However, *strict limits on cross-gender searches and the viewing of prisoners of the opposite gender who are nude or performing bodily functions are necessary because of the inherently personal nature of such encounters.* Court decisions have recognized that both male and female prisoners retain some rights to privacy, especially in searches of their bodies and in being observed in states of undress by staff of the opposite gender.<sup>900</sup>

The PREA Commission also discussed that in “1997, the U.S. Department of Justice sue[d] the State of Arizona and intervene[d] in women prisoner cases in Michigan to challenge pervasive sexual abuse of women prisoners during cross-gender pat downs. Consent judgments the following year create moratoriums on cross-gender pat downs of women in both States.”<sup>901</sup>

The resulting federal regulations require that:

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<sup>896</sup> See, e.g., Dep’t of Justice, Proposed Rule, National Standards to Prison Rape, 76 FR 6248-01, 2011 WL 318532, § II (F.R.) (Feb. 3, 2011).

<sup>897</sup> Id.

<sup>898</sup> National Prison Rape Elimination Commission, 2009 Report, p. 6-7, <https://www.ncjrs.gov/pdffiles1/226680.pdf>. (hereinafter NPREC 2009 Report).

<sup>899</sup> Ibid.

<sup>900</sup> Ibid.

<sup>901</sup> Ibid., 25.

- (a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.
- (b) As of August 20, 2015, or August 21, 2017 for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.
- (c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.
- (d) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit.
- (e) The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.
- (f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.<sup>902</sup>

Based on the PREA regulations discussed above, depending on the facts of the case, federal courts could uphold BFOQs for the positions involved in cross-gender pat downs or visual body cavity searches, and for positions involving the viewing of women prisoners dressing or showering or using the bathroom.<sup>903</sup> In some cases, there may not be enough women staff to effectively perform

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<sup>902</sup> 28 C.F.R. § 115.15.

<sup>903</sup> 28 C.F.R. § 115.15 (a), (b) and (d); and *see infra* notes 916-36 (discussing *Everson v. Michigan*) and 951-62 (discussing *Teamster's Local Union No. 117 v. Washington Dep't of Corrections*).



the functions that are required by the above PREA regulations to be limited to women (except in exigent circumstances).<sup>904</sup>

PREA regulations leave room for men to enter women prisoners' housing units if they announce themselves, and for training security staff on how to conduct cross-gender pat-down searches and searches of transgender and intersex inmates in a professional and respectful way, using the least intrusive means possible.<sup>905</sup> But in federal prisons with a relatively low percentage of female staff, female staff numbers may be insufficient to comply with PREA's general prohibition on cross-gender body cavity searches without compromising security, as was the case in Washington State where women guards had to be "shuttled" from duty to duty in order to comply.<sup>906</sup> However, because the case law regarding sex as a BFOQ in women's prisons is highly fact-intensive, these rules might not apply in cases that do not include heightened needs for privacy and security with regard to the positions at issue.<sup>907</sup>

One of the former PREA Commissioners, Professor Brenda V. Smith, testified at the U.S. Commission on Civil Rights briefing about her experience on the PREA Commission, and discussed that she believes that the regulations were belatedly issued and that there is still much work to be done in the field.<sup>908</sup> She has also stated that "PREA is about much more than abuse."<sup>909</sup> Professor Smith has also documented that while an increasing number of women have been able to enter into the field of corrections, which was traditionally dominated by men, "women's progress in correctional institutions has increased female inmates' exposure to supervision by male staff, which places them at greater risk for sexual victimization. Second, it has diminished privacy of both male and female inmates in custodial settings."<sup>910</sup> She and her research fellow also found that some women corrections officers have been abusive of male inmates.<sup>911</sup>

Based on this data, Professor Smith has argued in favor of enforcing PREA's protections against female correctional officers performing cross-gender searches and viewing of male and Transgender youth in a state of undress.<sup>912</sup> She also argues that other preventive measures required

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<sup>904</sup> See 28 C.F.R. § 115.15 (a), (b) and (d).

<sup>905</sup> 28 C.F.R. § 115.15 (d) and (f).

<sup>906</sup> See *infra* note 961.

<sup>907</sup> See *supra* notes 937-50 (discussing the *Breiner* and *Henry* cases).

<sup>908</sup> Smith Testimony, p. 144.

<sup>909</sup> Smith Testimony, Review Panel on Prison Rape Briefing, p. 2.

<sup>910</sup> Smith, Brenda V and Melissa C. Loomis, *After Dothard: Correctional Workers and the Challenge to Employment Law*, 8 FIU L. REV. 469, 472 (2013).

<sup>911</sup> *Id.*

<sup>912</sup> Smith Testimony, *Review Panel on Prison Rape Briefing*, p. 5.

by the PREA, including background checks, sanctions and training for staff, and services for victims, are essential; prohibiting cross-gender interactions in a state of undress is not the only tool needed to prevent sexual assault.<sup>913</sup>

### *Federal Court Decisions*

Some federal courts have held that sex may be considered a BFOQ in women's prisons, under certain conditions. These decisions have been based upon the need to prevent sexual assault, and to protect privacy and overall security. These cases show that courts have found that BFOQs limiting certain positions to women may be necessary and therefore legal in women's prisons in some situations, but not in others.

To date, the known decisions upholding BFOQs in women's prison settings have focused on prevention of sexual assault and the privacy rights of inmates (limited to rights not to be subjected to body searches or to being seen while dressing, using the bathroom, or showering).<sup>914</sup> Federal courts have mentioned other concerns, but mainly based their decisions on safety and privacy.

For example, in the case of *Everson v. Michigan Department of Corrections*, the Sixth Circuit court of appeals upheld the state's use of sex as a BFOQ and reasoned that in reaching that conclusion, "we are aided by a series of cases that directly address the issue of gender as a BFOQ for corrections officers in female correctional facilities."<sup>915</sup> In overturning the district court's decision, the court of appeals held that the reasoned decisions of prison officials are entitled to deference and that the goals of security, safety, privacy, and rehabilitation can justify sex-based assignments in female correctional facilities.<sup>916</sup> But, it also relied on a fact pattern showing high incidents of sexual assault of women prisoners by male guards, including during body searches and when the women inmates were showering, in addition to the settlements by the DOJ and the private litigation in which Michigan Department of Corrections agreed to increase the amount of female staff.<sup>917</sup> For example, the terms of Michigan Department of Corrections's agreement with DOJ to resolve these claims included implementing a study to explore the feasibility of increasing

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<sup>913</sup> *Ibid.*, 4-5.

<sup>914</sup> Judith Resnik, Arthur Liman Professor of Law, Yale Law School, Follow-up Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Apr. 2, 2019, at 2 (hereinafter Resnik Follow-up Statement).

<sup>915</sup> *Everson v. Michigan*, 391 F. 3d 737, 749-50 (6th Cir. 2004) (citing *Reed*, 184 F.3d at 600;); *Robino v. Iranon*, 145 F.3d 1109 1110-11 (9th Cir. 1998); *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223, 226 (8th Cir. 1995); *Torres v. Wisconsin Dep't of Health and Human Svc.*, 859 F.2d 1523, 1532 (7th Cir. 1988).

<sup>916</sup> *Everson*, 391 F. 3d at 749-50.

<sup>917</sup> *Id.* at 751-52.

the presence of female officers in the women's housing units.<sup>918</sup> The Michigan Department of Corrections Director implemented these requirements, which in turn led to the hiring of a consultant to study "whether certain custody positions at [Michigan Department of Corrections] MDOC women's facilities should be filled only by female custody staff or if there is a less intrusive means to ensure the safety and reasonable privacy needs of female inmates."<sup>919</sup> The consultant issued a report based on findings concluding that to reduce risk of sexual assault, women officers should fill certain positions in the women's housing units, segregation units, and intake units.<sup>920</sup> The Sixth Circuit also reasoned that the Michigan Department of Corrections decision-makers had consulted with staff, discussed alternatives with prison officials from other states, and assembled an array of materials in support of its application for selective certification, making the plan "the product of a reasoned decision-making process."<sup>921</sup> Further, while the Sixth Circuit considered that a BFOQ can only survive constitutional scrutiny if it relates to the "essence" of business, it concluded that:

Unquestionably, the security of the prisons relates to the essence of the [Michigan Department of Corrections] MDOC's business, and the [Michigan Department of Corrections] MDOC maintains that the presence of male... officers in female housing units imperils security in a number of ways. First, the presence of males in the housing units necessitates the use of "artificial barriers to security" such as covers for cell windows, doors on the toilet stalls, shower curtains, the moratorium on pat-down searches by male officers, and the "knock and announce" policy. Second, allegations of sexual abuse, whether true or not, create a "poisoned atmosphere" that breeds misconduct on the part of inmates and guards. Third, many male officers, afraid of false accusations of sexual abuse, become "gun-shy" and fail to monitor and discipline inmates in a proactive fashion.<sup>922</sup>

The Michigan case is characterized by studies and federal civil rights litigation that had already shown widespread sexual assault of women prisoners by male guards.<sup>923</sup> Michigan Department of Corrections was subject to a private lawsuit alleging rampant sexual misconduct, sexual harassment, and privacy violations that resulted in a \$4 million settlement and an agreement to restrict pat-down searches of female inmates by male staff, and to provide areas where female

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<sup>918</sup> *Id.* at 743.

<sup>919</sup> *Id.* at 745.

<sup>920</sup> *Id.* at 745.

<sup>921</sup> *Id.* at 750, citing *Torres*, 859 F.2d at 1532.

<sup>922</sup> *Everson*, 391 F. 3d at 753-54.

<sup>923</sup> *Id.* at 741-42 (summarizing reports by Human Rights Watch and the United Nations about women's prisons in Michigan).

inmates could dress, shower and use the bathroom without being seen by male staff.<sup>924</sup> The DOJ also issued a finding that “sexual abuse of women inmates by guards, including rapes, the lack of adequate medical care, including mental health services, grossly deficient sanitation, crowding, and other threats to the physical safety and well-being of the inmates violates their constitutional rights.”<sup>925</sup> Threats to constitutional rights included improper surveillance of women inmates by male guards, including the practice of watching them shower, undress, and use the toilet.<sup>926</sup> Regarding privacy rights, the Sixth Circuit quoted the Supreme Court’s holding that “[p]rison walls do not form a barrier separating prison inmates from the Constitution.”<sup>927</sup> The Sixth Circuit explained that in *Dothard v. Rawlinson*, the Supreme Court “held that male gender was a BFOQ in Alabama’s maximum security men’s prisons[,]” because the Court found “a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison,” and “a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.”<sup>928</sup> Based on this holding, the Sixth Circuit reasoned that in Michigan women’s prisons, because privacy screens “preclude proper surveillance of inmates,” at least in the realm of privacy rights, “the very manhood” of male corrections officers in Michigan women’s prisons “undermines their ability to provide security.”<sup>929</sup>

The Sixth Circuit also reasoned that other circuit courts had generally agreed that prisoners should not be subject to having their private body parts viewed by the opposite sex. In 1981, the Fourth Circuit “explained, most people ‘have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.’”<sup>930</sup> In 1987, the Sixth Circuit stated that “there is some vestige of the right to privacy retained by state prisoners and that this right protects them from being forced unnecessarily to expose their bodies to guards of the opposite sex.”<sup>931</sup> In 1995, the federal district court of Nevada stated that a BFOQ could be justified on privacy interests alone, based on “simple decency in order to afford female inmates as much privacy as possible.”<sup>932</sup> Through the 2012 PREA

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<sup>924</sup> *Id.* at 741-42.

<sup>925</sup> *Id.* at 743 (quoting DOJ findings letter of Mar. 27, 1995).

<sup>926</sup> *Id.*

<sup>927</sup> *Id.* at 757 (citing *Turner*, 482 U.S. 78, 84 (1987)).

<sup>928</sup> *Id.* at 754 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 334 and 335 (1977)).

<sup>929</sup> *Id.* at 756.

<sup>930</sup> *Id.* at 757 (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4<sup>th</sup> Cir. 1981)).

<sup>931</sup> *Id.* at 757 (quoting *Kent v. Johnson*, 821 F.2d 1220, 1227 (6<sup>th</sup> Cir. 1987)).

<sup>932</sup> *Id.* at 758 (quoting *Carl v. Angelone*, 883 F. Supp. 1433, 1442 n. 3 (D. Nev. 1995)).

regulations, the law also now requires these protections should extend to protect against cross-gender identity searching and viewing.<sup>933</sup>

The Sixth Circuit's opinion ended by emphasizing that its holding was limited to the conditions in Michigan and the 250 positions at issue, stating that "we simply conclude that given the endemic problem of sexual abuse in Michigan's female facilities, given the constellation of issues addressed by the [Michigan Department of Corrections's] MDOC's plan (security, safety, and privacy), and given the deference accorded to [Michigan Department of Corrections's] MDOC's judgment, the [Michigan Department of Corrections's] MDOC's plan is reasonably necessary to the normal operation of its female prisons."<sup>934</sup> This decision was appealed, but the Supreme Court declined to take up the case.<sup>935</sup>

In contrast, in 2010, in the case of *Breiner v. Nevada Department of Corrections*, the Ninth Circuit considered that limiting the positions at issue to women was not a necessary BFOQ to prevent sexual assault.<sup>936</sup> In *Breiner*, the Ninth Circuit reviewed the factual record indicating that a male guard had impregnated a female prisoner, and she alleged that this was because she had not received the medication she was prescribed to treat her schizophrenia.<sup>937</sup> Her complaint regarding substandard medical treatment resulted in the state Inspector General interviewing approximately 200 inmates who reported receiving substandard medical treatment.<sup>938</sup> The Inspector General also discovered that the facility had become "an uninhibited sexual environment," and that prisoners traded sex for narcotics and alcohol as well as other items and inmate privileges.<sup>939</sup> The Inspector General reasoned that this environment resulted from lax supervision, and not only was the prison contract with the private Corrections Corporation of America terminated, but also, the new state director "decided to hire only women in [Southern Nevada Women's Correctional Facility] SNWCF's three correctional lieutenant positions."<sup>940</sup> The court of appeals concluded that this decision constituted illegal discrimination because hiring only women for these positions was not necessary to avoid undermining the "essence" of the Nevada prison's business.<sup>941</sup> The Ninth Circuit

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<sup>933</sup> See Brenda V. Smith, *Testimony for the Review Panel on Prison Rape Hearings on Sexual Victimization in U.S. Prisons, Jails, and Juvenile Correctional Facilities*, at 5.

<sup>934</sup> *Everson*, 391 F. 3d at 761.

<sup>935</sup> *Everson v. Michigan Dept. of Corrections*, 546 U.S. 825 (2005) (denying certiorari).

<sup>936</sup> *Breiner v. Nevada Department of Corrections*, 610 F. 3d 1202, 1205 (2010).

<sup>937</sup> *Id.*

<sup>938</sup> *Id.*

<sup>939</sup> *Id.* at 1204-5.

<sup>940</sup> *Breiner*, 610 F. 3d at 1204-5 (quote is at page 5).

<sup>941</sup> *Id.* at 1210-11.

reasoned that there was not sufficient proof that “all or nearly all” men in the three lieutenant positions would tolerate sexual abuse by male guards, and that there was “no ‘basis in fact’ for believing that individuals in the correctional lieutenant role are particularly likely to sexually abuse inmates.”<sup>942</sup>

Similarly, in 2008, in the case of *Henry v. Milwaukee County*, the Seventh Circuit ruled that a juvenile detention center’s policy requiring that “each unit of the facility be staffed at all times by at least one officer of the same sex as the detainees housed on that unit,”<sup>943</sup> which resulted in providing more overtime opportunities to male officers as there were many more male units than female units, was unlawful.<sup>944</sup> This case rejected the argument that correctional officers of the same sex would better understand and provide better role models for the juveniles who were incarcerated.<sup>945</sup>

The Seventh Circuit rejected the juvenile detention center’s justifications for BFOQs because although they were designed to promote the essential functions of rehabilitation, security, and privacy, the sex classifications were not reasonably necessary based on the record at the facility in question.<sup>946</sup> The court of appeals noted that the policy of having staff of the same gender present might be helpful, and even though cross-gender “assaults and misconduct are statistically more likely,” there was no evidence of any such assault having occurred.<sup>947</sup> Moreover, the facility’s “other safety precautions, such as door alarms and the presence of supervisors, runners and video cameras, currently are working to prevent actual and alleged security breaches.”<sup>948</sup> Nor was the court convinced that same-sex mentoring was necessary.<sup>949</sup>

In contrast, in 2015, in the case of *Teamster’s Local Union No. 117 v. Washington Dept. of Corrections*, the Ninth Circuit reviewed a different fact pattern and upheld Washington State’s Department of Corrections requirement that 110 particular staff positions could only be held by women.<sup>950</sup> This conclusion was based in part on the need to comply with the new PREA federal civil rights protections for women in prison. Moreover, in 1993, the Ninth Circuit had affirmed a

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<sup>942</sup> *Id.* at 1211 (internal citations omitted).

<sup>943</sup> *Henry v. Milwaukee County*, 539 F. 3d 573, 575 (2008).

<sup>944</sup> *Henry*, 539 F. 3d at 575.

<sup>945</sup> *Id.* at 583.

<sup>946</sup> *Id.* at 581.

<sup>947</sup> *Id.* at 581.

<sup>948</sup> *Id.* at 581.

<sup>949</sup> *Id.* at 584 - 85.

<sup>950</sup> *Teamster’s Local Union No. 117 v. Washington Dep’t of Corrections*, 789 F.3d 979, 982 (2015).

ruling that “cross-gender body searches inflict unnecessary and wanton pain on female inmates, many of whom have suffered a history of sexual abuse before incarceration, and therefore, violate the Eighth Amendment.”<sup>951</sup> The court of appeals also took into account “a documented history of sexual misconduct” in Washington State prisons that was “distinguishable from *Breiner*,”<sup>952</sup> noting that:

There [in the *Breiner* case], Nevada prison officials designated as female-only three upper-management positions based on the assumption that men were “incapable of adequately supervising front line staff in female prisons.” 610 F.3d at 1213. The record disclosed no evidence that anyone in upper-management had ever abused an inmate. *Id.* at 1214. Here, by contrast, the sex-based job assignments are all “front line” positions that require direct, day-to-day interaction with female inmates. Washington has substantiated dozens of instances of sexual abuse implicating every job category at issue in this lawsuit.<sup>953</sup>

After receiving PREA funding to investigate, Washington State’s Department of Corrections had “fielded widespread allegations of sexual abuse in women’s prisons.”<sup>954</sup> A lawsuit was filed by women inmates alleging sexual abuse and misconduct, and the WDOC hired a consultant who documented 72 alleged women victims of male staff’s sexual advances and harassment, impregnating two.<sup>955</sup> Two further consultants documented the nexus with cross-gender supervision as follows:

Cross-sex supervision is currently one of the most significant issues facing the administration of women’s prisons. Today in many states, over 50 percent of the custody force in prisons for women are men. The fact that so many women in prison have experienced sexual abuse by men makes them different from male prisoners who do not share that history and therefore do not experience the same level of anxiety or violation as do women, when under the custody or supervision of an officer of the opposite sex.<sup>956</sup>

Washington State’s Department of Corrections therefore requested 110 guard post assignments at two prisons be limited to women, submitting a tailored request for each position, and emphasizing that making the positions women-only would reduce the risk of sexual misconduct, reduce allegations, protect male staff exposed to vulnerable situations, and “emphasized the privacy

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<sup>951</sup> *Id.* (citing *Jordan v. Gardner*, 986 F. 2d 1521, 1531 (9<sup>th</sup> Cir. 1993) (en banc)).

<sup>952</sup> *Teamster’s*, 789 F.3d at 982 (note 5).

<sup>953</sup> *Id.*

<sup>954</sup> *Id.* at 983.

<sup>955</sup> *Id.* at 983.

<sup>956</sup> *Id.* at 983.

requirements of female inmates and the operational need to have female officers on hand to perform necessary searches and other tasks.”<sup>957</sup> The Ninth Circuit reviewed the district court’s evaluation of these processes and concluded that in this case, “sex is an objective, verifiable job qualification for the posts designated as female-only by the Department and that the Department appropriately considered reasonable alternatives.”<sup>958</sup> In analyzing whether the BFOQ was applicable to the housing unit positions (in which prison officers would view women undressing and showering), the court of appeals took into account that in Washington State’s Department of Corrections at the time, “there [wa]s no reasonable substitute for having female guards inside housings units, according to the Department. Notably, temporarily removing a female guard from another part of the prison to cover in a housing unit ‘creates a gap for dealing with privacy issues at the post vacated.’”<sup>959</sup>

Moreover, the staff composition at Washington State’s Department of Corrections resulted in “shuttling” women staff from location to location to perform “essential security procedures, leaving other areas without appropriate staffing,” and “[w]ith female guards stretched thin, inmates went unsupervised showering, using the restroom, or dressing—raising security and safety risks.”<sup>960</sup> The Supreme Court has held that there are reasonable privacy expectations against cross-gender body searches and viewing in states of undress.<sup>961</sup> In this case, therefore, privacy concerns resulted in security concerns.

Other federal court decisions upholding BFOQs have also been based on privacy requirements. Professor Judith Resnik and others at the Arthur Liman Center for Public Interest Law at Yale Law School summarized those decisions as follows:

Some rulings have determined that searches of female prisoners by male officers are illegal. For example, in 1993, the Court of Appeals for the Ninth Circuit in *Jordan v. Gardner* held that the “cross-gender clothed body search policy at the women’s prison constituted cruel and unusual punishment in violation of the Eighth Amendment.”<sup>962</sup> The court enjoined prison officials from having male officers conduct non-emergent searches of female prisoners when those searches involve touching of the breast or genital areas.<sup>963</sup> In a 2010

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<sup>957</sup> *Id.* at 984 (reasoning that the state also explained that this would increase security).

<sup>958</sup> *Id.* at 991.

<sup>959</sup> *Id.* at 992.

<sup>960</sup> *Id.* at 993.

<sup>961</sup> *Id.*

<sup>962</sup> Resnik Follow-up Statement, at 2 (citing *Jordan v. Gardner*, 986 F. 2d 1521, 1531 (9<sup>th</sup> Cir. 1993)).

<sup>963</sup> *Id.*



case, a federal district court in the District of Connecticut held in *Forde v. Baird* that non-emergent pat-down searches by male officers of a female Sunni Muslim prisoner violated her rights under the Religious Freedom Restoration Act of 1993.<sup>964</sup>

The Liman Center attorneys also noted that:

The 1977 decision of *Dothard v. Rawlinson* involved questions of whether height and weight restrictions imposed by Alabama as a prerequisite to being a prison guard were permissible. While holding that they were not, the Court did conclude that the state could rely on the BFOQ defense in determining that it could require men, rather than women, to hold jobs involving close contact at maximum security prisons for men. Security was one rationale, and the Court accepted the view that female staff could be more at risk than male staff to sexual attack.<sup>965</sup>

However, the *Dothard* case addresses a distinct fact pattern, and issues regarding BFOQs in women's prisons have not been directly addressed by the Supreme Court. Moreover, whether reasons other than sexual assault prevention and essential privacy concerns would be sufficient to justify BFOQs is not yet clear in case law.

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<sup>964</sup> Resnik Follow-up Statement, at 2 (citing *Forde v. Baird*, 720 F. Supp. 2d 170, 172 (D. Conn. 2010)).

<sup>965</sup> *Id.* at 2 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (citing *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5<sup>th</sup> Cir. 1971)).

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## CHAPTER 6: REHABILITATION, EDUCATIONAL, AND VOCATIONAL TRAINING OPPORTUNITIES FOR WOMEN IN PRISON & LIFE AFTER PRISON

This chapter will examine whether the availability and types of prison programs vary by gender. As mentioned earlier, while the vast majority of the prison population is male, the number of women in prison is growing at a faster rate.<sup>966</sup> Therefore, it is vital to assess whether women have adequate access to rehabilitative programs in prison that assist them with transitioning back into their community. In addition, this chapter discusses recidivism rates for women in prison and collateral consequences of incarceration that disproportionately impact women exiting prison.

### Background on Prison Programs and Women in Prison

Common prison programs for both men and women include counseling (e.g. parenting, or drug and alcohol abuse dependency classes), education (e.g. GED, or literacy classes), and work programs (e.g. prison work, which helps prisons offset operation costs, or prison industry jobs).<sup>967</sup> Bureau of Justice Statistics data show that 85 percent of prisons have educational programs, 92 percent have some form of counseling programs, and almost 90 percent of prisons offer work programs.<sup>968</sup> According to 2017 Bureau of Justice Statistics data, 8.2 percent of prisoners in the United States are incarcerated in privately run prisons under the jurisdiction of 27 states or the BOP.<sup>969</sup> In comparison to private prisons,<sup>970</sup> a higher percentage of public prisons offer education programs (60 percent vs. 90 percent), counseling programs (74 percent vs. 97 percent), and work programs (56 percent vs. 97 percent).<sup>971</sup> Work release programs, which allow inmates to work in their community unsupervised, were more common in private prisons in comparison to public

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<sup>966</sup> See *supra* notes 18-21 and Figure 2.

<sup>967</sup> Ney Statement, at 2.

<sup>968</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities*, 2005, by James Stephan, Oct. 2008, p. 5 <https://www.bjs.gov/content/pub/pdf/csfcf05.pdf>; (hereinafter DOJ, *Census of State and Federal Correctional Facilities* 2005); see also Ney Statement, at 2

<sup>969</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2017*, by Jennifer Bronson, Apr. 2019, p. 16, 27, <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

<sup>970</sup> See Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2019," *Prison Policy Initiative* (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> (noting that public prisons are owned and operated by local, state, federal governments while private prison is a facility is owned by a third party and is contracted by local, state, federal governments; see Alexander Volokh, "Prison Accountability and Performance Measures" *Emory Law Journal*, 63 (2013), p. 339-416, at 347, <https://ssrn.com/abstract=2336155> (noting that there is little empirical data on whether public prisons or private prisons are more cost-effective or provide better quality stay).

<sup>971</sup> DOJ, *Census of State and Federal Correctional Facilities* 2005, pp. 5-6.

prisons (52 percent vs. 20 percent).<sup>972</sup> A range of other programs for women and men in prison such as religious or Bible classes, life skills classes, support groups, and recreation and fitness classes, are also offered in some federal prisons.<sup>973</sup>

A handful of studies have examined the availability and participation of prison programs for men and women. In 1980, a Government Accountability Office<sup>974</sup> report found that “[w]omen in correctional institutions were not provided comparable services, educational programs, or facilities as men prisoners. Inequities are most prevalent in [s]tate institutions, but they also exist in the [f]ederal and local correctional systems.”<sup>975</sup> Almost two decades later, Government Accountability Office published another report on women in prison, which found that while there had been significant improvements since the 1980s the BOP, California Department of Corrections, and Texas Department of Criminal Justice still faced challenges in meeting the programmatic needs of women.<sup>976</sup>

A 1994 study by Merry Morash, Robin Haar, and Lila Rucker used data from the *Survey of Inmates in State and Federal Prisons*<sup>977</sup> and the *Census of State Adult Correctional Facilities*<sup>978</sup> to examine numerous aspects of prisons and inmates and found that prison programming varied between incarcerated men and women.<sup>979</sup> Morash and her colleagues found that women were 20 percent more likely to take part in educational programming compared to men during their incarceration.<sup>980</sup>

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<sup>972</sup> Ibid., 5, 25.

<sup>973</sup> Ney Statement, at 2.

<sup>974</sup> Please note that at the time the U.S. Government Accountability Office was called the “U.S. General Accounting Office.” The Government Accountability Office changed its legal name in 2004. See “Government Accountability Office: What’s in a Name?” U.S. Government Accountability Office, Watch Blog, Apr. 4, 2014, <https://blog.gao.gov/2014/04/04/government-accountability-office-whats-in-a-name/>.

<sup>975</sup> U.S. General Accounting Office, *Women in Prison: Inequitable Treatment Requires Action*, Dec. 10, 1980, at cover page, <https://www.gao.gov/assets/140/131280.pdf>.

<sup>976</sup> U.S. General Accounting Office, *Women in Prison: Issues and Challenges Confronting U.S. Correctional Systems*, Dec. 1999, <https://www.gao.gov/new.items/gg00022.pdf> (note that this report focused on these three correctional systems: the BOP, California Department of Corrections, and Texas Department of Criminal Justice because they had the largest numbers of women in prison at the time).

<sup>977</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Survey of Inmates of State Correctional Facilities, 1986,” (last updated Nov. 4, 2005), Ann Arbor, MI: Inter-university Consortium for Political and Social Research [Distributor], <https://doi.org/10.3886/ICPSR08711.v2>.

<sup>978</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, “Census of State Adult Correctional Facilities, 1984,” by James Stephen, 1987, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=3604>.

<sup>979</sup> Merry Morash, Robin Haar, and Lila Rucker, “A Comparison of Programming for Women and Men in U.S. Prisons in the 1980s,” *Crime & Delinquency*, vol. 40, no. 2 (1994), p. 197-221, at 201-2 (hereinafter Morash et al., “A Comparison of Programming for Women and Men in U.S. Prisons in the 1980s”).

<sup>980</sup> Ibid., 20.

Notably, the authors also discovered that individuals with less education and those who were unemployed prior to incarceration were 10 percent more likely to participate in education-related programs than their counterparts.<sup>981</sup> Participation in programming also varied by region, as the chances of an inmate being in an academic program was 30 percent higher if the inmate was incarcerated in the Northeast region of the U.S., and 20 percent lower if the inmate was incarcerated in the South when compared with inmates from the West.<sup>982</sup> The authors also found that custodial classification impacted program participation, as inmates in large, maximum security facilities were more likely to participate in educational programming than those in smaller, lower security facilities.<sup>983</sup>

In regards to participation in work and vocational programs, Morash and her colleagues found that women in prison, regardless of their custodial classification, were more likely to have work assignments than their male counterparts, but the researchers contend that women's work assignments often reflected gender stereotypes.<sup>984</sup> A 2013 dissertation study by Courtney Crittenden replicated Morash and her colleagues' research with more recent data and found similar results.<sup>985</sup> Crittenden also found that women in prison have more programs available to them than men, but most of the programs for women tended to be gendered—that is mostly programs associated with stereotypically feminine skills like cooking, cosmetology, and sewing.<sup>986</sup> These gendered work assignments can suggest to women in prison that they are to be rehabilitated through domestic work while men are allotted more non-domestic prison work assignments.<sup>987</sup>

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<sup>981</sup> Ibid.

<sup>982</sup> Ibid.

<sup>983</sup> Ibid.

<sup>984</sup> Ibid., 204-05.

<sup>985</sup> Courtney Crittenden, "Gender and Programming: A Comparison of Program Availability and Participation in U.S. Prisons for Men and Women," Doctoral Dissertation (University of South Carolina) (hereinafter Crittenden, "Gender and Programming: A Comparison of Program Availability and Participation in U.S. Prisons for Men and Women"); see also Ney Statement, at 2.

<sup>986</sup> Crittenden, "Gender and Programming: A Comparison of Program Availability and Participation in U.S. Prisons for Men and Women"; see also Ney Statement, at 2; see also Adam Harris, "Women in Prison Take Home Economics, While Men Take Carpentry," *The Atlantic*, April 30, 2018, <https://www.theatlantic.com/education/archive/2018/04/the-continuing-disparity-in-womens-prison-education/559274/> (noting that the Texas Department of Criminal Justice, Louisiana Department of Corrections, and Mississippi Department of Corrections all have significantly more prison programs available for men in comparison to women and women were mostly offered culinary arts and office administration work programs).

<sup>987</sup> Courtney Crittenden, Barbara Koons-Witt, and Robert Kaminski, "Being Assigned Work in Prison: Do Gender and Race Matter?" *Feminist Criminology*, vol.13, no. 4 (2018), p. 359-381 (hereinafter Crittenden et al., "Being Assigned Work in Prison: Do Gender and Race Matter?") <https://doi.org/10.1177/1557085116668990>.

A more recent study in 2016 by Courtney Crittenden, Barbara Koons-Witt, and Robert Kaminski expands the literature on gender and prison work assignments to include how the race or ethnicity of the inmates impacts their work assignments.<sup>988</sup> Using recent BJS data from the *Survey of Inmates in State and Federal Prisons*<sup>989</sup> and the *Census of State and Federal Adult Correctional Facilities*<sup>990</sup> the authors examine whether or not men and women in prison participate in particular kinds of work assignments based on gender roles and racial stereotypes.<sup>991</sup> While the authors' initial bivariate analysis did not show a statistically significant result for racial differences in work assignments amongst women in prison, it demonstrated racial differences amongst men in prison—as black men were more likely to report working in facility services than non-black men, but less likely to work in prison industry assignments than non-black men.<sup>992</sup> Other advance analyses conducted by the researchers established a statistically significant relationship between being paid for work and race among women in prison, as white women and women of other races and ethnicities were paid more for work than black women in prison.<sup>993</sup>

At the Commission's briefing, several experts discussed the consequences of lack of programs for women in prisons as well as in the community and on reservations, prior to incarceration. Ms. Leann Bertsch, Director of North Dakota Department of Corrections and Rehabilitation, testified that Native American women in North Dakota are often incarcerated as a result of having inadequate access to social services.<sup>994</sup> Consequently North Dakota Department of Corrections and Rehabilitation acts as a pseudo social services department for Native American women.<sup>995</sup> According to a justice reinvestment study in North Dakota, 70 percent of district court judges indicated that they sentenced non-violent, low risk individuals to ND DOCR just to get them access to rehabilitative services that they would not have access to otherwise.<sup>996</sup> Ms. Susan Burton, Founder and Executive Director of A New Way of Life Re-Entry Project, and a formerly

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<sup>988</sup> Ibid.

<sup>989</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Survey of Inmates of State Correctional Facilities*, (Ann Arbor, MI: Inter-university Consortium for Political and Social Research [Distributor], 2004), <https://doi.org/10.3886/ICPSR04572.v5>.

<sup>990</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2005*, by James Stephen, 2008, <https://www.bjs.gov/content/pub/pdf/csfcf05.pdf>.

<sup>991</sup> Crittenden et al., "Being Assigned Work in Prison: Do Gender and Race Matter?" p. 364.

<sup>992</sup> Ibid., 369, Table 2.

<sup>993</sup> Ibid., 369-70, Table 2.

<sup>994</sup> Bertsch Testimony, p. 225.

<sup>995</sup> Ibid.

<sup>996</sup> Ibid.

incarcerated woman, shared her experiences in the criminal justice system for nearly two decades after personal tragedy that led to substance abuse.<sup>997</sup>

According to Ms. Burton,

When I was in prison, I begged for programs. Before I went to prison, I begged the courts for something other than prison, but I was always sent to prison and there was never enough programs there for me.

The lack of the ability for these correctional systems to see the humanity of people, to understand the potential of people, it's just not existent. They shuffle and they push, and they push people around, and they don't really meet the needs and don't even see where an investment could be made, or there would be a payoff on an investment.<sup>998</sup>

Ms. Burton also discusses how A New Way of Life Re-Entry Project is providing resources what her clients did not receive in prison, such as employment specialists, legal specialists, money management training and leadership development.<sup>999</sup>

In 2011, the New Hampshire Advisory Committee to the U.S. Commission on the Civil Rights issued the results of a two-year investigation on the civil rights of women in prison in New Hampshire.<sup>1000</sup> The Advisory Committee's investigation found that the state's prison for women had almost no space available for basic vocational training, which contrasted starkly with the substantial vocational training opportunities available to their male counterparts.<sup>1001</sup> In addition, unlike the men's prison, New Hampshire women's prison was in a small, old building that offered almost no space for family visitation and outdoor programming.<sup>1002</sup> Consequently, the New Hampshire Advisory Committee concluded that:

The failure of the state to provide comparable programs and services in these respects seriously affects the ability of women offenders to maintain appropriate family relationships, impairs their mental and physical health, and inhibits their ability to prepare for productive and self-supporting work upon their eventual release from prison. New Hampshire's recidivism rate for female offenders is exceptionally high—it is one of only

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<sup>997</sup> Burton Testimony, p. 284.

<sup>998</sup> *Ibid.*, 286-7.

<sup>999</sup> *Ibid.*, 313.

<sup>1000</sup> New Hampshire Advisory Committee to USCCR, *Unequal Treatment: Women Incarcerated in New Hampshire's State Prison System*, p. 1.

<sup>1001</sup> *Ibid.*, 1.

<sup>1002</sup> *Ibid.*, 9.

a few states with a higher recidivism rate for women than for men—and is a testament to the high cost paid by the state for its failure to address the unequal conditions of confinement faced by female offenders.<sup>1003</sup>

Subsequently, New Hampshire broke ground on a new facility for women,<sup>1004</sup> which opened in 2018.<sup>1005</sup> The new space provides for additional programming opportunities and on site medical care, which the former facility lacked.<sup>1006</sup>

The Arkansas Advisory Committee to the U.S. Commission on the Civil Rights recently held a briefing on mass incarceration at which a woman stressed the importance of drug treatment programs.<sup>1007</sup> She stated that:

I'm a single mom of four. Prior to being incarcerated I was a soccer mom, worked two jobs and did everything I could to take care of my family. In 2012 addiction turned my life upside down. By the end of 2013 I was sentenced to prison and released in 2015. By December of 2016 I was back in prison and finally released at the end of February 2018.

I knew upon my release that I had to do something different and voluntarily went through a two- year program for women post-incarceration in (Mayville). This program provided two years of free housing, mental - physical and mental health [care] and worked with women to meet their needs and rebuild their lives.

This program has shown me the importance of treatment in breaking the cycle of drugs and repeated incarceration. Lots of people get locked up and no one gets to the root of the problem to really understand why this person's in prison or keeps coming back into the system.

My experience has shown me that the majority of inmates are repeat offenders - in on drug charges. This is due to the fact that there are limited treatment options in prison and state programs for – to enter once they are released. I know that a longtime treatment can save

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<sup>1003</sup> Ibid., 1.

<sup>1004</sup> “Groundbreaking Planned for Women’s Prison in Concord,” *WMUR9*, <https://www.wmur.com/article/groundbreaking-planned-for-new-women-s-prison-in-concord/5192231>.

<sup>1005</sup> “New Hampshire Correctional Facility for Women Now Open,” *Correctional News*, Mar. 30, 2018, <http://correctionalnews.com/2018/03/30/new-hampshire-correctional-facility-for-women/>.

<sup>1006</sup> Alyssa Dandrea, “New Concord Prison Seeks ‘Hope’ and ‘Dignity’ for Incarcerated Women” *Concord Monitor*, Mar. 26, 2018, <https://www.concordmonitor.com/New-Concord-womens-prison-completed-16452870>.

<sup>1007</sup> Arkansas Advisory Committee to the U.S. Commission on Civil Rights, *Mass Incarceration and Civil Rights in Arkansas, Public Comment Period*, Apr. 23, 2019.



lives and it has certainly saved mine. I've been clean for over two years, have a full-time job and have been reunited with my family.<sup>1008</sup>

### ***Program Participation by Parents in Prison***

The gender differences observed in prison programming can also be bad for men in prison.<sup>1009</sup> While both men and women in prison are likely to be parents to dependent children prior to incarceration,<sup>1010</sup> parental programs were predominantly found in women's prisons, which underscore female inmates' roles as mothers.<sup>1011</sup> The need for such a curriculum was believed to be so imperative that the United States Department of Justice and Kansas included a mandatory provision in their 2012 settlement agreement that required Topeka Correctional Facility to provide programming about parenting and childcare to all inmate mothers.<sup>1012</sup> Yet men in prison would also benefit from parenting classes, but they rarely have access to them.<sup>1013</sup> These disparities in access are also evident in data showing that while mothers and fathers in prison were equally likely to report participating in employment and educational programming, mothers were over 2.5 times more likely than fathers to attend parenting classes.<sup>1014</sup>

According to a 2010 BJS report, 65 percent of mothers and 57 percent of fathers in state prisons reported attending self-help or improvement classes.<sup>1015</sup> Compared to parents in state prisons, parents in federal prisons reported higher levels of participating in work assignments and self-help programs and of having a high school diploma or GED.<sup>1016</sup> Over 90 percent of parents in federal prisons reported participating in a work assignment.<sup>1017</sup> Since admission, more than 70 percent of

<sup>1008</sup> Heather Carbosa Testimony, Mass Incarceration and Civil Rights in Arkansas Briefing Before the Arkansas Advisory Committee, Apr. 23, 2019, p. 26.

<sup>1009</sup> Adam Harris, "Women in Prison Take Home Economics, While Men Take Carpentry," *The Atlantic*, Apr. 30, 2018, <https://www.theatlantic.com/education/archive/2018/04/the-continuing-disparity-in-womens-prison-education/559274/> (hereinafter Harris, "Women in Prison Take Home Economics.")

<sup>1010</sup> DOJ, *Parents in Prison and Their Minor Children*, p. 1.

<sup>1011</sup> Morash et al., "A Comparison of Programming for Women and Men in U.S. Prisons in the 1980s," p. 215.

<sup>1012</sup> Settlement Agreement, *United States v. Kansas* (Dec. 22, 2014) at 14.

<sup>1013</sup> Harris, "Women in Prison Take Home Economics," (the author is referencing an interview he had with Professor Brenda V. Smith of American University).

<sup>1014</sup> Ibid; see also Email conversation between Alix McLearn, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019, (on file with U.S. Commission on Civil Rights) (noting that all BOP prisons offer at least one parenting program. However, comparative data are not currently available as the BOP has not historically used standardized codes to track programs. In September 2019, the BOP introduced new standardized codes, which will provide data in regard to offerings in the near future).

<sup>1015</sup> DOJ, *Parents in Prison and Their Minor Children*, p. 9.

<sup>1016</sup> Ibid.

<sup>1017</sup> Ibid.

parents attended self-help or improvement classes.<sup>1018</sup> At the state level, comparable percentages of participation in self-help or improvement classes were found between mothers and fathers in prison who lived with their children prior to incarceration and those who had not.<sup>1019</sup> Mothers who lived with their children prior to incarceration were more likely than mothers who had not lived with their children to participate in work assignments.<sup>1020</sup> The table below summarizes parents' participation in self-help or improvement classes in state prisons by gender.

**Table 8: Work Assignments, Program Participation, and Education Program Participation, by Living Arrangement and Gender, 2004**<sup>1021</sup>

	All Parents in State Prisons	Lived with Minor Child		Did Not Live with Minor Children	
		Men	Women	Men	Women
Work Assignments	66.8%	67.9%	72.2%	65.7%	66.6%
Self-help or Improvement Classes	57.2%	57.4%	65.4%	55.8%	63.4%
Parenting or Childbearing Classes	11.9%	12.1%	29.7%	9.3%	22.5%
Employment Programs	30.4%	30.6%	33.2%	30.1%	26.9%
Vocational or Job-Training Program	26.5%	26.2%	27.0%	26.8%	22.2%
Employment Counseling	9.4%	9.6%	12.4%	8.8%	11.3%
Education Programs	30.3%	29.4%	33.2%	30.8%	31.5%
Other Pre-release Programs	31.2%	32.0%	39.3%	29.3%	39.4%
Had GED or High School Diploma Upon Admission	62.4%	63.0%	65.5%	62.2%	56.4%
Estimated Number of Parents in State Prisons	636,300	272,200	32,800	313,000	18,300

**Source:** Bureau of Justice Statistics

The BOP reported that they have an Interagency Government Agreement with the Washington Department of Corrections (WADOC), which allows them to place eligible and interested pregnant inmates in the Residential Parenting Program at the Washington Correctional Center for Women in Gig Harbor, Washington.<sup>1022</sup> The goal of this program is to give new mothers in WADOC the

<sup>1018</sup> Ibid.

<sup>1019</sup> Ibid.

<sup>1020</sup> Ibid.

<sup>1021</sup> Ibid.

<sup>1022</sup> DOJ, "Female Offenders;" see also Dep't of Corrections, Washington State, "Fact Sheet May 2017 Residential Parenting Program Teaching Parenting, Infant-child bonding to Incarcerated Mothers," revised Oct. 2017, <https://www.doc.wa.gov/docs/publications/fact-sheets/400-FS003.pdf> (hereinafter Dep't of Corrections, Washington State, Fact Sheet May 2017); see also BOP Response to USCCR Interrogatory No. 42.

chance to bond with their children and learn parenting skills to enhance their children's development and assist in the mothers' reentry into the community.<sup>1023</sup> During this time, the mothers also receive a variety of services such as mental health, medical care, vocational training, and childcare.<sup>1024</sup> As of May 2019, the program served three participants and another inmate's request to participate in this program was denied due to a state detainer.<sup>1025</sup>

BOP also reported their enrollment numbers for the Mothers and Infants Together (MINT) program, which is a community residential program that aims to assist inmates during the last two months of their pregnancy.<sup>1026</sup> The MINT program transfers eligible women in federal prison to a Residential Reentry Center and participants remain there for up to three months after giving birth to bond with their child before returning to their respective institution to complete their sentence.<sup>1027</sup> The MINT program is available at five locations: Phoenix, AZ; Tallahassee, FL; Springfield, IL; Fort Worth, TX; and Greenbrier, WV. The level of MINT program participation by location is summarized in a table below.<sup>1028</sup>

**Table 9: Participation in MINT Program, by Location**

BOP Location	Number of Participants	Number of Inmates Denied / Delayed
Phoenix, AZ	11	0
Tallahassee, FL	15	0
Springfield, IL	3	0
Fort Worth, TX	19	0
Greenbrier, WV	39	1 <sup>1029</sup>

**Source:** BOP Response to USCCR Interrogatory No. 42.

<sup>1023</sup> Dep't of Corrections, Washington State, Fact Sheet May 2017.

<sup>1024</sup> U.S. Dep't of Justice, "Female Offenders."

<sup>1025</sup> BOP Response to USCCR Interrogatory No. 42. *See also*, The Detainer: A Problem in Interstate Criminal Justice Administration, 48 COL. L. REV. 1190, 1191 (1948) (a state detainer is a request from another jurisdiction to detain a person wanted in said jurisdiction for commission of a crime. The detainer request is directed to the jurisdiction where the wanted person is currently being detained or incarcerated); *see also* Interstate Agreement on Detainers, 18 U.S.C. App. 2 § 2 Pub. L. 91-538, 84 Stat. 1397 (1970) (as amended by Pub. L. 100-690, 102 Stat. 4403 (1988)).

<sup>1026</sup> U.S. Dep't of Justice, "Female Offenders."

<sup>1027</sup> *Ibid.*

<sup>1028</sup> BOP Response to USCCR Interrogatory No. 42.

<sup>1029</sup> According to the BOP, one woman was denied entry into the MINT program because of a public safety factor as the result of a prior sex offense. *See* BOP Response to USCCR Interrogatory No. 42.

### *Specific Programs for Women in Federal Custody*

In addition to addressing the needs of mothers in federal custody, the BOP has a number of programs to address the needs of women's substance abuse and mental health needs. BOP is piloting a new program called the Female Integrated Treatment program at FCI Danbury in Danbury, Connecticut, which is a low security facility.<sup>1030</sup> The Female Integrated Treatment program is designed as a therapeutic community that offers women inmates a variety of programs and services and also attempts to meet their individual programmatic needs.<sup>1031</sup> Once it is fully functioning, it can provide treatment for up to 200 inmates and it will be staffed with three psychologists, a social worker, four treatment specialists, and a unit team.<sup>1032</sup>

BOP also offers both non-residential drug treatment and a gender-responsive version of the Residential Drug Abuse Treatment Program (RDAP), an intensive Cognitive Behavioral Therapy that focuses on reducing the likelihood of a participant abusing drugs or alcohol.<sup>1033</sup> This program also focuses on challenging antisocial behavior and criminality.<sup>1034</sup> RDAP consists of a minimum of 500 hours of treatment programming, and most program participants have between 22 and 42 months remaining on their sentences.<sup>1035</sup> Participants who successfully complete the program may be eligible for up to a 12-month sentence reduction.<sup>1036</sup> Women in prison who participated in RDAP were 18 percent less likely to recidivate than similarly situated women who did not participate in RDAP.<sup>1037</sup> In addition, female program participants had higher frequencies of success than male program participants in maintaining employment, obtaining educational degrees, and caring for their children.<sup>1038</sup>

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<sup>1030</sup> "New Female Integrated Treatment (FIT) Program," U.S. Dep't of Justice, Federal Bureau of Prisons, Feb. 8, 2017, [https://www.bop.gov/resources/news/20170208\\_fit.jsp](https://www.bop.gov/resources/news/20170208_fit.jsp)

<sup>1031</sup> Ibid.

<sup>1032</sup> Ibid.

<sup>1033</sup> "Substance Abuse Treatment," U.S. Dep't of Justice, Federal Bureau of Prisons, [https://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp](https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp); see also Dignam Statement, at 12.

<sup>1034</sup> U.S. Dep't of Justice, Bureau of Prisons, *Directory of National Programs Federal Bureau of Prisons*, 2017, p. 14, [https://www.bop.gov/inmates/custody\\_and\\_care/docs/20170518\\_BOPNationalProgramCatalog.pdf](https://www.bop.gov/inmates/custody_and_care/docs/20170518_BOPNationalProgramCatalog.pdf) (hereinafter DOJ, *Directory of National Programs Federal Bureau of Prisons*).

<sup>1035</sup> Ibid.; see also Dignam Statement, at 12.

<sup>1036</sup> DOJ, *Directory of National Programs Federal Bureau of Prisons*, p. 14; Dignam Statement, at 12; see also U.S. Dep't of Justice, Federal Bureau of Prisons, Early Release Procedures Under 18 U.S.C. § 3621(e), Program Statement 5331.02 CN-11U, [https://www.bop.gov/policy/progstat/5331\\_002.pdf](https://www.bop.gov/policy/progstat/5331_002.pdf).

<sup>1037</sup> DOJ, *Directory of National Programs Federal Bureau of Prisons*, p. 14; Dignam Statement, at 12.

<sup>1038</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, *FY 2020 Performance Budget Congressional Submission*, 2019, p. 33, <https://www.justice.gov/jmd/page/file/1144626/download>.

As of September 1, 2019, 13 RDAP programs were available at 10 women's facilities and in each BOP region.<sup>1039</sup> By contrast, 72 RDAP programs were provided for men at 63 different locations; every region had at least one institution that ran two programs for men.<sup>1040</sup> There were three RDAP programs offered in Spanish—two for men at FCI Miami and one for women at FMC Carswell (in Fort Worth, Texas).<sup>1041</sup> A 2018 Office of Inspector General report documents that 118 people participate in RDAP at each institution at a time.<sup>1042</sup> Data from BOP demonstrates that as of October 5, 2019, in comparison to men, a higher proportion of women in federal custody are currently participating in RDAP programs (4 percent vs 7 percent).<sup>1043</sup> Also, of the men and women currently in federal custody, a higher rate of women than men completed RDAP (8 percent vs 18 percent).<sup>1044</sup>

As mentioned in Chapter 1, in comparison to men, a higher proportion of women in federal prison are serving sentences for drug offenses (47 percent vs 56 percent).<sup>1045</sup> However, in comparison to their male counterparts, a higher proportion of women in federal prison are qualified for RDAP and are currently waiting to participate in RDAP (3 percent vs 5 percent).<sup>1046</sup> These figures are cause for concern about whether current RDAP capacity meets the drug treatment needs of women incarcerated in federal prison.<sup>1047</sup>

A 2003 study examined the effectiveness of BOP's prison-based residential drug and alcohol treatment programs and found gender differences and similarities in the effectiveness of treatment and in predictors of post-release outcomes examined.<sup>1048</sup> The results indicated that subjects who would have entered and completed in-prison residential treatment were less likely to be arrested

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<sup>1039</sup> Email conversation between Alix McLearen, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019, (on file with U.S. Commission on Civil Rights).

<sup>1040</sup> Ibid.

<sup>1041</sup> Ibid.

<sup>1042</sup> DOJ, Review of Federal Bureau of Prisons' Management of Its Female Inmate Population, p. 24, Table 4.

<sup>1043</sup> Email conversation between Alix McLearen, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019, (on file with U.S. Commission on Civil Rights).

<sup>1044</sup> Ibid.

<sup>1045</sup> Bureau of Justice Statistics, *Prisoners in 2016*, at Table 14.

<sup>1046</sup> Email conversation between Alix McLearen, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019, (on file with U.S. Commission on Civil Rights).

<sup>1047</sup> Dignam Statement, at 12.

<sup>1048</sup> Bernadette Pelissier, Scott Camp, Gerald Gaes, William Rhodes, and William Saylor, "Gender Differences in Outcomes from Prison-based Residential Treatment," *Journal of Substance Abuse Treatment*, vol. 24, iss. 2, (2003), p. 149-160 (noting that the authors used event history procedures modified to accommodate a test of selection bias since participants in the drug rehabilitation program were not be randomly assigned to treatment group. According to the authors, there were 1,193 treatment and 1,122 comparison subjects and the gender split was 1,842 men and 473 women).

and use drugs 3 years after their release than comparison subjects.<sup>1049</sup> The authors found that women had lower three-year recidivism rates and rates of post-release drug use than did men.<sup>1050</sup> According to BOP's responses to the Commission's interrogatories and document requests, the BOP offers a number of trauma-related programs to women in federal custody.<sup>1051</sup> BOP offers a "Trauma in Life" Workshop at all female institutions—with the exception of Federal Transfer Centers.<sup>1052</sup> The purpose of this workshop is to provide women in federal prison with information on trauma and its potential impact in their lives.<sup>1053</sup> This program is voluntary, but women in prison who have experienced traumatic events such as child abuse or domestic violence are encouraged to attend.<sup>1054</sup> There is no prerequisite for this program, but potential program participants must report a history of a traumatic life event as documented in the screening instrument (e.g., the Stressful Life Experiences Screening), or present with a disorder that is related to a traumatic life event.<sup>1055</sup> Women inmates with disciplinary infractions may still be allowed to attend this workshop.<sup>1056</sup>

The Trauma in Life workshop also helps to identify and motivate inmates who need treatment to participate in the Resolve Program's non-residential protocol during their incarceration.<sup>1057</sup> BOP's Resolve Treatment Program is a residential treatment program for trauma-related disorders.<sup>1058</sup> Resolve uses a compilation of evidenced-based, cognitive behavior therapy protocols tailored to the individual needs of program participants.<sup>1059</sup> The Resolve Treatment Program is available at all federal female institutions with a full-time program coordinator who is a trained psychologist with an advanced degree.<sup>1060</sup> As of March 25, 2019, Resolve was offered at 13 female facilities—Alderson, Aliceville, Bryan, Carswell, Coleman, Dublin, Greenville, Hazelton, Lexington,

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<sup>1049</sup> Ibid.,155.

<sup>1050</sup> Ibid.,156.

<sup>1051</sup> BOP Response to USCCR Interrogatory No. 37.

<sup>1052</sup> Ibid.

<sup>1053</sup> Ibid.

<sup>1054</sup> Ibid.; see *also* Attachment 6.

<sup>1055</sup> BOP Response to USCCR Interrogatory No. 37.

<sup>1056</sup> Ibid.

<sup>1057</sup> Ibid.

<sup>1058</sup> Ibid.

<sup>1059</sup> Ibid.

<sup>1060</sup> Ibid.

Marianna,<sup>1061</sup> Tallahassee, Victorville, and Waseca—as well as a number of RRCs. The Resolve Program maintains a continuous enrollment of 24 participants at each facility.<sup>1062</sup>

According to BOP’s responses to the Commission’s Interrogatories, during FY 2018, 2,155 female inmates participated in the Trauma in Life Workshop and 756 female inmates participated in Resolve Treatment Program.<sup>1063</sup> However, these programs had significant waitlists, as there were 2,935 inmates placed on the waiting list for the Trauma in Life Workshop, and 616 inmates placed on the waiting list for the Resolve Treatment Program.<sup>1064</sup>

The duration of the Resolve Treatment Program depends on several factors including the individual needs of the inmate, the number of inmates requesting treatment, and specific issues of the facility.<sup>1065</sup> If an inmate participates in all phases of treatment, the program will run 9 to 12 months in length.<sup>1066</sup> Seeking Safety consists of a minimum of 12 group sessions meeting weekly for at least 1 hour per session.<sup>1067</sup> Cognitive Processing Therapy is a type of cognitive behavior therapy that has a 12-session protocol meeting for 60 to 90 minutes weekly.<sup>1068</sup> Cognitive Processing Therapy focuses on teaching participant a set of skills that will help challenge and modify their beliefs related to trauma.<sup>1069</sup> According to BOP, the goal of Cognitive Processing Therapy is to help participants create a new understanding of traumatic experiences and reduce the negative effects of trauma.<sup>1070</sup> Dialectical Behavioral Therapy is also a type of cognitive behavior therapy that has a 12-session protocol meeting for 60 to 90 minutes weekly.<sup>1071</sup> According to BOP,

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<sup>1061</sup> See U.S. Department of Justice, Federal Bureau of Prisons, “Acting Director Visits Institutions Affected by Hurricane,” (Oct. 27, 2018), [https://www.bop.gov/resources/news/20181027\\_hurricane\\_michael\\_aftermath.jsp](https://www.bop.gov/resources/news/20181027_hurricane_michael_aftermath.jsp); see also Email conversation between Alix McLearn, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019, (on file with U.S. Commission on Civil Rights) (noting that Marianna is a BOP facility that houses women, but the facility was damaged significantly by Hurricane Michael. Currently, no women are being housed there, as repairs are still ongoing. The women at Marianna were re-designated to other BOP institutions).

<sup>1062</sup> Ibid.

<sup>1063</sup> Ibid.; see also BOP Response to USCCR Interrogatory No. 37 and Attachment 6, p. 6-7.

<sup>1064</sup> BOP Response to USCCR Interrogatory No. 37; see also attachment 6.

<sup>1065</sup> BOP Response to USCCR Interrogatory No. 37; see also attachment 6.

<sup>1066</sup> Ibid.

<sup>1067</sup> Ibid.

<sup>1068</sup> Ibid.; see also Email conversation between Alix McLearn, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019, (on file with U.S. Commission on Civil Rights).

<sup>1069</sup> Email conversation between Alix McLearn, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019, (on file with U.S. Commission on Civil Rights).

<sup>1070</sup> Ibid.

<sup>1071</sup> Ibid.; see also BOP Response to USCCR Interrogatory No. 37.

the goal of Dialectical Behavior Therapy program is teach participants how to cope with stress in healthy ways, regulate emotions, and improve participants' interpersonal skills.<sup>1072</sup> Although Dialectical Behavior Therapy was initially developed to work with persons with suicidal behaviors and those diagnosed with Borderline Personality Disorder, it has been found to benefit people diagnosed with a variety of mental health challenges.<sup>1073</sup> The Trauma in Life Workshop is typically a four-session weekly workshop that meets for two hours.<sup>1074</sup>

BOP also provides job training to its inmates. Established by federal statute in 1934, BOP states that the Federal Prison Industries Program (known by its trade name UNICOR) provides skilled jobs and training to inmates in factory settings.<sup>1075</sup> It is somewhat controversial, because under the statute, all physically able inmates who are not a security risk are required to work, and some forms of prison labor have been criticized as abusive and a form of indentured servitude.<sup>1076</sup> According to a study of state policies, for their labor, prisoners receive from 23 cents an hour to \$1.15 an hour.<sup>1077</sup>

Since 2011, UNICOR has been permitted to sell products and services to private companies, and DOJ states that UNICOR prison labor can be helpful to private companies' bottom line; for example they offer call centers "staffed by '1,700 experienced inmate agents and support staff.'"<sup>1078</sup> UNICOR's 2017 Annual Report stated that:

UNICOR plays a critical role in preparing federal inmates to be productive law abiding citizens following release from prison. UNICOR workers receive job training in factories, warehouses, call centers and offices that closely resemble community work environments, so that the skills learned are easily transferrable to the outside world. We know from

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<sup>1072</sup> Email conversation between Alix McLearn, Ph.D., and LaShonda Brenson, Ph.D., Civil Rights Analyst, U.S. Commission on Civil Rights, Oct. 16, 2019, (on file with U.S. Commission on Civil Rights).

<sup>1073</sup> Ibid.

<sup>1074</sup> BOP Response to USCCR Interrogatory No. 37.

<sup>1075</sup> 18 U.S.C. § 4121; *see also* "Federal Prison Industries," U.S. Dep't of Justice, Federal Bureau of Prisons, [https://www.bop.gov/about/agency/org\\_fpi.jsp](https://www.bop.gov/about/agency/org_fpi.jsp) (accessed Oct. 20, 2019).

<sup>1076</sup> See, e.g., Christopher Zoukis, "Prison Work Programs: 'Cost-Effective Labor Pool' or 'Slave Labor of Yesterday,'" *Prison Legal News*, Jan. 8, 2019, <https://www.prisonlegalnews.org/news/2019/jan/8/prison-work-programs-cost-effective-labor-pool-or-slave-labor-yesterday/>.

<sup>1077</sup> Wendy Sawyer, "How Much Do Incarcerated People Earn in Each State," *Prison Policy Initiative*, Apr. 10, 2017, <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

<sup>1078</sup> Alexia Fernández Campbell, "The Federal Government Markets Prison Labor to Businesses as the 'Best-Kept Secret,'" *Vox*, Aug. 24, 2018, <https://www.vox.com/2018/8/24/17768438/national-prison-strike-factory-labor>.



research and experience that an individual's ability to secure employment with a living wage often prevents them [sic] from returning to a life of crime.<sup>1079</sup>

As noted in UNICOR's 2018 report, the positive impact of UNICOR job training is supported by data from a comprehensive study by BOP.<sup>1080</sup> BOP's Post-Release Employment Project compared inmates who volunteered to work in UNICOR to similarly situated inmates who did not work in prison industries and found that people who participated in this program were 24 percent less likely to recidivate (for up to 12 years following their sentence) and 14 percent more likely to be employed a year following their release.<sup>1081</sup> According to BOP data, UNICOR programs especially help young racial and ethnic minorities, who are at a greater risk of recidivism.<sup>1082</sup>

However, UNICOR programs are available to fewer women than men.<sup>1083</sup> In 2016, UNICOR was offered to men at 49 institutions and but only to women at 4 institutions, none of which were in the Mid-Atlantic or Northeast Regions.<sup>1084</sup> Despite federal women's prisons location in every region of the country,<sup>1085</sup> women are only able to participate in that program and develop skills required to obtain employment upon release at one minimum security facility (FPC Bryan) in the South Central Region, and three low security facilities (FCI Wasceca, FCI Tallahassee and FCI Dublin) in the North Central, Southeast and Western Regions.<sup>1086</sup>

### ***Specific Programs for Women in State Prisons***

Prison programs at the state level are not as robust as the programs offered in the federal system.<sup>1087</sup> The availability of rehabilitative prison programs not only eases reentry for women and men in prison, but can also assist inmates seeking release on parole, as they need to show evidence of

<sup>1079</sup> Federal Prisons Industries, *The Business of Reducing Crime, UNICOR Annual Report*, 2017, p. 3, [https://www.unicor.gov/publications/reports/FY2017\\_AnnualMgmtReport.pdf](https://www.unicor.gov/publications/reports/FY2017_AnnualMgmtReport.pdf).

<sup>1080</sup> Ibid., 6.

<sup>1081</sup> U.S. Dep't of Justice, *Federal Bureau of Prisons, FPI and Vocational Training Works: Post-Release Employment Project*, [https://www.bop.gov/resources/pdfs/prep\\_summary\\_05012012.pdf](https://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf); see also Dignam Statement, at 12.

<sup>1082</sup> Ibid.

<sup>1083</sup> Dignam Statement, at 12.

<sup>1084</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, *The BOP Occupational Directory Inmate Occupational Training Directory*, 2017, [http://www.bop.gov/inmates/custody\\_and\\_care/docs/inmate\\_occupational\\_training\\_directory.pdf](http://www.bop.gov/inmates/custody_and_care/docs/inmate_occupational_training_directory.pdf) (hereinafter DOJ *The BOP Occupational Directory Inmate Occupational Training Directory*, 2017).

<sup>1085</sup> See, e.g., *supra* Figure 9: Map of BOP Institution Female Inmates, Federal Bureau of Prisons, Female Offenders, Facilities Housing Female Offenders.

<sup>1086</sup> U.S. Dep't of Justice, *The BOP Occupational Directory Inmate Occupational Training Directory*, 2017.

<sup>1087</sup> Dignam Statement, at 13.

rehabilitation.<sup>1088</sup> As outlined above and according to experts, participation in rehabilitative and educational programs can assist women seeking employment after prison and reduce their rate of recidivism, which would ultimately decrease the amount of money spent on incarceration.<sup>1089</sup>

A few state Departments of Corrections have recently introduced innovative rehabilitation programs for women in prison.<sup>1090</sup> For instance, Michigan Department of Corrections recently opened a “vocational village” for women, which trains up to 180 inmates in computer coding, carpentry, cosmetology, 3D printing, and graphic design.<sup>1091</sup> Participants are required to meet measurable goals and earn nationally recognized certifications in their trade upon successful completion of their courses.<sup>1092</sup> Over 70 percent of prisoners who complete training at the vocational village obtain and retain employment.<sup>1093</sup> According to former Michigan Governor Rick Snyder, this program “will help us prepare more of our returning citizens for high-demand careers and a better life in the community, while reducing the risk of returning to prison.”<sup>1094</sup> Some other states also recently introduced programs for women in prison to staff telephones for the Department of Motor Vehicles or hotel reservations during the last 6 months of their sentence.<sup>1095</sup>

Recent surveys fielded by the National Resource Center for Justice Involved Women found that half of women exiting prison felt that their prison programs did not prepare them for success.<sup>1096</sup> Only 37 percent of the over 4,000 women surveyed felt that staff provided them with information about resources and services in the community.<sup>1097</sup>

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<sup>1088</sup> Ibid.

<sup>1089</sup> See *supra* notes 1035-49 (discussing the RDAP program, which is less accessible to women); *see also* Dignam Statement, at 13.

<sup>1090</sup> Ney Statement, at 2.

<sup>1091</sup> Michigan State Government, “Michigan Department of Corrections Breaks Ground on First Vocational Village Site for Women,” Press Release, <https://www.michigan.gov/som/0,4669,7-192-47796-483426--,00.html> (accessed Oct. 19, 2019); *see also* Ney Statement, at 2.

<sup>1092</sup> Michigan State Government, Michigan Department of Corrections Breaks Ground on First Vocational Village Site for Women, Press Release.

<sup>1093</sup> Ibid.

<sup>1094</sup> Ibid.

<sup>1095</sup> Ney Statement, at 2-3.

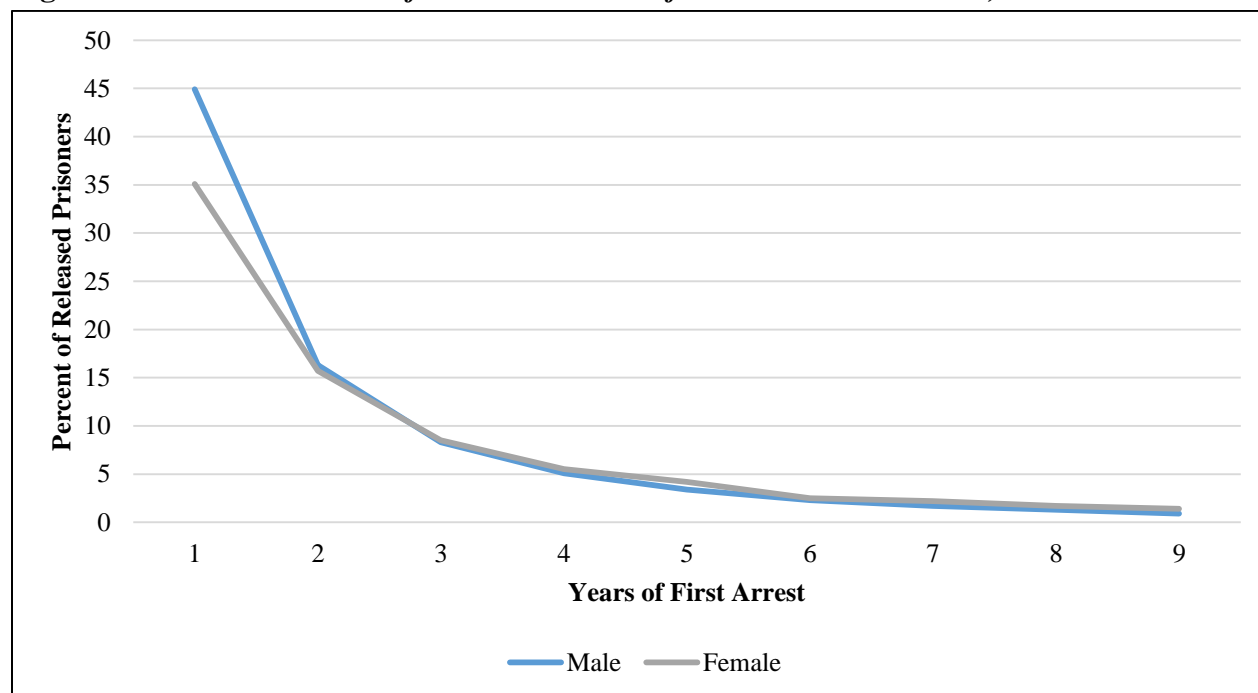
<sup>1096</sup> Ibid., at 5.

<sup>1097</sup> Ibid.

## Recidivism Rates, and Women's Plight to Reintegrate Back Into Society

The goal of many of the aforementioned programs and services is to reduce recidivism. However, according to Bureau of Justice Statistics data, from 2005 to 2014, the vast majority of men (84 percent) and women (77 percent) in prison were re-arrested.<sup>1098</sup> After the first year following their release, men and women are re-arrested at analogous rates of recidivism.<sup>1099</sup> The figure below summarizes the recidivism rates for 30 states from 2005 to 2014, by gender.

**Figure 14: Recidivism Rates of Prisoners Related from Prison in 30 States, 2005-2014<sup>1100</sup>**



**Source:** U.S. Department of Justice, Bureau of Justice Statistics

Since 2005, among all released prisoners, the average number of arrests in the 5-year period was 2.9 for men in prison and 2.5 for women in prison.<sup>1101</sup> About 50 percent of released women and about 41 percent of released men were arrested no more than once in the 5-year period, while 64

<sup>1098</sup> U.S. Department of Justice, Bureau of Justice Statistics, 2018 Update On Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014), by Matthew Durose, Alexia Cooper, and Howard Snyder (2018), p. 6, <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf> (hereinafter DOJ, 2018 Update On Prisoner Recidivism).

<sup>1099</sup> Ibid.

<sup>1100</sup> Ibid.

<sup>1101</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, by Matthew Durose, Alexia Cooper, and Howard Snyder, 2014, p. 11, Table 13, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>.

percent of women and 57 percent of men had 2 or fewer arrests over the same period.<sup>1102</sup> The recidivism rates (as measured by arrests) for males were higher than those for females, regardless of the incarceration offense or the recidivism period.<sup>1103</sup> At the end of the 5-year follow-up period, the post-release arrest rate for both males and females was highest among those incarcerated for a property offense.<sup>1104</sup>

Recidivism rates by gender and offense type are summarized in a table below.

**Table 10: Recidivism of Prisoners Released in 30 States in 2005, by Sex and Offense Type**<sup>1105</sup>

Sex of Releasee and Most Serious Commitment Offense		Cumulative Percent of Released Prisoners Arrested Within					
		6 months	1 year	2 years	3 years	4 years	5 years
	All Released Prisoners	28.2%	43.4%	59.5%	67.8%	73.0%	76.6%
<b>Male</b>		28.9%	44.5%	60.7%	69%	74.1%	77.6%
	Violent	25.2	38.9	54.4	62.3	67.9	72
	Property	35.1	52.3	68.6	76.4	80.9	83.6
	Drug	27.6	43.6	60.7	69.4	74.8	78.4
	Public Order	26.1	40.8	56.3	65.4	70.5	74.2
<b>Female</b>		22.1%	34.4%	49.8%	58.5%	63.9%	68.1%
	Violent	19.8	30.6	44.2	51.9	56.9	60.8
	Property	23.8	37.6	54.3	62.6	68	72.1
	Drug	21.9	33.3	48.1	57.6	62.9	67.3
	Public Order	19.2	31	47.6	56.1	62.2	66.5

**Source:** Bureau of Justice Statistics

According to some experts, a significant percentage of the re-arrests are related to technical violations of their release rather than commissions of new crimes.<sup>1106</sup> For instance, Becki Ney, Principal of the Center for Effective Public Policy and Director of the National Resource Center on Justice Involved Women stated that:

<sup>1102</sup> DOJ, *2018 Update on Prisoner Recidivism*, p. 11.

<sup>1103</sup> Ibid.

<sup>1104</sup> Ibid.

<sup>1105</sup> Ibid.

<sup>1106</sup> Ney Statement, at 6.

[t]hese technical violations often stem from unmet ‘survival needs’ such as difficulties meeting financial obligations, lower employment skills, or the inability to secure safe housing.

And given that the number of women reincarcerated for technical violations of supervision is increasing – this suggests that we can’t just focus on women who are incarcerated—if we can improve supervision practices and increase resources in the community, we may have a better chance of improving outcomes and reducing the prison revolving door for women.<sup>1107</sup>

While this may be true for some women recently released from prison, data from BJS also found that the vast majority (over 82 percent) of all prisoners released in 30 states in 2005 were arrested within 9 years for an offense other than a probation or parole violation.<sup>1108</sup>

There are very few empirical studies on recidivism among women in prison. One of the few studies in this area was published in 2004 by Bryan Stuart and Janet Brice-Baker, which examined over 20 explanatory variables related to women’s recidivism rates.<sup>1109</sup> This study found 5 variables that correlated with women’s recidivism rates: current age of inmate, re-arrests while under some form of community supervision, offense type, age of inmate at first arrest, and positive attitudes toward release.<sup>1110</sup>

### **Collateral Consequences of Incarceration and Women in Prison**

As the Commission discussed in a 2019 report entitled, “Collateral Consequences: The Cross Roads of Punishment, Redemption, and the Effect on the Communities” a number of federal statutes impose collateral consequences upon conviction for federal or state offenses that can impact an individual’s civic engagement, housing, and employment prospects.<sup>1111</sup> This report

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<sup>1107</sup> Ney Statement, at 6, 8.

<sup>1108</sup> DOJ, *2018 Update on Prisoner Recidivism*, p. 17.

<sup>1109</sup> Bryan Stuart, and Janet Brice-Baker, “Correlates of Higher Rates of Recidivism in Female Prisoners: An Exploratory Study,” *Journal of Psychiatry & Law*, vol. 32, iss. 1 (2004), p. 29-70.

<sup>1110</sup> *Ibid.*, (the authors also note that they found that the quality of health care in prison approached statistical significance).

<sup>1111</sup> U.S. Commission on Civil Rights, *Collateral Consequences: The Cross Roads of Punishment, Redemption, and the Effect on the Communities*, 2019, pp. 22-28, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> (hereinafter U.S. Commission on Civil Rights, *Collateral Consequences*); see also U.S. Dep’t of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction*, 2000, p.80-84, [https://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral\\_consequences.pdf](https://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf).

focuses on the specific collateral consequences that disproportionately impact women recently released from prison.

***Mothers in Prison, Parental Rights, and the Adoption and Safe Families Act of 1997***

As mentioned earlier, women in prison disproportionately shoulder the childcare responsibilities of their children prior to incarceration and in comparison to men in prison, have a greater number of children going into the foster care system (10.9 percent vs 2.2 percent).<sup>1112</sup> As discussed in Chapter 2, the Adoption and Safe Families Act permits parental rights to be terminated with or without the parent's permission if a child is in foster care for 15 of the last 22 months.<sup>1113</sup> Hence, in addition to other reentry challenges, many mothers recently released from prison who wish to reunite with their children face obstacles in regaining custody of their children and reuniting with their families and friends. Federal law does provide exceptions to the rule that parental rights would be terminated if the parent is in foster care for 15 out of the last 22 months, if the child is in the care of a relative; if the agency has documented a compelling reason why filing a termination petition would not be in the best interests of the child; or if the agency has not provided the parents or child with necessary reunification services.<sup>1114</sup> In recent years, New York and Washington State have passed laws expressly permitting state authorities to make exceptions to the general federal rule for children whose parents are incarcerated, if it is in the best interests of the child.<sup>1115</sup> Oregon has also passed a Bill of Rights of Children of Incarcerated Parents that includes the rights to be included in decisions about the parent, to speak with and see them, and "to have a lifelong relationship with the incarcerated parent."<sup>1116</sup> Nebraska, New Mexico and Oklahoma expressly

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<sup>1112</sup> See 42 U.S.C. § 675(5)(E) (Adoption and Safe Families Act of 1997 authorizes termination of parental rights when a child has been in foster care for 15 of the past 22 months); see also *supra* notes 474-88 (discussing gender disparities in termination of parental rights due to incarceration).

<sup>1113</sup> 42 U.S.C. § 675(5)(E).

<sup>1114</sup> *Id.* at § 675(5)(E)(i) – (iii).

<sup>1115</sup> N.Y. SOC. SERV. LAW § 384-b(3)(l)(i) <https://citylimits.org/2010/02/25/a-fight-to-extend-parents-rights/> (exception to foster care after 15 out of 22 months is subject to three requirements: 1) the parent is currently incarcerated, or the parent's previous incarceration is a "significant factor" in the child's having remained in foster care beyond the 15 month limit; 2) the agency has not documented a reason that it would otherwise be appropriate to file for termination (e.g., that it would be in the child's best interests to do so); and 3) the parent maintains a "meaningful role" in the child's life.); Wash. Rev. Code Ann. § 13.34.180(5) (2017) (it is within state courts' discretion to delay the termination of parental rights if the parent's incarceration or prior incarceration is a significant factor for the child's continued stay in the foster care system).

<sup>1116</sup> 10 O.R.S. 423.160 (2017), <https://www.oregonlaws.org/ors/423.160>.

prohibit terminating parental rights solely for parental incarceration if termination is not in the best interests of the child.<sup>1117</sup>

### ***The Disproportionate Impact of Lifetime Drug Bans for Public Benefits***

As discussed above, the majority of women in federal custody and a quarter of women in state prisons are serving sentences for drug-related offenses.<sup>1118</sup> Moreover, women recently released from prison often face difficulties attaining autonomy to provide for themselves and their families.<sup>1119</sup>

Federal law includes lifetime bans that prevent people with certain categories of drug convictions from receiving Temporary Assistance for Needy Families (TANF) (financial assistance) and Supplemental Nutrition Assistance Program (SNAP) (food assistance) benefits, which often disproportionately impact women, children, and people of color.<sup>1120</sup> The number of women in prison from 1980 to 2010 rose by 646 percent, compared to a 419 percent increase for men,<sup>1121</sup> and the number of female prisoners has continued to climb since then.<sup>1122</sup> Moreover, in 2016, the incarceration rate for black women was almost double that for white women,<sup>1123</sup> and the incarceration rate for Latina women was 1.2 times the rate for white women in 2014.<sup>1124</sup> The American Civil Liberties Union reports that women of color are arrested and imprisoned for drug crimes at far higher rates than white women.<sup>1125</sup> An estimated 180,000 women were affected by the TANF ban from 1996-2011 due to felony drug convictions or other convictions that would

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<sup>1117</sup> NEB. REV. STAT. ANN. § 43-292.02 (2) (2017); N.M. STAT. ANN. § 32A-4-29 (G) (9) (2009); OKLA. STAT. TIT. 10A, § 1-4-904(B)(12) (2017).

<sup>1118</sup> See *supra* notes 68-70; see also DOJ, Prisoners in 2016, p. 13.

<sup>1119</sup> Hirsch, Amy E. “‘Some Days Are Harder than Hard’: Welfare Reform and Women with Drug Convictions in Pennsylvania,” *Center for Law and Social Policy*, Dec.1999, pp. 35- 41, [https://static.prisonpolicy.org/scans/some\\_days\\_are\\_harder\\_than\\_hard.pdf](https://static.prisonpolicy.org/scans/some_days_are_harder_than_hard.pdf).

<sup>1120</sup> Mauer and McCalmont, “A Lifetime of Punishment,” p. 4; Amy E. Hirsch, Written Statement for the Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities Briefing before the U.S Commission on Civil Rights, May 19, 2017, at 5 (hereinafter Hirsch Statement).

<sup>1121</sup> Mauer and McCalmont, “A Lifetime of Punishment,” p. 4.

<sup>1122</sup> DOJ, *Prisoners in 2016*, p. 1, 3.

<sup>1123</sup> *Ibid.*,13.

<sup>1124</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Prisoners in 2014, by E. Ann Carson, (Sept. 2015), p. 15, <https://www.bjs.gov/content/pub/pdf/p14.pdf>; see also “Fact Sheet: Incarcerated Women and Girls,” *The Sentencing Project*, at 2.

<sup>1125</sup> “Words From Prison: Drug Policy, Race and Women’s Incarceration,” *American Civil Liberties Union*, <https://www.aclu.org/other/words-prison-drug-policy-race-and-womens-incarceration> (accessed Oct. 19, 2019).



trigger the ban.<sup>1126</sup> Approximately 85 percent of adult TANF recipients are women, and most TANF recipients are people of color (27.6 percent white, 29.1 percent black, and 36.9 percent Latino).<sup>1127</sup> Twice as many women (23 percent) as men (12 percent) have received SNAP benefits at any time in their life, and women of color are much likelier to have received SNAP benefits (for example, 39 percent of black women and 31 percent of Latina women versus 19 percent of white women).<sup>1128</sup> In 2015, over half of SNAP's non-elderly adult recipients were women (62 percent), and just under half of SNAP participants were children (44 percent).<sup>1129</sup> By extension, the bans on public benefits impact children being cared for by a parent who is subject to the ban.<sup>1130</sup> Under the law, parents with felony drug convictions can collect SNAP benefits only on behalf of their children, and thus receive far less assistance than parents who were never convicted.<sup>1131</sup>

Critics of these lifetime bans argue that they are counterproductive to safe reentry.<sup>1132</sup> Commission research indicates that welfare benefits allow a person to meet basic survival needs while searching for employment or housing; without public benefits, individuals with criminal records may be more likely to turn to criminal activity to provide for themselves and their families.<sup>1133</sup> One study examined the effects of denying SNAP benefits to individuals with drug convictions and found the denial increased recidivism among those individuals.<sup>1134</sup> Another study reported an elevated risk

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<sup>1126</sup> Mauer and McCalmont, "A Lifetime of Punishment," p. 3.

<sup>1127</sup> U.S. Dep't of Health and Human Services, Office of Family Assistance, *Characteristics and Financial Circumstances of TANF Recipients: Fiscal Year 2016*, at Table 17, 18 [https://www.acf.hhs.gov/sites/default/files/ofa/fy16\\_characteristics.pdf](https://www.acf.hhs.gov/sites/default/files/ofa/fy16_characteristics.pdf) (showing TANF recipients by race and ethnicity and showing that among 2016 adults TANF recipients, 94,967 were men and 542,506 were women) and Table 10 (showing TANF recipients by race and ethnicity).

<sup>1128</sup> Rich Morin, "The Politics and Demographics of Food Stamp Recipients," *The Pew Research Center*, July 12, 2013, <http://www.pewresearch.org/fact-tank/2013/07/12/the-politics-and-demographics-of-food-stamp-recipients/>; see also Hirsch Statement, at 5.

<sup>1129</sup> U.S. Dep't of Agriculture, *Characteristics of Supplemental Nutrition Assistance Households: Fiscal Year 2015*, by Kelsey Farson Gray, Sarah Fisher, and Sarah Lauffer, (Nov. 2016), p. 21, <https://fns-prod.azureedge.net/sites/default/files/ops/Characteristics2015.pdf>.

<sup>1130</sup> Mauer and McCalmont, "A Lifetime of Punishment," pp. 4-5.

<sup>1131</sup> 21 U.S.C. § 862a(a)--(b) (2014); see also Marina Golan-Vilella, "Why SNAP Matters for Formerly Incarcerated People," *Friends Committee on National Legislation*, June 26, 2018, <https://www.fcnl.org/updates/why-snap-matters-for-formerly-incarcerated-people-1526>.

<sup>1132</sup> Jeremy Haile, "How the Felony Drug Ban Keeps Thousands of Americans Hungry," *Talk Poverty*, Mar. 21, 2017, <https://talkpoverty.org/2016/03/21/felony-drug-ban-keeps-thousands-hungry/>.

<sup>1133</sup> *Ibid.*; CLASP, *Written Statement for the Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities Briefing before the U.S. Commission on Civil Rights*, June 13, 2017 at 3. (hereinafter CLASP Statement).

<sup>1134</sup> Cody Tuttle, "Snapping Back: Food Stamps Bans and Criminal Recidivism," *SSRN*, 2018, p. 26 (hereinafter Tuttle, "Snapping Back: Food Stamps Bans and Criminal Recidivism") [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2845435](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845435).



of food insecurity and other troubling public health implications.<sup>1135</sup> In fact, the level of food insecurity reported in this study among individuals upon reentry “mirror[ed] the magnitude of food insecurity in developing countries.”<sup>1136</sup> In addition, the bans can prevent individuals from obtaining mental health or substance abuse treatment, including residential treatment programs that rely on funds from public assistance to cover room and board costs.<sup>1137</sup>

A 2018 University of Maryland researcher’s study examined the effects of the SNAP ban on people with felony drug convictions, and found that these individuals were likelier to recidivate for offenses based on “a monetary motive,” like theft or drug distribution, instead of violent crimes.<sup>1138</sup> The study illustrated that the desperation driving individuals who are denied public assistance based on their criminal records may explain recidivism; without resources, many individuals resort to criminal activity as a stopgap.<sup>1139</sup> As women in prison have less earning power than men and are also more likely to be primary caretakers of children,<sup>1140</sup> these barriers to public benefits may impact them more.

### ***Barriers to Financial Aid for Higher Education***

Federal law prohibits a person who was convicted of certain drug offenses “during a period of enrollment for which” the person was receiving federal aid from obtaining federal student grants, loans, or work assistance for higher education.<sup>1141</sup> The duration of ineligibility for financial aid varies depending on whether the person has committed a first, second, or third offense.<sup>1142</sup> For

<sup>1135</sup> Emily A. Wang, Gefei A. Zhu, Linda Evans, Amy Carroll-Scott, Rani Desai, and Lynn E. Fiellin, “A Pilot Study Examining Food Insecurity and HIV Risk Behaviors Among Individuals Recently Released from Prison,” *AIDS Educ. and Prevention*, vol. 25, no. 2, (2013), pg. 112-23, at 115 (hereinafter Wang, *et. al.* “A Pilot Study Examining Food Insecurity.”; see also Jeremy Haile, “How the Felony Drug Ban Keeps Thousands of Americans Hungry,” *Talk Poverty*, Mar. 21, 2017, <https://talkpoverty.org/2016/03/21/felony-drug-ban-keeps-thousands-hungry/>; see also Jeremy Haile, “Thousands of Americans Are Hungry Because of This One Law,” *The Nation*, Mar. 23, 2016, <https://www.thenation.com/article/thousands-of-americans-are-hungry-because-of-this-one-law/>.

<sup>1136</sup> Wang, *et. al.* “A Pilot Study Examining Food Insecurity,” p. 5.

<sup>1137</sup> Mauer and McCalmont, “A Lifetime of Punishment,” p. 8.

<sup>1138</sup> Tuttle, “Snapping Back: Food Stamps Bans and Criminal Recidivism,” p. 3, 20, 26 (the author studied “the effect of the SNAP ban on probability of financially motivated recidivism and probability of non-financially motivated recidivism” and found that “the effect is completely driven by recidivism for financially motivated crimes.” Ibid. at 20. The author defined “financially motivated recidivism” as “a return to prison” for property crimes and drug distribution offenses among formerly incarcerated people. Ibid. at 2-3).

<sup>1139</sup> Ibid.

<sup>1140</sup> See *supra* notes 74-82 (earning power disparities) and 464-73 (women more likely to be primary caretakers of children).

<sup>1141</sup> 20 U.S.C. § 1091(r)(1).

<sup>1142</sup> *Id.*

people with drug-related criminal convictions, the obstacles to obtaining a share of the already-scarce supply of financial aid for postsecondary education are significant. As a higher percent of women in prison are there for drug convictions, these data show they may be disparately impacted.<sup>1143</sup>

Moreover, the federal restrictions on financial aid for people with drug-related convictions disproportionately impact people of color.<sup>1144</sup> Students of color are not only more likely to be arrested, convicted, and/or incarcerated than white students, they are also more likely to need federal financial aid to attend college.<sup>1145</sup> Combined with income inequality, legal barriers to financial aid can frustrate the ability of people of color to attend college—even as research has repeatedly proven that postsecondary education boosts employment and earnings.<sup>1146</sup> Although women in prison generally have more education than men, because they are more likely to have a high school education, these barriers to higher education may impact them more.<sup>1147</sup>

### *How a Criminal Record Can Affect Housing Opportunities*

Individuals with criminal convictions face barriers to housing. Federal laws prohibit individuals with certain types of criminal records from living in public or subsidized housing and/or living in certain geographical areas, and private housing providers may implement policies that restrict individuals with arrests or criminal convictions.<sup>1148</sup> Many formerly incarcerated people often return

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<sup>1143</sup> See *supra* notes 68-70.

<sup>1144</sup> U.S. Commission on Civil Rights, *Collateral Consequences* at n. 96-130.

<sup>1145</sup> Darren Wheelock and Christopher Uggen, “Race, Poverty and Punishment: The Impact Of Criminal Sanctions On Racial, Ethnic, and Socioeconomic Inequality,” *National Poverty Center*, 2006, p. 21, [http://www.npc.umich.edu/publications/workingpaper06/paper15/working\\_paper06-15.pdf](http://www.npc.umich.edu/publications/workingpaper06/paper15/working_paper06-15.pdf).

<sup>1146</sup> U.S. Commission on Civil Rights, *Collateral Consequences* at n. 96-130; see also *Trends in College Pricing 2018*, The College Board, 2018, p. 3, <https://trends.collegeboard.org/sites/default/files/2018-trends-in-college-pricing.pdf> (finding that, after adjusting for inflation, in “the public two-year and private nonprofit four-year sectors, published [college tuition] prices are more than twice as high in 2018-19 as they were in 1988-89,” and the “average in-state tuition and fee price in the public four-year sector is about three times as high in inflation-adjusted dollars as it was in 1988-89.”); see also U.S. Dep’t of Education, *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, 2016, p.1, <https://www2.ed.gov/documents/beyond-the-box/guidance.pdf>.

<sup>1147</sup> See Michele S. Phelps, “Educational Programs for Women Prisoners in 2014,” *The Gender Policy Report*, Univ. Minnesota, Mar. 21, 2017, <https://genderpolicyreport.umn.edu/rehabilitation-in-prison/>.

<sup>1148</sup> 42 U.S.C. § 1437n(f) (permanently prohibiting from public housing people convicted of manufacturing methamphetamine on the premises); 42 U.S.C. § 13663 (prohibiting from public housing certain individuals registered as state sex offenders); 42 U.S.C. § 13661(a) (prohibiting from public housing a tenant evicted for “drug-related criminal activity” for three years post-eviction unless the evicted tenant completes a rehabilitation program or obtains a waiver); 42 U.S.C. § 13661(b) (requiring public housing agencies and owners to set standards prohibiting from admission any household with a member determined to be “illegally using a controlled substance”); 42 U.S.C. § 13661(c) (allowing public housing agencies and owners to deny admission to an individual or any member of the individual’s household suspected of engaging “in any drug-related or violent criminal activity or other criminal activity” under certain circumstances). See generally Marie Claire Tran-Leung, *When Discretion*

to low-income communities, and the National Low Income Housing Coalition estimates that only 35 affordable rental units exist for every 100 “extremely low-income” households.<sup>1149</sup> Coupled with the collateral consequences that formerly incarcerated individuals face when trying to earn a living, formerly incarcerated individuals face a high risk of housing insecurity and homelessness.<sup>1150</sup> While landlords have a reasonable interest in safety,<sup>1151</sup> barring formerly incarcerated persons—regardless of the basis for conviction—from tenancy does not categorically serve that interest. In addition, high barriers to housing have severe implications. This section reviews overarching civil rights issues related to housing barriers for persons with felony convictions, and the subsequent sections discuss particular barriers for public and private housing.

These housing challenges persist beyond the immediate reentry period because initial housing arrangements are often temporary, and securing permanent housing is a more difficult feat.<sup>1152</sup> Some individuals are able to stay with family members or friends temporarily or for a lengthy period.<sup>1153</sup> Some individuals may qualify for supportive housing programs (transitional or permanent, and depending on various eligibility requirements based on sex or any federal

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*Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, Sargent Shriver National Center on Poverty Law, Feb. 2015, p. 7-8 <http://www.povertylaw.org/files/docs/WDMD-final.pdf>; see also Kate Walz and Marie Claire Tran-Leung, The Sargent Shriver National Center on Poverty Law, Written Statement for the Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 7 (discussing barriers in the private rental market) (hereinafter Walz and Tran-Leung Statement).

<sup>1149</sup> Elayne Weiss, *Housing Access for People with Criminal Records*, National Low Income Housing Coalition, 2017, at 1, [http://nlihc.org/sites/default/files/AG-2017/2017AG\\_Ch06-S06\\_Housing-Access-Criminal-Records.pdf](http://nlihc.org/sites/default/files/AG-2017/2017AG_Ch06-S06_Housing-Access-Criminal-Records.pdf); National Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes*, 2017, p. 2, [https://nlihc.org/sites/default/files/Gap-Report\\_2017.pdf](https://nlihc.org/sites/default/files/Gap-Report_2017.pdf) (The National Low Income Housing Coalition defines “extremely low-income” as having an income at or below the federal poverty guideline or 30 percent of the area median income, whichever is higher).

<sup>1150</sup> Stephen Metraux, Caterina G. Roman, and Richard S. Cho., *Incarceration and Homelessness*, National Symposium on Homelessness Research, 2007, <https://www.huduser.gov/publications/pdf/p9.pdf> (hereinafter Metraux et al., *Incarceration and Homelessness*); see also U.S. Dep’t of Health and Human Services, *Homelessness and Housing Insecurity among Former Prisoners*, by Claire W. Herbert, Jeffrey D. Morenoff, David J. Harding, Nov. 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4762459/pdf/nihms-729845.pdf> (hereinafter HHS, *Homelessness and Housing Insecurity among Former Prisoners*).

<sup>1151</sup> See, e.g., *Kline v. 1500 Massachusetts Avenue Apt. Corp.*, 439 F.2d 477, 479-81 (D.D.C. 1970) (recognizing that “[t]he landlord is no insurer of his tenants safety, but he certainly is no bystander” and imposing “upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants” when the landlord has notice of foreseeable acts of harm by third parties “in the portion of the premises exclusively within his control.”).

<sup>1152</sup> Jocelyn Fontaine and Jennifer Biess, *Housing as a Platform for Formerly Incarcerated Persons*, Urban Institute, Apr. 2012, p. 3, <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF> (hereinafter Fontaine & Biess, *Housing as a Platform for Formerly Incarcerated Persons*).

<sup>1153</sup> *Ibid.*, 3.

restrictions on eligibility), often serving individuals with mental health needs (and as noted before, over half of the incarcerated population in the U.S. reportedly has a mental health condition<sup>1154</sup>) or physical disabilities (also as noted previously, the incarcerated population is twice as likely to have a mobility disorder, three to four times likelier to be blind or have a vision impairment, and two to three times likelier to be deaf or hard of hearing than the general U.S. population<sup>1155</sup>), substance abuse disorders, chronic homelessness, or residential instability<sup>1156</sup> Other individuals must rely on other subsidized housing programs (for low-income individuals) or private housing.<sup>1157</sup>

Research confirms a clear connection between incarceration and homelessness: prior incarceration has been identified as a risk factor for homelessness, and individuals experiencing homelessness are vulnerable to incarceration.<sup>1158</sup> Many scholars argue that securing housing upon reentry is the most “pressing and immediate short-term need” for formerly incarcerated individuals.<sup>1159</sup> Formerly incarcerated individuals are especially likely to experience homelessness within the first 30 days

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<sup>1154</sup> Joint Statement of Disability Advocates (including the American Civil Liberties Union, Amplifying Voices of Inmates with Disabilities (AVID) Prison Project of Disability Rights Washington, Center for Public Representation, DC Jail & Prison Advocacy Project, University Legal Services, Disability Rights Education & Defense Fund, Inc., Equal Rights Center, Helping Educate to Advance the Rights of Deaf communities, Judge David L. Bazelon Center for Mental Health Law, National Alliance on Mental Illness, National Association of the Deaf, National Disability Rights Network, National Federation of the Blind, Prison Law Office, Rooted in Rights, Rosen Bien Galvan & Grunfeld LLP, The Arc, Who Speaks for Me?) to the U.S. Commission on Civil Rights, Washington, D.C., May 19, 2017, at 2 (hereinafter Joint Statement, Disability Advocates); see also DOJ, *Mental Health Problems of Prison and Jail Inmates*, p. 1.

<sup>1155</sup> Joint Statement, Disability Advocates at 3-4; Ann Davis, Leigh, *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects*, The Arc, <http://www.thearc.org/page.aspx?pid=2458> (accessed Oct. 23, 2019); see also U.S. Dep’t of Justice, Bureau of Justice Statistics, *Disabilities Among Prison and Jail Inmates, 2011-2012*, by Jennifer Bronson and Marcus Berzofsky, (Dec. 2015), p. 3, <https://www.bjs.gov/content/pub/pdf/dpji1112.pdf>

<sup>1156</sup> Fontaine and Biess, *Housing as a Platform for Formerly Incarcerated Persons*, p. 5.

<sup>1157</sup> Ibid., 5.

<sup>1158</sup> HHS, *Homelessness and Housing Insecurity among Former Prisoners*, p. 2; Metraux et al., *Incarceration and Homelessness*, pp. 9-11, 9-23 to 9-24. This report suggests multiple reasons why individuals experiencing homelessness are vulnerable to incarceration, including “the public nature of a homeless existence” and the criminalization of their attempts to survive (manifested by bans on begging and sleeping in public). Ibid., 9-11. See also National Law Center on Homelessness and Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, p. 7-8, [https://www.nlchp.org/documents/No\\_Safe\\_Place](https://www.nlchp.org/documents/No_Safe_Place).

<sup>1159</sup> HHS, *Homelessness and Housing Insecurity Among Former Prisoners*, p. 2; Faith E. Lutze, Jeffrey W. Rosky, and Zachary K. Hamilton, “Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders,” *Criminal Justice and Behavior*, vol. 41, no. 4 (2014), pg. 471-491 at 472, <https://s3.wp.wsu.edu/uploads/sites/436/2014/11/Criminal-Justice-and-Behavior-2014-Lutze-471-91.pdf> (hereinafter Lutze et al., “Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders”); see also Stephen Metraux and Dennis P. Culhane, “Homeless Shelter Use and Reincarceration Following Prison Release,” *Criminology and Public Policy*, vol. 3, iss. 2 (2004), pg. 139-160 at 139, 141, [https://repository.upenn.edu/cgi/viewcontent.cgi?article=1118&context=spp\\_papers](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1118&context=spp_papers).

after leaving prison.<sup>1160</sup> Furthermore, more than half of homeless individuals have reported being incarcerated at some point in their lives,<sup>1161</sup> and individuals who lack housing are more frequently arrested and rearrested than individuals with stable housing.<sup>1162</sup> Some research has shown that homeless people of color are more likely to have an incarceration history than white homeless individuals,<sup>1163</sup> which can be explained in part by the disproportionately high rates of incarceration among people of color, particularly black men.<sup>1164</sup> Incarcerated persons with mental health diagnoses are also at a higher than average risk of becoming homeless upon reentry into society.<sup>1165</sup>

A 2018 study by the Prison Policy Initiative found differences among formerly incarcerated people by race, gender, and homelessness.<sup>1166</sup> Overall, formerly incarcerated women are more likely to be homeless than formerly incarcerated men.<sup>1167</sup> But among homeless formerly incarcerated people, men are less likely to be sheltered<sup>1168</sup> than women, whether for reasons of availability or personal choice.

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<sup>1160</sup> Stephen Metraux and Dennis P. Culhane, “Recent Incarceration History among a Sheltered Homeless Population,” *Crime and Delinquency*, vol. 52, iss. 3, (2006), p. 10, [https://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=spp\\_papers](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=spp_papers).

<sup>1161</sup> “Homelessness: Programs and the People They Serve: Findings of the National Survey of Homeless Assistance Providers and Clients,” *Urban Institute*, Dec. 1999, p. 50, <https://www.urban.org/sites/default/files/publication/66286/310291-Homelessness-Programs-and-the-People-They-Serve-Findings-of-the-National-Survey-of-Homeless-Assistance-Providers-and-Clients.PDF>.

<sup>1162</sup> HCH Clinicians’ Network, “Keeping Homeless People Out of the Justice System: The HCH Role,” *Healing HandsI*, vol. 8, no. 6 (2004), p. 1-2, <https://nhchc.org/wp-content/uploads/2019/08/Dec2004HealingHands.pdf>.

<sup>1163</sup> Marian Moser Jones, “Does Race Matter in Addressing Homelessness? A Review of the Literature,” *World Med Health PolicyI*, vol. 8, no. 2 (2016), pg. 139-56, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5863922/pdf/nihms924492.pdf>.

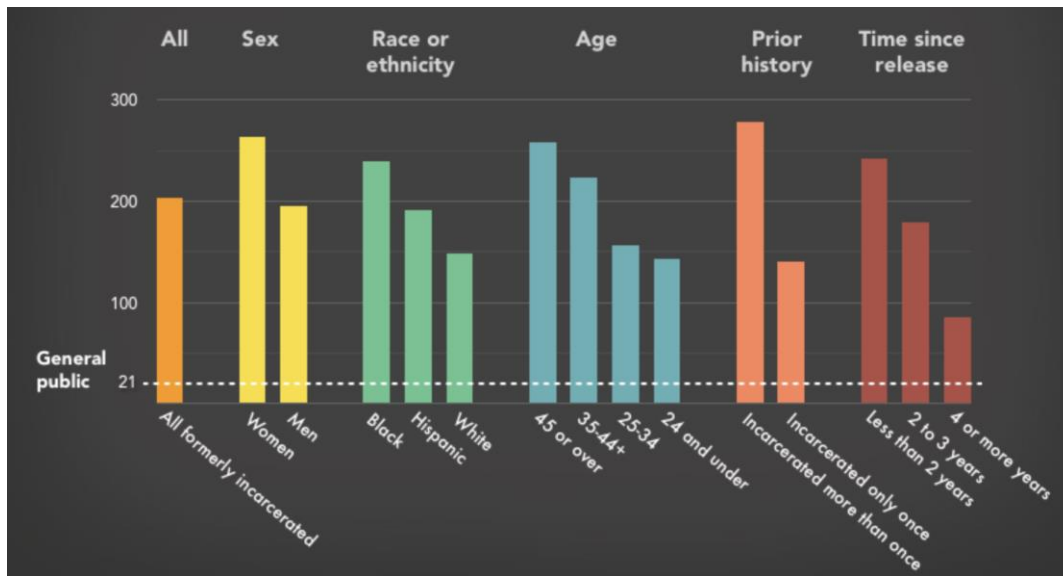
<sup>1164</sup> See U.S. Commission on Civil Rights, Collateral Consequences at *supra* notes 96-130.

<sup>1165</sup> Patricia McKernan, “Homelessness and Prisoner Reentry: Examining Barriers to Housing Stability and Evidence-Based Strategies That Promote Improved Outcomes,” *Journal of Community Corrections*, 2017, p. 7, [https://www.voa.org/pdf\\_files/homelessness-and-prisoner-reentry-examining-barriers-to-housing-stability-and-evidence-based-strategies-that-promote-improved-outcomes](https://www.voa.org/pdf_files/homelessness-and-prisoner-reentry-examining-barriers-to-housing-stability-and-evidence-based-strategies-that-promote-improved-outcomes).

<sup>1166</sup> Lucius Couloute, “Nowhere to Go: Homelessness Among Formerly Incarcerated People,” *Prison Policy Initiative*, (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>.

<sup>1167</sup> *Ibid.*

<sup>1168</sup> *Ibid.* This study defines sheltered homelessness as persons who are living a homeless shelter and unsheltered homelessness as persons who are experiencing homelessness without a fixed residence.

**Figure 15: Homelessness Rate Among Formerly Incarcerated People (per 10,000)**<sup>1169</sup>

**Source:** Prison Policy Initiative

This study also found that black women experienced the highest rate of sheltered homelessness - nearly four times the rate of white men, and twice as high as the rate of Black men. The high rates of homelessness among black women are especially striking in light of another Prison Policy Initiative study that found that unemployment rates among formerly incarcerated black women were higher than any other demographic group.<sup>1170</sup> These data demonstrate unemployment rate formerly incarcerated among black women is 43.6 percent as compared to their black male counterparts at 35.2 percent.<sup>1171</sup> Also, the unemployment rate formerly incarcerated among white woman was 23.2 percent, as compared to their white male counterparts at 18.4 percent.<sup>1172</sup>

<sup>1169</sup> Ibid. (This graph compares the rate of homelessness of formerly incarcerated people to the general public in 2008, which is the most recent data available.)

<sup>1170</sup> Luicus Couloute and Daniel Kopf, "Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People," *Prison Policy Initiative*, (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

<sup>1171</sup> Ibid.

<sup>1172</sup> Ibid.



## CHAPTER 7: EVALUATING THE DEPARTMENT OF JUSTICE'S AND BUREAU OF PRISONS' ENFORCEMENT EFFORTS IN PROTECTING THE RIGHTS OF WOMEN IN PRISON

This chapter reviews the efforts of the federal government in protecting the rights of women in prison. Although states have significant police powers and run their own state and local prisons, the federal government not only runs federal prisons, but it is also the ultimate guarantor of constitutional rights of women institutionalized in the United States. Moreover, the federal government conditions grant monies and programs on compliance with basic civil rights laws such as Title VI,<sup>1173</sup> and may condition it on compliance with other regulations. The activities of the federal government to protect women in prison include enforcing the constitutional rights discussed in Chapter 1, enforcing the Civil Rights of Institutionalized Persons Act, the Prison Rape Elimination Act (PREA) and other relevant federal statutes and regulations, and enforcing PREA regulations, as discussed in further detail below. The Commission notes that much of DOJ's enforcement activities and litigation have focused on the problem of sexual abuse.<sup>1174</sup> This focus may be because the law regarding the duty to protect prisoners from sexual assault, while still imperfect, is better developed than the law regarding other issues that also impact women in prison.<sup>1175</sup> For example, PREA regulations have been interpreted to be non-binding, but they also require regular audits and collection of data by the federal government that is not paralleled in other areas of women's rights in prisons.<sup>1176</sup>

This chapter first evaluates the work of the Federal Bureau of Prisons, the work of the Department of Justice in enforcing the PREA, and the Department's litigation efforts to enforce the rights of women in prison.

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<sup>1173</sup> Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 252 (codified as 42 U.S.C. § 2000(d) et seq., prohibiting discrimination based on race, color and national origin in programs and activities receiving federal financial assistance).

<sup>1174</sup> See *infra* notes 1394-1404.

<sup>1175</sup> See *supra* notes 193-257 (subjective standards to prove constitutional and Title IX violations) and 333-62 (barriers to enforcement such as immunities and requirements of Prison Litigation Reform Act).

<sup>1176</sup> See *supra* notes 270-322 (PREA regulations) and *infra* notes 1331-51 (regarding PREA audits); Cf. DOJ Bureau of Justice Assistance Grant Programs, 28 CFR § 33.52 (nondiscrimination under Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act); see also Department of Justice Nondiscrimination in Federally Assisted Programs, 28 C.F.R. § 42.101 the related nondiscrimination compliance provisions include compliance reviews and complaint-based investigations but do not specifically include an audit.

## Federal Bureau of Prisons

The Federal Bureau of Prisons (BOP) operates under a set of constitutional and statutory duties, and it issues regulations and funds activities relevant to women in prison. The main statutory duties of the BOP are to manage and regulate all federal correctional institutions (except military institutions), and with regard to prisoners, federal law requires that BOP shall:

Provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

Provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;

Provide technical assistance to State, tribal, and local governments in the improvement of their correctional systems;

Establish prerelease planning procedures that help prisoners apply for benefits, obtain identification, and “secure such identification and benefits prior to release from a sentence to a term of imprisonment[.]”<sup>1177</sup>

Additionally, BOP is charged with providing reentry planning procedures that include information about health, employment, literacy and education, personal finance, community resources, personal growth and development, and release requirements and procedures.<sup>1178</sup>

The BOP is also required to follow the constitutional mandates discussed in Chapter 1 of this report, regarding the Eighth and Fourteenth Amendments, to protect prisoners from cruel and unusual punishment or abuse, and to provide basic due process in disciplinary proceedings and equal access to rehabilitation programs, all while taking into account the need to maintain security and safety.<sup>1179</sup> Thus far, none of DOJ Civil Rights Division’s cases brought against prisons for violations of women’s constitutional rights have been brought against federal prisons.<sup>1180</sup>

As discussed in Chapter 2, BOP’s policy guidance regarding classification includes some provisions that take into account different security risk scoring systems needed for women, but the

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<sup>1177</sup> Bureau of Prisons Act, Pub. L. 90-371, 82 Stat. 280 (codified as 18 U.S.C. § 4042 (a)(2) (4), and (6).

<sup>1178</sup> 18 U.S.C. § 4042 (a)(7).

<sup>1179</sup> See *supra* notes 193-257.

<sup>1180</sup> See *infra* notes 1289-1381.



policy lacks clear consideration of data showing that women prisoners are more often primary caretakers of children, or other data showing the higher levels of trauma that women have faced.<sup>1181</sup>

At the Commission's briefing, Alix McLearen, BOP's National Administrator of Women and Special Population Branch, testified that "the Bureau has a number of gender-responsive practices that should be considered for replication."<sup>1182</sup> She went on to clarify her basis for this view, as follows:

We're all human and, therefore, we share commonalities but women are different. And while the differences apply outside of prison, they may be magnified in correctional settings where facilities are divided by gender. Contrasting male versus female is not to put women in a box. There's incredible variation between individuals and women aren't all alike, but again, men and women are different. Decades of study have helped us hone in not just on what those differences are but why they're important.

Women have higher rates of victimization and co-occurring psychiatric disorders but lesser criminal histories. These differences matter because to provide the best rehabilitative services to women in prison, we have to understand how they got there.<sup>1183</sup>

McLearen states that BOP's programs include "a holistic approach that includes training, management and programmatic practices specific to women's needs," and that her "headquarters-based office that oversees women's issues and provides guidance to staff" is "an excellent model."<sup>1184</sup> Having a high-level office overseeing civil rights is a model in line with former Commission recommendations.<sup>1185</sup> The components of gender-specific approaches McLearen described include training specific to women's needs, programs for inmates including "an ever-growing menu of interventions that were made just for women," and maintaining mother-child bonds "nurtured via regular contact, in-person visits but also phone and video, parenting programs," and programs that allow women to live with their babies.<sup>1186</sup> She added: "We cannot address only the mothers who fit what our conception of what a mother should be. We have to address them all;" but clarified "I always have beds available in my programs for pregnant women

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<sup>1181</sup> See *supra* notes 426-430.

<sup>1182</sup> McLearen Testimony, p. 18-19.

<sup>1183</sup> McLearen Testimony, p. 19-20.

<sup>1184</sup> *Ibid.*, 21.

<sup>1185</sup> U.S. Commission on Civil Rights, "Ten-year Check-up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume I: A Blueprint for Civil Rights Enforcement," (2002), p. 19, 47, <https://www.usccr.gov/pubs/archives/10yr02/vol1/vol1.pdf>.

<sup>1186</sup> McLearen Testimony, p. 21-22.

so at least in the federal system, access or capacity is not a problem.”<sup>1187</sup> Other “indicators of progress” she discussed are restrictions on the use of restraints on pregnant women and enhanced access to free feminine hygiene products.<sup>1188</sup> These developments are promising, yet there are also reports of ongoing issues of sexual assault of women in federal prisons,<sup>1189</sup> as well as lack of full access to the programming needed by women in prison. For example, BOP has issued policy guidance regarding the treatment of women prisoners who are pregnant,<sup>1190</sup> which is implemented through the MINT program discussed in Chapter 6, providing for two months of prenatal care and allowing women to live with their newborn babies for several months.<sup>1191</sup> Yet the program is only available in Phoenix, AZ; Tallahassee, FL; Springfield, IL; Fort Worth, TX; and Greenbrier, WV, so women would have to agree to be transferred in order to receive these services.<sup>1192</sup> Also, as discussed below, there are waiting lists for other programs.<sup>1193</sup>

This is in part because of the lower number of women’s prisons. While BOP’s Female Offender Manual requires taking into account gender-specific factors because there are fewer women’s prisons, the ability to actually place women where they could be closer to their children or receive trauma-informed care is limited.<sup>1194</sup>

According to a 2018 DOJ Office of Inspector General (OIG) report, *Review of the Federal Bureau of Prisons’ Management of Its Female Inmate Population*, while BOP offers trauma-informed treatment to eligible female inmates, because of its limited staff resources allocated to these programs, many participants are not able to get them until late in their incarceration, or not all.<sup>1195</sup> For instance, BOP’s “Trauma in Life” seminar has a waitlist that is over 6 months long.<sup>1196</sup> Moreover, the report notes that “[t]he lack of sufficient staff is most noticeable at larger female institutions, where inmates face delays in completing each of the program’s two prerequisites, as well as the program’s treatment phases.”<sup>1197</sup> Similarly, from FY2012 to FY 2016, only 37 percent

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<sup>1187</sup> Ibid., 22-23.

<sup>1188</sup> Ibid., 23-24.

<sup>1189</sup> See *supra* notes 664-85.

<sup>1190</sup> See *supra* notes 1024-28.

<sup>1191</sup> See *supra* note 1028-29.

<sup>1192</sup> See *supra* note 1030.

<sup>1193</sup> See *infra* notes 1198-1199 (discussing U.S. Dep’t of Justice, Office of Inspector General, *Review of the Federal Bureau of Prison’s Management of Its Female Inmate Population*).

<sup>1194</sup> See *supra* notes 435-57.

<sup>1195</sup> DOJ, *Review of the Federal Bureau of Prison’s Management of Its Female Inmate Population*, p. 23-4.

<sup>1196</sup> Ibid., 25.

<sup>1197</sup> Ibid., i.

of sentenced pregnant inmates participated in BOP's pregnancy programs, but OIG's investigation revealed that these programs had additional participant slots to accommodate more pregnant inmates during this period.<sup>1198</sup> OIG asserts that participation was low in pregnancy programs because inmates and staff lack awareness of these programs and BOP staff in participating facilities may apply more restrictive eligibility criteria than intended by BOP executive staff.<sup>1199</sup> Lastly, the OIG report found that the manner in which BOP's female facilities distributed feminine hygiene products and the type of products distributed varied by institution and did not always result in inmates having adequate access.<sup>1200</sup>

Another role of BOP is to provide supervision and assistance to state and local prisons. The Commission received written testimony on this matter from Dr. Emily Salisbury, who described the waning influence of the federal government in the field as follows:

[F]ederal support to address policy and practice in women's facilities from the early [19]90s until the last few years has made a substantial difference in guiding correctional practice. Federal support has allowed for technical assistance and programming that has included curriculum development, hosting of a national summit on the urgency of working with justice-involved women, focus on gender-specific classification, a gender-responsive case management model, research and strategy development in addressing sexual safety, and the development of leadership structures for effective management practices specific to well-run women's facilities. This federal assistance has been instrumental in improving practice in the field, particularly with the development of the [National Institute of Corrections] NIC Gender Responsive Principles publication and related technical assistance. More recently, the [National Resource Center of Justice Involved Women] NRCJIW received several years of funding from the Office of Justice Programs, Bureau of Justice Assistance, and products and outcomes from that work continue to contribute to the body of research-based work. The [National Resource Center of Justice Involved Women] NRCJW and [National Institute of Corrections] NIC have enjoyed a strong collaboration. Distribution and implementation capability through federal assistance is currently quite limited.<sup>1201</sup>

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<sup>1198</sup> Ibid., 26.

<sup>1199</sup> Ibid., 7.

<sup>1200</sup> Ibid., 29.

<sup>1201</sup> Emily Salisbury, Associate Professor of Criminal Justice, University of Nevada, Las Vegas, Follow-up Statement for the Women in Prison: Seeking Justice Behind Bars Briefing before the U.S. Commission on Civil Rights, Feb. 22, 2019, at 1 (hereinafter Salisbury Follow-up Statement).

Dr. Salisbury added that, because of federal budget cuts, “[t]he [Women’s Risk Needs Assessment] WRNA is now housed by me at my university and agencies must sign a license agreement/conditions of use document before adoption... The tool is a non-proprietary instrument, but there is some up-front associated costs with its training and implementation. Bottom line, this instrument was designed to be publicly accessible to agencies who wish to use it, but its promotion is severely hindered by [National Institute of Corrections] NIC continuing to be defunded.”<sup>1202</sup>

Anadora Moss, who has worked for over three decades as a correctional practitioner and consultant for women’s prisons, also testified that:

Federal assistance contributed to the development of research tools and many training opportunities for correctional staff that supports a gendered approach... the current federal assistance and focus on women has become very limited, resulting in stalled efforts and creating safety and dignity for the women and the staff who serve them. Because of these limited resources, we are losing momentum and the implementation of sorely needed strategies that support justice-involved women and their successes. *It is impossible to exaggerate the importance of federal assistance.*<sup>1203</sup>

Further, Moss emphasized that years of work of the National Institute of Corrections on developing strategies to address staff sexual misconduct had an important impact, and “[t]his was because of the PREA.”<sup>1204</sup> However, more work is needed in other areas, including the development and implementation of gender-responsive principles.<sup>1205</sup>

Professor Emily Salisbury emphasized the loss of funding for Women’s Risk Needs Assessment implementation, which she states is driven by technical assistance and training by National Institute of Corrections staff. She added that:

I fear [Women’s Risk Needs Assessment] WRNA will be adversely affected by the funding cuts occurring every year at [National Institute of Corrections] NIC. [National Institute of Corrections] NIC continues to be attacked by the Bureau of Prisons for what appears to be very disingenuous reasons. Their funding was cut by two-thirds last year as I understand it, and the President’s FY2020 budget request removes [National Institute of Corrections] NIC from the Bureau of Prisons altogether, consolidating it to the Office of Justice

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<sup>1202</sup> Ibid.

<sup>1203</sup> Moss Testimony, p. 118-19 (emphasis added).

<sup>1204</sup> Ibid., 119.

<sup>1205</sup> Ibid.

Programs. This organizational shift represents yet another weakening of [National Institute of Corrections] NIC.<sup>1206</sup>

In addition to the duties described above, under federal civil rights law, BOP is also responsible for ensuring that facilities it funds comply with basic civil rights protections.<sup>1207</sup> BOP stated that it currently does not contract private entities to run any federal women's prisons.<sup>1208</sup> But because BOP is part of the Department of Justice, the state and local institutions that BOP funds are subject to DOJ's review of their recipients of federal funding and in particular, as discussed below, DOJ reviews compliance with the Prison Rape Elimination Act.

### Department of Justice Enforcement of PREA

DOJ has a number of specific duties under the PREA. The PREA operates mainly through requiring compliance with the 2012 National Standards, enforced through DOJ auditing and certification rules to ensure compliance.<sup>1209</sup> As a condition precedent, the 2003 PREA required the creation of a nine-member National Prison Rape Elimination Commission, with bipartisan members appointed by Congress and the President.<sup>1210</sup> The PREA Commission was charged with further research, including annual statistical research by the BOP to identify the "characteristics of" both victims and perpetrators of prison rape, an assessment of the relationship of facilities design, staff training, supervision, discipline and reporting systems, and programs are needed to reduce its prevalence.<sup>1211</sup> Findings and recommended national standards were to be issued within five years of the date of the initial meeting of the Commission,<sup>1212</sup> and the Attorney General was to issue a final rule one year after that.<sup>1213</sup>

After the PREA Commission issued its findings and national standards were issued in 2009,<sup>1214</sup> in January 2012, Congress found that "[t]he total number of inmates who have been sexually

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<sup>1206</sup> Ibid.

<sup>1207</sup> 28 CFR § 33.52 (nondiscrimination under Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act); *see also* 28 C.F.R. 42.101 (the related nondiscrimination compliance provisions include compliance reviews and complaint-based investigations but do not specifically include an audit.)

<sup>1208</sup> BOP Response to USCCR Interrogatory No. 7.

<sup>1209</sup> *See infra* notes 1232-50.

<sup>1210</sup> Prison Rape Elimination Act of 2003, Pub. L. 108-179, 117 Stat. 980 (codified as 34 U.S.C. § 30301-30309).

<sup>1211</sup> 34 U.S.C. § 30306(b)(2).

<sup>1212</sup> 34 U.S.C. § 30306(d)(3).

<sup>1213</sup> 34 U.S.C. § 30307(a)(1).

<sup>1214</sup> *See* NPREC 2009 Report, <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

assaulted in the past 20 years likely exceeds 1,000,000.”<sup>1215</sup> The PREA Commission and Congress also found that prisoners who are young, first-time offenders as well as inmates with mental illness are at increased risk of sexual assault,<sup>1216</sup> and that “[t]he frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions[.]”<sup>1217</sup> There was not a specific finding on women in prison, but Congress’ 2012 PREA Findings also acknowledged that there was insufficient research.<sup>1218</sup> Among other statutory language about the negative impacts of sexual assault in prison, Congress found that:

The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners’ rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Eighth Amendment rights of State and local prisoners are protected through the Due Process Clause of the Fourteenth Amendment. Pursuant to the power of Congress under Section Five of the Fourteenth Amendment, Congress may take action to enforce those rights in States where officials have demonstrated such indifference. States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference. Therefore, such States are not entitled to the same level of Federal benefits as other States.<sup>1219</sup>

Based on these findings and constitutional obligations, Congress then mandated a number of duties for federal funding recipients as well as the Department of Justice.<sup>1220</sup> In addition, upon adoption, the federal regulations became immediately applicable to the Federal Bureau of Prisons.<sup>1221</sup>

As discussed in Chapter 3, Prison Rape Elimination regulations limit cross-gender body searches and other activities that were found to be related to higher risks of sexual assault.<sup>1222</sup> PREA regulations also require: prevention planning including facilities upgrades; making reporting accessible to inmates; including sexual assault prevention in hiring and promotion decisions;<sup>1223</sup>

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<sup>1215</sup> 34 U.S.C. § 30301(2).

<sup>1216</sup> 34 U.S.C. § 30301(3)-(4)

<sup>1217</sup> 34 U.S.C. § 30301(9).

<sup>1218</sup> *Id.*

<sup>1219</sup> 34 U.S.C. § 30301(13).

<sup>1220</sup> 34 U.S.C. § 30307I.

<sup>1221</sup> 34 U.S.C. § 30307(b). Soon thereafter, PREA standards also became applicable to the Department of Health and Human Services and the Department of Homeland Security. 34 U.S.C. § 30307(c)-(d).

<sup>1222</sup> See *supra* notes 896-903 (including text of the applicable PREA regulations).

<sup>1223</sup> Department of Justice Prison Rape Elimination Act National Standards, 28 C.F.R. §§ 115.211-18.

responsive planning, including referral of all allegations for investigations;<sup>1224</sup> training and education; screening for risk of sexual assault and victimization;<sup>1225</sup> appropriate official responses following reports of sexual assault;<sup>1226</sup> investigations and appropriate discipline of violators;<sup>1227</sup> medical and mental care, including ongoing care for sexual abuse victims and abusers.<sup>1228</sup>

### ***Monitoring and Audits***

PREA regulations also include extensive data collection requirements for recipients of federal funding. These include requirements that prisons collect data including sexual assault incident reviews,<sup>1229</sup> implement policies and procedures to investigate sexual assault of inmates,<sup>1230</sup> provide staff and inmate training and education,<sup>1231</sup> and submit to audits and corrective action.<sup>1232</sup> Under the audit provisions, “the agency shall ensure that each facility operated by the agency, or by a private organization on behalf of the agency, is audited at least once [every three years].”<sup>1233</sup> Moreover:

The Department of Justice may send a recommendation to an agency for an expedited audit if the Department has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with [Prison Rape Elimination Act] PREA-related issues.<sup>1234</sup>

Second, DOJ is charged with developing an audit instrument, which it has, and “[t]he agency shall bear the burden of demonstrating compliance with the standards.”<sup>1235</sup> The auditor must review all agency-wide policies, procedures, reports and other audits; have access to the facilities; “interview a representative sample of inmates, residents, and detainees, and of staff, supervisors, and

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<sup>1224</sup> 28 C.F.R. §§ 115.221-22.

<sup>1225</sup> 28 C.F.R. §§ 115.241-54.

<sup>1226</sup> 28 C.F.R. §§ 115.261-67.

<sup>1227</sup> 28 C.F.R. §§ 115.271-78.

<sup>1228</sup> 28 C.F.R. §§ 115.281-283.

<sup>1229</sup> 28 C.F.R. §§ 115.286-89.

<sup>1230</sup> 28 C.F.R. § 115.22.

<sup>1231</sup> 28 C.F.R. §§ 115.31-35.

<sup>1232</sup> 28 C.F.R. §§ 115.401-405.

<sup>1233</sup> 28 C.F.R. § 115.401(a).

<sup>1234</sup> 28 C.F.R. § 115.401(c).

<sup>1235</sup> 28 C.F.R. § 115.401(e).

administrators;” and inmates may speak confidentially to the auditor, who may also speak to community-based or victim advocates about sexual assault at the facility.<sup>1236</sup> The facility will be measured against PREA Standards, and if one or more such standards are not met, a 180-day corrective action period is triggered, during which time the auditor shall take “necessary and appropriate steps to verify implementation of the corrective action plan.”<sup>1237</sup> After that, the auditor must issue a final determination, although the agency may request (at its discretion and cost) an additional audit after it believes it has achieved compliance.<sup>1238</sup>

Facilities subject to PREA standards must submit to an audit by a certified PREA auditor at least once every three years.<sup>1239</sup> However, Ms. Abbate told the Commission that PREA audits remain inadequate because they do not provide a comprehensive picture of the degree to which PREA standards have been implemented, and of their efficacy when fully implemented.<sup>1240</sup> DOJ is responsible for overseeing implementation of the PREA standards and the auditing process, however DOJ does not have sufficient financial resources to ensure that PREA auditors are properly trained and certified.<sup>1241</sup> Currently, DOJ’s PREA Management Office only has four staff members to oversee 533 DOJ-certified PREA auditors, and to monitor PREA implementation in over 6,000 custodial facilities in the United States.<sup>1242</sup>

Governors have responsibilities as well. The PREA statute requires that:

For each fiscal year, any amount that a State would otherwise receive for prison purposes for that fiscal year under a grant program covered by this subsection *shall be reduced by 5 percent*, unless the chief executive of the State submits to the Attorney General—

- (i) a certification that the State has adopted, and is in full compliance with, the national standards described in subsection (a) of this section [the PREA National Standards]; or
- (ii) an assurance that not less than 5 percent of such amount shall be used only for the purpose of enabling the State to adopt, and achieve full compliance with, those national

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<sup>1236</sup> 28 C.F.R. § 115.401(f)-(o).

<sup>1237</sup> 28 C.F.R. § 115.404(a)-(c).

<sup>1238</sup> 28 C.F.R. § 115.404(d)-(e).

<sup>1239</sup> 28 C.F.R. § 115.401

<sup>1240</sup> Julie Abbate, National Advocacy Director, Just Detention International, Follow-up Statement for the Women in Prison Briefing before the U.S. Commission on Civil Rights, Apr. 22, 2019, at 1.

<sup>1241</sup> *Ibid.*, 2.

<sup>1242</sup> *Ibid.*, 2.



standards, so as to ensure that a certification under subparagraph (A) may be submitted in future years.<sup>1243</sup>

The Governor must consider the most recent agency audits as part of the determination of whether to certify for PREA standards compliance.<sup>1244</sup> The Governor's certification must be broad, as the regulation requires that it "shall apply to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch."<sup>1245</sup> And under the PREA statute, by September 30 of each year, the Attorney General must publish a list of grantees that are not in compliance with the PREA National Standards (which were codified in the PREA regulations).<sup>1246</sup> The Federal Bureau of Prisons, Department of Homeland Security, and Department of Health and Human Services, which also detain persons or provide funding for entities doing so, are subject to similar auditing and reporting rules under the PREA.<sup>1247</sup>

Finally, in order to receive federal funds, "an organization responsible for the accreditation of Federal, State, local, or private prisons, jails, or other penal facilities"<sup>1248</sup> must adopt accreditation standards consistent with the national standards.<sup>1249</sup>

But when enacting the PREA national standards as federal regulations, DOJ stated that it did not have "statutory authority to promulgate standards that would bind State, local, and private agencies, [but] other consequences may flow from the issuance of national standards, which could provide incentives for voluntary compliance."<sup>1250</sup> DOJ also stated that it hoped that agencies would want to come into compliance:

The Department cannot assume that all agencies will choose to adopt and implement these standards. An agency assessing whether to do so may choose not to based upon an assessment that, with regard to that specific agency, the costs outweigh the benefits. Such a course of action would be regrettable. The Department certainly hopes that it will not be common, and that agencies will instead consider the benefits of prison rape prevention not

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<sup>1243</sup> 34 U.S.C. § 30307(e)(2)(A).

<sup>1244</sup> 28 C.F.R. § 115.501(a).

<sup>1245</sup> 28 C.F.R. § 115.501(b).

<sup>1246</sup> 34 U.S.C. § 30307(e)(3).

<sup>1247</sup> 34 U.S.C. § 30307(b)-(d).

<sup>1248</sup> 34 U.S.C. § 30308(a).

<sup>1249</sup> 34 U.S.C. § 30308(b).

<sup>1250</sup> 28 C.F.R. § 115.501.

only to the agencies themselves but also to the inmates in their charge and to the communities to which the agencies are accountable.<sup>1251</sup>

At the Commission's briefing, Julie Abbate, who was formerly part of the Attorney General's PREA Working Group and contributed to drafting PREA regulations, testified that the lack of an enforcement mechanism was problematic.<sup>1252</sup> Other advocates have documented that it is problematic that a state's governor is the official responsible for certification of the state's prisons, and there is little oversight of the certification process.<sup>1253</sup> In 2013, the year after the PREA regulations were implemented, federal funding accounted for just 2.9 percent of state prison budgets.<sup>1254</sup> In 2014, then-Governor of Texas Rick Perry criticized the PREA regulations, calling them ill-conceived, and said that Texas would not adopt the national standards.<sup>1255</sup>

As of 2016, 40 states and the District of Columbia had not yet fully complied with PREA standards, resulting in over \$10 million in reallocations of federal funds towards PREA compliance programs in 42 of the 56 jurisdictions subject to PREA.<sup>1256</sup> Four jurisdictions, Arkansas, Guam, the Northern Mariana Islands, and Utah, did not certify that they were in compliance with PREA, nor did they assure DOJ that they were working towards PREA compliance, incurring a loss of five percent of their federal corrections funding, equivalent to a reduction of \$402,661 combined across the four jurisdictions.<sup>1257</sup> Thirty-eight of the 40 jurisdictions filed assurances with DOJ that they were working to come into full PREA compliance, which allows them to redirect the five percent of federal funds that otherwise would have been withheld into PREA compliance efforts.<sup>1258</sup> In contrast, under Eighth Amendment caselaw, not having sufficient funding is not a legal defense to deliberate indifference to a substantial risk of sexual assault.<sup>1259</sup>

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<sup>1251</sup> *Id.* (emphasis added).

<sup>1252</sup> Abbate Testimony, p.110.

<sup>1253</sup> Palacios, "The Prison Rape Elimination Act and the Limits of Liberal Reform."

<sup>1254</sup> Gabriel Arkles, *Prison Rape Elimination Act and the Perpetuation of Sexual Harm*, 17 NYU J. OF LEG. AND PUB. POL'Y 801, 806 (2014).

<sup>1255</sup> Sullivan, Laura, "Enforcing Prison Rape Elimination Standards Proves Tricky," *National Public Radio*, Apr. 2, 2014, <https://www.npr.org/2014/04/02/298332579/enforcing-prison-rape-elimination-standards-proves-tricky>.

<sup>1256</sup> U.S. Dep't of Justice, Bureau of Justice Assistance, *Impact of PREA on Department of Justice Grants*, 2016 <https://www.bja.gov/Programs/FY2016-PREA-Grant-Impact.pdf> (hereinafter DOJ, Impact of PREA).

<sup>1257</sup> *Ibid.*; see also Derek Gilna, "Five Years after Implementation, PREA Standards Remain Inadequate," *Prison Legal News*, Nov. 8, 2017, <https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/>.

<sup>1258</sup> 34 U.S.C. § 30307(e)(2).

<sup>1259</sup> See *supra* notes 699-717.

***Bureau of Justice Statistics Surveys and Reporting Responsibilities***

PREA also requires that DOJ's Bureau of Justice Statistics carry out an annual "comprehensive statistical review and analysis of the incidence and effects of prison rape."<sup>1260</sup> The research in the chapters above illustrates the value of this information. To satisfy this provision, Bureau of Justice Statistics has utilized three data collection devices relating to the sexual victimization of inmates: (1) the National Inmate Survey, (2) the National Survey of Youth in Custody, and (3) the Survey of Sexual Victimization.<sup>1261</sup> Bureau of Justice Statistics also releases a report every year to discuss its annual distribution of these surveys. These reports include brief discussions of survey findings, describe preparatory actions, and examine sampling objectives.<sup>1262</sup> However, not every institution submits complete reports, and more in-depth surveys would be valuable.

Bureau of Justice Statistics released its most recent report in 2018 focused on the Survey of Sexual Victimization's findings from 2012-2015.<sup>1263</sup> Bureau of Justice Statistics distributed the Survey of Sexual Victimization to all federal and state prisons, all correctional institutions operated by the U.S. military and the U.S. Immigration and Customs Enforcement, and a representative sample of privately operated prisons and jails, jails housing adult inmates in Indian country, and jail jurisdictions.<sup>1264</sup> The most significant conclusions of the 2018 report are below:

- Correctional administrators reported 24,661 allegations of sexual victimization in 2015, nearly triple the number recorded in 2011 (8,768).
- Most of the increase in allegations was due to an increase in unfounded (determined not to have occurred) and unsubstantiated (insufficient evidence to determine if it occurred) allegations.
- The increase in allegations of sexual victimization from 2011 to 2015 coincided with the release in 2012 of the National Standards to Prevent, Detect, and Respond to Prison Rape.
- In 2015, an estimated 1,473 allegations were substantiated (Determined to have occurred), up 63% from the 902 substantiated in 2011.

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<sup>1260</sup> 34 U.S.C. § 30303(a).

<sup>1261</sup> U.S. Dep't of Justice, PREA Data Collection Activities, 2018 <https://www.bjs.gov/content/pub/pdf/pdca18.pdf> (hereinafter DOJ, PREA Data Collection Activities, 2018).

<sup>1262</sup> Ibid., 1-3.

<sup>1263</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15*, by Ramona R. Rantala, July 2018, p. 1, <https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>.

<sup>1264</sup> Ibid., 3.

- Fifty-eight percent of substantiated incidents of sexual victimization in 2015 were perpetrated by inmates, while 42% were perpetrated by staff members.
- The number of allegations in prisons increased from 6,660 in 2011 to 18,666 in 2015 (up 180%).
- During the 3-year aggregated period of 2013-15, there were an estimated 15,875 allegations of inmate-on-inmate sexual harassment, of which 2,426 (16%) were substantiated based on completed investigations.<sup>1265</sup>

### *Review Panel on Prison Rape*

PREA also requires that DOJ establish a Review Panel on Prison Rape (Panel) to carry out annual public hearings, with subpoena power, to hear testimony of federal, state and local officials as well as victims and organizations “concerning the operation of the three prisons with the highest incidence of prison rape and the two prisons with the lowest incidents of prison rape.”<sup>1266</sup> The Panel’s website indicates that the most recent report focused on sexual victimization in prisons, jails, and juvenile facilities was published in 2016, based on 2014 hearings.<sup>1267</sup> The Panel’s penultimate report focused on sexual victimization in prisons and jails was published in 2012, based on hearings in 2011.<sup>1268</sup> The prior report focused solely on juvenile institutions and was published in 2010, based on hearings in 2010.<sup>1269</sup> No other reports are listed on the website, and there are no upcoming hearings scheduled.<sup>1270</sup>

The reports provide comprehensive details about sexual abuse in prisons. The 2016 PREA Panel report assessed all of the fifteen institutions that testified at the Panel’s 2014 hearings.<sup>1271</sup> The Panel chose these fifteen institutions based on information from the Bureau of Justice Statistics *Prisons and Jails Report* (which gathered its data through the National Inmate Survey) and the

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<sup>1265</sup> Ibid., 1.

<sup>1266</sup> 34 U.S.C. § 30303(b).

<sup>1267</sup> U.S. Dep’t of Justice, Office of Justice Programs, *Review Panel on Prison Rape*, <https://ojp.gov/reviewpanel/reviewpanel.htm> (accessed Oct. 21, 2019) (hereinafter DOJ, *Review Panel on Prison Rape*), (also noting that: “On April 15, 2016, the Review Panel on Prison Rape released its latest report on sexual victimization in prisons, jails and juvenile correctional facilities. The report is available at the link below.”).

<sup>1268</sup> U.S. Dept of Justice, Office of Justice Programs, *Review Panel on Prison Rape: Report of Sexual Victimization in Prisons and Jails*, (Apr. 2012), p. viii, [https://ojp.gov/reviewpanel/pdfs/prea\\_finalreport\\_2012.pdf](https://ojp.gov/reviewpanel/pdfs/prea_finalreport_2012.pdf) (hereinafter DOJ, *Review Panel on Prison Rape: Report of Sexual Victimization in Prisons and Jails*).

<sup>1269</sup> Ibid., at 5.

<sup>1270</sup> DOJ, *Review Panel on Prison Rape*.

<sup>1271</sup> U.S. Dep’t of Justice, Office of Justice Programs, *Review Panel on Prison Rape: Report of Sexual Victimization in Prisons, Jails, and Juvenile Correctional Facilities*, (Apr. 2016), p. v, [https://ojp.gov/reviewpanel/pdfs/panel\\_report\\_prea\\_apr2016.pdf](https://ojp.gov/reviewpanel/pdfs/panel_report_prea_apr2016.pdf) (hereinafter DOJ, *Report of Sexual Victimization*, 2016).

Bureau of Justice Statistics *Juvenile Report* (which gathered its data through the National Survey of Youth in Custody) that categorized the facilities as having a high- or low-incidence of sexual victimization.<sup>1272</sup>

### ***Low-Incidence Facilities***

Of the four low-incidence adult institutions (prisons and jails), one was mixed gender. The conditions contributing to the low-incidence nature of these institutions included having internal PREA policies, adequately training staff and inmates, housing lower-risk inmates (i.e. inmates who are medium custody, are more educated, are less violent, etc.), creating a housing-system based on inmate classification, and implementing procedures for reporting and responding to sexual victimization.<sup>1273</sup> Of the two low-incidence juvenile facilities, one was mixed gender. The conditions contributing to the low-incidence nature of these institutions included having adequate staffing, having updated facilities (video camera systems), implementing PREA training for both staff and youth, and creating a housing system based on inmate classification.<sup>1274</sup>

### ***High Incidence Facilities***

Of the six high-incidence adult institutions, one was exclusively female and two were mixed-gender. The conditions contributing to the high-incidence nature of these three institutions included having outdated facilities (a lack of video camera systems), having staff shortages and issues, housing higher-risk inmates (i.e. inmates who are violent, have mental illnesses, are less educated, etc.), and having discipline and management issues.<sup>1275</sup>

Of the three high-incidence juvenile facilities, none housed female inmates. The conditions contributing to the high-incidence nature of these institutions included having staffing issues, using an inadequate reporting system, having large facilities, and not establishing PREA curricula.<sup>1276</sup>

### ***Review Panel on Prison Rape Recommendations***

The 2016 PREA Panel report also included key recommendations based on the Panel's expert testimony on steps that might be taken to reduce sexual victimization at these high-incidence facilities. For prisons, the report stated:

The Panel encourages prisons to work closely with community service providers to serve inmates who are victims of sexual violence. In particular, prisons should collaborate with

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<sup>1272</sup> Ibid., 2-9.

<sup>1273</sup> Ibid., viii-ix.

<sup>1274</sup> Ibid., x.

<sup>1275</sup> Ibid., vii-ix.

<sup>1276</sup> Ibid., x.

victim advocates, state sexual-assault coalitions, local rape crisis centers, and local healthcare providers.

The Panel encourages prisons to develop protocols that protect inmates who are most vulnerable to sexual predation. As part of this initiative, prisons should have effective staff training to respond to the needs of inmates with mental illness, inmates with developmental disabilities, and inmates who are non-heterosexual. Prisons should also review all of their interactions with inmates to ensure they are trauma informed and gender specific.

The Panel encourages prisons and prosecutors to work together to bring charges against anyone who sexually assaults an inmate. The Panel encourages the U.S. Department of Justice, along with other governmental agencies, professional and advocacy organizations, and educational institutions to sponsor opportunities for continuing education to help prosecutors and prison administrators develop effective strategies for pursuing criminal cases against sexual predators who target inmates.<sup>1277</sup>

PREA also requires that the Attorney General provide an annual report regarding Bureau of Justice Statistics's annual survey and the Panel's hearings, to Congress and the Secretary of Health and Human Services.<sup>1278</sup> Commission research shows that Bureau of Justice Statistics been conducting and reporting annual surveys.<sup>1279</sup> However, since the Panel apparently has not been holding annual hearings, the Attorney General has not been able to report on them.<sup>1280</sup> According to information on the DOJ website, the latest PREA Panel report was issued in April 2016, and it presented the findings of panel hearings in 2014.<sup>1281</sup>

### ***National PREA Resource Center***

Under the PREA, the Attorney General may also provide grants to conduct research, as well as to provide training, policies and programs, to investigate and prosecute prison rape, and to more effectively protect inmates.<sup>1282</sup> Among other activities, DOJ's Office of Justice Programs' Bureau

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<sup>1277</sup> Ibid., 36 (footnotes omitted).

<sup>1278</sup> 34 U.S.C. §30303(c).

<sup>1279</sup> U.S. Dep't of Justice, *PREA Data Collection Activities, 2016* <https://www.bjs.gov/content/pub/pdf/pdca16.pdf>; U.S. Dep't of Justice, *PREA Data Collection Activities, 2017* <https://www.bjs.gov/content/pub/pdf/pdca17.pdf>; DOJ, *PREA Data Collection Activities*, 2018.

<sup>1280</sup> "Review Panel on Prison Rape," U.S. Dep't of Justice, Office of Justice Programs <https://ojp.gov/reviewpanel/reviewpanel.htm> (accessed Oct. 4, 2019).

<sup>1281</sup> Ibid.

<sup>1282</sup> 34 U.S.C. § 30303(d).

of Justice Assistance has funded the National PREA Resource Center.<sup>1283</sup> The National PREA Resource Center is a coalition of organizations led by Impact Justice (a nonprofit group), which states that it “serves as a central repository for the best research in the field on trends, prevention, and response strategies, and best practices in corrections. Technical assistance and resources are available through the National PREA Resource Center’s coordinated efforts with its federal partners, and the National PREA Resource Center will take the lead in helping the corrections field to implement the Department of Justice’s national PREA standards.”<sup>1284</sup> National PREA Resource Center’s mission is to provide assistance to prisons and jails and inmates and their families “in their efforts to eliminate sexual abuse in confinement.”<sup>1285</sup> It provides access to national standards for various types of correctional institutions, audit instruments and training for auditors, training and technical assistance, and an online library of materials.<sup>1286</sup>

### **DOJ Litigation**

In addition to the above, regarding the civil rights of women in prison, DOJ’s Civil Rights Division prosecutes violations of the Eighth Amendment, the PREA Resource Center, or the Civil Rights of Institutionalized Persons Act (CRIPA).

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<sup>1283</sup> “About, National PREA Resource Center,” *PREA Resource Center.org*, <https://www.prearesourcecenter.org/about> (accessed June 18, 2019).

<sup>1284</sup> *Ibid.*

<sup>1285</sup> *Ibid.*

<sup>1286</sup> “National PREA Resource Center,” *PREA Resource Center.org*, <https://www.prearesourcecenter.org/> (accessed June 18, 2019).

**Table 11: DOJ CRIPA Cases Against Corrections Institutions Regarding Women in Prison (1986–present)**<sup>1287</sup>

Facility Investigated by DOJ	Defendant	Claim	Facilities: Exclusively Female or Mixed Gender	Consent Decree or Out-of-Court Settlement	Specific Substantive Provisions Regarding Sexual Assault?	Date
Erie County Correctional Facility (New York)	Erie County, New York	8 <sup>th</sup> Amend.	Mixed Gender	Consent Decree	Yes	08/17 /2011
Golden Grove Adult Correctional Facility (Virgin Islands)	Territory of the Virgin Islands	8 <sup>th</sup> Amend.	Mixed Gender	Consent Decree (incl. PREA)	No	08/31 /2012
Orleans Parish Prison System (Louisiana)	Orleans Parish Sherriff (in his official capacity)	8 <sup>th</sup> Amend.	Mixed Gender	Consent Decree (incl. PREA)	No	06/06 /2013
Topeka Correctional Facility (Kansas)	State of Kansas	8 <sup>th</sup> Amend.	Exclusively Female	Out-of-Court Settlement (incl. PREA)	Yes	12/22 /2014
Julia Tutwiler Prison for Women (Alabama)	State of Alabama, Alabama Department of Corrections	8 <sup>th</sup> Amend.	Exclusively Female	Consent Decree (includes PREA) <sup>1288</sup>	Yes	06/18 /2015

**Main Features of DOJ Enforcement Actions for Adult Women in Prison**

Of the five DOJ CRIPA cases addressing the situation of women in prison, all included claims of sexual abuse, and all raised constitutional claims.<sup>1289</sup> Four also resulted in agreements that the

<sup>1287</sup> Ibid.

<sup>1288</sup> Consent Decrees or Out-of-Court Settlements coded as including PREA means that the parties agreed that Defendant should comply with PREA regulations. *See, e.g.,* Consent Decree, *United States v. Alabama*, No. 2:15-cv-368, § III.A.1 (M.D. Ala., Jun. 18, 2015) (“ADOC and Tutwiler shall comply with all the provisions of PREA.”).

<sup>1289</sup> *See* Amended Complaint, *United States v. Erie Cty.*, No. 09-cv-0849, ¶¶ 22(b), 47(a) (W.D.N.Y., July 30, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/US\\_v\\_Erie\\_AmendedComplaint\\_07-23-10.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/US_v_Erie_AmendedComplaint_07-23-10.pdf); Settlement Agreement at 6, *United States v. Territory of the Virgin Islands*, No. 1:86-cv-00265 (V.I. Aug. 31, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2013/09/25/goldengrove\\_settlement\\_8-31-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/09/25/goldengrove_settlement_8-31-12.pdf); Order Granting United States’ Motion to Find Defendant in Contempt and for Appointment of Special Master, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. Marc. 23, 2006), [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/GoldenGrove\\_ContemptOrder\\_3-23-06.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/GoldenGrove_ContemptOrder_3-23-06.pdf); Acting Ass’t Attorney General Loretta King, letter to Orleans Parish Criminal Sheriff Marlin N. Gusman, Sept. 11, 2009, Re: Orleans Parish Prison System, New Orleans, Louisiana, at pp. 2-21,



facility would comply with PREA regulations, which were issued in 2012.<sup>1290</sup> Only the first one, resolved in 2011, was brought and resolved solely on constitutional bases (without mention of PREA).

These five cases required a range of specific remedies. The main remedies included requiring the prisons to train staff about sexual assault and harassment, to create a better reporting system, to establish an appropriate inmate classification system, to eliminate cross-gender body searches, to discipline offenders, and to undergo federal monitoring.<sup>1291</sup> As discussed, four of the five cases required coming into compliance with PREA. Because PREA's regulations and audit requirements are more thorough, these post- PREA settlements effectively require a broad and comprehensive range of remedies.<sup>1292</sup> Of these five cases, one was resolved by an out-of-court settlement,<sup>1293</sup> and four were resolved by consent decree.<sup>1294</sup>

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[https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/parish\\_findlet.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/parish_findlet.pdf) (hereinafter DOJ Orleans Findings Letter); Findings Letter from Attorney General Thomas E. Perez to Kansas Governor Samuel D. Brownback (Sept. 6, 2012), Re: Investigation of the Topeka Correctional Facility at pp. 3-21, [https://www.justice.gov/sites/default/files/crt/legacy/2012/09/10/topeka\\_findings\\_9-6-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/09/10/topeka_findings_9-6-12.pdf) (hereinafter DOJ Kansas Findings Letter); Complaint, *United States v. Alabama*, No. 2:15-cv-368, ¶¶ 9-36 (M.D. Ala., May 28, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/tutwiler\\_complaint\\_5-28-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/tutwiler_complaint_5-28-15.pdf).

<sup>1290</sup> Settlement Agreement at 6, *United States v. Territory of the Virgin Islands*, No. 1:86-cv-00265 (V.I. Aug. 31, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2013/09/25/goldengrove\\_settlement\\_8-31-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/09/25/goldengrove_settlement_8-31-12.pdf); Order Granting United States' Motion to Find Defendant in Contempt and for Appointment of Special Master, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. Marc. 23, 2006), [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/GoldenGrove\\_ContemptOrder\\_3-23-06.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/GoldenGrove_ContemptOrder_3-23-06.pdf); Acting Ass't Attorney General Loretta King, letter to Orleans Parish Criminal Sheriff Marlin N. Gusman, Sept. 11, 2009, Re: Orleans Parish Prison System, New Orleans, Louisiana, at pp. 2-21, [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/parish\\_findlet.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/parish_findlet.pdf) (hereinafter DOJ Orleans Findings Letter); Findings Letter from Attorney General Thomas E. Perez to Kansas Governor Samuel D. Brownback (Sept. 6, 2012), Re: Investigation of the Topeka Correctional Facility at pp. 3-21, [https://www.justice.gov/sites/default/files/crt/legacy/2012/09/10/topeka\\_findings\\_9-6-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/09/10/topeka_findings_9-6-12.pdf) (hereinafter DOJ Kansas Findings Letter); Complaint, *United States v. Alabama*, No. 2:15-cv-368, ¶¶ 9-36 (M.D. Ala., May 28, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/tutwiler\\_complaint\\_5-28-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/tutwiler_complaint_5-28-15.pdf).

<sup>1291</sup> See Consent Decree, *United States v. Alabama*, No. 2:15-cv-368 (M.D. Ala., June 18, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/tutwiler\\_agreement\\_6-18-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/tutwiler_agreement_6-18-15.pdf); Settlement Agreement, *United States v. Kansas* (Dec. 22, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2015/03/19/topeka\\_agreement\\_12-22-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/03/19/topeka_agreement_12-22-14.pdf); Stipulated Order of Dismissal, *United States v. Erie Cty.*, No. 09-cv-0849, III.A.1-5 (W.D.N.Y. Aug. 17, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/09/19/Erie\\_settle\\_8-18-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/09/19/Erie_settle_8-18-11.pdf); Order Granting United States' Motion to Find Defendant in Contempt and for Appointment of Special Master, *United States v. The Virgin Islands*, *supra* note 1313; Consent Judgement, *United States v. Gusman*, No. 2:12-cv-00859 (E.D. La., June 6, 2013), [https://www.justice.gov/sites/default/files/crt/legacy/2013/06/12/opp\\_consentjudg\\_6-6-13.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/06/12/opp_consentjudg_6-6-13.pdf).

<sup>1292</sup> See *supra* note 1292.

<sup>1293</sup> Settlement Agreement, *United States v. Kansas*, *supra* note 1316.

<sup>1294</sup> See Consent Decree, *United States v. Alabama*; Stipulated Order of Dismissal, *United States v. Erie Cty.*; Consent Judgement, *United States v. Gusman*; Order Granting United States' Motion to Find Defendant in Contempt and for Appointment of Special Master, *United States v. The Virgin Islands*, *supra* note 1316.

In the cases reviewed, DOJ has conducted long-term monitoring to enforce the rights of women prisoners. By their terms, the cases are only closed when a jurisdiction substantially comes into compliance. As of FY 2018, all but one (Topeka Correctional Facility) of these cases are all still open; four out of these five consent decrees and out-of-court settlements have not been closed out because the prisons have not achieved substantial compliance.<sup>1295</sup> For example, in 2013 the United States entered into a consent decree with the Virgin Islands and mandated compliance with PREA to address the widespread sexual assault that plagued the territory's Golden Grove facility.<sup>1296</sup> In the Eleventh Monitoring Report evaluating compliance with the decree, issued in 2016, the Monitor declared that Golden Grove had not complied with the decree's single substantive provision regarding the sexual abuse of prisoners.<sup>1297</sup>

Some of the main data about the five cases, including the nature of sexual abuse of women in prison that DOJ documented, which was the main focus of the enforcement actions, and the remedies DOJ procured through bringing claims under CRIPA, are discussed below.

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<sup>1295</sup> Dep't of Just. Activities Under CRIPA Rep. FY 2018 (2019), <https://www.justice.gov/crt/case-document/file/1160466/download>; Dep't of Just. Activities Under CRIPA Rep. FY 2017 (2018), <https://www.justice.gov/crt/case-document/file/1081841/download>; Dep't of Just. Activities Under CRIPA Rep. FY 2016 (2017), <https://www.justice.gov/crt/page/file/1019881/download>; Dep't of Just. Activities Under CRIPA Rep. FY 2015 (2016), <https://www.justice.gov/crt/page/file/933876/download>; Dep't of Just. Activities Under CRIPA Rep. FY 2014 (2015), [https://www.justice.gov/crt/about/spl/documents/split\\_cripa14.pdf](https://www.justice.gov/crt/about/spl/documents/split_cripa14.pdf); Dep't of Just. Activities Under CRIPA Rep. FY 2013 (2014), [https://www.justice.gov/crt/about/spl/documents/split\\_cripa13.pdf](https://www.justice.gov/crt/about/spl/documents/split_cripa13.pdf); Dep't of Just. Activities Under CRIPA Rep. FY 2012 (2013), [https://www.justice.gov/crt/about/spl/documents/split\\_cripa12.pdf](https://www.justice.gov/crt/about/spl/documents/split_cripa12.pdf); Dep't of Just. Activities Under CRIPA Rep. FY 2011 (2012), [https://www.justice.gov/crt/about/spl/documents/split\\_cripa11.pdf](https://www.justice.gov/crt/about/spl/documents/split_cripa11.pdf); Dep't of Just. Activities Under CRIPA Rep. FY 2010 (2011), [https://www.justice.gov/crt/about/spl/documents/split\\_cripa10.pdf](https://www.justice.gov/crt/about/spl/documents/split_cripa10.pdf).

<sup>1296</sup> Settlement Agreement at 6, *United States v. Territory of the Virgin Islands*, No. 1:86-cv-00265 (V.I. Aug. 31, 2012) (a court-ordered settlement agreement, e.g., a consent decree), [https://www.justice.gov/sites/default/files/crt/legacy/2013/09/25/goldengrove\\_settlement\\_8-31-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/09/25/goldengrove_settlement_8-31-12.pdf). The Defendant had already been held under contempt based on noncompliance with a 1986 consent decree regarding other prisoners' rights violations, and subsequently a special master was appointed to serve as an agent of the court in evaluating Golden Grove prison policies. Order Granting United States' Motion to Find Defendant in Contempt and for Appointment of Special Master, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. Mar. 23, 2006), [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/GoldenGrove\\_ContemptOrder\\_3-23-06.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/GoldenGrove_ContemptOrder_3-23-06.pdf); See also, Consent Decree, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. Dec. 1, 1986), [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/GoldenGrove\\_ConsentDecree\\_12-1-86.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/GoldenGrove_ConsentDecree_12-1-86.pdf). The United States also filed to bring the Virgin Island's under receivership in order to execute the 1986 decree. Motion for Appointment of a Receiver, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. June 9, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/06/13/GoldenGrove\\_MemoInSupportMtnforReceiver.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/06/13/GoldenGrove_MemoInSupportMtnforReceiver.pdf).

<sup>1297</sup> Court-Appointed Independent Monitor's Eleventh Compliance Report at 31-32, *United States v. Territory of the Virgin Islands*, No. 1:86-cv-00265 (V.I. May 29, 2016), <https://www.justice.gov/crt/file/863576/download>.

*Investigations into Exclusively Female Facilities, Post- PREA: Alabama and Kansas*

DOJ case brought its most recent case against Julia Tutwiler Prison for Women (Tutwiler), an all-female institution located in Alabama.<sup>1298</sup> Originally constructed to house 417 inmates, in 2013, when DOJ began its investigation, the facility was holding 928 prisoners—more than double its intended capacity.<sup>1299</sup> In its post-investigation Findings Letter, DOJ determined that this institution was consistently violating the prisoners' constitutional and PREA rights by allowing a pervasive environment of sexual misconduct.<sup>1300</sup> The Findings Letter described that:

For nearly two decades, Tutwiler staff have harmed women in their care with impunity by sexually abusing and sexually harassing them. Staff have raped sodomized, fondled, and exposed themselves to prisoners. They have coerced prisoners to engage in oral sex. Staff engage in voyeurism, forcing women to disrobe and watching them while they use the shower and use the toilet. Staff sexually harass women, subjecting them to a daily barrage of sexually explicit verbal abuse.<sup>1301</sup>

DOJ also found that staff not only physically and sexually abused the inmates, but additionally fostered a culture that systemically encouraged such abuse.<sup>1302</sup> For example, staff dissuaded prisoners from reporting their assaults by isolating the women or forcing them to take lie detector tests.<sup>1303</sup> And when abuse was reported, staff often failed to respond or investigate the allegations.<sup>1304</sup> DOJ summarized the systemic problems and likely constitutional violations as follows:

- Tutwiler staff also harm women prisoners through a constant threat of sexual violence.
- Tutwiler has a toxic, sexualized environment that permits staff sexual abuse and harassment.

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<sup>1298</sup> Acting Ass't Attorney General Jocelyn Samuels, letter to Alabama Governor Robert Bentley, Jan. 17, 2014, Re: Investigation of the Julia Tutwiler Prison for Women and Notice of Expanded Investigation, *passim*, [https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler\\_findings\\_1-17-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/01/23/tutwiler_findings_1-17-14.pdf) (hereinafter DOJ, *Alabama Findings Letter*).

<sup>1299</sup> *Id.*

<sup>1300</sup> *Id.* at 2-3.

<sup>1301</sup> *Id.*

<sup>1302</sup> *Id.* at 3-4.

<sup>1303</sup> *Id.* at 4.

<sup>1304</sup> *Id.*

- Prison officials have failed to curb the sexual abuse and sexual harassment despite possessing actual knowledge of the harm, including a federal statistical analysis identifying sexual misconduct at Tutwiler as occurring at one of the highest rates in the country.
- Prison officials discourage prisoner reporting of sexual abuse due to actual and perceived retaliation against individuals who make allegations.
- Systemic deficiencies at Tutwiler directly contribute to staff and prisoner sexual abuse and staff sexual harassment that injures prisoners, and creates a substantial risk of further harm.
- These factual determinations provide us with reasonable cause to conclude that Tutwiler violates prisoners' Eighth Amendment rights to be protected from harm, *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), and serious risk of harm, *Helling v. McKinney*, 509 U.S. 25, 33-35 (1993), as well as the constitutional right to bodily privacy, *Fortner v. Thomas*, 983 F.2d 1024, 1029-30 (11th Cir. 1993).<sup>1305</sup>

In 2015 the State of Alabama, the Alabama Department of Corrections and the United States entered into a settlement agreement, issued by a court consent decree, requiring Tutwiler to abide by the standards of PREA.<sup>1306</sup> The agreement had a number of constructive policies, including, but not limited to, training staff on sexual harassment policies,<sup>1307</sup> educating inmates on their rights to be free from sexual abuse,<sup>1308</sup> implementing a gender-responsive classification system,<sup>1309</sup> creating risk-assessment procedures,<sup>1310</sup> and establishing a safe and effective method of reporting abuse.<sup>1311</sup> Alabama Department of Corrections and Tutwiler are also required to report to a Monitor a self-evaluation of their implementation of these sexual-harassment policies until the agreement is terminated.<sup>1312</sup> Further, the agreement will only be terminated when Tutwiler and Alabama Department of Corrections have substantially complied with the mandates of the consent decree.<sup>1313</sup>

At the Commission's briefing, Wendy Williams, Alabama Department of Corrections's Deputy Commissioner of Women's Services, testified that without the consent decree, Tutwiler would not

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<sup>1305</sup> *Id.* at 3-4.

<sup>1306</sup> Consent Decree at ¶ 22, *United States v. Alabama*, No. 2:15-cv-368 (M.D. Ala., June 18, 2015).

<sup>1307</sup> *Id.* at ¶¶ 44-45.

<sup>1308</sup> *Id.* at ¶ 49.

<sup>1309</sup> *Id.* at ¶ 52.

<sup>1310</sup> *Id.* at ¶ 55.

<sup>1311</sup> *Id.* at ¶ 66.

<sup>1312</sup> *Id.* at ¶ 112.

<sup>1313</sup> *Id.* at ¶ 125.

have been able to secure funds from the state in order to make the systemic changes needed to come into compliance with the PREA.<sup>1314</sup> Julie Abbate also testified at the briefing that without federal intervention, systemic changes could not have occurred in Tutwiler, although she added that a deeper cultural change was also needed.<sup>1315</sup> Notably, the DOJ findings and the court's consent decree included provisions to address other issues that DOJ found were related to sexual abuse, such as mental and physical health care.<sup>1316</sup>

The only other DOJ case specifically investigating a women's prison also included findings of widespread sexual abuse. It was settled with similarly comprehensive remedies, but out of court. Topeka Correctional Facility, an all-female facility with a maximum capacity of 749, is operated by the Kansas Department of Corrections.<sup>1317</sup> In May 2011, it held approximately 558 prisoners.<sup>1318</sup> In its investigation, DOJ found that Topeka Correctional Facility was violating the constitutional rights of the prisoners as well as their rights under PREA.<sup>1319</sup> Specifically, the DOJ found that the women in the prison were subject to unwanted sexual contact and sexual abuse by both other inmates and correctional staff.<sup>1320</sup> For example, in one case, a correctional officer was charged with sexual misconduct when he demanded oral and penetrative sex during the prisoner's work-release-transport.<sup>1321</sup>

Furthermore, DOJ found Topeka Correctional Facility and Kansas Department of Corrections were "aware of, and deliberately indifferent to, the substantial harm and serious risk of harm to [Topeka Correctional Facility] TCF prisoners due to sexual assault, harassment, and misconduct and...failed to take reasonable steps to prevent harm and risk of harm."<sup>1322</sup> DOJ determined that in two of Topeka Correctional Facility's Cell Houses, nearly 100 percent of prisoners feared for their safety and wellbeing.<sup>1323</sup>

Because of these findings of rampant sexual abuse, the United States and the State of Kansas filed a settlement agreement. The settlement agreement had a number of substantive mandates,

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<sup>1314</sup> Williams Testimony, p. 240-41.

<sup>1315</sup> *Ibid.*, 177-178.

<sup>1316</sup> DOJ Alabama Findings Letter, at pp. 8 and 12.

<sup>1317</sup> *Id.* at 2.

<sup>1318</sup> *Id.*

<sup>1319</sup> *Id.* at 1.

<sup>1320</sup> *Id.*

<sup>1321</sup> *Id.* at 4-5.

<sup>1322</sup> DOJ, *Kansas Findings Letter*, at p. 16.

<sup>1323</sup> *Id.* at 14.

including establishing useful correctional practices that the parties considered would reduce the risk of sexual assault (such as creating an inmate classification system to house prisoners with their same gender and eliminating cross-gender strip searches),<sup>1324</sup> implementing sexual misconduct training for correctional staff,<sup>1325</sup> and disciplining those who are charged with sexual abuse or harassment.<sup>1326</sup> The United States and Kansas agreed to terminate the settlement agreement only when Kansas Department of Corrections and Topeka Correctional Facility achieve compliance with the mandates of the order, and maintain this compliance for at least twelve months thereafter.<sup>1327</sup>

### ***Investigations into Mixed Gender Facilities, Post- PREA: Louisiana, Florida, and the Virgin Islands***

The remaining five cases involved the sexual assault of both men and women in mixed-gender facilities, and some involved various types of physical abuse (not only sexual assault). Three of these cases were settled by DOJ after the 2012 PREA regulations were issued, and so they require compliance with those regulations.

The Orleans Parish Prison System, located in Louisiana, houses both men and women, and DOJ found in 2009 that Orleans Parish Prison System OPP had a dangerous culture of sexual misconduct, assault, and harassment.<sup>1328</sup> The DOJ wrote in its Updated Finding Letter that:

[S]exual violence is pervasive throughout the jail. A recent report by the [Department of Justice] DOJ Office of Justice Programs (OJP) confirms this conclusion reached from interviews and records review. A survey of prisoners conducted by the Bureau of Justice Statistics...revealed that 7.5% of [Orleans Parish Prison System] OPP prisoners had experienced sexual assault while incarcerated. [Office of Justice Programs] OJP's Review Panel on Prison Rape singled out [Orleans Parish Prison System] OPP and reported that it

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<sup>1324</sup> Settlement Agreement at ¶¶ 11-16, *United States v. Kansas* (Dec. 22, 2014).

<sup>1325</sup> *Id.* at ¶¶ 17-18.

<sup>1326</sup> *Id.* at ¶¶ 26.

<sup>1327</sup> U.S. Dep't of Justice, Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act, Fiscal Year 2017, p. 7, <https://www.justice.gov/crt/case-document/file/1081841/download> ("In November 2016, the Division closed its investigation of the Topeka Correctional Facility in Topeka, Kansas. Kansas had successfully met and sustained all of the requirements of a 2014 settlement agreement designed to protect women prisoners from custodial sexual abuse by reforming systems designed to prevent, detect, and respond to custodial sexual abuse.").

<sup>1328</sup> Chief of the Special Litigation Section for the Civil Rights Division Jonathan M. Smith, letter to Marlin N. Gusman, Orleans Parish Sheriff, Apr. 23, 2012, Re: Update to Letter of Findings, United States' Civil Rights Investigation of the Orleans Parish Prison System, at pp. 2, 4, [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/23/parish\\_update\\_4-23-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/23/parish_update_4-23-12.pdf) (hereinafter Updated DOJ Orleans Findings Letter).

is [sic] “is deeply disturbed by the apparent culture of violence at [Orleans Parish Prison System] OPP.”<sup>1329</sup>

By relying on Bureau of Justice Statistics data, this case illustrates how Bureau of Justice Statistics data may be used to help enforce PREA and related constitutional rights. The Bureau of Justice Statistics data showed high levels of reported sexual abuse in the prison. Citing this data, a class action lawsuit was filed on behalf of the inmates against the facilities.<sup>1330</sup> The United States intervened under CRIPA.<sup>1331</sup> Subsequently, the parties (the class action Plaintiffs, the U.S., and Orleans Parish Prison System), reached a Consent Judgement, requiring the Orleans Parish Sheriff’s Office to “develop and implement policies, protocols, trainings, and audits, consistent with the requirements of the Prison Rape Elimination Act of 2003... and its implementation of regulations, including but not limited to, preventing, detecting, reporting, investigating, and collecting sexual abuse data, including prisoner-on-prisoner and staff-on-prisoner sexual abuse, sexual harassment, and sexual touching.”<sup>1332</sup> The Consent Judgement required that the order could only be terminated when substantial compliance with the Judgement has been met and maintained for at least two years.<sup>1333</sup> It is still open.

The Golden Grove Correctional Facility of the Virgin Islands holds both men and women to serve their sentences.<sup>1334</sup> After more than twenty years of noncompliance with a 1986 settlement and various court filings that do not mention the original 2003 PREA legislation,<sup>1335</sup> DOJ won a court-ordered consent decree in 2012, requiring that the Virgin Islands facilities comply with the 2012 PREA regulations.<sup>1336</sup> The facility is now required to “develop...facility-specific policies that incorporate the definitions and substantive requirements of the Prison Rape Elimination Act.”<sup>1337</sup> The court order also required hiring a monitor to oversee the execution of the agreement, training

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<sup>1329</sup> *Id.* at 4.

<sup>1330</sup> Motion to Intervene at 2, *Jones v. Gusman*, No. 2:12-cv-00859 (E.D. La. Sep. 24, 2012) at 2.

<sup>1331</sup> *Id.* at 1-2.

<sup>1332</sup> Consent Judgement at ¶ 19, *Jones v. Gusman*, No. 2: 12-cv-00859 (E.D. La. June 6, 2013).

<sup>1333</sup> *Id.* at ¶ 43.

<sup>1334</sup> See World Prison Brief, Virgin Islands (USA), Golden Grove Corrections Facility, <https://www.prisonstudies.org/country/virgin-islands-usa>.

<sup>1335</sup> Consent Decree, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. Dec. 1, 1986); Order Granting United States’ Motion to Find Defendant in Contempt and for Appointment of Special Master, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. Mar. 23, 2006); Memorandum of Points and Authorities in Support of United States’ Motion for Appointment of a Receiver Pursuant to Fed. R. Civ. P. 66 and This Court’s Equity Jurisdiction, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. Jun. 9, 2011).

<sup>1336</sup> Consent Decree at ¶ 6, *United States v. The Virgin Islands*, No. 1986-cv-0265 (V.I. Dec. 1, 1986).

<sup>1337</sup> *Id.*



of staff in relation to sexual assault and abuse, and semi-annual impact evaluation reports, in order to enforce the provisions of the decree.<sup>1338</sup> The order will remain operational until the Virgin Island facilities have proven that they have complied with the decree's substantive mandates for at least one year.<sup>1339</sup> It is still open.

### *Investigations into Mixed Gender Facilities, Pre- PREA: New York and Illinois*

The last two cases—settled before the 2012 PREA regulations—also included findings of widespread sexual assault of both men and women, and deliberate indifference to it, but they were much less comprehensive in their discussions of sexual assault. These cases were brought by DOJ against correctional institutions in Erie County (NY) and Cook County (IL).

As described in DOJ's Finding Letters, both facilities notably often did not distinguish in their reporting between physical and sexual assault, lumping those two phenomena together in statistical analysis; DOJ reported of Erie County: "In a period of just over one year, between January 1, 2007 and February 9, 2008, there were over 70 reported incidents of inmate-on-inmate assaults, including sexual assaults,"<sup>1340</sup> and of Cook County, "[b]etween January 1, 2007 and June 19, 2007, IAD [Internal Affairs Division] opened approximately 254 cases involving inmate assault and/or battery and five cases of sexual assault. In 2006, [Internal Affairs Division] IAD opened approximately 357 cases involving inmate assault, battery, or sexual assault."<sup>1341</sup> Neither did the assessment distinguish between sexual assault occurring against women and sexual assault occurring against men. Furthermore, very little space was given to discussing and assessing sexual assault in the Finding Letters.<sup>1342</sup>

Additionally, the Cook County Jail Consent Decree provided little detail of how to implement policies to reduce the prisoners' risk of sexual harm. There was no section on sexual assault; procedures and regulations regarding sexual assault were incorporated throughout the report in other administrative policies. For example, a regulation discussing investigatory procedures of sexual misconduct allegations appeared in the "Incidents and Referrals" section: "CCDOC shall

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<sup>1338</sup> *Id.* at ¶¶ 15, 13, 14.

<sup>1339</sup> *Id.* at ¶ 19.

<sup>1340</sup> Amended Complaint at ¶ 13, *United States v. Erie Cty.*, No. 09-cv-0849 (W.D.N.Y. July 23, 2010) .

<sup>1341</sup> Acting Assistant Attorney General Grace Chung Becker, letter to Todd H. Stroger, Cook County President and Thomas Dart, Cook County Sheriff, July 11, 2008, Re: Cook County Jail, Chicago, Illinois, at p. 24, [https://www.justice.gov/sites/default/files/crt/legacy/2011/04/13/CookCountyJail\\_findingsletter\\_7-11-08.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/04/13/CookCountyJail_findingsletter_7-11-08.pdf).

<sup>1342</sup> *Id.* and See Findings Letter from Acting Assistant Attorney General Loretta King to County Executive Chris Collins (July 15, 2009), Re: CRIPA Investigation of the Erie County Holding Center and the Erie County Correctional Facility, [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Erie\\_findlet\\_redact\\_07-15-09.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Erie_findlet_redact_07-15-09.pdf) (hereinafter DOJ Erie County Findings Letter).



require timely and appropriate investigations of all suicides, serious suicide attempts... sexual misconduct between inmates, sexual misconduct involving staff, fires, escapes...”<sup>1343</sup> The consent decree guiding Erie County was more thorough in creating sexual assault and harassment policies, mandating procedures that included, most notably, creating the position of a sexual abuse prevention coordinator, eliminating cross-gender strip searches and visual body cavity searches, establishing a more effective system of reporting, and training staff for how to manage sexual abuse investigations and allegations.<sup>1344</sup> On the positive side, the Consent Decree has been closed after CCDOC was found to have substantially complied by 2015.

### **DOJ Enforcement Actions for Girls in Juvenile Facilities**

Ten DOJ CRIPA actions have dealt with sexual assault, harassment, or misconduct of juvenile inmates in juvenile correctional facilities, and of these, seven concerned female inmates. These cases are included to show the pattern of litigation of civil rights issues for incarcerated females. As in the case of federal litigation brought on behalf of women, all involved sexual assault. Of these seven cases brought on behalf of girls, three involved facilities that housed female inmates, exclusively.

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<sup>1343</sup> Agreed Order at 15, 16, *United States v. Cook Cty.*, No. 10-cv-2946 (N.D. Ill., May 13, 2010).

<sup>1344</sup> Settlement Agreement at 10-11, *United States v. Erie Cty.*, No. 09-cv-0849 (W.D.N.Y Aug. 17, 2011).

**Table 12: DOJ CRIPA Cases Against Corrections Institutions Regarding Sexual Abuse of Girls and Women in Juvenile Facilities (1997 – present)**<sup>1345</sup>

Facility Investigated by DOJ	Defendant	Claim	Facilities: Exclusively Female or Mixed Gender	Consent Decree or Out-of-Court Settlement	Specific Substantive Provisions Regarding Sexual Assault?	Date
Leflore County Juvenile Detention Center (Mississippi)	Leflore County	14 <sup>th</sup> Amend.	Mixed Gender	Consent Decree (does not include PREA)	No	05/13/2015
Michigan Department of Corrections (private litigation) <sup>1346</sup> (Michigan)	Michigan Department of Corrections	14 <sup>th</sup> Amend.	Mixed Gender and Excl. Female (and Excl. Male)*	N/A (Statement of Interest)	N/A	N/A
Juvenile Facilities of Office of Children and Family Services (New York)	The State of New York and the New York State Office of Children and Family Services	14 <sup>th</sup> Amend.	2 Exclusively Male and 2 Excl. Female (and 2 Excl. Male)*	Consent Decree (does not include PREA)	No	07/14/2010
Indianapolis Juvenile Correctional Facility (Indiana)	NA	8 <sup>th</sup> Amend. 14 <sup>th</sup> Amend.	Exclusively Female*	NA	N/A	NA
Scioto Juvenile Facility (Ohio)	The State of Ohio	14 <sup>th</sup> Amend.	Mixed Gender	Consent Decree (does not include PREA)	No	06/2008*
Puerto Rico Juvenile Facilities (Puerto Rico)	The Commonwealth of Puerto Rico, the Governor of Puerto Rico, the Juvenile Institutions Administration, the Secretary of Corrections and Rehabilitation, the Administrator of the Juvenile Institutions Administration	14 <sup>th</sup> Amend.	Mixed Gender	Consent Decree (does not include PREA)	N/A	1997

<sup>1345</sup> U.S. Dep't of Justice, *Special Litigation Section, Cases and Matters, Corrections*, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0#corrections> (accessed June 3, 2019) (each of the cases are cited and discussed further in the following text; *see infra* notes 1379-1415).

<sup>1346</sup> Statement of Interest of the United States of America, *Doe v. Michigan Dep't of Corrections*, No. 2:13-cv-14356, (E.D. Mich. Mar. 20, 2014).

*DOJ Intervention in a Private Case in Michigan*

One of the six cases did not take the form of a DOJ litigating or investigative action, but instead, a DOJ Statement of Interest submitted to a federal court overseeing a lawsuit of juvenile inmates alleging a culture of sexual abuse at the facilities of the Michigan Department of Corrections. In 2014, seven inmates housed in Michigan Department of Corrections facilities filed a federal complaint representing a class of “‘youthful prisoners who are, were, or will be confined in adult prisons in Michigan and who have been or will be subjected to sexual and physical assaults and abuse, sexual harassment, and degrading treatment from adult prisoners and staff as a result of incarceration without adequate supervision, separation from adult prisoners, or treatment consistent with the status as children.’”<sup>1347</sup> Thus, though this case was argued on behalf of male plaintiffs, the outcome could affect all similarly situated individuals, including female juvenile inmates.<sup>1348</sup> The plaintiffs specifically alleged that Michigan Department of Corrections was aware of the harm consistently inflicted on the juvenile prisoners—including sexual assault, abuse, and extended periods of solitary confinement—and yet took no action to protect them from it.<sup>1349</sup>

DOJ asserted its “broad interest” in guarding the constitutional and federal rights of prisoners against violations by state and local governmental, including by ensuring that all correctional institutions abide by PREA.<sup>1350</sup> DOJ then refuted Defendant’s assertion that state institutions are not required to comply with PREA, and stated that Michigan Department of Corrections and other state facilities are obliged to adhere to both the Constitution and PREA regulations.<sup>1351</sup> Quoting the regulations, DOJ insisted that “The PREA regulations are clear: ‘The standards contained in this final rule applies to facilities operated by, or on behalf of, State and local governments and the Department of Justice.’”<sup>1352</sup> DOJ further noted that if a state facility does not meet PREA standards, it is subject to a loss of federal funding.<sup>1353</sup>

DOJ also argued that meeting the standards of PREA is not sufficient to meeting the standards of the Constitution as they “‘are not intended to define the contours of constitutionally required conditions of confinement. Accordingly, compliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual

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<sup>1347</sup> Statement of Interest of the United States at 4, *Doe v. Michigan Dep’t of Corrections*, No. 13-14356 (E.D. Mich. Mar. 20, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/03/26/doe\\_soi\\_3-20-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/03/26/doe_soi_3-20-14.pdf).

<sup>1348</sup> *Id.* at 1.

<sup>1349</sup> *Id.* at 4.

<sup>1350</sup> *Id.* at 2, 3.

<sup>1351</sup> *Id.* at 5.

<sup>1352</sup> *Id.* at 6.

<sup>1353</sup> *Id.* at 5.

abuse.”<sup>1354</sup> Though Plaintiff’s claims have not yet been decided on the merits, their PREA claims survived a motion to dismiss,<sup>1355</sup> despite Defendant’s arguing that Michigan Department of Corrections’s compliance with PREA is voluntary.<sup>1356</sup>

### *DOJ Cases Currently Unresolved: Indiana*

Along with the Michigan case in which DOJ filed a Statement of Interest, one of the DOJ-led cases has yet to be resolved, but it is the most thorough of DOJ’s evaluations of sexual assault at juvenile facilities. In its 2010 Findings Letter discussing its investigation into Indianapolis Juvenile Correctional Facility, which houses only girls, DOJ reported that the facility violated juvenile prisoners’ constitutional rights by failing to protect the juveniles from sexual harassment, abuse, and misconduct.<sup>1357</sup> DOJ also found that these incidents were underreported: “the frequency of staff sexual abuse and misconduct at the facility is significantly higher than officially reported or investigated by the administration... Indeed, the sexualized environment at the facility appears rampant.”<sup>1358</sup> DOJ quantified this culture of abuse with the following statistics:

22.8% of girls at [Indianapolis Juvenile Correctional Facility] IJCF reported having experienced at least one incident of sexual victimization by another youth or staff member at the facility in the prior year...nearly double the national average of 12.1%. It is also nearly double the national average of 14% for facilities housing only girls and is more than double the national average of 9.6% for facilities housing both sexes. These numbers place IJCF among the thirteen facilities with the highest rates of sexual victimization nationally. An astounding 16.3% of girls at [Indianapolis Juvenile Correctional Facility] IJCF reported unwanted sexual activity with another youth...more than six times the national average of 2.6%, and is nearly double the national average of 9.1% for girls in juvenile facilities nationwide. It also far exceeds the national average of 11% in facilities housing only girls. Additionally, 8.7% of girls at [Indianapolis Juvenile Correctional Facility] IJCF reported sexual activity with facility staff. Although slightly below the national average of 10.3%, this rate is nearly double the national average of 4.7% for girls in juvenile facilities

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<sup>1354</sup> *Id.* at 6.

<sup>1355</sup> Opinion and Order Granting in Part and Denying in Part Defendants’ Motion for Partial Summary Judgment and to Dismiss Certain Claims at 10-13, No. 2:13-cv-14356, (E.D. Mich., Nov. 5, 2018).

<sup>1356</sup> Opinion and Order at 10-13, *John Doe 1 v. Michigan Dep’t of Corrections*, No. 2:13-cv-14356, (E.D. Mich., May 28, 2014).

<sup>1357</sup> Assistant Attorney General Thomas E. Perez, letter to Mitch Daniels, Governor of Indiana, Jan. 29, 2010, Re: Investigation of the Indianapolis Juvenile Correctional Facility, Indianapolis, Indiana, at p. 9, [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Indianapolis\\_findlet\\_01-29-10.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Indianapolis_findlet_01-29-10.pdf).

<sup>1358</sup> *Id.* at 10.

nationwide, and nearly double the national average of 5% in facilities housing only girls.<sup>1359</sup>

DOJ found that inadequate staffing contributed to this pervasive culture of sexual misconduct by allowing lax security and supervision.<sup>1360</sup> Furthermore, even when sexual abuse of the young women inmates was reported, the facility often failed to provide an adequate investigation, if any investigation at all.<sup>1361</sup> Because of these findings, DOJ recommended that Indianapolis Juvenile Correctional Facility implement policies that ensure the protection of these juvenile inmates from the risk of sexual abuse and misconduct.<sup>1362</sup> However, as noted above, the resolution of this case is pending.<sup>1363</sup>

***Cases Resolved by Consent Decree or Out-of-Court Settlement: Mississippi, Ohio, Puerto Rico, New York***

The remaining four of the six cases were either addressed by consent decree or out-of-court settlement (three and one, respectively). These cases about institutions housing both boys and girls do not discuss whether or how boys and girls may have been treated differently, either with respect to protections from sexual assault or with regard to other issues that arose. In Mississippi, in its 2011 Findings Letter, DOJ reported that Leflore County Juvenile Detention Center violated the rights of its juvenile inmates by systematically failing to report and investigate allegations of abuse and thus subjecting the inmates to unnecessary risk of harm.<sup>1364</sup> However, the only remedial measure required by the consent decree was to improve Leflore County Juvenile Detention Center's system of child abuse reporting: "all Staff shall receive...competency-based training ... on the identification and prevention of custodial misconduct, including physical and sexual abuse, including appropriate reporting and non-retaliation requirements."<sup>1365</sup> Similarly, DOJ found that Ohio's Scioto Juvenile Correctional Facility was violating its juvenile inmates' constitutional

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<sup>1359</sup> *Id.* at 10-11.

<sup>1360</sup> *Id.* at 12.

<sup>1361</sup> *Id.* at 11.

<sup>1362</sup> *Id.* at 42.

<sup>1363</sup> Dep't of Justice, Civil Rights Division, *Special Litigation Section, Cases and Matters, Corrections: Indiana Juvenile Facilities, Indianapolis and Pendleton, IN*, <https://www.justice.gov/crt/special-litigation-section-case-summaries#indianajuv-summ> (accessed Aug. 19, 2019).

<sup>1364</sup> Assistant Attorney General Thomas E. Perez, letter to Robert Moore, Chair, Leflore County Board of Supervisors, Mar. 31, 2011, Re: Investigation of the Leflore County Juvenile Detention Center, at pp. 1, 2 and 7, [https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/LeFloreJDC\\_findlet\\_03-31-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/LeFloreJDC_findlet_03-31-11.pdf).

<sup>1365</sup> Settlement Agreement at ¶ 23, *United States v. Leflore Cty.*, No. 4:15-cv-00059 (N.D. Miss. May 13, 2015).

rights to reasonable safety by consistently subjecting them to the risk of sexual harm.<sup>1366</sup> Since 2003, 14 correctional staff at Scioto Juvenile Correctional Facility were charged and indicted for sexually and physically abusing juvenile prisoners<sup>1367</sup> and DOJ also found that Scioto Juvenile Correctional Facility had a deficient grievance system.<sup>1368</sup> In 2015, a district court terminated the agreement after finding that Scioto Juvenile Correctional Facility substantially complied.<sup>1369</sup>

In Puerto Rico, DOJ's case summary states that at Juvenile Facilities suffered pervasive constitutional violations, including the risk of sexual harm, particularly at the hands of correctional staff.<sup>1370</sup> Despite this, sexual abuse was not mentioned in DOJ's 1994 Findings Letter regarding its investigation of the Juvenile Facilities<sup>1371</sup> or in the consent decree.<sup>1372</sup> The Findings Letter included overcrowding, lack of medical and mental health care, lack of access to education, and lack of access to special education or other equal opportunities for juveniles with disabilities; but none of these findings were specific to boys or girls.<sup>1373</sup> The Monitoring Reports describe a number of substantive provisions to correct these issues as well as provisions that address sexual assault at juvenile institutions in Puerto Rico, the efficacy of which the Monitoring Report assessed by comparing the provisions to PREA regulations.<sup>1374</sup>

The final case—an investigation of New York's Office of Children and Family Services—was initially focused on whether the all-female juvenile inmates housed at these facilities were

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<sup>1366</sup> Assistant Attorney General Wan J. Kim, letter to Ted Strickland, Governor of Ohio, May 9, 2007, Re: Investigation of the Scioto Juvenile Correction Facility, Delaware, Ohio, at p.4, [https://www.justice.gov/crt/about/spl/documents/scioto\\_findlet\\_5-9-07.pdf](https://www.justice.gov/crt/about/spl/documents/scioto_findlet_5-9-07.pdf).

<sup>1367</sup> *Id.*

<sup>1368</sup> *Id.* at 7.

<sup>1369</sup> Order Grant. Joint Mot. to Terminate the Consent Decree, *United States v. Ohio*, Case No. 2:08-cv-00475 (S.D. Ohio, Dec. 9, 2015).

<sup>1370</sup> Dep't of Justice, Civil Rights Division, "Special Litigation Section, Cases and Matters, Corrections: *United States v. Commonwealth of Puerto Rico* (D.P.R.) San Juan, PR," <https://www.justice.gov/crt/special-litigation-section-case-summaries#prjuv-summ> (accessed June 10, 2019).

<sup>1371</sup> Assistant Attorney General Deval L. Patrick, letter to Pedro J. Rossello, Governor of Commonwealth of Puerto Rico, 1994, Re: Investigation of Juvenile Facilities in the Commonwealth of Puerto Rico, <https://www.justice.gov/crt/commonwealth-puerto-rico-findings-letter> (hereinafter DOJ Puerto Rico Findings Letter).

<sup>1372</sup> Settlement Agreement, *United States v. the Commonwealth of Puerto Rico*, No. 94-2080 (D.P.R. 1997), <https://www.justice.gov/crt/united-states-district-court-district-puerto-rico>.

<sup>1373</sup> DOJ, *Puerto Rico Findings Letter*.

<sup>1374</sup> Monitor's Compliance Ratings, Third Quarter, 2015, *United States v. the Commonwealth of Puerto Rico*, No. 94-2080 (D.P.R. Dec. 31, 2015); Monitor's Compliance Ratings, First Quarter, 2016, *United States v. the Commonwealth of Puerto Rico*, No. 94-2080 (D.P.R. Mar. 31, 2016).

adequately protected from harm, specifically sexual assault and abuse.<sup>1375</sup> But after its inquiry, DOJ reported in its 2009 Findings Letter that Office of Children and Family Services was appropriately safeguarding the rights of juvenile inmates (without distinguishing by gender) to be free from sexual harm, writing:

In the course of our investigation, we...reviewed allegations of custodial sexual misconduct. We find no current systemic constitutional deficiencies in this area. In the wake of custodial sexual misconduct charges at the facilities, [Office of Children and Family Services] OCFS has taken multiple steps, including but not limited to installing video cameras, increased staff accountability, and additional training for staff in order to safeguard youth at the facilities.<sup>1376</sup>

Nonetheless, the consent decree required the State of New York to report to the U.S. allegations of sexual misconduct and gave the U.S. the discretion to demand additional compliance with regulations if there exists “emergent issues” or “recurring problems” of sexual misconduct at the facilities.<sup>1377</sup>

### ***Overview of DOJ Litigation Activities***

In its recent report on CRIPA activities during fiscal year 2018, DOJ reported that it opened three new CRIPA investigations, closed two CRIPA investigations, and terminated three CRIPA cases.<sup>1378</sup> At the end of fiscal year 2018 (September 30, 2018), DOJ reported that it “had active CRIPA matters and cases involving 106 facilities in 17 states, the Commonwealth of Puerto Rico, and the Virgin Islands.”<sup>1379</sup> DOJ reported that it initiated five new CRIPA investigations, closed six investigations, and terminated three CRIPA cases when the facilities came into compliance with a settlement agreement or consent decree.<sup>1380</sup> At the end of fiscal year 2017, DOJ had active

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<sup>1375</sup> Acting Assistant Attorney General Loretta King, letter to David A Paterson, Governor of New York, Aug. 14, 2010, at p. 1, [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/NY\\_juvenile\\_facilities\\_findlet\\_08-14-2009.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/NY_juvenile_facilities_findlet_08-14-2009.pdf).

<sup>1376</sup> *Id.* at 2.

<sup>1377</sup> Settlement Agreement at ¶¶ 23, 21, *United States v. New York*, No. 1:10-cv-0858 (N.D.N.Y. July 14, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2011/01/26/NY\\_juvenile\\_facilities\\_settle\\_07-14-10.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/01/26/NY_juvenile_facilities_settle_07-14-10.pdf).

<sup>1378</sup> U.S. Dep’t of Justice, Office of Legislative Affairs, *Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act Fiscal Year 2018*, (Apr. 23, 2019), p. 2, <https://www.justice.gov/crt/case-document/file/1160466/download> (hereinafter DOJ, *Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act Fiscal Year 2018*).

<sup>1379</sup> *Ibid.*, 2-3.

<sup>1380</sup> U.S. Dep’t of Justice, Office of Legislative Affairs, *Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act Fiscal Year 2017*, (Mar. 9, 2018), p. 2, <https://www.justice.gov/crt/case-document/file/1081841/download>.



CRIPA matters and cases involving 156 facilities in 24 states.<sup>1381</sup> These data indicate a decrease in active CRIPA matters and cases. However, unlike the above data about cases litigated and resolved through settlements or consent decrees, these data do not document how many of those involve protecting women and girls in prison. The data do indicate which facilities remain under compliance evaluation, and of those, as of fiscal year 2018, the Julia Tutwiler Prison for Women Correctional Facility is the only women-only facility that still remains under federal monitoring, although the Golden Grove facility in the Virgin Islands that houses both men and women and is subject to a consent decree to come into compliance with Prison Rape Elimination Act is still subject to monitoring.<sup>1382</sup> Notably, a 2016 investigation of the Georgia Department of Corrections is focusing on “whether Georgia adequately protects transgender and gay prisoners from sexual harassment, sexual abuse, and assault by both staff and other prisoners.”<sup>1383</sup> DOJ is also reportedly investigating widespread sexual abuse and extortion of women prisoners in Lowell Correctional Institution for Women in Ocala, Florida; a formal investigation was reportedly opened in July 2018.<sup>1384</sup> At the time of this writing, no Findings Letter has yet been issued in either of these cases.<sup>1385</sup>

Due to the legal and practical limits of private litigation discussed in Chapters 1 and 4, women in prison rely substantially on DOJ work in this area.<sup>1386</sup> While the Commission heard testimony about the value of DOJ litigation,<sup>1387</sup> critics contend that DOJ does far too little enforcement under CRIPA and does not open enough investigations to properly ensure the safety of women prisoners. Julie Abbate testified before the Commission that “DOJ brings far too few CRIPA investigations to have a meaningful impact on women prisoner’s sexual safety,”<sup>1388</sup> and “between fiscal years

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<sup>1381</sup> Ibid.

<sup>1382</sup> DOJ, Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act Fiscal Year 2018, p. 5.

<sup>1383</sup> U.S. Dep’t of Justice, Civil Rights Division, Special Litigation Section, Cases and Matters, Georgia Dep’t of Corrections, <https://www.justice.gov/crt/special-litigation-section-case-summaries#pdoc-summ> (accessed Oct. 4, 2019).

<sup>1384</sup> See Brown, Julie K. “Meeting on Rapes, Degradation at Notorious Florida Women’s Prison Draws a Packed House,” *Miami Herald*, Aug. 19, 2018, <https://amp.miamiherald.com/news/special-reports/florida-prisons/article216987885.html>; see also “Feds Investigate Allegations of Sexual Abuse at Central Florida Women’s Prison,” *Orlando Sentinel*, Aug. 20, 2018, <https://www.orlandosentinel.com/news/breaking-news/os-sexual-abuse-florida-womens-prison-20180820-story.html>.

<sup>1385</sup> See U.S. Dep’t of Justice, Civil Rights Division, *Special Litigation Section, Cases and Matters*, passim., <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0> (accessed Oct. 4, 2019).

<sup>1386</sup> See *supra* notes 334–63 (discussing legal obstacles to private litigation, in Ch. 1) and 691–98 and 718–48 (discussing how these obstacles operate in private cases about sexual abuse of women in prison, in Ch. 4).

<sup>1387</sup> See *supra* notes 1316–18 (discussing Alabama).

<sup>1388</sup> Abbate Testimony, p. 109.



2010 and 2018, the Special Litigation Section opened an average of just two CRIPA investigations into jails and prisons per year.”<sup>1389</sup>

The Commission’s research of the five DOJ cases involving adult women in prison that were resolved by enforcement actions, illustrated in Table 11 above, shows that DOJ’s CRIPA findings letters and complaints do not document civil rights issues unique to adult women without connecting them to sexual abuse. Of the two investigations DOJ has carried out regarding women in prison under CRIPA, DOJ focused mainly on sexual abuse and less so on other challenges suffered by women in prison that are documented in this report. In Alabama and Kansas, DOJ found widespread sexual abuse and harassment.<sup>1390</sup> It expanded its enforcement work to include more comprehensive issues in Alabama, but did not in Kansas. In Alabama, the complaint filed in court centered on sexual abuse and how other “deficiencies at Tutwiler that contributed to the sexualized environment and harm to prisoners.”<sup>1391</sup> Other issues were addressed, but, for example, the investigation of mental and physical health care was done in relation to sexual abuse.<sup>1392</sup> Similarly, access to menstrual products was addressed because of the finding that women prisoners were “compelled to submit to unlawful sexual advances” to obtain such necessities.<sup>1393</sup> In Kansas, DOJ’s investigation and subsequent enforcement actions were even more focused on sexual abuse and harassment; other civil rights issues that women in prison may have experienced were not part of this case.<sup>1394</sup> In the three other DOJ CRIPA investigations of mixed-gender prisons (in Erie

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<sup>1389</sup> Ibid., 110.

<sup>1390</sup> See DOJ, *Alabama Findings Letter* at p. 7-32 (headings of findings are as follows: Staff Sexual Abuse and Sexual Harassment Subjects Prisoners to Harm and the Serious Risk of Harm, Tutwiler’s Toxic Sexualized Environment Permits Staff Sexual Abuse and Harassment, ADOC and Tutwiler Officials are Deliberately Indifferent to the Constitutional Harms to Women Prisoners”); DOJ, *Kansas Findings Letter* at p. 3-17 (headings of findings are as follows: “Women Prisoners are Subjected to Sexual Assault and Other Unwanted Sexual Conduct From Staff, Women Prisoners are Exposed to Harm and the Risk of Harm From Prisoner-on -Prisoner Sexual Violence, Sexual Misconduct by Staff and Prisoners is Rampant Throughout the Facility, Women Prisoners Live in Fear of Sexual Abuse, Prison Officials Are Deliberately Indifferent to the Constitutional Harms to Women Prisoners”).

<sup>1391</sup> Complaint, *United States v. Alabama*, No. 2:15-cv-00368, ¶¶ 9-30 (M.D. Ala., May 28, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/tutwiler\\_complaint\\_5-28-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/tutwiler_complaint_5-28-15.pdf) (quote is from ¶ 30).

<sup>1392</sup> DOJ, *Alabama Findings Letter* at p. 8,12.

<sup>1393</sup> DOJ, *Alabama Findings Letter* at p. 3 (“Prisoners are compelled to submit to unlawful sexual advances to either obtain necessities, such as feminine hygiene products and laundry service, or to avoid punishment. Inconsistent application of facility rules and disciplinary sanctions causes many prisoners to believe that acceding to staff sexual abuse will engender improved treatment”).

<sup>1394</sup> DOJ, *Kansas Findings Letter* at p. 3-17 (headings of findings are as follows: “Women Prisoners are Subjected to Sexual Assault and Other Unwanted Sexual Conduct From Staff, Women Prisoners are Exposed to Harm and the Risk of Harm From Prisoner-on -Prisoner Sexual Violence, Sexual Misconduct by Staff and Prisoners is Rampant Throughout the Facility, Women Prisoners Live in Fear of Sexual Abuse, Prison Officials Are Deliberately Indifferent to the Constitutional Harms to Women Prisoners”).

County, NY, Orleans Parish, LA, and the Virgin Islands), the issues addressed are broader and include investigations into physical abuse, lack of access to mental health care, and whether conditions are safe and sanitary, among other issues.<sup>1395</sup> Sexual abuse of both men and women are also addressed in these cases.<sup>1396</sup> None of the adult CRIPA prison cases that included investigations of the situation of women in prison addressed any disparities in treatment between men and women.<sup>1397</sup>

The fact pattern is slightly different when reviewing the six CRIPA cases that involve girls in juvenile prisons. Of the DOJ CRIPA actions have dealt with juvenile female inmates, all six involved mixed-gender state correctional systems (although some included female-only juvenile prisons).<sup>1398</sup> These included much more comprehensive sets of civil rights issues and claims: although they all included investigations of sexual assault, many other issues were addressed, such as inadequate protection from harm, physical and mental health, and education.<sup>1399</sup> On the other hand, none of the juvenile CRIPA prison cases addressed any disparities in treatment between boys and girls.<sup>1400</sup>

Because PREA and CRIPA can only be enforced by the federal government, private litigation must allege other violations, such as constitutional violations. Furthermore, the comprehensive remedies available under PREA and CRIPA statutes are not available to private plaintiffs. The Commission also heard testimony that federal litigation may include other advantages over private litigation. At the Commission's briefing, Julie Abbate testified that private "Eighth Amendment litigation is primarily limited by the Prison Litigation Reform Act, barriers to access to courts," and by difficulty in proving that the victim did not "consent, and I put that word in air quotes and in actual quotes whenever I write it."<sup>1401</sup> She clarified that few women experiencing sexual abuse in prison

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<sup>1395</sup> DOJ, *Erie County Findings Letter* at p. 9-36 (headings of findings are as follows: "Inadequate Suicide Prevention, Inadequate Mental Health Care, Inadequate Protection from Harm, Inadequate Medical Care, Environmental Health and Safety Deficiencies"); DOJ, *Orleans Parrish Update to Findings Letter* at pp. 2-21 (headings of findings are as follows: "Inadequate Protection From Violence and Sexual Assault, Inadequate Suicide Prevention, Inadequate Mental Health Care and Access to Medical Care, Concerns regarding Inadequate Services to Limited English Proficient Individuals"); Complaint, *United States v. Territory of the Virgin Islands et al.*, 1:86-cv-00254 ¶¶ 13-16 (D.V.I., Nov. 24, 1986).

<sup>1396</sup> Complaint, *United States v. Erie County, New York*, 1:09-cv-00849, ¶¶ 22,26 (W.D. NY., Sept. 30, 2009), [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/US\\_v\\_Erie\\_AmendedComplaint\\_07-23-10.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/US_v_Erie_AmendedComplaint_07-23-10.pdf); Complaint in Intervention, *Jones v. Gusman*, 2:12-cv-00859, ¶¶ 15-16 (E.D. L.A., Sept. 24, 2012).

<sup>1397</sup> See Table 11 (summary of cases and citations thereafter).

<sup>1398</sup> See Table 12 (summary of cases and citations thereafter).

<sup>1399</sup> All cases except *New York* included education as a focal point; all cases except *LeFlore County* included mental health as a focal point. See Table 12 (summary of cases and citations thereafter).

<sup>1400</sup> See Table 12 (summary of cases and citations thereafter).

<sup>1401</sup> Abbate Testimony, p. 108-9.

are believed, which ironically makes cases brought by one plaintiff more difficult than class action cases.<sup>1402</sup> She emphasized that although CRIPA investigations by DOJ also have to overcome the hurdle of disproving consent “before they get out of the Department of Justice... in all my dealings with jurisdictions in CRIPA cases of sexual abuse, not one jurisdiction or agency has actually raised the defense of consent in negotiating those settlements.”<sup>1403</sup> These dynamics show the relative power of the federal government as compared to litigation by individual impacted women, making the work of the federal government in enforcing these statutes protecting the rights of women in prison even more critical.

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<sup>1402</sup> Ibid.

<sup>1403</sup> Abbate Testimony, p. 108-9.

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## CHAPTER 8: FINDINGS AND RECOMMENDATIONS

### Overview

#### *Findings*

Finding 1. The incarceration rate for women is rapidly increasing, even as the overall rate for men is declining. Despite this increase policies and practices in women's prisons generally do not adequately protect the civil rights of these women.

Finding 2. Incarcerated people retain many civil rights despite their incarceration. They retain the right to enforce the legal protections to which they are entitled through administrative proceedings and the courts. These rights include the freedoms of speech and religion, the right to petition courts for relief, the right to be free from cruel and unusual punishment, the right to due process, and the right to be free from discrimination.

Finding 3. The Eighth Amendment prohibition on cruel and unusual punishment includes the right for incarcerated people to receive adequate healthcare, to be protected from sexual assault and harassment, and to experience overall conditions that do not violate contemporary standards of decency.

Finding 4. Many prison policies and facilities are not designed for women or tailored to their specific needs. Rather, many policies were adopted from men's prison institutions without evaluating their application to women's prison institutions.

Finding 5. Incarcerated women report extremely high rates of histories of physical, sexual, and mental trauma, much higher rates than incarcerated men report, although incarcerated men also report high rates of trauma. Studies indicate as many as 90% of incarcerated women experienced traumatic events prior to their incarceration, including, but not limited to physical assault, sexual assault, and psychological degradation.

Finding 6. Incarcerated women are disproportionately women of color and LGBT people.

Finding 7. Very limited data exists on incarcerated women and their experience in the prison system, leaving policymakers at a deficit in designing and implementing policies for incarcerated women.

Finding 8. According to some experts, the routine practices of prisons (e.g. strip searches, or solitary confinement) and the physical environment and design of prisons (e.g. limited light, loud noises, clanking metal doors, and often extreme temperatures) can create or recreate the damaging experiences of trauma for women in prison. But prisons, when effectively run, can still accomplish their punitive and rehabilitative goals by using trauma informed responses without exacerbating the impacts on traumatized women.

Finding 9. Providing adequate services to assist formerly incarcerated individuals with reentering society can reduce recidivism rates, given that re-arrests are often related to technical violations of release provisions related to difficulties in meeting financial obligations, lower employment skills, or the inability to secure safe housing.

## **Adequacy of Legal Protections and Federal Action**

### ***Findings***

Finding 10. Legal barriers exist that are specific to incarcerated people seeking to enforce their constitutional rights. These include procedural barriers, such as administrative exhaustion and limits on attorney's fees contained in the Prison Litigation Reform Act, and high substantive standards of proof, such as the deliberate indifference standard for Eighth Amendment claims. This standard requires not only that prison administrators knew of the rights violation that caused the harm to the inmate (such as lack of adequate medical care or extended solitary confinement), but, in addition to knowing about the deficit were indifferent to the harm the violation would cause.

Finding 11. Notwithstanding federal statutory legal protections such as the Civil Rights of Institutionalized Persons Act (CRIPA) and the Prison Rape Elimination Act (PREA), aimed at protecting incarcerated people, many incarcerated women continue to experience physical and psychological safety harms while incarcerated and insufficient satisfaction of their constitutional rights.

Finding 12. Federal funding assistance such as through the National Institute of Corrections and the National Resource Center on Justice Involved Women specific to issues faced by women in prison made an important contribution in the past by facilitating the development research tools and training methods specific to policies and practices regarding incarcerated women. This assistance has been sharply decreased because of federal budget cuts and agency prioritization of funds.

Finding 13. DOJ litigation against prison systems involving sexual abuse among other wrongs, has secured important changes to safeguard incarcerated women's rights. Consent decrees have played important roles in resolving such cases to the parties' satisfaction, allowing for necessary reforms to commence and take hold.

Finding 14. DOJ has a finite capacity to litigate constitutional violations and therefore cannot litigate against all institutions that, for example, do not address women's medical needs, requiring additional mechanisms to ensure these rights.

Finding 15. DOJ is required pursuant to the Prison Rape Elimination Act (PREA) to conduct annual public meetings of the Review Panel on Prison Rape. DOJ has not held a meeting since 2014 and has none scheduled.

Finding 16. Of the investigations it has carried out under CRIPA, DOJ has focused heavily on sexual abuse and less so on other challenges suffered by women in jails and prisons. Noticeably lacking are investigations into issues unique to women that are unconnected to sexual abuse, including dedicated attention for feminine health needs or access to programs and resources equal to those made available to men.

### ***Recommendations***

Recommendation 1. Congress should restore federal assistance through the National Institute of Corrections and the National Resource Center on Justice Involved Women to resume the development of research tools and training methods regarding incarcerated women.

Recommendation 2. Congress should amend the Prison Litigation Reform Act to address unnecessary legal barriers that limit the ability of incarcerated people to bring meritorious cases of constitutional violations.

Recommendation 3. The Review Panel on Prison Rape should return to its mandated annual meetings rather than continue its ongoing noncompliance with the statute.

Recommendation 4. DOJ should continue to litigate enforcement of the civil rights of incarcerated women in states that violate these mandates and the rights of incarcerated women. It should expand its investigation and litigation capacity to ensure the rights of all incarcerated women are protected through internal recognition of these civil rights harms and requests for additional funding if necessary.

Recommendation 5. The National Institute of Corrections should direct its resources to continuing to develop and implement evidence-based, gender-informed policies and trainings. The NIC must be provided sufficient resources by Congress to do so.

## **Classification and Placement**

### ***Findings***

Finding 17. Classification systems which are not calibrated for gender-specific characteristics have been shown to classify incarcerated women at higher security requirement levels than necessary for the safety and security of prisons. This classification results in some women serving time in more restrictive environments than is necessary and appropriate.

Finding 18. Women who are classified at higher security levels may receive fewer programming (such as vocational and educational opportunities), community placement, and reentry opportunities, which often results in women serving more time in prison than would be required if they had access to and completed these programming opportunities.

Finding 19. Transgender inmates report often being placed in facilities which do not conform to their gender identity, but rather their biological assignment at birth. These misplacements subject them to a greater risk of harm. The federal Bureau of Prisons (BOP), which is administered by the Attorney General and the DOJ, has adopted definitions classifying transgender inmates to emphasize biological sex, which has the potential to lead to inaccurate classifications of transgender people.

## **Recommendations**

Recommendation 6. Prison officials should adopt validated assessment tools, currently available, to avoid inaccurately classifying incarcerated women to a higher security level than appropriate.

Recommendation 7. Prison officials should ensure they place transgender incarcerated people in an appropriate facility which ensures their safety and does not unduly restrict their movements within the prison facility such as restrictive housing or protective custody.

## **Family Disruption**

### ***Findings***

Finding 20. Many incarcerated women are placed at facilities far from their families, many times as a result of a lack of regional facilities, despite policies requiring that they be placed as close to home as practicable. The federal system's goal of placement within 500 miles of home often still results in incarcerated women being located in a different state from their family, dramatically limiting visitation opportunities. Women's institutions are often isolated in rural areas. As a result, incarcerated women face barriers to receiving visitation from their family members and children.

Finding 21. Many prison policies do not prioritize family visits, such as by permitting extremely limited family visitation hours that often do not reflect distances visiting family must travel.

Finding 22. Women are disproportionately primary caretakers of minor children prior to incarceration. Women are estimated to be 5 times more likely to have a child placed in foster care while they are incarcerated, compared to incarcerated men.

Finding 23. Alternatives to traditional sentencing such as community placements or intermittent sentencing, such as pursuant to federal law permitting confinement during nights and weekends in some circumstances, are often not employed by sentencing authorities, despite the ability of these alternatives to help maintain family ties and avoid termination of parental rights.

Finding 24. Incarcerated parents are at risk of permanent loss of their parental rights when their children are placed in foster care. The Adoption and Safe Families Act calls for termination of parental rights if a child has been placed in foster care for 15 of the past 22 months. Some states,



such as Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, and Oklahoma, have amended state law to prohibit termination of parental rights solely on the basis of incarceration.

Finding 25. Incarcerated parents permanently lose parental rights at higher rates than parents whom courts find to have neglected or abused their children but are not incarcerated.

Finding 26. Prison policies can fail to support incarcerated parents' efforts to maintain their parental rights by impeding participation in hearings and contact with their children or through lack of coordination with social service providers.

Finding 27. Some prisons unnecessarily curtail inmates' opportunity for in-person contact with their loved ones by banning in-person visits after installing technology to support video conferencing systems to allow visitation without the need for physical proximity. In addition, prisons often charge inmates for the cost charged by the providers of video conferencing.

## **Recommendations**

Recommendation 8. Prison officials should enforce policies that support parental rights and familial contact except where inconsistent with safety concerns. Such policies include keeping incarcerated parents apprised of family court proceedings, providing transportation to those proceedings, and assisting in locating counsel. Institutions should implement visitation policies with the goal of maintaining familial relationships.

Recommendation 9. Prison officials should give strong preference to placing incarcerated women in as close proximity as possible with location of their family.

Recommendation 10. Institutions should provide free video and low-cost phone services to incarcerated persons, and should not ban in-person visits for non-safety reasons.

Recommendation 11. Prison officials should ensure adequate staffing to allow for more meaningful visitation hours, including regular evening and weekend availability, that reflect the realities of visiting family traveling long distances.

Recommendation 12. Lawmakers and judges should explore sentencing alternatives, such as intermittent confinement, drug treatment programs or early transfer to residential re-entry centers closer to family which would limit family disruption and decrease the likelihood of termination of parental rights resulting from incarceration.

## **Healthcare**

### ***Findings***

Finding 28. Incarcerated women generally have biological healthcare needs distinct from incarcerated men. They have a constitutional right to have these healthcare needs met.

Finding 29. There is a lack of standardization among prison systems regarding how female-specific healthcare, such as gynecological and prenatal care, is provided. Some prisons provide adequate regular care while others do not.

Finding 30. Incarcerated women who are pregnant are at heightened risk of healthcare emergencies, yet there is a lack of standardization in policies governing how their healthcare needs should be met, particularly in light of the rural locations of many prisons and distances to adequate specialist healthcare for pregnant women.

Finding 31. Reports from incarcerated women include prison officials ignoring early symptoms of potential miscarriage until too late to intervene, failing to transport laboring women to the hospital, and forcing them to give birth in their cells alone.

Finding 32. Shackling pregnant women and placing them in solitary confinement still occurs in some institutions despite the proven risks these practices pose to the safety of pregnant women.

Finding 33. Incarcerated women report incredibly high rates of past trauma, resulting in the need for mental health care and treatment while incarcerated.

Finding 34. Some incarcerated women do not have access to feminine hygiene products or must purchase them, putting them at risk of infection and other health consequences when they cannot be obtained in a timely adequate fashion.

Finding 35. Many prisons are located far from urban centers where specialized care for women-specific health issues can be rendered.

Finding 36. LGBT women in prison are at even greater risk for their physical safety and healthcare needs being met than all women as a group.

Finding 37. The Bureau of Justice Statistics (BJS) does not collect information on pregnancy rates, medical treatment during and after pregnancy and health outcomes of pregnant incarcerated women.

### ***Recommendations***

Recommendation 13. Prison officials should implement policies to address women's specific healthcare needs, including gynecological and prenatal care, as is constitutionally required.

Recommendation 14. All prisons should prohibit shackling pregnant women and placing them in solitary confinement, as these practices represent serious physical and psychological health risks.

Recommendation 15. Prisons should provide adequate feminine hygiene products free of charge.

Recommendation 16. Prison officials should adopt training policies that adequately train their staff on how to handle medical emergencies, including emergencies specific to women, any time of day or place they occur.

Recommendation 17. The federal government should facilitate standardization of prison healthcare through its convening and grant-making authority so that all health needs are met, including gender-specific health needs.

Recommendation 18. Prison administrators should adopt policies to ensure specialist healthcare is available and where necessary, provide transportation to a specialist healthcare provider without delay.

Recommendation 19. BJS should routinely collect information about pregnancy while incarcerated, such as medical treatment and health outcomes to insure best medical practices are being followed at the institutions charged with the women's care.

Recommendation 20. Prisons should have adequate mental health care staff and treatment programs available to meet the needs of the many incarcerated women with mental health challenges, such as past trauma.

## **Prevention of Sexual Abuse**

### ***Findings***

Finding 38. Sexual abuse and rape remain prevalent against women in prison. This continuing prevalence has led to significant litigation involving several different institutions, at tremendous cost to taxpayers and providing strong evidence of the need for reform at the institutional level, even following passage of the Prison Rape Elimination Act (PREA) in 2003. Reports include abuse of incarcerated women by staff and other incarcerated women that is prevalent and pervasive.

Finding 39. Incarcerated women who report sexual assault have experienced retaliation by their institutions and prison personnel in violation of PREA and their Eighth Amendment rights.

Finding 40. PREA's enforcement mechanism of 5% reduction in certain federal funds for noncompliance has not yet achieved full compliance with PREA:

- a. As of 2016, DOJ deemed 40 states and the District of Columbia out of compliance, although most continually assert every year they are working towards compliance;

- b. DOJ rarely reduces funds for noncompliance, and amounts allowed by the statute are not sufficient to serve as a true incentive for states to comply
- c. The Department of Justice does not have sufficient resources to ensure PREA auditors are properly trained and certified.

Finding 41. PREA standards prohibit prison personnel from conducting cross-gender searches and viewing incarcerated people in states of undress, however some prisons struggle to meet these requirements due to inadequate staffing.

Finding 42. Congress does not consistently appropriate grant funds sufficient to provide personnel, training, technical assistance, data collection, and equipment for institutions to comply with PREA.

***Recommendations:***

Recommendation 21. The Department of Justice should rigorously enforce the PREA standards, including training and certifying auditors and investigating whether facilities are in fact in compliance. Congress should provide more funds for investigations and audits.

Recommendation 22. Congress should enact stricter penalties for non-compliance with PREA standards focused on inmate safety.

Recommendation 23. Congress should consistently appropriate grant funding sufficient to ensure correctional agencies do not default on their obligations to incarcerated people to protect them from sexual abuse, such as funding for personnel, training, technical assistance, data collection, and equipment.

Recommendation 24. Prison officials should implement policies and discipline practices to eliminate retaliation for reporting sexual assault, and should take all necessary measures to ensure incarcerated people can report assault without risk to their safety.

Recommendation 25. PREA standards require prison officials to hire sufficient staff to ensure the safety of incarcerated people, including sufficient women staffing to perform searches and supervision in sensitive areas. In order to implement these requirements and comply with Title VII of the Civil Rights Act of 1964, officials should consider a rigorous analysis of their hiring practices, including whether a bona-fide occupational qualification is appropriate for any posting in the circumstances, consistent with legal precedent when such action is necessary and permissible by law.

## **Discipline and Restrictive Housing**

### ***Findings***

Finding 43. Studies have shown incarcerated women are often given disproportionately harsh punishments for minor offenses while incarcerated compared to incarcerated men. This disproportionality results in such outcomes as placing women in segregation for minor violations of prison regulations, which denies them good time credits which would shorten their sentences and denies them programming privileges, among other restrictions. Reports indicate women are disproportionately punished harshly for offenses such as “being disorderly” where men tend more often to be punished for violence.

Finding 44. Placement in solitary confinement, also known as segregation or restrictive housing, does profound physical and psychological harm. It may also result in a longer period of incarceration as people in segregation can lose good time-credits, do not have the same access to programming opportunities that can shorten their sentences, and do not have access to prison jobs.

Finding 45. Prisons inappropriately use segregation as a purported means of protection for LGBT people and people who report sexual assault, which amounts to additional punishment for these incarcerated people.

Finding 46. Incarcerated people who report past mental health challenges are more likely than other incarcerated people to be found in violation of prison rules and sent to restrictive housing.

Finding 47. Restricted housing is also often used disproportionately against people of color.

### ***Recommendations:***

Recommendation 26. Prisons should implement evidence-based discipline policies that are trauma-informed to avoid harsh punishments for minor infractions, recognizing significant harms that can result from placement in restrictive housing. Prisons should ensure restrictive housing is not used against people of color, LGBT people, and people with mental health challenges in a discriminatory manner based on these characteristics.

Recommendation 27. Prison officials should ensure the safety of LGBT people and people who report sexual assault without using punitive restrictive housing as the only alternative.

## **Training**

### ***Findings***

Finding 48. Prison officials, supervisors, and correctional officers are inconsistently trained on the prevalence of disproportionate punishment of incarcerated women and evidence-based disciplinary practices.

Finding 49. Prison policies not designed to address the high rates of historical trauma among incarcerated women lead to women being punished for behavior that results from trauma. Policies and practices designed to address trauma have resulted in less violence and need for discipline, such as the dramatic reduction in the use of segregation after such policies were implemented in Julia Tutwiler Prison for Women in Alabama following a settlement agreement in 2015.

Finding 50. BOP executive staff had not, as of February 2019, completed trauma-informed training required of staff at women's institutions. According to the DOJ Office of Inspector General, such training of executive staff is necessary to inform BOP policy regarding incarcerated women.

Finding 51. State departments of corrections report a need for additional staff trained in medical and mental health needs, programming for pregnant women, and sufficient staff to support visitation by families and friends. Trauma-informed training of staff has not been fully implemented in many states.

### ***Recommendations***

Recommendation 28. Prison officials should implement staff training to address the high rates of trauma among incarcerated women and adjust prison policies accordingly, including training on evidence-based discipline practices.

Recommendation 29. BOP executive staff should complete trauma-informed training as recommended by the Office of the Inspector General, and should continually train new staff as they begin employment.

## **Programming**

### ***Findings***

Finding 52. Incarcerated women report an overall lack of programming in varying professions which would create a meaningful impact to their lives so they can successfully reenter the community after prison.

Finding 53. Reports indicate vocational programming for incarcerated women can be limited to professions that are stereotypically coded female, such as cosmetology, and not include training in professions that are stereotypically coded male, such as welding.

Finding 54. Programs that are present are small in nature with long waiting lists.

Finding 55. BOP has extensive waitlists for programs designed and proven successful to address the prevalent trauma in women's lives.

Finding 56. Corrections officials report a lack of sufficient staff to implement the programs they see as necessary.

***Recommendations***

Recommendation 30. Prison officials should implement programming necessary to assist incarcerated women to develop skills they need to successfully re-enter the community. They should hire appropriate staff to manage these programs.

Recommendation 31. Congress and states should appropriate sufficient funds to implement necessary programming.

Recommendation 32. Prison officials should not limit vocational opportunities available to incarcerated women based on gender stereotypes. Vocational programs should not be coded female-only, but should include programs that will optimize job advancement, regardless of gender.

Recommendation 33. BOP should increase availability of its trauma-related programming for incarcerated women.

Recommendation 34. Prison officials and lawmakers should fund and implement sufficient trauma-related programming to meet the incredible rates of trauma reported by incarcerated women.

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## COMMISSIONERS' STATEMENTS, DISSENTS, AND REBUTTALS

### Statement of Commissioner David Kladney

A woman lays on a jail cell bunk in the throes of labor. She is alone, but is being watched by a jail guard via color video somewhere in the jail complex. She is moaning and then screaming in the pain of labor. Yet no one comes to assist. Finally, as the time of delivery approaches the not convicted 27 year-old, soon-to-be mother, sheds her own sweat pants and delivers the baby alone. Curiously, after the delivery the staff entered the room.<sup>1404</sup> In 2018, the Denver jail did not have a policy mandating that a prisoner giving birth to be taken to the hospital so that both mother and child receive appropriate care.

The Illinois prison system rounded up 200 women prisoners without notice. They corralled them into a gym cutting out small groups to the bathroom and a beauty shop where they were ordered to strip naked in full view of male guards and the prisoners remaining in the gym. They were ordered to stand and remove their tampons or sanitary napkins even though that left them bleeding standing in place in front of prison staff. They were ordered to lift their breasts and hair, cough, squat and finally bend over and expose their vaginal and anal cavities to staff and cadets taking part in a training exercise on how to visually search inmates without probing their body openings.<sup>1405</sup>

This humiliating and dehumanizing conduct by the government for the sake of a training exercise was found by the courts not to be a search in violation of fourth amendment proscriptions as there was no bodily intrusion.<sup>1406</sup> The women standing totally naked, exposed, and bleeding, not for anything they did, but for the sake of the state saving a few dollars by not hiring free person stand-ins for training is shameful.

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<sup>1404</sup> Jordan Culver, “‘They took no action’: Colorado Women Files Lawsuit After Prison Video Shows Her Giving Birth Alone in Jail,” *USA Today*, August 29, 2019, [www.usatoday.com/story/news/nation/2019/08/29/colorado-woman-who-gave-birth-alone-jail-cell-files-federal-lawsuit/2156850001](https://www.usatoday.com/story/news/nation/2019/08/29/colorado-woman-who-gave-birth-alone-jail-cell-files-federal-lawsuit/2156850001).

<sup>1405</sup> Meagan Flynn, “Female Inmates Were Forced to Expose Their Genitals in a ‘Training Exercise.’ It Was Legal, Court Rules,” *Washington Post*, July 19, 2019, <https://www.washingtonpost.com/nation/2019/07/19/female-inmates-were-forced-expose-their-genitals-training-exercise-it-was-legal-court-rules>.

<sup>1406</sup> *Henry v. Hulett*, 930 F. 3d 836 (7th Cir. 2019).

These recent examples of the treatment of women in prison and jails throughout our country may be anecdotal, but they are, regrettably, not isolated or unusual.<sup>1407</sup>

It shouldn't have taken an act of Congress<sup>1408</sup> to supply women in prison with free menstrual products, a feat most of the states have yet to match. (As of 2018 only 15 states supplied free feminine hygiene products.)<sup>1409</sup> For that matter, it shouldn't have been necessary for Congress to pass a law banning BOP from handcuffing and shackling women while giving birth. Other states and local jails still do.

I see a better way.

The Commission's study on Women in Prison covers the major issues faced by incarcerated women every day. I fully support the findings and recommendations of the Commission. They are not pie in the sky reforms that are impossible to implement. They do not make "doing time" easier on women nor do they adjust the authority dynamic between correctional officers and incarcerated people. What they do is correct wrongdoing. They change a culture of oppression into a culture of correction which will benefit incarcerated women and make the public safer.

Women are the fastest growing segment of the prison population. The reasons why can be debated; however, it is a fact. As our report explains, women's incarceration is growing almost twice as fast as incarceration for men, as since 1980 the number of women in prison increased by more than 700 percent compared to an approximately 400 percent increase for men.<sup>1410</sup>

From healthcare to prevention of sexual assault to having their parental rights terminated, the prison industry is failing these women and the public.

Prisoners do not leave their civil rights at the jailhouse gate. They maintain a host of rights, including, but not limited to freedom of religion, freedom from cruel and unusual punishment, the right to due process and access to the courts to redress grievances, and the right to be free from discrimination. They do forfeit some rights as well, such as prohibitions on warrantless search and seizure and freedom to travel among others.

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<sup>1407</sup> See, e.g., Sandra E. Garcia, "Ordeal of Woman Who Gave Birth in Florida Jail Cell Prompts Internal Investigation," *New York Times*, May 7, 2019, <https://www.nytimes.com/2019/05/07/us/woman-gives-birth-jail-cell.html>.

<sup>1408</sup> The First Step Act of 2018, P. L. 115-391, 132 Stat. 5194.

<sup>1409</sup> Derek Gilna, "New Policies for Federal and State Prisoners Guarantee Feminine Hygiene Products," *Prison Legal News*, April 2, 2018, <https://www.prisonlegalnews.org/news/2018/apr/2/new-policies-federal-and-state-prisoners-guarantee-feminine-hygiene-products/>.

<sup>1410</sup> Report at 10.

We found most women prisoners (90%) are low and minimum security. They, by much greater rates than men, enter the prison system after suffering extremely high rates of physical and sexual assault, and mental abuse.

To its credit, the U.S. Bureau of Prisons (BOP) has instituted trauma-informed training for its staff. This training enlightens the staff as to the different ways women in their custody have suffered trauma and the best approaches to those traumas. It works. Hopefully, the executive staff of BOP takes the training as suggested by the Office of Inspector General<sup>1411</sup> to see for themselves. States, cities and counties should also institute this type of training throughout their systems.

BOP also offers trauma-informed classes. It is a program used by women in BOP institutions which addresses the unique sexual, physical and mental abuse they suffered. The only issue is BOP does not offer near enough classes in this program so all those who want and need to attend can. More resources should be spent in this area for such a popular and effective program.

There is also an additional need for more and better trained staff to address medical and mental health needs of women. Many prisons are located in rural America, far from urban centers where specialized healthcare professionals are concentrated. The complex and different medical needs of women go unaddressed because of a lack of resources. Many women do not get annual exams in prisons, timely mammograms or sufficient mental health counseling. Even where good mental health treatment programs exist, the wait lists to enter them are extraordinarily long, causing more problems for the inmate and staff.

If the public and legislatures demand incarceration, they should be willing to provide the resources necessary to create effective incarceration.

Most women's prisons are located far from their homes. Women at the time of their incarceration are disproportionately the primary caretakers of minor children. BOP does not have institutions in every state. BOP has a policy to attempt to place women within 500 miles of their homes. Still quite a distance for a visit. However, what is not understandable is why more federal judges do not utilize 18 U.S.C. § 3563(b)(10).<sup>1412</sup> This is where the person being sentenced remains in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release.

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<sup>1411</sup> U.S. Department of Justice, Office of Inspector General, *Review of the Federal Bureau of Prisons' Management of its Female Population*, (Sept. 2018), <https://oig.justice.gov/reports/2018/e1805.pdf>.

<sup>1412</sup> 18 U.S.C. §3563 et. seq.

This allows people to remain, work, and participate in the community, with their children and families. It also increases opportunities to attend vocational rehabilitation or any number of positive rehabilitative activities the court may order under the supervision of parole and probation.

Throughout the different prison systems there are three main methods families communicate with incarcerated women – in-person visits, by telephone or video visits. The cost of these visits varies greatly from the federal government, state to state prison, and county and city jails. As noted above, many federal and state prisons are located far from urban areas. Free people can use FaceTime or internet phone lines at a very, very low cost. Many states make a profit from the communication between inmates and their families.<sup>1413</sup> They shouldn't. The Commission understands the need of the institutions to monitor communications for security and to collect evidence for pending offenses. This should be done at the lowest possible cost with communication made easily available to the incarcerated to maintain family relations since in-person visits are difficult and costly. Phone and video calls at no cost to incarcerated people should be possible. The technology is available.

Where video visits are allowed, prisons should not eliminate in-person visits to incarcerated people.<sup>1414</sup> This has occurred in some institutions. It is an alarming trend, again prioritizing cost savings over deeply important family connections.

Where women do not have other family members to care for their children when they are incarcerated, social services place them in foster care. This starts the clock running on possible termination of their parental rights. Where children are in foster care for 15 of the immediate past 22 months the law calls for termination of parental rights. However, some states have amended state law to prohibit termination on the sole basis of incarceration.<sup>1415</sup>

Prison systems should also assist incarcerated people with keeping family court dates, whether by video or in person and assist in locating and/or maintaining a list of counsel and organizations to assist in representation.

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<sup>1413</sup> Clint Smith, "While Prisoners Struggle to Afford Calls to Their Families, States Are Making a Profit. This Must Stop Now," *Time Magazine*, May 24, 2019, <https://time.com/5595475/prison-phone-calls-connecticut-law/>

<sup>1414</sup> Debra Cassens Weiss, "Another jail eliminates in-person visits and adopts 50-cent-a-minute video visitation," *ABA Journal*, July 24, 2018, [http://www.abajournal.com/news/article/another\\_jail\\_eliminating\\_free\\_in\\_person\\_visits\\_and\\_adopts\\_video\\_visitation](http://www.abajournal.com/news/article/another_jail_eliminating_free_in_person_visits_and_adopts_video_visitation)

<sup>1415</sup> Massachusetts, Missouri, New Hampshire, New Mexico, and Oklahoma. Report at 81.

A comprehensive review of disciplinary actions in prison has not been conducted, but the information we do have indicates women are given harsh sanctions for minor offenses.<sup>1416</sup> They are sent to solitary confinement for subjective and comparatively minor offenses, such as talking back. We heard from experts that in men's prisons the exact same disciplinary punishment, solitary confinement, tends to be imposed in response to violent conduct. The unfairness is obvious. Solitary confinement is an extremely harsh punishment in any circumstances. When it is the only resort prison officials have to even minor infractions, discipline policies and practices are in need of substantial adjustment. Prison officials who have rightfully recalibrated have seen safer prisons and avoided re-traumatizing incarcerated people through sending them to solitary confinement. More prison systems should follow suit.<sup>1417</sup>

Through the course of this project, we were reminded over and over not to forget the humanity of incarcerated people. This important call has been echoed by moral leaders throughout history, and bears repeating. It is all too easy to mentally categorize prisoners as people not worthy of our concern. We must resist this careless pattern of thinking and policy making.

As Justice Kennedy put it:

Even those of us who have specific professional responsibilities for the criminal justice system can be neglectful when it comes to the subject of corrections. The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.

We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away. To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering

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<sup>1416</sup> See the testimony of Jessica Pupovac, lead reporter and researcher on discipline and its disproportionate application in women's prisons. Briefing before the U.S. Commission on Civil Rights, "Women in Prison," Washington, D.C., February 22, 2019, page 206, line 10 to page 213, line 7, <https://www.usccr.gov/calendar/2019/02-22-Women-In-Prison-Transcript.pdf>.

<sup>1417</sup> See the testimony of Wendy Williams, Deputy Commissioner of Women's Services, Alabama Department of Corrections, referring to discipline at the Julia Tutwiler Prison for Women, and testimony of Leann K. Bertsch, Director of Corrections and Rehabilitation, North Dakota Department of Corrections. Briefing transcript at page 226, line 7 to page 228, line 10 <https://www.usccr.gov/calendar/2019/02-22-Women-In-Prison-Transcript.pdf>.

of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.<sup>1418</sup>

As the family of humankind, we must not forget the people we don't see because they are behind bars. Their rights to human dignity, safety, opportunity, and freedom from trauma are just as vital as the rights of people in free society. I am proud of the work of this Commission to draw attention to these rights and the realities many incarcerated women face where these rights are not upheld. I hope our work will lead to better prison conditions for women as their stories are heard and understood.

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<sup>1418</sup> Justice Anthony M. Kennedy, Address At The American Bar Association Annual Meeting, August 9, 2003, [https://www.supremecourt.gov/publicinfo/speeches/sp\\_08-09-03.html](https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html).

### Dissenting Statement and Rebuttal of Gail L. Heriot (Peter N. Kirsanow concurring)

If ever you are given the choice between spending time in a women's prison or a men's, I would advise you to choose the women's, no matter what your sex. Men's prisons tend to be much tougher places.<sup>1419</sup> This can be attributed to the fact that the crimes that lead to men's incarceration are typically more serious and violent than those of women. If one reflects upon it for a moment, it should surprise no one that men are more likely to be raped in prison than women.

The Commission nevertheless chose to study conditions at women's prisons rather than men's (or rather than both). There is nothing wrong with that, but I do hope the Commission will in the future be as concerned about the special problems faced by men in prisons as they are here about those faced by women.<sup>1420</sup>

I originally supported this proposal because it provided an opportunity to conduct original research on whether educational and vocational training resources are allocated fairly between men's and women's prisons. Men are overwhelmingly more likely to be incarcerated than women. For example, according to the latest statistics available, 92.9% of federal prisoners are men and 7.1% are women.<sup>1421</sup> It may therefore be easier for men's prisons to offer a wide variety of educational and vocational offerings than it is for women's prisons. To use a concrete example, imagine a men's prison with 1000 inmates existing beside a women's prison with 100 inmates. It's more likely that you'll find enough interested persons in the larger prison to make offering a particular educational or vocational offering worthwhile – whether that's a GED program or an electrician's

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<sup>1419</sup> See, e.g., Mark Fleischer and Jessica Kreinert, "The Culture of Prison Sexual Violence," National Institute of Justice, November 2006, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf>. Fleischer and Kreinert stated, "Five percent of women and 22.0 percent of men reported they were certain that at least one rape occurred in an institution they were housed in their life-time experience of imprisonment. Nine percent of women inmates and 21.3 percent of men inmates reported some worry or sense of threat caused by a potential rape" (260). See also Cindy Struckman-Johnson, David Struckman-Johnson, Lila Rucker, Kurt Bumby, and Stephen Donaldson, "Sexual coercion reported by men and women in prison," 33 J. Sex Research 67 (1996) ("The reported incident rate [of sexual coercion] was 22% for male and 7% for female respondents.").

<sup>1420</sup> In a previous report, *The Collateral Consequences of Imprisonment*, the Commission made an unusual claim--that lifetime bans on public benefits for individuals with drug convictions disproportionately harm women. Report at 72-73. This makes me wonder if the Commission can show equal concern for the concerns of both men and women. As Commissioner Kirsanow and I wrote at the time, "The problem is that prisoners are overwhelmingly male..., so the report's efforts to cast these bans as having an unfair bias against women don't quite work. The various statistics cited in the report--e.g., that female offenders are somewhat more likely to have been incarcerated for drugs than male offenders and that women are more likely to qualify for certain public benefits in the absence of a drug conviction--aren't mathematically enough to overcome the fact that prisoners are overwhelmingly male. We are a bit troubled--and perhaps a bit amused--that our staff took a topic (the collateral consequences of a criminal conviction) that overwhelmingly affects men, downplayed the significance of this disproportionality, and somehow managed to instead argue (incorrectly) that certain collateral consequences have a disparate impact on women."

<sup>1421</sup> BOP Statistics: Inmate Gender, available at [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp).



license or a course in air conditioner repair. Therefore, men may be more likely to get a broad range of opportunities in prison that will prepare them for good jobs once back outside. In addition, there is the problem that men and women tend to prefer different courses. All of this adds to the difficulty of determining whether the range of opportunities available to each group is equitable. For the most part, I don't think that this type of imbalance results from intentional discrimination, as opposed to economies of scale.<sup>1422</sup> But it may mean that policymakers should think carefully about how to ensure basic fairness.

Unfortunately, that opportunity to conduct original research wasn't taken. The report says almost nothing about specific educational and vocational offerings and how men's and women's prisons compare.<sup>1423</sup> To my mind at least, this is unfortunate. The Commission needs to do more basic original research. I note that at least one State Advisory Committee has looked more closely at allocation of resources between men's and women's prisons in its state.<sup>1424</sup> Other SACs may wish to take up this topic.

Here are some of my problems with what *did* go into this report.<sup>1425</sup>

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<sup>1422</sup> Schools face a similar challenge with regard to allocation of athletic resources. Men as a group are more interested in playing sports than women as a group are. A school that allocates spots on sports teams based on interest is therefore likely to allocate more spots to men's teams than women's. That will mean that some schools will wind up offering men's lacrosse but not women's or the like.

Title IX of the Educational Amendments of 1972 has been interpreted to require schools to offer equal athletic opportunities to men and women. A school that offers men's lacrosse but not women's may find itself the recipient of a Title IX complaint and the target of an investigation by the Department of Education's Office for Civil Rights. Many schools have therefore added women's teams (or dropped men's) to avoid costly investigations or litigation.

I am not aware of similar legal pressure being placed on prisons to have identical offerings or programs for both sexes. The Title IX sports experience suggests, though, that measures intended to bolster women can have the unintended consequence of decreasing opportunities for interested men. Policymakers would be advised to tread carefully here.

<sup>1423</sup> Some discussion of older research conducted by others appears starting at page 157 of the Report.

<sup>1424</sup> See New Hampshire State Advisory Committee to the United States Commission on Civil Rights, *Unequal Treatment In New Hampshire's State Prison System*, September 2011, available at [https://www.usccr.gov/pubs/docs/Unequal\\_Treatment\\_WomenIncarceratedinNHStatePrisonSystem.pdf](https://www.usccr.gov/pubs/docs/Unequal_Treatment_WomenIncarceratedinNHStatePrisonSystem.pdf).

<sup>1425</sup> I note also the Commission didn't interview any prison guards or officials who are involved with the day-to-day management of prisons. And while it did hear from some high-level administrators, that is not at all the same thing. Some policies that sound senseless turn out not to be when one learns more about the situation from those who deal directly with it.

The Commission also did not visit a women's prison. In my commissioners' statements to two recent reports on immigration detention, I have described discrepancies between the majority's lurid descriptions of conditions at detention facilities and what I actually saw with my own eyes when I visited. See Statement of Commissioner Gail Heriot in United States Commission on Civil Rights, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies* (2019), 137-41; Statement of Commissioner Gail Heriot in United States Commission on Civil



In advocating special treatment for women, the Commission overlooks potential equal protection issues. For example, the majority finds that not using assessment tools “calibrated for gender-specific characteristics” means that some women are placed in higher security facilities than is strictly necessary for safety.<sup>1426</sup> It therefore recommends adopting assessment tools that take sex into account. The problem is that this is a sex-based classification that may be an equal protection violation. It is possible that the government’s interest in not putting prisoners in overly restrictive settings qualifies as an interest sufficient to withstand intermediate scrutiny, and that these classification tools are a means that are sufficiently related to that interest to withstand intermediate scrutiny.<sup>1427</sup> If so, this particular sex-based classification would be lawful. But the report needs to make that case. It is troubling that a Commission on Civil Rights would just ignore this sort of legal problem.<sup>1428</sup>

The Commission also wanders into transgender issues without serious analysis.<sup>1429</sup> Figuring out where to put transgender individuals in a sex-binary system is difficult. I see four basic options. One is to treat all transgender persons as members of their birth sex. But some transgender

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Rights, With Liberty and Justice For All: The State of Civil Rights at Immigration Detention Facilities (2015) at 172-219.

Along the same lines, I recognize the gravity of some of the issues that Commissioner Kladney discusses in his Commissioner’s Statement. It is important to remember the basic humanity and dignity of all persons, even those who have committed terrible crimes, as he exhorts us to do in his Statement. At the same time, I fear he is overconfident about the level of wisdom and insight that we as a federal body can bring to bear on the problems of managing prisons. Are we really, without even so much as having visited a women’s prison, in a strong position to give micromanaging advice on tampon distribution? (My apologies in advance for making Commissioner Kirsanow blush.)

<sup>1426</sup> See Finding 17.

<sup>1427</sup> *Craig v. Boren*, 429 U.S. 190 (1976)(applying “intermediate scrutiny” to differential treatment based on sex).

<sup>1428</sup> The opposite argument was made in *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). In that case, the Los Angeles Department of Water and Power knew that, on average, women live longer than men. It thus took that fact into consideration in requiring that women pay somewhat more than men for the same level of retirement benefits. The thought was that on average it will even out, since women will collect benefits longer than men due to their longer lives. The problem is that for any individual woman or man, this may or may not turn out to be true. The Supreme Court held that because Title VII prohibits sex from being taken into consideration in employment benefits, this was a violation of the law.

The same logic applies here (though here the claim would be an equal protection claim under the Constitution and hence subject to intermediate scrutiny). See *Craig v. Boren*, 429 U.S. 190 (1976). The Commission’s failure even to recognize the issue suggests to me that its members take the position that taking sex into account is fine if it benefits women, but not if it benefits men. This should be an embarrassing argument to make.

<sup>1429</sup> The majority’s excitement about being on the “right side of history” with regard to LGBT issues sometimes leads it to do strange things. For example, on page 56, it complains about bans on sexual activity in prison and their negative effects on lesbian and bisexual women in prison. I see good reasons, unrelated to anti-gay bias, for such rules. Concerns about sexual coercion can be very serious. Also there’s not much privacy in prison, so preventing other people from having to witness intimate behavior can be a consideration.

individuals, especially those who have undergone surgery or are taking hormones, may no longer fit in well in a single-sex prison with members of their birth sex. A second option (the one endorsed in this report's Findings and Recommendations) is to classify all transgender individuals as members of their preferred sex. But this approach may not work well for transgender persons who do not clearly identify with one particular sex ("two spirit" or the like) or who have the anatomical features of their birth sex. There is also the problem of opportunism on the part of biological males who wish to be transferred to women's prison because they believe that these facilities are safer or otherwise preferable.<sup>1430</sup> A third approach is to have some person (or committee of persons) study individual cases and then recommend an assignment. Finally, a fourth option would be to create a specialized facility or part of a facility for transgender persons.

I don't claim to know what the right answer is here. But I'm not convinced that the Commission does either. The report doesn't weigh the tradeoffs in any kind of thoughtful way. Instead, it adopts the orthodox (and unscientific) "progressive" position that anyone who identifies as a woman is a woman, full stop, and that anyone who identifies as a man is a man, full stop. To question any such assertion, or even to acknowledge that cisgender women and male-to-female transgender persons have meaningfully different experiences of femininity, they dismiss as bigotry.

Finally, I have reservations about the findings and recommendations under "Adequacy of Legal Protections and Federal Action." I agree that it is important to respect the individual rights of prisoners and that violations should be corrected swiftly. However, the report laments "legal barriers" (otherwise known as "democratically enacted laws") such as "administrative exhaustion and limits on attorneys' fees" and "high substantive standards of proof."<sup>1431</sup> Prisoners can be a litigious group. I observed some of this when delving into complaints for an earlier Commission report on religious liberty in prison. As I discuss in my statement to that report, the Prison Litigation Reform Act was passed in part because of concerns about the high volume of prisoner complaints of dubious merit.<sup>1432</sup> A balance needs to be struck between making it easy for prisoners to vindicate their rights while deterring frivolous and vexatious claims. My colleagues haven't given me reason to conclude that the current system is out of balance.

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<sup>1430</sup> Note that gender and sexual orientation are not the same thing. A transgender woman (i.e. an anatomical male who psychologically identifies as a woman) may also be sexually attracted to women. Hence a finding that a transgender woman has been having sexual relations with women prisoners is not necessarily a ground for finding that the person is not transgender after all.

<sup>1431</sup> Finding 10.

<sup>1432</sup> Statement of Gail Heriot in United States Commission on Civil Rights, *Enforcing Religious Freedom in Prison* (2008) at 126.

## **Rebuttal of Commissioner David Kladney**

Vocational and educational training in prison is vital to the success of the women leaving prison and lowering the recidivism rate. When people have employment options we have safer communities.

Commissioner Heriot's initial support of the project was welcome, but her follow-up in seeking "original research" failed. Unfortunately, when the briefing came, she didn't provide any input. At the Commission's day-long briefing on this topic, the record reflects a lack of engagement with the testifying experts on Commissioner Heriot's part. Ultimately Commissioner Heriot did not support the report.

Commissioner Heriot states she supported this project as it provided an opportunity to conduct original research on "whether educational and vocational training resources are allocated fairly between men's and women's prisons" as "men are overwhelmingly more likely to be incarcerated than women."

We adopted the research plan for the Women in Prison project on December 7, 2018. At that meeting, Commissioner Heriot voiced her concern regarding economies of scale between men and women's in prison as it is acknowledged that 95% of prisoners are men. I noted in response that throughout this project we would engage with the federal Bureau of Prisons and would seek to have a representative testify before us. Additionally, during the course of this project, we sent document requests and interrogatories to the BOP.

Dr. Alix McLearen, of BOP, did attend the briefing held by the commission on February 22, 2019. She was the first witness on the first panel when the Commission convened. Commissioner Heriot did not ask her, the expert sent from BOP, any questions about education or vocational education in BOP prisons. Commissioner Heriot sat through 21 expert witnesses and didn't ask a single question about anything. If she had asked, Dr. McLearen would have told her BOP has a list of each educational and vocational programs offered, but, for some unknown reason, they do not keep track of the number of individuals who attend each program in each prison. Additionally, we requested a list of the programs offered by BOP in our interrogatories. BOP provided extensive information, but not the numbers of individuals who had completed each program, a metric it apparently does not track.<sup>1433</sup>

Ultimately, Commissioner Heriot sat mute during the entire process. She did not support the Commission's report, findings and recommendations when there was a real opportunity to join in the process.

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<sup>1433</sup> See Attachments 12a and 12b to BOP's Interrogatory Responses, on file with the Commission.

At the briefing, her only participation was to offer a suggestion to panelists for an avenue for research rather than engaging in the Commission's information gathering process.

She stated:

COMMISSIONER HERIOT: I think I have a suggestion. And maybe this has already been done. But a couple of people have mentioned this notion that prisoners who get visitors do better when they get out than prisoners who haven't had visitors. And the problem with that is you don't know whether the causation runs one way or the other. It may be that the sort of person that nobody wants to visit is the sort of person that doesn't do very well when they get out. So what you could do to test that is to look at the population of prisoners whose home is very far away, because the reason they're not getting visited is going to be disproportionate because it's hard to, it's hard for the people to get to them, and compare that to the population who are very close to their families. And if the family isn't coming, it could signal something that's different from what, you know, from what you're thinking, and compare the gap in those two. And I think that would be useful research.<sup>1434</sup>

In her statement, Commissioner Heriot opines the lack of programs in women's prisons may exist because it is easier and most cost effective to offer a wider variety of programs in men's facilities because 92.7% of men and 7.1% women currently make up the incarcerated population.

Mere speculation.

If size matters, Commissioner Heriot should compare size of women's facility to that of a men's facility before she proffers a "concrete example" imagining a men's prison of 1,000 and a women's prison of 100 inmates. In short, she states it is more likely a broad range of vocational and educational programs would be offered to men because of economies of scale.

Oh, how wrong.

In my home state of Nevada there are six men's prisons of differing populations and one women's prison. The women's prison, Florence McClure Women's Correctional Facility, has a capacity of 950 people. According to the Nevada Department of Corrections (NDOC) website the state offers self-help, substance abuse programs, and employment skills that employers expect employees to have to retain employment.<sup>1435</sup> They also offer Adult High School diploma classes. The only vocational program listed by NDOC for women is a cosmetology program "to recruit, teach and

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<sup>1434</sup> Briefing Transcript at p. 233-234, <https://www.usccr.gov/calendar/2019/02-22-Women-In-Prison-Transcript.pdf>.

<sup>1435</sup> State of Nevada Department of Corrections, <http://doc.nv.gov/>.

train each inmate that is approved for this program, to master the art and sciences of the cosmetology industry.” As we noted in the report, offering only cosmetology classes to women is an example of programming likely based on stereotypical assumptions about women’s vocational preferences.<sup>1436</sup> The educational program consists of classes to obtain an adult high school diploma or a high school equivalency certificate.

By contrast, the Lovelock men’s facility (capacity 1680), offers dry cleaning, culinary food service, computers, horticulture, automotive maintenance and repair. In addition, a mattress and a garment factory exists as a prison industry. Educational programs provide an “opportunity to enroll in educational classes in pursuit of a GED, high school diploma or college degrees.”

The Northern Nevada Correctional Center (capacity 1619) offers Auto mechanics/auto shop, computers, and dry cleaning. Prison industries offers wood shop, metal shop, paint shop and upholstery. Educational programs are listed as high school diploma by the Carson City School District and some college courses by Western Nevada Community College.

Clearly, with no significant difference in facility size, critical mass is present at the women’s facility to offer more and diverse vocational programs.

This is a factual approach which confirms the testimony of Dr. McLearen of the BOP, Dr. Wendy Williams, the Alabama Deputy Commissioner for Women’s Services, Leann K. Bertsch, the North Dakota Director of Corrections and Rehabilitation, and others who testified before the commission that more diverse educational and vocational programs should be offered women in prison to put their rehabilitation on an equal footing with men in prison.<sup>1437</sup> This is not a matter of economies of scale, it is a matter of discrimination against women.

Commissioner Heriot also comments at footnote 7 of her statement that, “the Commission didn’t interview any prison guards or officials who are involved in the day-to-day operation management of prisons. And, while it did hear from some high-level administrators, that is not at all the same thing. Some policies that sound senseless turn out not to be when one learns more about the situation from those who deal directly with it.”

I believe the record we gathered very much reflects deep knowledge of day-to-day management of prisons. For example, Dr. Williams began her career as a correctional officer trainee in 1987. She has since moved up the ranks from correctional officer to captain. She was appointed the Director of training and ultimately Deputy Director for Women’s Services. Dr. McLearen has worked as a psychologist in three BOP institutions. Furthermore, their testimony revealed personal

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<sup>1436</sup> Report at 159.

<sup>1437</sup> See, e.g., Briefing Transcript at 20, 202, 219, <https://www.usccr.gov/calendar/2019/02-22-Women-In-Prison-Transcript.pdf> (describing a historic lack of programming for women and the steps correctional systems are taking to address this issue).

knowledge of the practical realities of the changes they implemented and a thorough explanation of the metrics they use to measure the success of those policies. Additional experts also shared their personal experience from working inside prisons. I am not aware that Commissioner Heriot suggested any additional persons, guards or otherwise, the Commission should hear from to address her concern. How can she be heard to complain now?

Commissioner Heriot then goes on to rail against the use of a classification tool to be used for women that is different from the instrument used for men. These instruments, among other things, are used to determine the security level the inmate is held. An improper higher classification limits/prohibits earning good time credits and educational and programing participation.

An improper classification can cause great harm.

The Commission's research and the testimony we received at the briefing shows those institutions using the single sex classification tool for both sexes will either modify the results for women on what that institution believes it has seen in the past regarding the difference between men and women (on an ad hoc basis) and adjust the classification or will just go by the unmodified results of the instrument. Either approach is not the best practice. They unfairly discriminate against women. The report is replete with research on this issue.<sup>1438</sup>

In my opinion, putting prisoners in overly restrictive classifications qualifies as an interest sufficient to withstand scrutiny under equal protection. Commissioner Heriot's example in footnote 10 is off the mark. An employment benefits case is a far cry from a situation that effects someone's rehabilitation and freedom from incarceration.

Commissioner Heriot also opines that the Commission is not in a position to offer recommendations on the placement and treatment of transgender incarcerated people. The Commission has in the past and will continue to stand for the humanity of transgender people and support policies that keep them from harm. Gender identity should never be a reason someone's safety should be at risk, and there is much work to be done to make this a reality for transgender people. The Commission should not shirk its duty to identify policies that fail to do so. Commissioner Heriot's concern about "opportunistic males" falsely claiming transgender status to secure transfer to a women's facility does not appear to be based on any documented cases. As Commissioner Heriot knows, transgender status must have a basis in fact.

Finally, Commissioner Heriot objects to our finding that certain legal processes that apply only to incarcerated people, in reality, act as a barrier to vindicating their rights. Having spent three years litigating cases for the Nevada Attorney General's Office and being attached to the criminal division, I can attest that prisoners can be a litigious group. The Prison Litigation Reform Act was passed to cut down on frivolous litigation. It is not contested that it also prevents some individuals

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<sup>1438</sup> See Report at 63-65.

with meritorious cases from seeking justice. In my opinion, as it has developed, it is over-the-top when it comes to short administrative complaint and appeal deadline times, the number of administrative appeals necessary before the exhaustion of administrative process and being allowed to file in court. (Then, of course, the court will review the merits of the filing on its face before allowing the case to proceed.) It also restricts allowable attorney's fees, which would only be available in meritorious cases. Incarcerated people have valid legal claims, and they do face challenges, barriers even, they must overcome to have them heard. Such a statement should not be controversial. We should recalibrate to deter frivolous claims, but give valid claims an opportunity to be heard.

Commissioner Peter Kirsanow joined Commissioner Heriot's statement upon which I have commented above. However, he expressed his own opinions on the briefing in his occasional column which appears in the National Review's The Corner.<sup>1439</sup>

There he enlightened us that progressive witnesses, one after another, proclaimed that men and women are different. He was shocked that the heavens did not cave in as a result. He failed to note the witnesses spoke of the realities of differences in healthcare needs. They testified women require different reproductive and preventative healthcare than men. The witnesses also spoke to empirical research on differing rates of psychological and physical abuse prior to landing in the prison system. Statistically women report such abuse at much greater rates than men.

He failed to report to his readers that the witnesses felt women in prison were denied and should have the same opportunities as men when it comes to educational and vocational training.

Then he launched into a disingenuous attack in an attempt to paint all the 21 witnesses with the proverbial "soft on crime" brush, stating, "This momentary descent into reality (healthcare differences between women and men) was immediately overshadowed, however, by witness demands that the United States justice system cease incarcerating women. *All* female prisoners should be released." He is referring to the statement of one witness, vastly overselling the prevalence of this one person's position. The transcript of our briefing is public.<sup>1440</sup>

These Commissioners missed the mark. They could have contributed to the protection and advancement of the civil rights narrative for women in prison. They chose not to.

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<sup>1439</sup> <https://www.nationalreview.com/corner/breaking-men-and-women-are-different/>

<sup>1440</sup> Briefing Transcript, <https://www.usccr.gov/calendar/2019/02-22-Women-In-Prison-Transcript.pdf>.

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## APPENDICES

### Appendix A: Changes in State Prison Populations by Gender, 2000–2016<sup>1441</sup>

Jurisdiction	Gender	2000	2016	Percent Change in Prison Population 2000- 2016
National Statistics (U.S. Total)		1,334,174	1,458,173	9%
	Male	1,249,130	1,352,684	8%
	Female	85,044	105,489	24%
Alabama		26,034	27,799	7%
	Male	24,244	25,593	6%
	Female	1,790	2,206	23%
Alaska		2,128	2,089	-2%
	Male	2,031	1,982	-2%
	Female	97	107	10%
Arizona		25,412	40,849	61%
	Male	23,623	37,131	57%
	Female	1,789	3,718	108%
Arkansas		11,851	17,476	47%
	Male	11,084	16,111	45%
	Female	767	1,365	78%
California		160,412	130,340	-19%
	Male	149,815	124,443	-17%
	Female	10,597	5,897	-44%
Colorado		16,833	19,862	18%
	Male	15,500	17,963	16%
	Female	1,333	1,899	42%
Connecticut		13,155	10,365	-21%
	Male	12,365	9,804	-21%
	Female	790	561	-29%
Delaware		3,937	4,090	4%
	Male	3,692	3,889	5%
	Female	245	201	-18%
Florida		71,318	99,974	40%
	Male	67,213	93,111	39%

<sup>1441</sup> See Bureau of Justice Statistics Correctional Statistical Analysis Tool (CSAT)—Prisoners (Custom Tables), 2000 State Prison Population (Year-end Jurisdictional Population with Sentence Greater than 1 year) available at <https://www.bjs.gov/index.cfm?ty=nps> (accessed Oct. 20, 2019); Bureau of Justice Statistics Correctional Statistical Analysis Tool (CSAT)—Prisoners (Custom Tables), 2016 State Prison Population (Year-end Jurisdictional Population with Sentence Greater than 1 year) available at <https://www.bjs.gov/index.cfm?ty=nps> (accessed Oct. 20, 2019); The percent change was calculated by Commission staff.

Jurisdiction	Gender	2000	2016	Percent Change in Prison Population 2000- 2016
	Female	4,105	6,863	67%
Georgia		44,141	53,064	20%
	Male	41,390	49,324	19%
	Female	2,751	3,740	36%
Hawaii		3,553	3,629	2%
	Male	3,175	3,271	3%
	Female	378	358	-5%
Idaho		5,535	7,376	33%
	Male	5,042	6,416	27%
	Female	493	960	95%
Illinois		45,281	43,657	-4%
	Male	42,432	41,044	-3%
	Female	2,849	2,613	-8%
Indiana		19,811	25,530	29%
	Male	18,364	23,325	27%
	Female	1,447	2,205	52%
Iowa		7,955	8,998	13%
	Male	7,363	8,181	11%
	Female	592	817	38%
Kansas		8,344	9,628	15%
	Male	7,840	8,831	13%
	Female	504	797	58%
Kentucky		14,919	23,018	54%
	Male	13,858	20,077	45%
	Female	1,061	2,941	177%
Louisiana		35,207	35,646	1%
	Male	32,988	33,665	2%
	Female	2,219	1,981	-11%
Maine		1,635	1,828	12%
	Male	1,573	1,675	6%
	Female	62	153	147%
Maryland		22,490	19,821	-12%
	Male	21,429	19,010	-11%
	Female	1,061	811	-24%
Massachusetts		9,479	8,494	-10%
	Male	9,250	8,140	-12%
	Female	229	354	55%
Michigan		47,718	41,122	-14%
	Male	45,587	38,880	-15%
	Female	2,131	2,242	5%
Minnesota		6,238	10,592	70%
	Male	5,870	9,818	67%
	Female	368	774	110%

<b>Jurisdiction</b>	<b>Gender</b>	<b>2000</b>	<b>2016</b>	<b>Percent Change in Prison Population 2000- 2016</b>
Mississippi		19,239	18,666	-3%
	Male	17,709	17,397	-2%
	Female	1,530	1,269	-17%
Missouri		27,519	32,461	18%
	Male	25,531	29,124	14%
	Female	1,988	3,337	68%
Montana		3,105	3,814	23%
	Male	2,799	3,405	22%
	Female	306	409	34%
Nebraska		3,816	5,235	37%
	Male	3,560	4,825	36%
	Female	256	410	60%
Nevada		10,063	13,637	36%
	Male	9,217	12,403	35%
	Female	846	1,234	46%
New Hampshire		2,257	2,818	25%
	Male	2,137	2,591	21%
	Female	120	227	89%
New Jersey		29,784	19,786	-34%
	Male	28,134	18,952	-33%
	Female	1,650	834	-49%
New Mexico		4,666	6,972	49%
	Male	4,322	6,276	45%
	Female	344	696	102%
New York		70,199	50,620	-28%
	Male	66,919	48,356	-28%
	Female	3,280	2,264	-31%
North Carolina		27,043	34,596	28%
	Male	25,654	32,085	25%
	Female	1,389	2,511	81%
North Dakota		994	1,779	79%
	Male	940	1,568	67%
	Female	54	211	291%
Ohio		45,833	52,175	14%
	Male	43,025	47,581	11%
	Female	2,808	4,594	64%
Oklahoma		23,181	26,486	14%
	Male	20,787	23,527	13%
	Female	2,394	2,959	24%
Oregon		10,553	15,150	44%
	Male	9,959	13,846	39%
	Female	594	1,304	120%
Pennsylvania		36,844	49,000	33%

Jurisdiction	Gender	2000	2016	Percent Change in Prison Population 2000- 2016
	Male	35,266	46,188	31%
	Female	1,578	2,812	78%
Rhode Island		1,966	2,030	3%
	Male	1,902	1,962	3%
	Female	64	68	6%
South Carolina		21,017	20,371	-3%
	Male	19,716	18,981	-4%
	Female	1,301	1,390	7%
South Dakota		2,613	3,820	46%
	Male	2,413	3,323	38%
	Female	200	497	149%
Tennessee		22,166	28,203	27%
	Male	20,797	25,481	23%
	Female	1,369	2,722	99%
Texas		158,008	157,903	0%
	Male	146,374	144,928	-1%
	Female	11,634	12,975	12%
Utah		5,541	6,181	12%
	Male	5,180	5,776	12%
	Female	361	405	12%
Vermont		1,313	1,229	-6%
	Male	1,269	1,146	-10%
	Female	44	83	89%
Virginia		29,643	37,813	28%
	Male	27,658	34,704	25%
	Female	1,985	3,109	57%
Washington		14,666	19,019	30%
	Male	13,658	17,377	27%
	Female	1,008	1,642	63%
West Virginia		3,795	7,162	89%
	Male	3,508	6,286	79%
	Female	287	876	205%
Wisconsin		20,336	22,144	9%
	Male	18,977	20,734	9%
	Female	1,359	1,410	4%
Wyoming		1,680	2,374	41%
	Male	1,524	2,088	37%
	Female	156	286	83%

## Appendix B: BOP Types of Facilities for Women in Federal Prison

The BOP describes its housing types as:

- Minimum security institutions, which is also referred to as Federal Prison Camps (FPC), have dormitory-like housing, low staff-to-inmate ratios, and limited or no perimeter fencing.<sup>1442</sup>
- Low security institutions, also known as Federal Correctional Institutions (FCI) or Federal Satellite Lows (FSL), have double-fenced perimeter fencing; have higher staff-to-inmate ratios than minimum-security facilities, and the housing accommodations are either dormitory style or cell-style.<sup>1443</sup>
- Federal Medical Centers (FMC) house sentenced inmates of all security levels who have severe or long-lasting medical problems.<sup>1444</sup>
- Administrative facilities are institutions that have unique missions.<sup>1445</sup> Women in federal prison are usually held in administrative facilities either because they are receiving treatment for serious or chronic medical problems, or a small number of female inmates are classified as high risk and housed at the Federal Medical Center Carswell in Fort Worth, Texas.<sup>1446</sup>
  - Administrative facilities also include transfer centers, which houses inmates in transit to other BOP facilities, and detention centers that are designed for the temporary incarceration of pretrial detainees.<sup>1447</sup> Dissimilar from institutions designed for long-term incarceration, detention and transfer centers house both female and male inmates in the same facility.<sup>1448</sup>

The next Appendix provides a description and breakdown of the types of facilities that women in federal custody are currently housed in.

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<sup>1442</sup> Federal Bureau of Prisons, *About Our Facilities*, [https://www.bop.gov/about/facilities/federal\\_prisons.jsp](https://www.bop.gov/about/facilities/federal_prisons.jsp) (accessed Oct.20, 2019) (hereinafter Federal Bureau of Prisons, *About Our Facilities*).

<sup>1443</sup> Ibid.

<sup>1444</sup> Ibid.

<sup>1445</sup> Ibid.

<sup>1446</sup> DOJ, *Review of the Federal Bureau of Prison's Management of Its Female Inmate Population*, p. 4; see also McLearen Testimony, p. 105 (noting that there currently 7 women in federal prison that a classified as high risk); see also Appendix D.

<sup>1447</sup> DOJ, *Review of the Federal Bureau of Prisons' Management of Its Female Inmate Population*, pp. 3-4.; see also U.S. Department of Justice, "Female Offenders."

<sup>1448</sup> DOJ, *Review of the Federal Bureau of Prisons' Management of Its Female Inmate Population*, pp. 3-4.

### Appendix C: Women in Federal Prison Housed Over 500 Miles from Listed Legal Residence (for U.S. Residents), by Institution

Name of Location	Location of Facility	Number of Female Inmates Greater Than 500 Miles from Legal Residence
ALD—Federal Prison Camp Alderson	Alderson, WV	123
ALI—Federal Correctional Institution Aliceville	Aliceville, AL	411
BRO—Metropolitan Detention Center Brooklyn	Brooklyn, NY	3
BRY—Federal Prison Camp Bryan	Bryan, TX	135
CCC—Metropolitan Correctional Center Chicago	Chicago MCC	5
COM—Federal Correctional Institute Coleman Medium	Sumterville, FL	88
CRW—Federal Medical Center Carswell	Fort Worth, TX	647
DAN—Federal Correctional Institute Danbury	Danbury, CT	28
DUB—Federal Correctional Institution Dublin	Dublin, CA	465
GRE—Federal Correctional Institution Greenville	Grenville, IL	70
GUA—Guaynabo Metropolitan Detention Center	Guaynabo, PR	7
HAF—Federal Correctional Institution Hazelton	Bruceton Mills, WV	116
HON—Federal Detention Center Honolulu	Honolulu, HI	6
HOU—Federal Detention Center Houston	Houston, TX	6
LEX—Federal Medical Center Lexington	Lexington, KY	20
LOS—Los Angeles Metropolitan Detention Center	Los Angeles, CA	1
MIM—Federal Detention Center Miami	Miami, FL	9
NYM—Metropolitan Correctional Center New York	New York, NY	4

Name of Location	Location of Facility	Number of Female Inmates Greater Than 500 Miles from Legal Residence
OKL—Federal Transfer Center Oklahoma City	Oklahoma City, OK	30
PEK—Federal Correctional Institution Pekin	Pekin, IL	38
PHL—Federal Detention Center Philadelphia	Philadelphia, PA	8
PHX—Federal Correctional Institution Phoenix	Phoenix, AZ	65
SDC—Metropolitan Correctional Center San Diego	San Diego, CA	1
SET—Federal Detention Center Seatac	Seattle, WA	41
TAL—Federal Correctional Institution Tallahassee	Tallahassee, FL	248
TCN—Federal Correctional Institution Tucson	Tucson, AZ	45
VVM—Federal Correctional Institution Victorville Medium II	Victorville, CA	0
WAS—Federal Correctional Institution Waseca	Waseca, MN	257
TOTAL		2,877 (25.7% of the Female Population)

**Source:** BOP Response to USCCR Interrogatory No. 3.

**Appendix D: BOP Institutions for Women**

<b>Name of Location</b>	<b>Detail Facility</b>	<b>Security Level(s)<sup>1449</sup></b>	<b>Number of Female Inmates</b>
ALD—Federal Prison Camp Alderson	Alderson FPC	Minimum	899
ALI—Federal Correctional Institution Aliceville	Aliceville FCI	Low	1,337
	Aliceville FCI (Satellite Camp)	Minimum	257
BRO—Metropolitan Detention Center Brooklyn	Brooklyn MDC	Administrative	37
BRY—Federal Prison Camp Bryan	Bryan FPC	Minimum	858
CCC—Metropolitan Correctional Center Chicago	Chicago MCC	Administrative	28
COM—Federal Correctional Institute Coleman Medium	Coleman Medium FCI (Satellite Camp)	Minimum	502
CRW—Federal Medical Center Carswell	Carswell FMC (Administrative)	High	7
	Carswell FMC (Cron Care, Mental Health, Medical Surgery)	Administrative	271
	Carswell FMC (Low)	Low	987
	Carswell (Satellite Camp)	Minimum	368
DAN—Federal Correctional Institute Danbury	Danbury FCI	Low	117
	Danbury FCI (Satellite Camp)	Minimum	167
DUB—Federal Correctional Institution Dublin	Dublin FCI	Low	1,019
	Dublin FCI (Satellite Camp)	Minimum	207
GRE—Federal Correctional Institution Greenville	Grenville FCI (Satellite Camp)	Minimum	327
GUA—Guaynabo Metropolitan Detention Center	Guaynabo MDC (Cadre)	Low	3
	Guaynabo MDC	Minimum	72
HAF—Federal Correctional Institution Hazelton	Hazelton FCI	Low	564
HON—Federal Detention Center Honolulu	Honolulu FDC (Cadre)	Low	48

<sup>1449</sup> Federal Bureau of Prisons, *About Our Facilities*.



Name of Location	Detail Facility	Security Level(s) <sup>1450</sup>	Number of Female Inmates
HOU—Federal Detention Center Houston	Houston FDC	Administrative	56
	Houston FDC (Sht Trm Sen)	Low	32
LEX—Federal Medical Center Lexington	Lexington FMC (Satellite Camp)	Minimum	236
LOS—Los Angeles Metropolitan Detention Center	Los Angeles MDC	Administrative	54
MIM—Federal Detention Center Miami	Miami FDC	Administrative	73
	Miami FDC (Cadre)	Low	22
NYM—Metropolitan Correctional Center New York	New York MCC	Administrative	39
OKL—Federal Transfer Center Oklahoma City	Oklahoma City FTC	Administrative	56
PEK—Federal Correctional Institution Pekin	Pekin FCI (Satellite Camp)	Minimum	240
PHL—Federal Detention Center Philadelphia	Philadelphia FDC	Administrative	31
	Philadelphia FDC (cadre)	Low	83
PHX—Federal Correctional Institution Phoenix	Phoenix FCI (Satellite Camp)	Minimum	286
SDC—Metropolitan Correctional Center San Diego	San Diego MCC	Administrative	39
SET—Federal Detention Center Seatac	Seatac FDC	Administrative	21
	Seatac FDC (Cadre)	Low	143
TAL—Federal Correctional Institution Tallahassee	Tallahassee FCI	Low	705
TCN—Federal Correctional Institution Tucson	Tucson FCI	Administrative	35
VVM—Federal Correctional Institution Victorville Medium II	Victorville Medium II FCI (Satellite Camp)	Minimum	295
WAS—Federal Correctional Institution Waseca	Waseca FCI	Low	527
	Waseca FCI (Cadre)	Minimum	136
Total Number of Female Inmates			11,184

<sup>1450</sup> Federal Bureau of Prison, *About Our Facilities*.

**Appendix E: Frequency of Contact with Children Among State and Federal Inmates, by Gender and Type of Contact, 2004<sup>1451</sup>**

Any Kind of Contact with Minor Children						
Frequency of Contact	Parents in State Prison			Parents in Federal Prison		
	Total	Male	Female	Total	Male	Female
Daily/Almost Daily	9.1%	8.7%	14.1%	18.8%	18.3%	26.9%
At Least Once a Week	30.8%	29.8%	41.6%	46.1%	45.9%	48.2%
At Least Once a Month	22.3%	22.7%	18.1%	17.0%	17.1%	14.7%
Less Than Once a Month	16.5%	16.9%	11.2%	9.4	9.6%	3.9%
Never	21.4%	21.9%	15.0%	8.8%	9.1%	3.9%
Telephone Contact with Minor Children						
Frequency of Contact	Parents in State Prison			Parents in Federal Prison		
	Total	Male	Female	Total	Male	Female
Daily/Almost Daily	5.3%	5.0%	8.6%	16.9%	16.5%	23.4%
At Least Once a Week	17.5%	17.1%	22.4%	40.9%	40.7%	43.7%
At Least Once a Month	15.6%	15.6%	15.7%	17.2%	17.2%	16.9%
Less Than Once a Month	15.0%	15.3%	12.4%	10.1%	10.2%	7.4%
Never	46.6%	47.1%	40.9%	14.9%	15.4%	8.5%
Mail Contact with Minor Children						
Frequency of Contact	Parents in State Prison			Parents in Federal Prison		
	Total	Male	Female	Total	Male	Female
Daily/Almost Daily	4.5%	4.3%	6.9%	4.2%	4.0%	7.7%
At Least Once a Week	24.0%	23.0%	35.3%	29.0%	28.3%	40.4%
At Least Once a Month	23.2%	23.3%	22.5%	31.0%	31.2%	28.2%
Less Than Once a Month	17.9%	18.3%	13.0%	19.8%	20.2%	12.9%
Never	30.4%	31.1%	22.3%	16.0%	16.3%	10.7%
Personal Visits Contact with Minor Children						
Frequency of Contact	Parents in State Prison			Parents in Federal Prison		
	Total	Male	Female	Total	Male	Female
Daily/Almost Daily	0.6%	0.6%	*	*	*	*
At Least Once a Week	5.9%	5.7%	7.7%	4.6%	4.4%	7.6%
At Least Once a Month	12.5%	12.3%	14.6%	14.7%	14.7%	15.5%
Less Than Once a Month	22.5%	22.7%	19.7%	35.6%	35.9%	31.5%
Never	58.5%	58.6%	57.7%	44.7%	44.7%	44.6%
Estimated Number of Parents	636,500	585,200	51,100	81,300	76,200	5,100

<sup>1451</sup> DOJ, *Parents in Prison and Their Minor Children*, p. 18.

## Appendix F: Number of Staff Members in Federal Prisons for Women, by Location and Gender

Name of Location	Total of Staff	Number of Female Staff	Number of Male Staff
ALD—Federal Prison Camp Alderson	147	89 (60.5 %)	58 (39.5%)
ALI—Federal Correctional Institution Aliceville	257	113 (44 %)	144 (56%)
BRO— Metropolitan Detention Center Brooklyn	421	138 (32.8%)	283 (67.2%)
BRY—Federal Prison Camp Bryan	114	67 (58.8%)	47 (41.2%)
CCC— Metropolitan Correctional Center Chicago	197	52 (26.4%)	145 (73.6%)
COM—Federal Correctional Institute Coleman Medium	220	54 (24.5%)	166 (75.5%)
CRW—Federal Medical Center Carswell	373	194 (52.0%)	179 (48.0%)
DAN—Federal Correctional Institute Danbury	250	63 (25.2%)	187 (74.8%)
DUB—Federal Correctional Institution Dublin	207	82 (39.6%)	125 (60.4%)
GRE—Federal Correctional Institution Greenville	241	73 (30.3%)	168 (69.7%)
GUA—Guaynabo Metropolitan Detention Center	234	66 (28.2%)	168 (71.8%)
HAF—Federal Correctional Institution Hazelton	242	56 (23.1%)	186 (76.9%)
HON—Federal Detention Center Honolulu	167	43 (25.7%)	124 (74.3%)
HOU—Federal Detention Center Houston	206	65 (31.6%)	141 (68.4%)
LEX—Federal Medical Center Lexington	444	135 (30.4%)	309 (69.6%)
LOS—Los Angeles Metropolitan Detention Center	211	65 (30.8%)	146 (69.2%)
MIM—Federal Detention Center Miami	246	71 (28.9%)	175 (71.1%)
NYM— Metropolitan Correctional Center New York	204	54 (26.5%)	150 (73.5%)
OKL—Federal Transfer Center Oklahoma City	252	60 (23.8%)	192 (76.2%)
PEK—Federal Correctional Institution Pekin	248	63 (25.4%)	185 (74.6%)
PHL—Federal Detention Center Philadelphia	222	67 (30.2%)	155 (69.8%)
PHX—Federal Correctional Institution Phoenix	269	66 (24.5%)	203 (75.5%)
SDC—Metropolitan Correctional Center San Diego	193	39 (20.2%)	154 (79.8%)
SET—Federal Detention Center Seatac	199	52 (26.1%)	147 (73.9%)
TAL—Federal Correctional Institution Tallahassee	249	110 (44.2%)	139 (55.8%)
TCN—Federal Correctional Institution Tucson	203	45 (22.2%)	158 (77.8%)
VVM—Federal Correctional Institution Victorville Medium II	247	54 (21.9%)	193 (78.1%)
WAS—Federal Correctional Institution Waseca	192	76 (39.6%)	116 (60.4%)
TOTAL	6,655	2,112 (31.7%)	4,543 (68.3%)

## Appendix G: Copies of Interrogatories and Document Requests Sent by the Commission to the Federal Bureau of Prisons

*FY 2019 Women in Prison: Seeking Justice Behind Bars Report*

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**DATE:** March 11, 2019

**TO:** Hugh Hurwitz, Acting Director, Federal Bureau of Prisons

**FROM:** Mauro A. Morales, Staff Director  
Maureen E. Rudolph, General Counsel  
U.S. Commission on Civil Rights

**SUBJECT:** Interrogatories and Document Requests in Support of the U.S. Commission on Civil Rights' Examination of the Conditions of Women in Federal Prisons

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Congress has tasked the United States Commission on Civil Rights (the "Commission") with investigating the administration of justice and allegations of discrimination. The Commission is authorized to "study and collect information relating to," and "make appraisals of the law and policies of the Federal Government with respect to," ... "discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin[.]" See 42 U.S.C. § 1975a(a)(2)(A)-(C). Under this mandate, the Commission is conducting a study of women in prison and their treatment while incarcerated as it pertains to their civil rights. This study encompasses civil rights issues including whether relevant federal policies and/or practices operate on the basis of the administration of justice and/or color, race, religion, sex, age, disability, or national origin.

Pursuant to 42 U.S.C. § 1975a(e)(4) and § 1975b(e), the Commission, through its General Counsel Maureen E. Rudolph, requests that Acting Director Hugh Hurwitz, Federal Bureau of Prisons ("BOP"), answer fully in writing and under oath, each of the following Interrogatories and respond to each of the following Document Requests.

We request that the Acting Director serve a copy of the answers and objections, if any, along with the requested documents on the General Counsel for the Commission within thirty days after service, at the offices of the U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C. 20425. Please respond by April 11, 2019.

**INSTRUCTIONS AND DEFINITIONS**

1. These interrogatories request information available to the Director and his employees, agents, and representatives, including with respect to any information or persons within the Federal Bureau of Prisons.
2. The United States Commission on Civil Rights is referred to as the “U.S. Commission on Civil Rights,” or the “Commission.”
3. The Federal Bureau of Prisons is referred to as “BOP.”
4. The Director should state the basis for any objection to answering any interrogatory. In the event that the Director objects to a part of an interrogatory, please provide information requested by the interrogatory that is not included within that partial objection.
5. These interrogatories are continuing in nature, and to the extent that the Director acquires new information on or before June 3, 2019, that is responsive to these interrogatories, please supplement the response.
6. The word “document” or “documents” or words of like or similar import means, and includes correspondence; memoranda; data; letters; books; charts; diagrams; empirical studies; graphs; handwritten notes; telegrams; studies; working papers; tabulations; data sheets; reports; typewritten notes; printed notes; contracts; memoranda of understanding; computer printouts; and electronic mail.
7. “Institution” refers to any women’s detention facility managed by either BOP or a BOP contractor.
8. “Facility” refers to any women’s detention institution managed by either BOP or a BOP contractor.
9. “Inmate,” unless otherwise specified, refers to any woman in the custody of either BOP or a BOP contractor.
10. “Women,” unless otherwise specified, refers to all women who are in the custody of either BOP or a BOP contractor.
11. “MINT” refers to Mothers and Infants Together (MINT), which is a BOP community residential program that aims to assist women inmates during the last two (2) months of pregnancy.
12. If any document responsive to this request was, but is no longer, in your possession, custody, or control, please furnish a description of each such document and indicate the manner and circumstances under which it left your possession, custody, and control and state its present location and custodian, if known.
13. If for any request there are no responsive documents in your possession, custody, or control, state whether documents that would have been responsive were destroyed or mislaid, and if so, the circumstances under which they were destroyed or mislaid.
14. For any document response for production but withheld pursuant to a claim of privilege, identify:
  - a. The author’s name and title or position
  - b. The recipient’s name and title or position
  - c. All persons receiving copies of the document

- d. The number of pages of the document
  - e. The state of the document
  - f. The subject matter of the document; and the basis for the claimed privilege.
15. In lieu of providing a written response to an interrogatory, you may produce a document that fully responds to the interrogatory. Should the document not fully respond to the interrogatory, please state so in your written response and also provide the additional information needed to fully respond or the grounds for withholding such information, as specified in these instructions.

**1. III. Interrogatories and Document Requests**

1. Please identify the most knowledgeable person or persons to answer the following interrogatories and provide their title and/or relevant qualifications. If more than one person is the most knowledgeable, please provide the person's name and position after each interrogatory for which they have provided an answer.
2. Please confirm that these are the correct copies of the prisoner handbooks currently in use in the institutions under your control and the control of your contractors (and if not, please provide updated copies):  
[https://search.usa.gov/search/docs?utf8=%E2%9C%93&affiliate=bop.gov&sort\\_by=&query=prisoner+handbook](https://search.usa.gov/search/docs?utf8=%E2%9C%93&affiliate=bop.gov&sort_by=&query=prisoner+handbook).
3. Please list each institution, identify whether the institution is operated by BOP or a contractor, and provide the following information (for ease of providing this information, please create a document for each institution with the following information thereon):
  - a) The level of security at the institution;
  - b) The number of inmates in each institution;
  - c) The number of male correctional officers at each institution;
  - d) The number of female correctional officers at each institution;
  - e) Please provide a true and correct copy of the current policies and procedures concerning physical searches of inmates. Please specify whether the same policies and procedures apply to all correctional officers; if different policies and procedures apply depending on the correctional officer's gender, then provide all versions of the policies and procedures and specify to whom they apply;
  - f) Please provide a true and correct copy of all policies and procedures in effect in 2017 and 2018, respectively, concerning physical searches of inmates by male prison guards;

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*FY 2019 Women in Prison: Seeking Justice Behind Bars Report*

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4. Please provide the number of physical searches conducted by male correctional officers upon inmates at each institution for calendar years 2016, 2017 and 2018.
5. Does any institution use a Bona Fide Occupational Qualifications (“BFOQ”) for hiring or retaining employees?
  - a) If so, please list the institution and positions that are covered by a BFOQ.
6. Does any institution use a BFOQ that covers all correctional officer positions that interact with inmates on a regular or daily basis?
  - a) If there are no institutions that use a BFOQ, please explain why BOP does not think that it is necessary.
7. Please provide a copy of each and every contract in effect in January 2019 for facilities housing women inmates managed by contractors.

NOTE: When providing these contracts, please delineate the contracts between the different types of institutions. For instance delineate maximum, medium, minimum, etc. Also, if contracts are the same for several of the contractor-operated facilities, please provide one contract and attached thereto a list of the facilities for which the exact same contract provisions are in effect. If a facility has additional or different provisions, please provide the true and correct copy of that facility’s contract.

**CIVIL RIGHTS INVESTIGATIONS**

8. How many institutions are currently the subjects of class action litigation that allege constitutional or civil rights violations within the institution? Please identify the full name of each institution and indicate whether the institution is operated by BOP or a contractor.
9. How many institutions are currently monitored by an independent auditor to ensure compliance with a court order or consent decree pursuant to class action litigation alleging constitutional or civil rights violations within the institution? Please identify the full name of each institution and indicate whether the institution is operated by BOP or a contractor.
10. How many third-party contractors that provide medical or mental health care by contract to any institution are currently the subjects of class action litigation that allege constitutional or civil rights violations regarding their work in an institution operated by BOP or a contractor? Please identify the full name of each third-party contractor and each institution with which the third-party contractor is, or has been, under contract. For each of these third-party contractors, please indicate whether the institution is operated by BOP or a contractor.



Please provide the number of class action lawsuits filed alleging constitutional or civil rights violations against any institution in each of the years 2016, 2017, and 2018. Please identify the full name of each institution and indicate whether the institution is operated by BOP or a contractor.

**Prison Rape Elimination Act of 2003 (PREA)**

11. Please confirm that these are the correct copies of all PREA policies and procedures currently in operation, including procedures about processing complaints and PREA investigations, as they pertain to BOP institutions (and if not, please provide updated copies): [https://www.bop.gov/inmates/custody\\_and\\_care/sexual\\_abuse\\_prevention.jsp](https://www.bop.gov/inmates/custody_and_care/sexual_abuse_prevention.jsp). Please provide any other policies or procedures that detail how PREA policies and procedures are implemented in BOP or contractor institutions.
12. Please answer whether the policies and procedures used in BOP institutions for PREA complaints and investigations differ from those used at contractor-operated institutions;
13. Please provide a true and correct copy of all PREA policies and procedures as they pertain to contractor-operated institutions. Please include a detailed description of all policies and procedures related to processing PREA complaints and conducting PREA investigations.
14. Please describe in detail the actions that employees are required to take in order to comply with PREA within the first 96 hours of receiving a complaint. Please describe in detail any and all required actions related to the PREA complainant's housing, food, visits, phone calls, video visits, medical needs, including but not limited to sick calls and other privileges.
15. Please describe in detail the actions that each institution is required to take involving the person who is the subject of a PREA complaint within the first 96 hours after the complaint is made when:
  - a) the person who is the subject of the PREA complaint is an inmate of the institution;
  - b) the person who is the subject of the PREA complaint is a correctional officer at the institution;
  - c) the person who is the subject of the PREA complaint is a BOP employee other than a correctional officer;
  - d) the person who is the subject of the PREA complaint is an employee of a contractor working at a BOP institution;
  - e) the person who is the subject of the PREA complaint is a correctional officer at a contractor-operated institution;



- f) the person who is the subject of the PREA complaint is an employee of a contractor-operated institution, but is not a correctional officer; and
  - g) the person who is the subject of the PREA complaint is an employee of a third-party contractor.
16. What is the average length of time that the BOP has taken to resolve a PREA complaint from women inmates?
17. What is the average length of time that each contractor has taken to resolve a PREA complaint? For each response, please identify the full name of each contractor and the full name of each institution operated by each such contractor.
18. What has been the shortest time that the BOP has taken to resolve a PREA complaint that has not been withdrawn?
19. What has been the shortest time that each contractor has taken to resolve a PREA complaint that has not been withdrawn? For each response, please identify the full name of each contractor and each institution operated by the contractor.
20. What has been the longest time that the BOP has taken to resolve a PREA complaint?
21. What has been the longest time that each contractor has taken to resolve a PREA complaint? For each response, please identify the full name of each contractor and each institution operated by the contractor.
22. What number of PREA complaints are withdrawn at each institution?
23. What number of PREA complaints are resolved at each institution?
24. Once a final determination is made regarding the PREA complaint, what actions are each institution's employees required to take with regard to the complainant inmate if the complaint is:
- a) Upheld; and/or
  - b) Denied.

Please include any actions that the institution's employees are required to take regarding the complainant's good time credits, housing, food, visits, phone calls, video visits, medical needs, including but not limited to sick calls and other privileges.

25. Please provide the number of PREA complaints submitted and processed at each institution for each of the years 2014, 2015, 2016, 2017, and 2018. For each institution, provide the number of PREA complaints that were:

- a) made by an inmate against another inmate;
- b) made against a BOP correctional officer;
- c) made against a non-correctional officer BOP employee;
- d) made against a contractor's correctional officer;
- e) made against a contractor's employee, other than a correctional officer; and
- f) made against a third-party contractor's employee at either a BOP or contractor-operated institution.

### **MEDICAL AND MENTAL HEALTH CARE**

26. Please provide a true and correct copy of the following documents:

- a) All policies and procedures regarding intake medical exams determining the status of the health of new inmates in the custody of institutions (including any intake medical exams and any other policy related to the health of the inmate). (If there are different policies for some institutions than others, please provide a copy of the main policy, and then list the institution(s) that are the exception, and provide the policy for that institution.)
27. For the institutions that provide intake medical exams, please list each and every question of medical history, medical test, medical procedure, medical exam, laboratory test, or any other item that is determined and/or performed at the exam.
28. Please list, for each institution, whether the intake medical exam occurs when the inmate arrives at the facility, within 48 hours after the inmate's arrival, more than 48 hours after the inmate's arrival, or does not occur at a specific time subsequent to the inmate's arrival at the facility.
29. Please list, by institution, the credentials of the medical professionals that conduct medical intake exams of the inmates. If the person conducting the examination is not a licensed physician (M.D.), please state under what authority they are legally allowed to conduct the exam and provide a true and correct copy of the authority that allows the person to conduct the exam.
30. For each institution, please indicate whether the medical personnel utilized at that institution are employees of BOP, employees of other government agencies, employees of contractors, or employees of third-party contractors.
- a. For every institution that utilizes BOP medical personnel, please list the institution and the title and credentials for each BOP medical employee attached thereto;

- b. For every institution that utilizes medical personnel employed by a contractor or third-party contractor, please provide a copy of the contract that authorizes the employment of the contractor or third-party contractor employee;
  - c. For every institution that utilizes medical personnel employed by a contractor or third-party contractor, please identify the title and credentials of the BOP employee responsible for overseeing the contractor's or third-party contractor's work and the institution for which they are responsible, and please list the employees they oversee.
31. Please provide a true and correct copy of any and all policies stating what routine medical examinations, if any, are conducted for each inmate at each institution, and how often these medical examinations are conducted.
- a) If not stated in the policy, please list the standard operating procedure that applies to the routine medical examinations of the inmates at each institution, including any and all laboratory tests performed both routinely and in response to any findings resulting from the examination;
  - b) Please state if each inmate at each institution receives a gynecological examination each year. If not, please state why not.
  - c) Please provide a true and correct copy of any and all policies that require a gynecological examination on inmates at each institution.
  - d) Please identify if there is a requirement at each institution that all inmates receive free feminine hygiene and sanitary products as needed. For each institution that does not provide free feminine hygiene and sanitary products as needed, please list the name of the institution and list "None" next to the institution.
  - e) Please provide a true and correct copy of each contractor's contract that contains the duties of the contractor as they pertain to the medical care of inmates at each institution; and
  - f) For each institution during the calendar years 2016, 2017 and 2018, please list the title and credentials of who performs the medical examinations and the gynecological examinations at the institution.
32. Please identify if at any institution, the provision of medical or mental health services are contracted to a third-party contractor who is a separate contractor or who is a separate entity from either the BOP or the contractor.

33. If the answer to Interrogatory Number 32 is yes, please provide a true and correct copy of the third-party contractor's contract, including the third-party contractor's duties pertaining to the medical or mental health care of inmates, at each institution.
- a. Please provide a true and correct copy of any and all policies stating what regular medical or mental health examinations, if any, are conducted for each inmate at each institution that utilizes a third-party contractor.
  - b. If not stated and listed in the requested policy in Interrogatory Number 33(a), please list the standard operating procedure that applies to the regular medical examinations of the inmates, including any and all laboratory tests performed both routinely and in response to any findings resulting from the examination, at each institution that utilizes a third-party contractor.
  - c. Please state if there is a requirement at each institution that utilizes a third-party contractor that all inmates receive a gynecological exam annually. If so, please list the name of each third-party contractor and the number of gynecological examinations conducted at each institution that utilizes the third-party contractor.
  - d. Please state if there is a requirement at each institution that utilizes a third-party contractor that all inmates receive free feminine hygiene and sanitary products as needed. For each institution that does not provide free feminine hygiene and sanitary products as needed, please list the name of the institution and list "None" next to the institution.
  - e. In the last year, have there been any instances where an institution that utilizes a third-party contract did not provide inmates with free feminine hygiene and sanitary products as needed? If so, please state the name of the institution and date for each of these instances and describe how BOP addressed this.
  - f. Please identify the titles and credentials of who is responsible for overseeing the performance of medical and mental health care duties pursuant to the terms of the contract of each third-party contractor at each institution that utilizes the third-party contractor.

**Mental Health Disability and Mental/Physical Trauma**

34. Please state if each inmate at each institution is examined upon intake or within 48 hours of arriving at the facility to determine if the inmate is suffering from any mental health disabilities. If not, please list, for each institution, whether the mental health intake exam occurs more than 48 hours after the inmate's arrival at the facility or does not occur at a specific time subsequent to the inmate's arrival at the facility.



35. For the institutions that provide intake mental health examinations, please list each and every question of mental health history, test, procedure, evaluation or questionnaire, laboratory test, or any other item that is determined and/or performed during the intake examination.
36. Please identify if each institution has policies in place to address if an inmate is suffering from mental health disabilities as the result of mental and/or physical trauma.
  - a) If so, please provide a true and correct of all the policies and procedures at each institution that relate to and are relevant to the trauma condition. This request includes policies and procedures as they relate to inmates and, also, the responsibilities of BOP employees, contractor employees, and third-party contractor employees.
  - b) Please describe in detail the training that BOP employees, contractor employees, and third-party contractor employees are required to complete on how to perform their duties with inmates suffering and/or identified as having suffered mental and/or physically induced trauma.
  - c) Please identify the titles of BOP employees, contractor employees, and third-party contractor employees who are not required to complete training on how to perform their duties with inmates suffering and/or identified as having suffered mental and/or physically induced trauma. Please explain why these employees are not required to receive the training.
37. Please list the number of programs that are available, if any, at all institutions, including those that utilize third-party contractors, for inmates to address mental and/or physically induced trauma. Please list each institution, the number of trauma-related programs offered annually at that institution, the title of each trauma-related program offered at that institution annually, and the number of inmates that can be accommodated in each trauma-related program offered at that institution annually. If no programs are offered at an institution, please list the institution and list "None" next to the institution.
  - a) Please identify if there is any prerequisite criteria for entry into each and any program and, if not, if each inmate, including an inmate with one or more disciplinary infractions, permitted to attend any program that addresses mental and/or physically induced trauma.
  - b) Please list each institution and list how many inmates, if any, request to take part in trauma-related programs to address mental and/or physically induced trauma at the institution annually. Please list each institution and list how many inmates, if any, are enrolled in each trauma-related program at each institution annually.
  - c) Please provide the average length and timeline of each trauma-related program at each institution from commencement to completion.

- d) Please provide a true and correct copy of all trauma-related program materials (*i.e.*, those used by the instructor and those supplied to the program attendees) at each institution.
  - e) Please list each institution and the number of instructors who are qualified to conduct each trauma-related program offered at that institution annually.
  - f) Please list the qualifications that the instructor is required to possess to teach each trauma-related program offered at that institution annually. Please provide a true and correct copy of all required training materials for each qualified instructor of trauma-related programs offered at that institution annually.
38. Please state if all contractor employees and/or third-party contractor employees required by contract to receive the same training as BOP employees as it relates to trauma-related training. If yes, please identify:
- a) The titles and credentials of employees who receive the training;
  - b) The methods and procedures used to select the employees chosen; and
  - c) The titles and credentials of employees who do not receive the training, and an explanation of why they are not required to do so.

#### **FAMILY DISRUPTION**

39. Please list for each institution how many inmates currently reside in an institution more than 500 miles away from their home.
40. Please list for each institution what methods are available to the inmate for purposes of visitation (*e.g.*, in-person, video, telephone).
- a) For each institution, please list the cost charged to the inmate for each and every method of visitation (*e.g.*, in-person, video, telephone);
  - b) For each institution, please list the cost charged to the institution for each and every method of visitation;
  - c) For each institution, please list the charges, if any, by third parties who provide a means and/or assist in effectuating visitation for inmates at the facility;
  - d) For each institution, please list limitations, restrictions, and prohibitions, if they exist, on each and every form of visitation allowed by the facility; and
  - e) If any form of visitation is allowed in one institution and not available in another, for each institution, explain why the full range of visitation is not available.

41. Please produce all current statutes, rules, and regulations that refer to visitation at each institution. Where the statutes, rules, and regulations are the same for multiple institutions, please produce only one copy and identify the institutions they govern and then provide the exceptions to them and to what institution the exceptions apply.
42. For the most recent 24 months for which you have data, please list the following for the Residential Parenting Program at each institution: a) how many inmates participated? b) how many inmates were denied or delayed participation? c) how many were denied and the reasons why?
43. For the most recent 24 months for which you have data, please list the following for the MINT at each institution: a) how many inmates participated? b) how many inmates were denied or delayed participation? c) how many were denied and the reasons why?
44. For each of the past five (5) years for which you have data, please list the following information for each institution:
  - a. how many children have the BOP and/or the contractor had to assist in placing outside the institution after birth?
    - i. When assisting the inmate with the placement of the newborn, please describe the options and factors that BOP and/or the contractor consider when assisting the inmate.
  - b. how many newborns were placed with social services after the child's birth and how many mothers were returned to her institution to complete her sentence?
  - c. how many newborns were placed with family members after the child's birth and how many mothers were returned to her institution to complete her sentence?
  - d. how many inmates had their parental rights terminated from newborns placed with social services or family members after the child's birth and the mother's return to her institution to complete her sentence?
45. For each of the past five (5) for which you have data, please list for each year how many termination of parental rights actions were filed against inmates in the custody of either BOP or a contractor.
  - a. Please state how many of the actions enumerated in Interrogatory Number 45 resulted in the termination of parental rights of the inmate.
  - b. Please state how many of the actions enumerated in Interrogatory Number 45 did not result in the termination of parental rights of the inmate.

c. Please state how many termination of parental rights actions in each institution were pending against inmates as of December 31, 2018.

46. Please list in detail the assistance currently provided by BOP and/or contractors to inmates who have termination of parental rights actions filed against them.

47. Please provide true and correct copies of all statutes, rules, and regulations governing the responsibilities and actions required of all facilities and institutions to assist inmates when termination of parental rights actions are filed against them.

### **DISCIPLINARY PROGRAMS**

48. Please provide the total number and type of disciplinary tickets issued and what infractions the disciplinary tickets were issued for in the last year, disaggregated by institution. Please include the number and type of sanctions issued for these infractions.

49. Please provide a list of disciplinary sanctions that limit access to children including by phone, mail, or in-person visits, and how often they were used.

50. Please state how many women were confined in segregation in the last year. Please identify which infractions led to this assignment, and how many days were assigned.

51. Please state how many Good Time days were revoked because of disciplinary tickets, which infractions led to this revocation, and how many women lost Good Time credits.

52. Please state how many disciplinary tickets were appealed, how many were sustained and how many overturned through the appeals process.

53. Please provide any reports, memos, instructions or training manuals that address discipline procedures for women that are currently in use

### **EDUCATIONAL PROGRAMS**

54. Please list each institution individually and list what educational programs are available for inmates at that facility. After the name of each program offered, please provide a description of the program and its goals. Please list any certificate, degree, and/or some other type or form of acknowledgment that may be attained by the inmate upon completion of each program you list.

a) Next to each program listed in Interrogatory Number 54 please list for the past 36 months for which you have data: (1) how many inmates applied for each educational class at each institution; (2) how much student space was available in each educational class held at each institution; (3) how many cycles (number of educational classes) were available at each institution for each individual type of educational class; (4) how



many inmates were accepted and enrolled into each educational class at each institution; (5) how many inmates were placed on a waiting list for each educational class at each institution; and (6) and how many inmates were rejected and the reasons why at each institution.

- b) Please state for each educational program, how many inmates were on a waiting list as of December 31, 2017 and December 31, 2018 or the last two (2) year-end dates for which you have data. Please list this information for each institution.
  - c) For each educational program, please list the number of participants who completed the program and received a certificate, degree, and/or some other type or form of acknowledgment of completion of the educational program, as of December 31, 2017 and December 31, 2018 or the last two (2) year-end dates for which you have data.
55. Please list each program that teaches interpersonal or communications skills to inmates. Please list this information for each institution.
- a) Please provide true and correct copies of the lesson plan and syllabus for each interpersonal or communications class at each institution.
56. Please list each educational program available in each institution for men inmates and the ultimate achievable goal of those programs. Please list any certificate, degree, and/or some other type or form of acknowledgment that may be attained by the male inmate upon completion of the educational program.

## **VOCATIONAL PROGRAMS**

57. Please list each institution individually and what vocational programs are available for inmates at each facility. After the name of each program, please provide a description of it and its goals. Please list any certificate, degree, and/or some other type or form of acknowledgment that may be attained by the inmate upon completion of the program.
58. Next to each program listed in Interrogatory Number 57, please list for the last 36 months for which you have data: 1) How many inmates applied for each vocational program at each institution; 2) How much space was available in each vocational program at each institution; 3) How many cycles (the number of vocational program classes conducted) were available at each institution; 4) How many inmates were accepted for each vocational program at each institution; 5) How many inmates were placed on a waiting list for each program at each institution; and 6) How many inmates were rejected and the reasons why at each institution.
59. For each vocational program, please list how many inmates were on a waiting list as of December 31, 2017 and December 31, 2018 or the last two (2) year-end dates for which BOP has data. This interrogatory request is a system-wide response for each type of similar vocational program. Please list this information for each institution.

60. For each vocational program, please list the number of different subject classes in each program, the length of time each course takes to complete, and how much time each program takes to complete in its entirety. Please list this information for each institution.
61. For each vocational program, please provide a description of the ultimate achievable goal of the program. Please list any certificate, degree, and/or some other type or form of acknowledgment that may be attained by the inmate upon completion of the program. Please list this information for each institution.
62. Please list each vocational program at each institution for men inmates, the ultimate achievable goal of the program, and a description of each vocational program. Please list any certificate, degree, and/or some other type or form of acknowledgment that may be attained by the inmate upon completion of the program.
63. Please provide a true and correct copy of the immediate past five (5) Women Prisoner Surveys that BOP has completed.

#### **POLICIES SPECIFIC TO TRANSGENDER INMATES**

64. Please confirm that this is the current policy in place with respect to the initial designation and facility assignment of transgender offenders:  
<https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>.
65. Please identify and provide if there any other current policies or procedures in place that detail the designation and assignment process for an individual who has identified with a gender identity that is different from the institution in which he or she is housed.
66. Please identify how many transgender female inmates have been or are currently housed in BOP facilities for the years 2016, 2017, and 2018.
67. Please identify whether these inmates have been assigned to male or female facilities for the years 2016, 2017, and 2018 (distinguishing between assignments made before the Manual change on May 11, 2018 and afterwards). If an inmate is housed in a facility not in accordance with his or her gender identity, please detail the rationale behind that decision.
68. For each transgender inmate housed in a facility not in accordance with his or her gender identity, please identify if that individual has reported any harms from other inmates, correctional officers, or other BOP or contractor employees.



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*FY 2019 Women in Prison: Seeking Justice Behind Bars Report*

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**CERTIFICATE OF SERVICE**

I certify that I have caused this 11th day of March 2019, the foregoing United States Commission on Civil Rights' Interrogatories and Document Requests to be served by email upon the following:

Hugh J. Hurwitz  
Acting Director  
Federal Bureau of Prisons  
320 First St., N.W.  
Washington, D.C. 20534



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Maureen E. Rudolph  
General Counsel