

**Prisons Must Cease Re-Traumatizing Women:
A Call for Gender-Responsive Programs that End the Cycle of Abuse**

I. Introduction

“See we're in here because something in us is broken. They break us out there and then more in here. And they don't do anything to build us back up. What are we supposed to do?”¹ This is a quote from a woman serving thirty-one years for assault and crack-cocaine possession. Like many other incarcerated women she has a history of being in domestically abusive relationships. She articulated the feelings of hopelessness she had before entering prison; that her boyfriend, who was also addicted to crack-cocaine, would beat her on a regular basis. Prison, she said, felt like an extension of this oppression. She talked about using drugs as a means to escape the reality of abuse and poverty in which she lived. Her time in prison further disempowered her economically and socially, as she received no job-training and lost many of her relationships in the community, which caused more feelings of isolation, a feeling that often fosters domestically abusive relationships.

This paper explores the connection between domestic violence and women in prison. It argues that under the current system prison re-traumatizes women with histories of abuse. Prison isolates women socially, strains relationships and creates more economic burdens. These effects of prison make leaving an abusive relationship even harder than before incarceration. This is a particularly worrisome because of the large number of women in prison who have been in a domestically abusive relationship.

While domestic violence affects women regardless of race, class, education level and other

¹ Interview with Anonymous Inmate, in maximum security prison, March 21, 2009.

privilege disparities, domestic violence has a unique effect on those oppressed in the greater society.² For poor, less-educated, and newly immigrated women, domestic violence is more challenging to escape because they are more likely to be economically dependent on their abusers, and may face a wider variety of barriers to leaving abusive relationships.³ Statistics and empirical studies show that women in prison have a high likelihood of having experienced domestic violence prior to their incarceration.

There is a precarious balance one must strike when analyzing the intersection of violence against women and women in prison. While it is clear that there is a connection between women who suffer violence and women who end up in prison, one must not take agency away from female inmates, and say that abuse they suffered was the only factor that caused them to commit a crime.⁴ Although this paper will look at the connection between women who are victims of domestic violence, it does not aim to essentialize every woman's experience nor argue that women are simply products of the abuse they have suffered. This paper relies on empirical evidence that points to important differences between male and female prisoners. It also looks at social science research that tries to explain why so many incarcerated women have experienced domestic violence and abuse prior to their incarceration.

Also, this paper focuses on the effect prison has on women who have suffered domestic violence. It does not assert that domestic violence happens in a vacuum. Many incarcerated women

² See generally Hotaling, G.T., & Sugarman, D.B. (1990). A Risk Marker Analysis of Assaulted Wives, 5 J. OF FAM. VIOLENCE 1, 1-13 (pointing to the wide variety of findings about the characteristics of women who are domestically abused).

³ Susan Buel, Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay, 28 The Colorado Lawyer 10, 19 (October 1999).

⁴ See Smita Vir Tyagi, Victimization, Adversity and Survival in the Lives of Women Offenders: Implications for Social Policy and Correctional Practice, 25 CANADIAN WOMAN STUDIES 1/2, 134 (listing "poverty, economic need, unemployment, and having responsibility for children" are reasons women often have trouble leaving abusive relationships).

have suffered domestic violence, but they have a variety of other common characteristics. Incarcerated women, statistically, are likely poor, less-educated, of a racial minority, and have substance abuse problems.⁵ However, this paper will focus on domestic violence and its prevalence in incarcerated female population because this prior abuse arguably most uniquely and strongly affects women's experience in prison. Prison replicates many of the characteristics of abuse such as power and control over the women.⁶ This paper asserts that prison policies often revictimize women with histories of abuse. This paper will not address the revictimization many women face when they are illegally abused or raped while in custody because it is narrowed to focus on the legal infrastructure of prisons. Although gender-responsive approaches deal with a wide variety of issues, such as the fact that women are more likely than men to be their children's custodians, this paper focuses solely on gender-response approaches that pertain to domestic violence. Finally, in arguing for a gender-responsive approach, this paper is not diminishing the need for reforms and gender-responsive programs for men; it is beyond the scope of this paper to analyze reforms to better address male prisoners' needs.

There is an indisputable connection between domestic violence and women in prison.⁷ Studies range from finding that forty-eight percent of women in prison have experienced domestic violence to finding that up to ninety percent of incarcerated women.⁸ In contrast, only about thirteen percent of

⁵ See Dr. Stephanie S. Covington and Dr. Barbara Bloom, Creating Gender-Responsive Services in Correctional Settings: Context and Considerations, Paper Presented at American Society of Criminology Conference (November 17-20, 2004) *available at* <http://www.centerforgenderandjustice.org/pdf/2.pdf> (specifying that while both men and women battle substance abuse problems, women uniquely

⁶ See *id.* (arguing that "a safe, consistent, and supportive environment is the cornerstone of a corrective process").

⁷ *Id.*

⁸ Bureau of Justice Statistics. Prior Abuse Reported by Inmates and Probationers, Washington, DC: U.S. Department of Justice (1999c).

incarcerated males have suffered physical abuse prior to incarceration.⁹

This paper begins with a historical and contemporary overview of women in prison. Second, it examines women's unique pathways to criminal activity, focusing specifically on the role domestic violence plays in women's criminology. Third, this paper will discuss women's unique needs while in prison and once released, and the manner in which the prison structure and having a criminal record disproportionately affects women. The paper will then call for gender-responsive approaches to imprisonment and a reduction on the collateral consequences of prison because of the disproportionate effect they have on women. Finally, this paper will conclude that gender-responsive programs survive the Equal Protection Clause of the Constitution, whether or not the court examines the programs as a prison issue, and uses a rational basis analysis under *Turner v. Safley*, or examines the gender-responsive programs as a gender discrimination case and applies intermediate scrutiny as articulated in *Virginia v. United States*.

II. Gender Approach to Imprisonment

A. Historical Evolution of Gender and Prisons

The historical implementation of women's prisons differs drastically from that of men. While men's prisons were historically viewed as custodial mechanism, and not rehabilitative or reformatory institutions, women's prisons were designed to reform women into society's view of appropriate mothers, wives and daughters.¹⁰ In fact, female prisons embodied a "treatment model"; women who had strayed from their traditional gender role were corrected and directed back to the appropriate role.¹¹

⁹ *Id.*

¹⁰ Rebecca Jurado, The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards, 7 Am. U.J. Gender Soc. Pol'y & L. 1, 2 (1999) and Nicole Hahn Rafter, Partial Justice: Women in State Prisons 1800-1935, 26 (Northeastern University Press 1985).

¹¹ See Jurado, *supra* note 10 (comparing female prisons' inception with male prisons' inception, which

This rehabilitative model promoted women's traditional roles, and did not provide treatment that would aid women economically, professionally or personally once they were released. Women received little attention once incarcerated because they made up a small number of the incarcerated population. The lack of women in the penal system meant that programs such as those for job skills, and health care, were almost non-existent for women.¹² The lack of incarcerated women also meant that many jurisdictions did not even have female-only facilities until the late 1970s.¹³

Until the last few decades the number of women in prison was miniscule compared to that of men; in 1980 there were only 12,000 women incarcerated in the United States.¹⁴ Even as the number of incarcerated women increased, prisons did not evolve from the male-oriented model because women were less violent in their resistance so it was easier to ignore their needs.¹⁵ There are many indications that the two genders may need different programs for rehabilitation because recent studies show that women and men's pathways to crime vary drastically, and that women experience imprisonment differently.¹⁶

The prison reform movement, in its modern, form did not begin until the 1960s.¹⁷ Due to the lack of services in female prisons when compared to male institutions, an equality movement commenced to fight for equal treatment of men and women prisoners.¹⁸ Equal treatment initially meant

were created to punish, no rehabilitate offenders).

¹² Marc Mauer and Meda Chesney-Lind, Invisible Punishment: The Collateral Consequences of Mass Imprisonment 79 (The New Press 2002).

¹³ *Id.*

¹⁴ *Id.* at 81.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Rebecca Jurado, The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards, 7 Am. U.J. Gender Soc. Pol'y & L. 1, 10 (1999) (observing that a movement for a "reformatory" penal system began in the 1960s).

¹⁸ *Id.* at 3.

the same programs. Additionally, the court cases brought to advocate prison reform focused almost exclusively on male prisoners. The male prisoners became the “standard bearer” because they were the ones bringing lawsuits; cases that dealt with men in custody determined the standards to which female prisons were held.¹⁹

Early activists for female inmates’ rights focused on Equal Protection.²⁰ Court cases focused on women prisons’ inferior programs compared to male prisons’ programs.²¹ Activists fought for laws requiring men and women to have equal access to educational programs and activities in order to bring female prisoners out of a second-class standing.²² Instead of fighting for programs tailored to women’s unique needs in custody, activists fought for programs on par with those that men had.²³ This focus of the fight for women prisoners could be because women’s programs were so inferior to those of men, and gender-responsive programs were, historically, inferior programs that caged women into a stereotypical role.

B. Women in Prison: The Current Situation

Presently, women make up seventeen percent of people under criminal justice supervision.²⁴ In

¹⁹ *See id.* at 15 (finding that prison officials felt that cages with constant supervision was the best environment for male prisoners because of their strength, criminal background and demeanor).

²⁰ *See id.* at 18 (explaining that most cases challenged the explanations for lack of programs in female prisons such as they were not cost-effective or women were not suited for the programs, under the Fourteenth Amendment).

²¹ Women Prisoners of the District of Columbia Department of Corrections v. D.C. 93 F.3d 910 (D.C. Cir. 1996) (plaintiffs alleging that they were denied academic, vocational, work, recreational and religious programs because of their gender).

²² *Id.*

²³ *Id.*

²⁴ Dr. Barbara Bloom, Dr. Barbara Owen, Dr. Stephanie Covington and Myrna Raeder, Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders v (National Institute of Corrections, June 2003) available at <http://www.nicic.org/pubs/2003/018017.pdf>.

fact, there are about one million women under criminal justice supervision.²⁵ This accounts for about one percent of the female population in the United States.²⁶ Women make up the fastest growing incarcerated population.²⁷ This increase in incarcerated women is attributed largely to the increase in imprisonment for drug and other non-violent offenses.²⁸ Although, the characteristics of women inmates are similar to what they have been for the past few decades, we still do not know as much about female prisoners as we do about male prisoners.²⁹ There is a gap in research about women and criminology because for so long women made up such a small percentage of the incarcerated population.³⁰ Until the 1990s there was little research on why women ended up in prison and what led them to engage in criminal activity.³¹ Initially, all criminology and prison research was based on a male model. Custody classifications for prisoners derive from a male model of imprisonment and were designed for male prisoners.³² As the number of incarcerated women increases, so does a pressure for gender-responsive programs in prisons.³³

²⁵ *Id.*

²⁶ U.S. Department of Justice, Bureau of Justice Statistics Criminal Statistics (August 8, 2007) available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#women>.

²⁷ Angela Browne, Brenda Miller, and Eugene Maguin, Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women, 22 INT'L J. OF L. AND PSYCHIATRY 301, 302 (1999).

²⁸ Deborah Labelle, Human Rights In The United States: A Special Issue Celebrating The 10th Anniversary Of The Human Rights Institute At Columbia Law School: Article: Bringing Human Rights Home To The World Of Detention 40 COLUM. HUMAN RIGHTS L. REV. 79, 98 (Fall 2008).

²⁹ Candace Kruttschnitt and Rosemary Gartner, Women's Imprisonment 30 CRIME & JUST. 1, 17 (2003).

³⁰ Emily Wright, Emily Salisbury and Patricia Van Voorhis, Predicting the Prison Misconduct of Women Offenders: The Importance of Gender Responsive-Needs, 23 J. OF CONTEMP. CRIM. JUST. 4 (November 2007).

³¹ Nicole Hahn Rafter, Partial Justice: Women in State Prisons 1800-1935, 26 (Northeastern University Press 1985).

³² Browne, et. all *supra* note 26.

³³ Wright, et. all, *supra* note 29.

Most incarcerated women are serving time for non-violent crimes.³⁴ Women only commit about fifteen percent of all homicides.³⁵ Of women who commit violent crimes against men, thirty-five percent attacked someone with whom they were intimately involved.³⁶ When women do commit violent crimes, they tend to kill abusers.³⁷ Ninety-three percent of women who killed intimate partners had suffered abuse at the hands of the intimate partner that they killed.³⁸ Of women who kill abusive intimate partners the recidivism rate is almost zero.³⁹

The majority of women in state and federal prisons are incarcerated for drug offenses: about thirty-four percent of women incarcerated in state prisons and about seventy-two percent of women in federal prisons.⁴⁰ Drug offenses are followed by property offenses and then violent offenses.⁴¹

Prior to incarceration, women in prison are less likely to have been married than women in the general population.⁴² Over half of women in state and local jails had never been married.⁴³ However, about seventy percent of women in prison have children.⁴⁴ Female prisoners are more likely than men to suffer harsher economic circumstances prior to entering prison.⁴⁵ About four in ten women reported being employed full-time prior to entering prison, where as about six in ten male prisoners report full

34 Women in Prison Project, Correctional Association of New York, Fact Sheet (2002) *available at* http://www.prisonpolicy.org/scans/Fact_Sheets_2002.pdf.

35 *Id.*

36 U.S. Department of Justice, Bureau of Justice Statistics Special Report: Women Offenders, (October 3, 2000) *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf>.

37 Women in Prison Project, *supra* note 33.

38 Women in Prison Project, *supra* note 33.

39 Women in Prison Project, *supra* note 33.

40 Special Report: Women Offenders, *supra* note 35.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

time employment prior to entering prison.⁴⁶ About thirty-seven percent of women incarcerated were earning less than \$600 per month prior to their incarceration, and about thirty percent of the women were receiving welfare assistance before their incarceration.⁴⁷ This is compared the male prison population of which only twenty-eight percent were making less than \$600 prior to incarceration and only about eight percent were receiving welfare.⁴⁸

Although male inmates outnumber female inmates fifteen to one, the female prison population continues to increase.⁴⁹ There are many findings that point to differences between men and women in their pathways to crime.⁵⁰ With this increase in female prisoners, comes the question how prison policies, which have traditionally been designed for male populations, should be tailored differently for women.⁵¹ Although not all women have identical situations, there are some common trends among women that differ from men. For instance, women on parole or probation are more likely than men to need childcare in order to meet with their correctional officers.⁵² Most women who are incarcerated were the head of their household. They are more likely than men to face economic obstacles after

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Jurado, *supra* note 10; Linda Sydney, “Gender-Responsive Strategies for Female Offenders,” U.S. Department of Justice, National Institute of Corrections. October 2005.

⁵⁰ Connie Neal, Women Who are Victims of Domestic Violence: Supervision Strategies For Community Correction Professionals, CORRECTION TODAY (August 2007), 39 (mentioning that women’s crimes are either directly related to domestic violence, such as killing their abuser or indirectly related to the violence, such as failure to protect children or kidnapping charges from taking the children and fleeing the abusive situation).

⁵¹ Marc Mauer and Meda Chesney-Lind, Invisible Punishment: The Collateral Consequences of Mass Imprisonment 79 (The New Press 2002).

⁵² Linda Sydney, “Gender-Responsive Strategies for Female Offenders,” U.S. Department of Justice, National Institute of Corrections. October 2005.

leaving prison, and they are more likely to have suffered abuse in their past.⁵³

III. Domestic Violence and Imprisoned Women

A. Domestic Violence: a Pathway to Incarceration?

Many criminal theorists hypothesize that physical and sexual abuses are the greatest reasons women commit the crimes that cause them to end up in prison.⁵⁴ One of the most common forms of violence that women experience is domestic violence at the hands of a boyfriend or husband.⁵⁵ Some argue that the traumatic effects of “gender-based” violence lead women to engage in criminal and destructive behavior including “illicit drug use, sex trade, and violent crime.”⁵⁶ Others theorize women’s pathways into crime most often comes from a desire to leave an abusive situation.⁵⁷ The criminal behavior derives from an effort to flee or cope with the violence: such as drug use or sex crimes. Sometimes these crimes are committed under the coercion of the abuser, and other times to earn money to escape the abuser.⁵⁸ Finally, when women are violent, they are often violent against their abusers in an attempt to end the abuse.⁵⁹

Most women in prison report battling substance abuse, and this addiction is often closely connected with an abusive history.⁶⁰ Although substance abuse is prevalent in both male and female prison populations, evidence indicates that a higher percent of incarcerated women struggle with

⁵³ Linda Sydney, “Gender-Responsive Strategies for Female Offenders,” U.S. Department of Justice, National Institute of Corrections.

⁵⁴ Browne et. all, *supra* note 26.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Tyagi, *supra* note 4 (arguing that women’s pathways are motivated by a desire to escape or cope with the abuse in their lives).

⁵⁸ *Id.* (listing prostitution and drug addiction as examples of types of crimes motivated by a desire to leave a relationship or cope with the abuse in the relationship).

⁵⁹ Neal, *supra* note 49 (explaining that most women who kill do so against intimate partners, and often kill in self-defense).

⁶⁰ Tyagi, *supra* note 4

addiction than men.⁶¹ Additionally, addiction is more predictive of certain crimes in female populations than in male population, such as property crimes.⁶² One study found that sixty-five percent of female offenders reported problems with addictions, and seventy-percent reported that substance abuse was involved in the crime that led to their imprisonment.⁶³ A high proportionality of women who struggle with addiction have suffered some form of abuse in their past.⁶⁴ Conversely, women with substance abuse problems suffer domestic violence at a higher rate than those who do not have a substance abuse problem.⁶⁵ Women with substance problems are also usually of marginalized populations with extra barriers, such as economic ones, to leaving the relationship.⁶⁶

Another theory about why women in prison suffer higher rates of domestic violence than women in the general population is because women value relationships strongly and they are affected negatively when the relationship is abusive.⁶⁷ Psychologists have observed that women value relationships higher than men do, and measure much of their self-worth through relationships with other people.⁶⁸ Relationships are valued highly, and if the relationships are abusive and unsupportive, women turn to criminal activity for a number of reasons.⁶⁹ One reason abusive relationships cause women to commit crimes is because some abusive men use their power and control over the woman to make her commit the criminal acts.⁷⁰ Although many women autonomously choose to commit the

⁶¹ Wright, *supra* note 29 at 315 (adding that addiction is also a better predictor of types of crimes in female populations than in male populations).

⁶² *Id.* at 315

⁶³ Tyagi, *supra* note 4

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Wright, *supra* note 29 at 315.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

crimes for which they get convicted, some are threatened with rape, murder or sexual assault on themselves or their children if they do not commit illegal activity.⁷¹ Sometimes it is not the direct threat of violence, but the repeated abuse that fosters a sense of powerlessness and an inability to decline from participating in crime.⁷² An Oregon study found that fifty-six percent of the female inmate population reported that they committed their charging crime to please their partner. Forty-five percent said they committed the crime to obtain drugs for their partner, and forty percent said their charging crime was actually committed by their partner.⁷³

Some crimes where it is especially common for abusive partners coerce women to commit are “welfare fraud, identity theft, writing fraudulent checks, and using or selling drugs.”⁷⁴ Additionally, studies have shown that women in co-dependent, abusive relationships have higher recidivism levels than those who are not in codependent relationships.⁷⁵ Additionally, under coercion some women take the rap for crimes their abusive partners commit because they fear what will happen if they do not take the blame.⁷⁶ Finally, some women go to prison as a passive way to escape the abuse.⁷⁷

B. Domestic Violence and its Effect on Women’s Imprisonment

Women have dramatically different pathways to crime than men. Due to the different ways women end up in prison, and their different characteristics, they experience imprisonment, as whole,

⁷¹ Barbara Zust, Assessing and Addressing Domestic Violence Experienced by Incarcerated Women, 14 CREATIVE NURSING 70 (November 2, 2008) (emphasizing that when there is a long history of abuse and abusers make threats, women know they are not “idle threats,” and feel they have no option but to comply with the abusers demand).

⁷² Martha Cramer and Shirley Scott, Seventy Percenters: An Innovative Domestic Violence Program at the Pine County Jail, CORRECTIONS TODAY (February 2006) 32.

⁷³ Neal, *supra* note 49.

⁷⁴ *Id.* at 39

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

differently than men. Although there is much research on the psychological differences between women and men, women's prisons are replicas of males' prisons because there is a deficiency of research on females and prison.⁷⁸

Prisons throughout the United States use uniform custody levels to classify prisoners: community, minimum, medium and maximum security.⁷⁹ Custody levels are used to determine appropriate "safety, housing, privileges, movement, and programming."⁸⁰ The penal system, in general, was developed through male samples and aimed at the "male offenders in mind."⁸¹ Once women are incarcerated they present different needs. Women are less violent than male offenders and present less of a risk to prison officials that they will riot.⁸² The present classification system tends to over classify women into higher risk categories than what their behavior warrants.⁸³ This means women are treated in ways in which their crime may not merit, and are put in environments that will not foster rehabilitation because it is overly restrictive.

i. Searches and Their Re-Traumatizing Effect

Beyond posing less of a security risk, and therefore generally being over-classified, women may feel over-classification more dramatically than men. Higher classification levels mean higher security levels and more prison searches. Due to the past trauma many women experience, the physical restraint and searches used on women affect them differently than the way they affect men.⁸⁴

In *Jordan v. Gardner* the Ninth Circuit held that cross-gender searches on female prisoners

⁷⁸ Wright, *supra* note 29.

⁷⁹ *Id.* at 310.

⁸⁰ *Id.* at 311.

⁸¹ *Id.* at 311.

⁸² *Id.* at 312.

⁸³ *Id.* at 312.

⁸⁴ *Id.*

violated the Eighth Amendment because such searches constituted cruel and unusual punishment.⁸⁵ The searches, which male guards conducted, began with the guard running his hands on the fully-clothed female inmate from her head to her feet.⁸⁶ The prison's instructions to the guards were that the guard "use a flat hand and pushing motion across the [inmate's] crotch area."⁸⁷ The instructions added that the guards should "push inward and upward when searching the crotch and upper thighs of the inmate," and that the "crotch area" should be "squeezed and kneaded."⁸⁸ Finally, the guards were to search the breast area "in a sweeping motion, so that the breasts will be 'flattened.'"⁸⁹ Guards were to conduct ten random searches during every two-day shift.⁹⁰

The court in *Jordan* went on to describe detailed accounts of the effects cross-gendered searches had on women with histories of past abuse.⁹¹ In one instance the body search caused such severe distress that the inmate's fingers had to be pried from the bars she was clutching during the search, and after the search she began vomiting.⁹² The court found that cross-gendered searches violated the Eighth Amendment because it was "cruel and unusual" to conduct these searches on a prison population in which past abuse was so prevalent.⁹³ During the district case, experts testified

⁸⁵ 986 F.2d 1521 (9th Cir. 1993) (finding that the severe reaction some women had to cross-gendered searches constituted "cruel and unusual punishment"). *But see Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1999) (rejecting that cross-gender searches on male inmates violated their fundamental rights, and adding that it did not violate the Equal Protection Clause to treat male and female prisoners differently because the two populations are so different).

⁸⁶ *Jordan*, 986 F.2d at 1523.

⁸⁷ *Id.* at 1523.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1525 (explaining that eighty-five percent of inmates told counselors about the abuse they had suffered at the hands of fathers, boyfriends and husbands).

about the revictimization that occurs when male guards search female inmates with abusive histories.⁹⁴ Although the Ninth Circuit held that cross-gendered searches violated the Eight Amendment, this is not true nation-wide.⁹⁵

Beyond routine searches, women are often shackled during labor.⁹⁶ In some jurisdictions, women, who are not considered flight risks and did not commit a violent crime, are routinely shackled while they give birth.⁹⁷ This use of restraint is not only traumatizing because women are in a physically and medically precarious situation, but the lack of body autonomy also re-traumatizes women who have histories of abuse.⁹⁸

C. Domestic Violence and Post-Imprisonment

Women, like their male counterparts, face many obstacles as they attempt to reintegrate into society after being incarcerated. However, there are some unique obstacles women face, especially women attempting to not go back to an abusive relationship.⁹⁹ When women leave prison they are financially strapped and socially isolated. They are often forced to go back to an abusive relationship. It is common for an abuser to use economics as a means of control over his victim. Abusers often sabotage their victim's attempts at maintaining employment.¹⁰⁰ Additionally, without economic capabilities, it is often impossible to leave an abusive relationship. While in prison women may lose whatever job they may have had, receive inferior job training compared to men and have a criminal record that prohibits them from receiving some public benefits.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Dana L. Sichel, Giving Birth In Shackles: A Constitutional And Human Rights Violation, 16 AM. U.J. GENDER SOC. POL'Y & L. 223 (2008).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Neal, *supra* note 49 (stating every case should be addressed as a suicide prevention case).

¹⁰⁰ *Id.*

Financial constraints are one of the greatest barriers for any woman trying to leave an abusive relationship. A Texas study showed that eighty-five percent of women calling hotlines, emergency rooms and shelters had left their abusers at least five times prior to the present incident. The majority of the interviewed women said that they could not afford to leave and that their financial hardship was what led them to return to their abusers.¹⁰¹ Another study found that the majority of battered women trying to flee an abusive relationship had no access to a charge account and that about thirty-four percent had no access to a checking account and that twenty-one percent of battered women have no access to cash.¹⁰² Without access to money, the odds that a woman can successfully leave an abusive relationship dramatically decrease.¹⁰³

When women do not have access to private funds, they reach for public welfare safety nets to financially enable them to leave abusive relationships. The primary place women in need turn is to Temporary Assistance for Needy Families (TANF). However, this proves problematic for women with criminal records. A felony conviction, especially a drug related felony conviction, comes with several long-lasting economic effects. The Personal Responsibility And Work Opportunity Reconciliation Act of 1996 created a lifetime ban on anyone convicted of a drug related felony from ever receiving TANF.¹⁰⁴ In many states, a conviction for possession of a small amount of marijuana would be a felony.¹⁰⁵ Not only are people with felony convictions banned from the cash benefits of

101 Estroff Marano, Why They Stay: A Saga of Spouse Abuse, *Psychology Today* (May-June 1996) at 56.

102 Follingstad, Role of Emotional Abuse in Physically Abusive Relationships, 5 J. OF FAMILY VIOLENCE 113 (1990).

103 Susan Buel. "Fifty Obstacles to Leaving, *a.k.a.*, Why Abuse Victims Stay," 28 The Colorado Lawyer 10, 19 (October 1999).

104 Joel Handler. "Ending Welfare As We Know It": The Win/Win Spin or the Stench of Victory," 5 J. GENDER RACE & JUST. 131, 132 (Fall 2001).

105 *Id.*

TANF, there is also a lifetime ban on food stamps.¹⁰⁶ If a person violates her parole or probation, for any reason, she is ineligible for TANF, food stamps, Social Security Income and public housing benefits.

States may opt-out of the ban on public assistance for people with drug convictions; however, most states impose the ban at least partially.¹⁰⁷ Seventeen states adopted the ban without modification.¹⁰⁸ Twenty-one states have some exceptions to the ban that allow former inmates to receive public assistance, such as for people who are convicted of a possession felony, or if a person convicted of a drug crime goes through a treatment program.¹⁰⁹ Most states allow public housing authorities to consider individual's criminal history, both convictions and arrests, when deciding the fate of an applicant.¹¹⁰

While incarcerated women are more likely than men to be unemployed prior to prison, the statistics show that once women are released from prison they are even worse off.¹¹¹ Even if a job can be secured after leaving, her earning power will drop ten to twenty percent from where it was before she was incarcerated.¹¹² As with public benefits, felony convictions preclude women from qualifying for a number of jobs.¹¹³ Many jobs that ban people with felony convictions are jobs in sectors for which women make up the workforce majority.¹¹⁴ While states may issue “certificates of

106 NGA Center for Best Practices, Social, Economic and Workforce Program Division, The Challenges and Impacts of Prisoner Reentry, (November 4, 2004) *available at* www.nga.org/Files/pdf/REENTRYBACKGROUND.pdf.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

rehabilitation,” which lifts bans for certain jobs for individuals, only six states are currently doing so: Arizona, California, Illinois, Nevada, New Jersey and New York.¹¹⁵ Additionally, it is legal for an employer to deny employment or to fire an employee solely because of a criminal conviction, without regards to the individual case at issue.¹¹⁶

One of the greatest obstacles in leaving a domestically abusive relationship is lack of financial autonomy.¹¹⁷ Additionally, lack of financial capabilities contributes to recidivism.¹¹⁸ Barring women with criminal records further economically paralyzes a population group that has a high rate of domestic violence and is typically comprised of the poorest members of society.

IV. Gender-Responsive Approach

The best way to address past domestic abuse in female inmates’ lives is through a gender-responsive approach that focuses on how women can successfully rehabilitate and grow economically, psychologically and emotionally so that once released from prison they can set up a life apart from their abuser. Gender-responsiveness aims to meet women’s unique needs through staff, prison infrastructure and programs.¹¹⁹ Gender-responsive programs emphasize the importance of “creating an environment . . . that reflects an understanding of the realities of women’s lives and addresses the issues of the women.”¹²⁰ These programs generally focus on the intersection of substance abuse, trauma, mental health, and economic marginality in women’s lives.¹²¹ A gender-responsive approach acknowledges differences between male and females pathways to incarceration and the barriers they

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Linda Sydney, “Gender-Responsive Strategies for Female Offenders,” U.S. Department of Justice, National Institute of Corrections. October 2005, page 2.

¹²⁰ Dr. Bloom, *supra* note 23.

¹²¹ *Id.*

face once out of prison and emphasizes that the differences matter in the rehabilitation of the two unique populations.¹²²

A significant difference between the two genders is the manner in which they best-respond to incarceration. Research shows that the best way to ensure behavior change and lower the recidivism rate among women is to create a safe and respectful environment.¹²³ A large percentage of the women in prisons have been abused prior to their incarceration, and if the prison environment is unsafe and disrespectful, the situation re-abuses the women.¹²⁴ Additionally, because women usually commit lower level crimes, the criminal justice system should implement the least amount of restrictions necessary for public safety. Women's crimes do not generally merit the same level of supervision as men's crimes.¹²⁵ Also, in a less restrictive environment, any allegation of misconduct must be seriously investigated as it is imperative that prison not re-abuse women if they are going to go back into society rehabilitated.¹²⁶

Another important part of a gender-responsive program for women in prison who have experienced abuse is developing policies and programs that are relational and promote healthy connections.¹²⁷ Women are much more relationally-centered than men.¹²⁸ Relationships have more to do with why women commit crimes than they do with why men commit crimes.¹²⁹ Women's identities are also more intimately connected with relationships in their lives than they are to men's identities.

However, many women in prison suffer from unhealthy, abusive relationships, and prison often adds to

¹²² Sydney, *supra* note 123.

¹²³ Dr. Covington et. all, *supra* note 5.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Dr. Bloom et. all, *supra* note 23.

¹²⁷ Dr. Covington et. all, *supra* note 5.

¹²⁸ *Id.*

¹²⁹ *Id.*

the isolation the women have experienced because of drug addiction or mental illness. Many women in prison have never received any intervention about domestic violence or what resources exist in leaving the relationship.¹³⁰ Accordingly, prison presents a unique opportunity to reach a vulnerable group. The best prison practices are those that focus on building healthy relationships.¹³¹ These healthy relationships are built both through the interactions between correction officers and prisoners, and programs that help women maintain and strengthen their relationships with their children and deal with the abuse in their pasts.¹³² It is fundamental in trying to help survivors of domestic violence, who are imprisoned, have successful reentries that their abuse is not be elongated during their incarceration.¹³³

Perhaps one of the trickiest but most important aspects of a gender-responsive approach is economic-strengthening. Traditionally gender-responsive programs to empower women in prison provided less economic empowerment than the programs implemented in men's prisons.¹³⁴ However, economically empowering women is a fundamental tool for survival on their own after being released from prison. Economic empowerment affords women more autonomy, and leaves them less vulnerable to their abusers.¹³⁵ Research has shown that economic needs such as housing and financial support, educational and vocational training, and job development are the most important in helping women leave domestically abusive situations.¹³⁶ Additionally, most women who are incarcerated were their family's head of household before the incarceration, and about thirty-seven percent of households

¹³⁰ Martha Cramer and Shirley Scott, Seventy Percenters: An Innovative Domestic Violence Program at the Pine County Jail, CORRECTIONS TODAY (February 2006) 32.

¹³¹ Dr. Covington et. all, *supra* note 5.

¹³² Dr. Bloom et. all, *supra* note 23.

¹³³ Dr. Covington et. all, *supra* note 5.

¹³⁴ *Id.*

¹³⁵ Dr. Bloom et. all, *supra* note 23.

¹³⁶ Dr. Covington et. all, *supra* note 5.

headed by women live below the federal poverty line.¹³⁷ In order to diminish recidivism rates, female offenders must be economically empowered.

A. Trauma Theory

Within the gender-responsive approach are several different theories about how to approach populations of incarcerated females. The theory that speaks most directly to the abuse women suffered before incarceration is the Trauma Theory approach.¹³⁸ This Theory posits that physical and emotional abuse, along with witnessing violence and being marginalized because of race, gender or class, causes some women to experience trauma.¹³⁹ Research has shown that women who have been raped or severely physically abused react similarly to prisoners of war and war veterans.¹⁴⁰ Both populations suffer Post-Traumatic Disorder, and have a higher likelihood of suffering from a drug addiction.¹⁴¹ While not all women who experience abuse become offenders, the Theory asserts that without coping skills or a support network, the trauma leads to criminal behavior.¹⁴² The Trauma Theory advocates that when dealing with female inmates, who have suffered trauma, prison policies should refrain from retraumatizing inmates, acknowledge the trauma and work with the inmate on creating better survival techniques.¹⁴³

One of the most successful ways to overcome trauma is to have a support system.¹⁴⁴ A first step to establishing a support system in prison is ensuring women are given a safe environment.¹⁴⁵

¹³⁷ Dr. Bloom et. all, *supra* note 23.

¹³⁸ Linda Sydney, "Gender-Responsive Strategies for Female Offenders," U.S. Department of Justice, National Institute of Corrections. October 2005. Page 8.

¹³⁹ *Id.*

¹⁴⁰ Dr. Bloom et. all, *supra* note 23.

¹⁴¹ *Id.*

¹⁴² Sydney, *supra* note 141.

¹⁴³ *Id.*

¹⁴⁴ Dr. Bloom et. all, *supra* note 23.

Specifically, prison must be an environment where sexual, verbal or physical abuse is not tolerated among prisoners or correction officers.¹⁴⁶ “We have come to believe that retraumatizing people by placing them in environments that reinforce helplessness, scapegoating, isolation, and alienation must be viewed as antitherapeutic, dangerous, immoral, and a violation of basic human rights.”¹⁴⁷ The Trauma Theory focuses on the need to address the past abuse women have experienced through a safe environment. Understanding and accommodating the trauma that female prisoners have experienced in their lives creates a more conducive environment for rehabilitation.¹⁴⁸

B. Level of Scrutiny Afforded to Gender Approach in Prisons

This paper advocates creating prison programs that are directed towards the specific gender that is housed at the prison. However, any program that discriminates among two distinct populations must meet a constitutional standard. What standard gender-responsive programs must meet depends on if the courts choose to analyze it under the *Turner v. Safley* decision, or the *United States v. Virginia (VMI)* decision. However, the standard chosen is irrelevant because gender-responsive programs meet both standards.

In *Turner*, the Supreme Court held that prison officials only need to have a rational reason for prison programs that infringe on prisoners’ fundamental rights.¹⁴⁹ The Court upheld a prison regulation that prevented inmates from corresponding with anyone outside of family members and legal matters. However the Court struck down an inmate marriage restriction, which prohibited inmates to marry unless the prison superintendent felt there was a “compelling reason” for the inmate to marry.¹⁵⁰ In this

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Dr. Bloom et. all, *supra* note 23.

¹⁴⁸ Dr. Covington et. all, *supra* note 5.

¹⁴⁹ Turner v. Safley 482 U.S. 78 (1987).

¹⁵⁰ *Id.*

decision the Court created a rational basis standard for prison regulations.¹⁵¹ Specifically, the court articulated three components to determine reasonableness of a prison regulation: 1) “a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it”; 2) whether there is an “alternative means of exercising the right that remain open to prison inmate”; and 3) the “impact that accommodation of the asserted constitutional right will have on guards and other inmates and the allocation of prison resources generally.”¹⁵² The Court instructed lower courts to look at whether there existed alternative means to reach the prison policy’s goal.¹⁵³

Turner set out the standard for how and when prison officials may impede prisoner’s rights.¹⁵⁴ In *Turner* the Court emphasized the difficulty in running a prison and that deference should be given to prison officials because they are the experts.¹⁵⁵ The Court did not want to “hamper innovative solutions” that prison officials may be able to come to in addressing issues with women in prison, and stated that it was more appropriate for prison officials to be deciding policies, not judges.¹⁵⁶

Past cases show that in examining gender-responsive program challenges, courts usually turn to *Turner*. Prison officials have used *Turner* to justify same-sex supervision for female inmates.¹⁵⁷ In *Torres v. Wisconsin Department of Health and Social Services*, the court reiterated that prison officials cannot make gender specific programs based on stereotypes.¹⁵⁸ However, where there is empirical proof that a specific experience or characteristic exists among a particular gender, the court will give

¹⁵¹ *Id.*

¹⁵² Brenda Smith, Prison And Punishment: Rethinking Prison Sex: Self-Expression And Safety, 15 Colum. J. Gender & L. 185 (2006).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 227.

¹⁵⁵ *Turner* 482 U.S. at 83

¹⁵⁶ *Id.* at 90.

¹⁵⁷ *Torres v. Wisconsin Dept. of Health and Social Services*, 859 F.2d 1523 (7th Cir. 1988).

¹⁵⁸ *Id.* at 1527.

prison officials the deference to “experiment” with “innovative” programs directed at rehabilitating that particular group.¹⁵⁹ Therefore, if a gender-responsive program is challenged as unconstitutional because it discriminates against men, it will likely be analyzed under a rational-basis test pursuant to *Turner*.

However, after *Turner*, the Supreme Court decided *VMI*. In *VMI* the Court ruled that a state educational institution may not prefer one gender over another. States must meet an intermediate level scrutiny if they implement policies that discriminate between different genders.¹⁶⁰ The Court mandated that the only way in which an institution may discriminate between genders is if there is an “exceedingly persuasive justification for gender-based different treatment.”¹⁶¹ The Court warned that the reason for discrimination must be “genuine, not hypothesized.”¹⁶²

This language indicates that while the Court may traditionally defer to prison officials and review prison policies under rational basis, it is possible that the Court will hold gender-responsive programs to intermediate level scrutiny. However, even under an intermediate level scrutiny, gender-responsive programs are likely to succeed. There is real, empirical data that female and male prison populations vary significantly.¹⁶³ Women are much more likely to have experienced abuse, committed a lower level, non-violent crime, battle substance abuse, be significantly poorer and suffer from mental illness.¹⁶⁴ These characteristics are universally observed and not simply “hypothesized” gender differences, but empirically shown.

V. Conclusion

¹⁵⁹ *Id.* at 1530.

¹⁶⁰ *United States v. Virginia*, 518 U.S. 515, 555 (1996) (stating that “all gender based classifications today warrant heightened scrutiny”).

¹⁶¹ *Id.* at 530.

¹⁶² *Id.*

¹⁶³ Dr. Bloom et. all, supra note 23.

¹⁶⁴ *Id.*

There is a strong connection between women who have suffered domestic violence and women who end up in prison. Although there is no one answer as to why there is such a strong correlation, the abuse history is significant, directly and indirectly, to women's pathways to crime. Most women also commit lower-level crimes and return from incarceration after a short sentence. If a primary goal of incarceration is rehabilitation, it is imperative that prison not re-abuse women. Considering abuse is a significant factor that leads women to crime, gender-responsive programs must be made a priority in order to lower recidivism rates.

Women in prison need to be in a safe environment. There must be strictly enforced codes of conduct for correction officers. Women commit lower level offenses, and respond positively to less penal environments. The criminal justice system must work on ways to stop over-classifying women, and allow them to be in less restrictive environments, while maintaining public safety. Additionally, relationships are very important to women. The interactions between correction officers and female prisoners may affect women differently than men. Women need to have programs where they both work therapeutically on relationship issues and programs that allow them to foster and strengthen relationships that had prior to incarceration so that they do not leave prison isolated.

Beyond the actual incarceration, there must be economic programs designed at empowering women. Studies have shown that such empowerment both decreases recidivism rates, and makes it easier for women to leave abusive relationships. However, economic empowerment through job training should not be done necessarily through traditionally "female" industries, as these tend to pay less than traditionally "male" industries. There must be a shift in priority, and female prisons must be given more job training programs.

The goal of prison should not be to further breakdown women who already exist at society's margins. Most prisoners will be released and if prison has only broken them further, the cycle of abuse

and illegal behavior will be perpetuated. Instead, prison provides an important opportunity for a population that has often never received any information or help in dealing with abusive relationships. It is also a time to build skills to make it easier to leave the abusive relationships. Prison should provide an opportunity for rehabilitation and growth so that when female offenders return back to their communities, they do so with more tools that will allow them to make better informed choices about how they want to proceed in their lives.