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Punishing Gender

Erin Collins

ABSTRACT

As jurisdictions across the country grapple with the urgent need to redress the impact of mass incarceration, there has been a renewed interest in reforms that reduce the harms punishment inflicts on women. These “gender-responsive” reforms aim to adapt traditional punishment practices that, proponents claim, were designed “for men.” The push to change how we punish based on gender, while perhaps well intentioned, is misguided. As abolition feminist principles reveal, these gender-responsive practices not only reify traditional gender norms, but also strengthen the operation of the carceral state. This Article catalogs the ways that the gender-responsive approach currently influences various decisions about criminal punishment, including about the length, location, and type of punishment one receives. Then, it provides an abolition feminist critique of how we “punish gender” and concludes that these efforts to treat some people better than others ultimately lead to a system that is worse for all.

AUTHOR

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INTRODUCTION

Rikers Island Jail Complex is notoriously an overcrowded, filthy space characterized by such rampant violence that the New York City Department of Corrections commits civil rights violations simply by incarcerating people there.¹ While the announcement that Rikers would close was met with widespread support, the plans to replace it with a series of smaller facilities across New York City have been the subject of much criticism.² The Women’s Center for Justice detailed one such critique.³ The Center’s thirty-eight page report characterizes the plan to construct a new facility for women⁴ in Queens as an “unsafe setback” for those who would be incarcerated there, because the facility would not be designed

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1. See Benjamin Weiser & Michael Schwartz, *U.S. Inquiry Finds a ‘Culture of Violence’ Against Teenage Inmates at Rikers Island*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/nyregion/us-attorneys-office-reveals-civil-rights-investigation-at-rikers-island.html> [<https://perma.cc/D7T8-7MTM>].
 2. See Jeffrey C. Mays, *As Conditions Worsen at Rikers, New Commission Revives Push to Close It*, N.Y. TIMES (Oct. 19, 2023), <https://www.nytimes.com/2023/10/19/nyregion/rikers-island-jail-close.html> [<https://perma.cc/9SN6-J9TN>] (discussing history of plan to close Rikers and describing political support for the plan); *Who We Are*, CAMPAIGN TO CLOSE RIKERS, <https://www.campaigntocloserikers.org/who-we-are> [<https://perma.cc/V8PE-5TB8>] (organization of people impacted by the New York City jail system, faith leaders, service providers, and other allies dedicated to closing Rikers Island).
 3. THE WOMEN’S CTR. FOR JUST., *A SAFER NEW YORK CITY* (May 2022) [hereinafter “WOMEN’S CTR. FOR JUST.”], <https://justicelab.columbia.edu/sites/default/files/content/Womens%20Center%20for%20Justice.pdf> [<https://perma.cc/79KA-JE8R>]. This organization is a cooperative effort of the Women’s Community Justice Association, the Columbia University Justice Lab, The Prison and Jail Innovation Lab at the University of Texas, and HR&A Advisors, which conducts “public policy and real estate analysis.” *Id.* at 6.
 4. This paper will amplify critiques of how the system disregards the identities of transgender or gender-nonconforming people. When I use gendered terms in my analysis, I am using them to include all people who identify with that gender, whether they are cisgendered, transgender, gender-nonconforming, or nonbinary. See generally Angela Irvine-Baker, Nikki Jones & Aisha Canfield, *Taking the “Girl” Out of Gender-Responsive Programming in the Juvenile Justice System*, 2 ANN. REV. CRIMINOLOGY 321, 323–24 (2019) (explaining the difference between sex, gender identity, and gender expression and defining terms). For example, when I use the general term woman, I use it to include cisgender and transgender women. When I discuss specific “gender-responsive” research or reforms, however, gendered terms are limited by how those researchers or reformers use them, which often erroneously collapses the terms “man” and “woman” to mean people assigned male or female at birth. The Women’s Center for Justice, for example, distinguishes women from “gender-expansive people,” a category that includes transgender women. WOMEN’S CTR. FOR JUST., *supra* note 3, at 8. I will from time to time clarify that these reforms are mostly targeted at people that system actors or reformers identify as women.

to address their “specific needs” and they would “share spaces and staff with men.”⁵ As a New York Times article summarizing the Center’s proposal declared, “[T]here is an alternative [to the construction of the new facility], whose implementation ought to be self-evident.”⁶

In a moment when there is growing support for alternatives to traditional carceral punishment, one might assume the obvious alternative would not involve incarceration at all.⁷ Instead, perhaps it would emphasize community-based punishment or even a robust policy to divert people from the criminal system entirely. This assumption would be all the more reasonable in light of the opening paragraphs of the New York Times article, which detail the experience of a woman who killed the man who was attempting to rape her and was convicted of manslaughter and incarcerated for more than a decade.⁸

But that is not what the Women’s Center for Justice proposes. Rather, the purportedly “self-evident” alternative is to incarcerate women in a vacant state prison in Harlem.⁹ According to the Center, this facility would be markedly different from—and better than—the one planned for Queens. It would be closer to the communities and families of the incarcerated women.¹⁰ It would not be attached to a men’s facility, so the women would avoid “being exposed to men—and possibly their abusers—and retraumatized.”¹¹ And it would be designed around women’s “special needs.”¹² In a letter of support for the new facility, Gloria Steinem argued that currently incarcerated women’s “needs are not being uniquely served: Roughly 81% have mental health concerns, an estimated 77% have experienced domestic violence, and most are mothers and primary

5. WOMEN’S CTR. FOR JUST., *supra* note 3 at 2.

6. Ginia Bellafante, *What Would a Feminist Jail Look Like?*, N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/2022/05/14/nyregion/jail-women.html> [<https://perma.cc/6ANF-CP4C>].

7. *See, e.g.*, MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME 197–237* (2020) (discussing alternative approaches to current punishment practices). *See also* KELLY LYTTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* 196 (2017) (“Under pressure, political leaders, policymakers, and voters across the United States have taken small steps toward decarcerating the nation’s imprisoned population and freeing the formerly incarcerated from the collateral consequences of felony conviction.”).

8. Bellafante, *supra* note 6.

9. The Center’s proposal also includes “gender-expansive people.” WOMEN’S CTR. FOR JUST., *supra* note 3, at 2. For reasons addressed in Part II, this inclusion does not address the core problems with this gender-focused approach.

10. WOMEN’S CTR. FOR JUST., *supra* note 3, at 4.

11. *Id.* at 11.

12. *Id.* at 16.

caregivers.”¹³ In other words, the proposed facility would incarcerate women *better*. New York City is hardly alone in embracing the creation of specialized prisons for women. New prisons and prison units for women have been built across the country, from California,¹⁴ to Iowa,¹⁵ to Connecticut.¹⁶ And there are more in the planning stages.¹⁷

While the push for specialized prisons for women is relatively new, the ideas it embodies are not. It is an application of established theory that punishment practices should be “gender-responsive.”¹⁸ The gender-responsive approach starts from the proposition that modern punishment practices were designed “for

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13. Graham Rayman, *Gloria Steinem Lends Name to Campaign to Turn Shuttered Harlem State Prison Into New Women’s Jail*, N.Y. DAILY NEWS (June 12, 2022, 2:18 PM), <https://www.nydailynews.com/new-york/nyc-crime/ny-gloria-steinem-campaign-rikers-woman-jail-harlem-20220612-hvk32eeagjfljizih5q6xkwjne-story.html> [<https://perma.cc/8N7Z-U9BN>].
 14. The “gold standard for gender-responsive corrections” is Las Colinas Detention and Reentry Facility, a jail in San Diego. Keri Blakinger, *Can We Build a Better Women’s Prison?*, WASH. POST MAG. (Oct. 28, 2019), <https://www.washingtonpost.com/magazine/2019/10/28/prisons-jails-are-designed-men-can-we-build-better-womens-prison> [<https://perma.cc/7RD7-NHYF>]. Las Colinas opened in 2014. See *Directory: Las Colinas Detention and Reentry Facility*, SAN DIEGO CNTY. SHERIFF’S DEPT., <https://www.sdsheriff.gov/Home/Components/FacilityDirectory/FacilityDirectory/105> [<https://perma.cc/YRC3-8646>].
 15. Joseph Shapiro, *In Iowa, a Commitment to Make Prison Work Better for Women*, NPR: ALL THINGS CONSIDERED (Oct. 17, 2018, 3:45 PM), <https://www.npr.org/2018/10/17/656972806/in-iowa-a-commitment-to-make-prison-work-better-for-women> [<https://perma.cc/4XQQ-UFJF>] (discussing the Iowa Correctional Institution for Women, which was “newly built” as of 2018).
 16. Mattie Kahn, *Inside a Radical Experiment to Transform the Lives of Incarcerated Women*, GLAMOUR (Aug. 22, 2018), <https://www.glamour.com/story/incarcerated-women-recidivism-connecticut-prison-program> [<https://perma.cc/TL2F-TNRZ>] (discussing WORTH (Women Overcoming Recidivism Through Hard Work), a new specialized unit at Connecticut’s York Correctional Institution).
 17. Travis County, Texas, for example, was planning to construct a new \$97 million facility for women. See Blakinger, *supra* note 14. The construction of that planned facility, however, has been put on pause. See Olivia Aldridge, *Travis County Pauses Plans to Build New Women’s Jail*, CMTY. IMPACT (June 15, 2021, 7:22 PM), <https://communityimpact.com/austin/central-austin/government/2021/06/15/travis-county-pauses-plans-to-build-new-womens-jail> [<https://perma.cc/RHF5-LZSM>]. Massachusetts is also considering constructing a new incarceration facility for women. See Tamar Sarai, *Massachusetts Organizers Call for No New Women’s Prisons and an End to Their Construction*, PRISM (Oct. 14, 2022), <https://prismreports.org/2022/10/14/massachusetts-no-new-womens-prisons> [<https://perma.cc/G8J7-Z2QH>].
 18. See, e.g., BARBARA BLOOM, BARBARA OWEN & STEPHANIE COVINGTON, NAT’L INST., OF CORR., GENDER-RESPONSIVE STRATEGIES (2003), <https://s3.amazonaws.com/static.nicic.gov/Library/018017.pdf> [<https://perma.cc/59P5-RVGB>].

men” and therefore are inattentive to the unique needs of women.¹⁹ Specifically, this approach contends that women are unique because they are mothers and caregivers; they are the victims of intimate partner violence and sexual assault; they suffer from physical and mental harm; and when they commit crimes, it is often because of the influence of another person.²⁰ According to proponents, because of these differences criminal system actors and institutions should treat women differently than they treat men. In this case, differently is often synonymous with more humane conditions and programs. Common gender-responsive improvements for correctional facilities include increased opportunities to visit with family, architecture that provides more privacy and access to natural light, and access to more robust physical and mental health care.²¹

The gender-responsive approach to punishment might seem like an appropriate and necessary corrective measure, especially in light of recent scholarship and activism detailing the ways that the criminal system enforces gender norms by singling out women—particularly women of color and transgender women—for surveillance, arrest, prosecution, and punishment.²² For example, young women and girls are disproportionately targeted by the juvenile system when their actions are inconsistent with gendered norms.²³ And women who are mothers often receive enhanced punishment because engaging in behavior deemed criminal defies traditional norms of motherhood.²⁴ Meanwhile,

19. See ELIZABETH FLEMING, ALLISON UPTON, FELICIA LOPEZ WRIGHT, SARAH WURZBURG & BECKI NEY, COUNCIL OF STATE GOV'TS JUST. CTR., ADOPTING A GENDER-RESPONSIVE APPROACH FOR WOMEN IN THE JUSTICE SYSTEM 3 (2021) (“[C]riminal justice policies, practices, and programs have historically been designed for men and applied to women without consideration of women’s distinct needs.”); ELIZABETH SWAVOLA, KRISTINE RILEY & RAM SUBRAMANIAN, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7 (2016) (“Once incarcerated, women must grapple with systems, practices, and policies that are designed for the majority of the incarcerated population: men.”); Bellafante, *supra* note 6 (“[P]risons have been historically designed for men and have neglected the particular needs of women.”).

20. See *infra*, Part II.B.

21. See *infra*, Part I.B.3.

22. See generally Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091 (2014) (highlighting how the juvenile justice system uses status offenses to criminalize girls’ conduct); see also I. India Thusi, *Girls, Assaulted*, 116 NW. U. L. REV. 911, 923–24 (2022) (providing statistics about the characteristics of girls in the juvenile incarceration system and arguing the system “fails to address the unique needs of girls”).

23. See Fanna Gamal, *Good Girls: Gender-Specific Interventions in Juvenile Court*, 35 COLUM. J. GENDER & L. 228, 239 (2018) (“[C]onduct that deviates from conventional notions of femininity, like running away or incorrigibility, more often results in harsher punishment for girls than for boys.”).

24. See *infra*, Part II.B.

the system fails to protect women and girls from violence they experience at the hands of their partners, law enforcement, and guardians. Their claims are dismissed or disbelieved, or because they know the system will not protect them or advance justice in ways they want, they are hesitant to engage the system at all.²⁵ This can leave women to protect themselves, and when they do, they are then punished harshly and deprived of the legal protection of self-defense routinely afforded to men who, for example, shoot people on their property.²⁶ This leads to the “survived and punished” phenomenon, whereby system actors target and punish women for engaging in acts of survival.²⁷

Considering these observations about how system actors weaponize gender to unjustly surveil and punish women, one may wonder—shouldn’t we craft reforms that soften the harshness of these systems for women? Given the ways in which the system punishes women because of their gender, doesn’t it make sense that punishment practices should compensate by treating women preferentially?

This Article argues that gender-responsive punishment practices cannot and will not redress the entrenched problems with how the criminal system punishes gender. It contends that gender-specific punishment practices operationalize gender in the service of the carceral state and catalogues the ways that the gender-responsive approach influences decisions throughout the criminal punishment process in ways that are harmful. I argue that gender-responsive reforms ultimately strengthen both traditional gender norms and traditional punishment practices for everyone, regardless of gender. Moreover, the narrative invoked to justify this gendered approach—namely, that the traditional punishment system

25. See Andrea Smith, Beth Richie, Julia Sudbury & Janelle White, *The Color of Violence: Introduction*, in INCITE! WOMEN OF COLOR AGAINST VIOLENCE 1, 2 (2016) (emphasis in original) (“The challenge women of color face in combatting personal and state violence is to develop strategies for ending violence that *do* assure safety for survivors of sexual/domestic violence and *do not* strengthen our oppressive criminal justice apparatus.”); see also Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in INCITE! WOMEN OF COLOR AGAINST VIOLENCE 138, 138–39 (2016) (recounting acts of violence by law enforcement against women of color).

26. See generally LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM* (2023) (describing how acts of survival by women, transgender, and gender-nonconforming people are criminalized).

27. The organization Survived & Punished is a national coalition that “organizes to de-criminalize efforts to survive domestic and sexual violence, support and free criminalized survivors, and abolish gender violence, policing, prisons, and deportations.” SURVIVED & PUNISHED, <https://survivedandpunished.org> [<https://perma.cc/P3TU-YEMC>]. It “specifically focuses on criminalized survivors to raise awareness about the integrated relationship between systems of punishment and the pervasiveness of gender violence.” *About S&P*, SURVIVED & PUNISHED [hereinafter “*About S&P*”], <https://survivedandpunished.org/about> [<https://perma.cc/U9V2-25WB>].

was designed for men—obscures the central role of racism and white supremacy in the creation and continued operation of the carceral state. Further, the gender-responsive framework centers and expands the carceral system in the name of better treatment for some, thus working against the increasingly loud push for decarceration and abolition from activists and the academy.²⁸

Ultimately, this Article offers a critique of how we punish gender that is both abolitionist and feminist.²⁹ It combines the abolitionist commitment to “eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment”³⁰ with a feminist dedication to ending gender-based violence in all of its manifestations. In so doing, this Article joins burgeoning scholarship that acknowledges that neither feminism nor abolition, on their own, are sufficient to fully understand the harms of carceral practices nor illumine paths forward.³¹ What is needed instead is an abolition feminist perspective, one that “incorporates a dialectic, a relationality, and a form of interruption: an insistence that abolitionist theories and practices are most compelling when they are also feminist, and conversely, a feminism that is also abolitionist is the most inclusive and persuasive version of feminism for these times.”³² Abolition feminism provides an analytic counterpoint to carceral feminism, which invokes the punitive power of the state to resolve gendered violence. In contrast, abolition feminism understands that “the movement to end gender and sexual violence . . . can never be isolated from the work to end state violence,” including the violence perpetuated by police and other criminal system actors.³³

While the term “abolition feminism” is relatively new, abolition feminist principles have deep roots in social movements and the academy. These roots reach back at least as far as the resistance and organizing by incarcerated Black

28. See SCHENWAR & LAW, *supra* note 7 at 197–98. See also Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. (SUP. CT. 2018 TERM) 1 (2019); MARIAME KABA, WE DO THIS ‘TIL WE FREE US (Tamara K. Nopper ed., 2021); RUTH WILSON GILMORE, ABOLITION GEOGRAPHY (2022).

29. Abolition and feminism are not “static identifiers but rather political methods and practices.” ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, ABOLITION. FEMINISM. NOW. 1–2 (Naomi Murakawa ed., 2022).

30. *Id.* at 50.

31. See, e.g., *id.*; GOODMARK, *supra* note 26; ABOLITION FEMINISMS VOL. 1: ORGANIZING, SURVIVAL, AND TRANSFORMATIVE PRACTICE (Alisa Bierria et al eds., 2022).

32. DAVIS ET AL., *supra* note 29, at 2. See also GOODMARK, *supra* note 26, at 186 (“Abolition feminism is, quite simply, ‘feminism that opposes, rather than legitimates, oppressive state systems.’”).

33. DAVIS ET AL., *supra* note 29, at 2

women and other women of color in the 1970s and subsequent alliances between organizations focused on ending gender violence and the prison industrial complex.³⁴ Abolition feminism builds on the analytical foundations established through Black feminism and critical race feminism.³⁵ Legal scholars have recently started to apply abolition feminist principles to analyze the criminal system, focusing primarily on how the system uses gender to target people for punishment.³⁶ This Article applies these principles to a different end, namely, to reveal the ways the system deploys gender in the name of helping some people and ultimately harms all.

Viewed in the best light, the movement for gender-responsive punishment is a movement to respond with empathy to some people—some of the people whom the system identifies as women—under some circumstances. But empathy should not be a scarce resource to be rationed. While it is not surprising that the empathetic impulse is strongest for people who seem particularly vulnerable and minimally culpable, it cannot and should not stop there. If we are willing to see the connection between trauma, systemic vulnerability, conduct, and criminalization in one group of people, we should look broadly and create responses for everyone who has experienced such trauma.

The reforms that have come out of this rationed empathetic impulse are perhaps well intentioned, but they have been short sighted. They effectively cover the harshness of the system by treating those deemed to be its most vulnerable targets better, while doing nothing to change the fact that the criminal system itself is rotten to its core.³⁷ In other words, they are “release valve” reforms that reduce some pressure to change the system, but ultimately help sustain it in perpetuity.³⁸

34. See, e.g., *INCITE!-Critical Resistance Statement: Statement on Gender Violence and the Prison Industrial Complex* (2001), INCITE!, <https://incite-national.org/incite-critical-resistance-statement> [<https://perma.cc/956X-QX9W>]; see also EMILY L. THUMA, *ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE 2* (2019) (“Anticarceral feminist politics grew in the cracks of prison walls and at the interfaces between numerous social movements, including those for racial and economic justice, prisoners’ and psychiatric patients’ rights, and gender and sexual liberation.”).

35. See DAVIS ET AL., *supra* note 29, at 84–102 (discussing origins of abolition feminism); Roberts, *supra* note 28, at 44–46 (discussing history of anticarceral feminism).

36. Professor Leigh Goodmark, for example, recently published a robust abolition feminist critique of how the system criminalizes acts of survival by people who have experienced gender-based violence. See GOODMARK, *supra* note 26.

37. See *id.* at 182 (arguing that reform that “leav[es] the basic structure of the criminal punishment system intact . . . legitimates that system and stymies more radical change”).

38. Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481 *passim* (2017). Release valve reforms are designed to selectively “relieve the pressure of the fiscal and emotional costs of our current carceral crisis.” *Id.* at 1482. Release valve reforms “tend to be shortsighted emergency measures

Thus, as we craft a path forward, we should channel collective concern towards non-reformist reforms that do not justify the system writ large.³⁹ We must simultaneously work against the criminalization of gender and acts of survival while resisting punishment practices that further entrench the centrality of the carceral state and justify its logics.

This Article proceeds in three parts. Part I identifies different sites of gender (re)production in the punishment process: moments in the criminal process at which gender is used to differentiate people convicted of crimes for purposes of punishment. Part II analyzes the gender sorting described in Part I, focusing on how it helps produce conditions and justifications which sustain the operation of the criminal punishment system. Part III concludes by attempting to resolve the tension between the need to acknowledge and address the very real ways in which the criminal system targets people because of gender, and the danger of replicating the hierarchies and power structures we seek to dismantle. It does so by envisioning a future of punishment guided by abolition feminist principles.

I. GENDERING PUNISHMENT

This Part describes the origins of gender-responsive punishment practices and catalogs different sites of gender (re)production in the criminal punishment system—where the gender of the convicted person influences the length, location, and conditions of punishment they receive.

A. The Criminal System Responds to Gender

The U.S. criminal punishment system underwent significant changes at the end of the twentieth century. The number of people in the system dramatically increased, along with the governmental capacity to incarcerate people.⁴⁰ Some of these increases continued established trends. For example, at the century's end, Black men continued to be incarcerated at rates that were disproportionate to their

that are implemented to provide immediate fiscal relief and enacted without careful consideration of their long-term consequences,” and may help sustain the system in perpetuity. *Id.* at 1507–08.

39. See RUTH WILSON GILMORE, *GOLDEN GULAG* 242 (Earl Lewis et al. eds., 2007) (discussing non-reformist reforms); GOODMARK, *supra* note 26, at 188.

40. ALLEN J. BECK & PAIGE M. HARRISON, *BUREAU OF JUST. STATS., BULLETIN: PRISONERS IN 2000* 9 (2001), <https://bjs.ojp.gov/content/pub/pdf/p00.pdf> [<https://perma.cc/9RF9-47RE>] (noting that state incarceration capacity increased by 81.2 percent and states built 351 new facilities during this time).

representation in the general population and at rates that surpassed incarceration of white men.⁴¹

Other trends in punishment departed from past practices—and one change in particular garnered significant attention: The number of women entering the criminal system was increasing at a rate greater than the number of men. Specifically, the number of women under some form of correctional supervision (probation, jail, prison, or parole) increased by 81 percent between 1990 and 2000, as compared to a 45 percent increase for men under correctional control.⁴² While men remained fifteen times more likely to be incarcerated than women by 2000, the number of women serving a state or federal prison sentence increased by an average of 7.6 percent per year between 1990 and 2000, while the rate of increase for men was 5.9 percent.⁴³ A parallel development occurred in the juvenile justice system, where there was a 50 percent increase in new delinquency proceedings against girls between 1990 and 1999. In contrast, the rates of proceedings against boys increased by 4 to 7 percent during the same period.⁴⁴

Concern over women's incarceration rates prompted research that sought to understand what led women into the criminal system—or what “pathways” women followed into the system.⁴⁵ Pathways research grew out of Kathleen Daly's study of forty women convicted of felonies in New Haven, Connecticut. Daly identified five categories of women who commit crimes: 1) “street women” who “ran away from . . . abusive household[s];” 2) “harmed and harming women” who were “[a]bused or neglected as a child;” 3) “battered women” who “were in relationships with violent men or had recently ended such relationships;” 4) “drug-connected women” who “used or sold drugs in their relationships with boyfriends or family members;” and 5) “Other Women” whose lawbreaking “seemed to arise from a desire for more money.”⁴⁶ Overall, pathways research,

41. See *id.* at 11 (revealing that in 1990 and in 2000 Black people represented about 45 percent of all people incarcerated in state and federal facilities, white people represented about 35 percent, and in 2000 nearly 10 percent of all Black men between the ages of twenty-five and twenty-nine were incarcerated).

42. See BLOOM ET AL., *supra* note 18, at 2 (breaking down increases by type of correctional control).

43. BECK & HARRISON, *supra* note 40, at 5.

44. Irvine-Baker et al., *supra* note 4, at 326.

45. See Emily J. Salisbury, Breanna Boppre & Bridget Kelly, *Gender-Responsive Risk and Need Assessment: Implications for the Treatment of Justice-Involved Women*, in HANDBOOK ON RISK AND NEED ASSESSMENT 220, 225–26 (Faye Taxman ed., 2016) (summarizing pathways research).

46. KATHLEEN DALY, GENDER, CRIME AND PUNISHMENT 46–48 (1994) (describing these categories); Kathleen Daly, *Women's Pathways to Felony Court: Feminist Theories of Lawbreaking and Problems of Representation*, 2 S. CAL. REV. L. & WOMEN'S STUD. 11, 17–19 (1992) (describing study method and data).

which remains influential today,⁴⁷ has concluded that women generally commit crimes because of external influences, including “childhood and ongoing victimization, trauma, substance abuse, dysfunctional relationships, lack of human or social capital, economic disadvantage, and mental health issues including depression and anxiety.”⁴⁸

In addition to seeking to understand what led women into the criminal system, many people also called for new and more effective interventions specifically targeted at stemming the tide of women and girls entering the system.⁴⁹ In 1999, the National Institute of Corrections launched a three-year project to “create a foundational body of work on gender-relevant approaches to managing and intervening effectively with women offenders in adult corrections.”⁵⁰ This project, under the leadership of researchers Barbara Bloom, Barbara Owen, and Stephanie Covington, came to two key research findings: First, because there were considerably more men in the system than women, “the issues relevant to women” had been “overshadow[ed].”⁵¹ Second, criminal system “policies and procedures [...] have been designed for male offenders.”⁵² Specifically, the researchers concluded, women differ from men in their “pathways to the criminal justice system,” their “behavior while under supervision or in custody,” and “the realities of [their] lives,” all of which impacts how they respond to punishment.⁵³

Decades later, Bloom, Owen, and Covington’s primary conclusions—that the criminal punishment system was designed “for men,” and that women have unique needs that the system does not (but should) account for—are regularly recited as justifications for developing a “gender-responsive” approach to punishment.⁵⁴ Bloom, Owen, and Covington define gender responsiveness as

47. Michael D. Reising, Kristy Holtfreter & Merry Morash, *Assessing Recidivism Risk Across Female Pathways to Crime*, 23 JUST. Q. 384, 390–91 (2006) (quoting DALY, GENDER, CRIME AND PUNISHMENT, *supra* note 46, at 21) (noting that pathways theory is “one of the best-known and respected attempts to organize the varying ‘conditions and circumstances that spawn violence and illegal forms of economic gain’ among women”).

48. Salisbury et al., *supra* note 45, at 227. See also FLEMING ET AL., *supra* note 19, at 10 (summarizing women’s “‘pathways’ to crime”).

49. Irvine-Baker et al., *supra* note 4, at 326 (noting advocates’ calls for “special interventions for girls”).

50. BLOOM ET AL., *supra* note 18, at iii.

51. See *id.* at vi.

52. See *id.*

53. *Id.* at 11.

54. See FLEMING ET AL., *supra* note 19, at 3 (“[C]riminal justice policies, practices, and programs have historically been designed for men and applied to women without consideration of women’s distinct needs.”); SWAVOLA ET AL., *supra* note 19, at 13 (“For women, however, jail can be especially destabilizing, because most jail environments were not designed with them in

“creating an environment . . . that reflects an understanding of the realities of women’s lives and addresses the issues of the women.”⁵⁵

The policies and procedures this approach produces are purportedly “guided by women-centered research; . . . relational, strengths-based, trauma-informed, culturally competent, and holistic; and account for the different characteristics and life experiences of women and men, and respond to their unique needs, strengths, and challenges.”⁵⁶ Common experiences and characteristics that gender-responsive proponents and programs highlight as being unique to women in the criminal system include: they are parents;⁵⁷ they have experienced trauma, often resulting from intimate partner violence or sexual assault or both;⁵⁸ they have more

mind and do not take into account the particular adversities they have experienced.”); WOMEN’S CTR. FOR JUST., *supra* note 3, at 18 (“Not only are most jails and prisons physically designed for men, with women’s needs as an afterthought, but these facilities are also operated using procedures are approaches developed for men in custody.”) (citing research that Risk assessments are male-oriented and fail to accurately predict risk in women). *See also* Christopher A. Mallett, Michael J. Williams & Shawn C. Marsh, *Specialized Detention and Correctional Facilities*, in CORRECTIONAL PSYCHIATRY 12-1, 12-14 (O. Thienhaus & M. Piasecki eds., 2013) (citation omitted) (“To achieve rehabilitation, prison programs must provide offenders meaningful opportunities for personal development, skill enhancement, and reintegration support. Most prison programs, however, are based on the needs of male offenders, and they lack the necessary supports and services specific to the needs of female offenders in terms of physical and mental health, relational and vocational skill development, and family/social reintegration.”); Blakinger, *supra* note 14 (“The American prison system was built with men in mind.”); Tiffany Williams Brewer & H. Mitchell Caldwell, *No Girl Left Behind: Girls Courts as a Restorative Justice Approach to Healing*, 52 SETON HALL L. REV. 685, 697–98 (2022) (“Prisons remain challenged to meet the unique needs posed by biological differences that the male-dominated system does not account for and has been sluggish to address.”)

55. BLOOM ET AL., *supra* note 18, at v. *See also* WOMEN’S CTR. FOR JUST., *supra* note 3, at 2 (“A gender-responsive approach would mean addressing the realities of the lives of women and gender-expansive people, their unique pathways into the system, and how they differ from cis-gender men.”). Some definitions of “gender responsiveness” also include an affirmation of “femaleness” as a positive identity. Mallett et al., *supra* note 54, at 12-15 to -16 (“Researchers such as Ellis, McFadden, and Colaric (2008) note that simply separating female offenders from male offenders is not the same as comprehensive gender-specific programming. Rather, ‘gender-specific programming reinforces ‘femaleness’ as a positive identity with inherent strengths.”).
56. ALYSSA BENEDICT, BECKI NEY & RACHELLE RAMIREZ, NAT’L RES. CTR. ON JUST. INVOLVED WOMEN, GENDER RESPONSIVE DISCIPLINE AND SANCTIONS POLICY GUIDE FOR WOMEN’S FACILITIES 4 (Becki Ney & Rachelle Ramirez eds., 2018) <https://cjininvolvedwomen.org/wp-content/uploads/2018/04/Combined-Discipline-Guide-031518.pdf> [<https://perma.cc/R4H9-BXXV>].
57. Bellafante, *supra* note 6 (80 percent of “female detainees” at Rikers are mothers); WOMEN’S CTR. FOR JUST., *supra* note 3, at 2 (70 percent in NYC).
58. Bellafante, *supra* note 6 (77 percent of female detainees at Rikers are victims of DV); WOMEN’S CTR. FOR JUST., *supra* note 3, at 2 (49–97 percent in NYC); Blakinger, *supra* note 14 (“Trauma is the common denominator underlying the life experience of the vast majority of female

mental health needs than men;⁵⁹ they are less likely to commit crimes and reoffend;⁶⁰ they are less likely to commit violent crimes when they do commit crimes.⁶¹

Bloom, Owen, and Covington developed a set of six “guiding principles . . . for a gender-responsive approach to the development of criminal justice policy” for the National Institute of Corrections:⁶²

The first principle is to “[a]cknowledge that gender makes a difference.”⁶³ This principle calls for a recognition that men and women follow different pathways into the criminal system; respond differently to supervision and custody; “exhibit differences in terms of substance abuse, trauma, mental illness, parenting responsibilities” and pose “different levels of risk within both the institution and the community.”⁶⁴

The second principle is “[c]reate an environment based on safety, respect, and dignity.”⁶⁵ This principle is based on the premise that many women in the criminal system “have grown up in less than optimal family and community environments”—specifically, they have experienced emotional, physical, and sexual abuse.⁶⁶ System actors, the principle suggests, should be aware of these past traumatic experiences and avoid “reenact[ing]” women’s “earlier life experiences.”⁶⁷

The third principle is “[d]evelop policies, practices, and programs that are relational and promote healthy connections to children, family, significant others, and the community.”⁶⁸ This principle starts from the premise that relationships are uniquely important to women and that significant relationships—such as family members, intimate partners, or friends—may lead them to commit crimes.⁶⁹ This principle also reflects the sentiment that most women whom the

inmates, and trauma-informed care is a key piece of the gender-responsive approach. More than half of female prisoners are survivors of physical or sexual violence; 73 percent of female state inmates and 61 percent of female federal inmates have mental health problems.”).

59. WOMEN’S CTR. FOR JUST., *supra* note 3, at 4–5.

60. *Id.* at 9 (noting that “[w]omen have especially low recidivism rates,” particularly for offenses involving violence).

61. *Id.*; see also BLOOM ET AL., *supra* note 18, at 13 (reciting statistics showing low rates of violent crimes by women).

62. BLOOM ET AL., *supra* note 18, at 76.

63. *Id.*

64. *Id.* at 77.

65. *Id.* at 76.

66. *Id.* at 77.

67. *Id.*

68. *Id.* at 76.

69. *Id.* at 79.

system punishes are mothers who want to maintain their parenting responsibilities.⁷⁰

The fourth principle is “[a]ddress substance abuse, trauma, and mental health issues through comprehensive, integrated, and culturally relevant services and appropriate supervision.”⁷¹ A “key finding” underlying this principle is that “family violence and battering, substance abuse, and mental health issues” often “propel women into crime,” and therefore punishment practices should address these often interrelated issues.⁷²

The fifth principle is “[p]rovide women with opportunities to improve their socioeconomic conditions.”⁷³ This principle contends that most women in the system are “poor, undereducated, and unskilled” and this “reality is compounded by their trauma and substance abuse histories.”⁷⁴ Therefore, criminal system interventions should provide education and training so women can support themselves and their children.⁷⁵

The sixth and final principle is “[e]stablish a system of community supervision and reentry with comprehensive, collaborative services.”⁷⁶ This principle posits that women in the system “face specific challenges” when they reenter their community or serve time on community supervision, including “additional burdens” such as “single motherhood, decreased economic potential, . . . and a general lack of community support.”⁷⁷ This principle proposes that these burdens should be alleviated through services such as housing, childcare, and transportation support.⁷⁸

Decades later, these principles continue to influence decisions about punishment design and implementation. The gender-responsive orientation to punishment ushered in a “new generation of correctional programs and other interventions for women,”⁷⁹ and has been increasingly influential on decisionmaking throughout the punishment process, from decisions about how

70. *Id.*

71. *Id.* at 76.

72. *Id.* at 80.

73. *Id.* at 76.

74. *Id.* at 81.

75. *Id.*

76. *Id.* at 76.

77. *Id.* at 82.

78. *Id.* at 82–83.

79. Renée Gobeil, Kelley Blanchette & Lynn Stewart, *A Meta-Analytic Review of Correctional Interventions for Women Offenders: Gender-Neutral Versus Gender-Informed Approaches*, 43 CRIM. JUST. & BEHAV. 301, 303 (2016) (citations omitted) (noting, in 2016, that it “has been about a decade since the advent of a new generation of correctional programs and other interventions for women—those hailed as ‘gender-informed’ or ‘gender-responsive’”).

much punishment is due to how such punishment is administered and where it should occur.

B. Gendered Punishment Decisions

1. Length of Punishment or Incarceration

Undoubtedly, people empowered to make important decisions about what sentence to impose on someone who has been convicted of a crime are implicitly influenced by a range of considerations, including the person's gender. But in many jurisdictions, these decisionmakers are *explicitly* empowered to consider gender in determining how long a person should be punished or whether they are eligible for early release from prison. Specifically, decisionmakers are empowered to punish people whom they identify as women with shorter and less harsh sentencing. This differential treatment is legitimated by the use of predictive risk assessment instruments at various punishment decisionmaking points.⁸⁰ Risk assessment instruments are actuarial tools that purport to predict an individual's risk of recidivism and their criminogenic needs.⁸¹ Criminogenic needs are characteristics risk-assessment research identifies as correlating with recidivism.⁸² The four needs believed to be most predictive of recidivism are a history of antisocial behavior; antisocial attitudes; antisocial peers; and antisocial personality characteristics.⁸³

Proponents of gender-responsive punishment have advocated for the development of risk assessment tools that explicitly consider gender for two reasons.⁸⁴ First, they claim that gender-neutral risk-assessment tools overpredict

80. Common risk assessment instruments are LSI-R, COMPAS, and LS/CMI. Salisbury et al., *supra* note 45, at 228 (identifying LSI/R, COMPAS, and LS/CMI as “well established risk/need assessment tools”). There are a variety of assessment tools, but all are essentially a survey that scores people for the presence or absence of certain risk factors believed to correlate with criminal behavior. Most tools consider both “static” risk factors, which cannot be changed through correctional intervention, and “dynamic” factors, which can be changed. See Reisig et al., *supra* note 47, at 386. The individual's total risk score is tallied, and the resultant score categorizes them as having either a low, moderate, or high risk of recidivism.

81. Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 81 (2018). Risk assessment instruments were originally developed to guide correctional decisions about where incarcerated people would be housed and what programming opportunities and treatment requirements to place upon them during their incarceration. *Id.* at 57. However, these tools have been adapted and applied to “off-label” uses, namely, to guide judicial decisions about bail and sentencing. *Id.*

82. Salisbury et al., *supra* note 45, at 233 (summarizing the relevant literature).

83. *Id.*

84. *Id.* at 222 (“We argue that to create a criminal justice environment that reflects the realities of justice-involved women, while simultaneously addressing their individual needs and

women’s risk of recidivism. They argue that, because data shows that men commit more crimes than women, risk assessment tools that do not consider gender are less accurate than they could be—a result that, they urge, is unfair to women, whose risk of recidivism is overstated.⁸⁵ Or, as the Department of Justice has said in dismissing complaints that its risk assessment tool raises constitutional concerns, “[i]f men and women were scored using a single model, women would be scored according to a model that centered on men,” resulting in “women being over-classified and over-supervised.”⁸⁶ In sum, the argument goes, the risk assessment tool must consider gender—and must categorize men as inherently riskier—in order to produce accurate results for women.

A second critique of gender-neutral risk assessment practices concerns the identification of criminogenic needs. Specifically, gender-responsive punishment proponents have argued that the risk tools fail to identify and respond to “women’s pathways to criminal behavior, the gender-responsive pathways that affect dynamic needs, or the unique factors that are important for women’s specific responsivity needs.”⁸⁷ Critics contend that foundational research about which criminogenic needs are predictive of recidivism does not accurately reflect

strengths, traditional, male-based risk assessments are simply insufficient.”); Mallett et al., *supra* note 54, at 12-14 (alteration in original) (citations omitted) (“In seeking to develop a gender-responsive justice system, ‘risk classification and sentencing policies and practices [also] should systematically consider public safety risks, individual assets to family and community, and health and human service needs to determine a proper criminal sentence. In other words, classification systems for determining dispositions and placements for female offenders need to be different than those used with male offenders.”); Reisig et al., *supra* note 47, at 389 (“[C]riminologists working from a feminist perspective argue that the LSI-R and other risk assessments rely on male-centered theories of crime and delinquency, and as a result fail to take into account a host of critical factors that lead women into crime and shape the context of their (re)offending.”)

85. FLEMING ET AL., *supra* note 19, at 17 (surveying existing risk assessment tools and discussing the need for a gender-responsive approach); Jennifer Skeem, John Monahan & Christopher Lowenkamp, *Gender, Risk Assessment, and Sanctioning: The Cost of Treating Women Like Men*, 40 LAW & HUM. BEHAV. 580, 591 (2016) (supporting the use of gender as a risk assessment factor because not doing so results in overpredicting risk level for women); Salisbury et al., *supra* note 45, at 232-33 (arguing that “male-based institutional custody classification instruments” result in “[o]verclassification, which assigns women to higher risk levels than is behaviorally warranted”). *But see* Reisig et al., *supra* note 47, at 384 (concluding that the LSI-R risk assessment predicts recidivism for “women who did not follow gendered pathways into criminality, whose offending context was similar to males, and who occupied a relatively advantaged social location”).

86. U.S. DEPT. OF JUST., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM - UPDATE 17 (2020), <http://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf> [<https://perma.cc/4FZT-Z9MP>].

87. Salisbury et al., *supra* note 45, at 227.

women's lives. For example, some argue that the primary factors believed to predict recidivism—antisocial behavior, antisocial attitudes, antisocial peers, and antisocial personality traits—do not reflect factors that correlate with recidivism in women.⁸⁸ Instead, they advocate for the inclusion of factors believed to be “predictive for women only, such as depression, anxiety, and unhealthy relationships.”⁸⁹

As a result of these critiques, many risk assessment tools explicitly consider the gender of the individual being surveyed. The tools incorporate gender in a few different ways. First, some risk tools assign the individual additional points that quantify increased risk simply for being a man. Virginia follows this approach in its algorithmic assessment of whether convicted people are eligible for an alternative to a prison sentence.⁹⁰ The Virginia Nonviolent Risk Assessment worksheet for drug offenses considers the following categories for eligible defendants: age at time of offense;⁹¹ gender;⁹² prior juvenile adjudication;⁹³ prior adult felony convictions;⁹⁴ prior adult incarcerations;⁹⁵ and prior arrest or confinement within twelve months prior to the instant offense.⁹⁶ Assume, for example, there are two individuals being assessed: one whom the system identifies as a man and one whom it identifies as a woman. Both are convicted of the same nonviolent drug offense when they are twenty years old, and both have a single prior juvenile adjudication. Under Virginia's scheme, the man scores eighteen points (nine for being younger than twenty-one, two for being a man, and seven for his prior juvenile adjudication). The woman scores ten points (nine for being

88. *Id.* at 233.

89. FLEMING ET AL., *supra* note 19, at 17 (providing examples).

90. See BRANDON GARRETT, ALEXANDER JAKUBOW & JOHN MONAHAN, VA. CRIM. JUST. POL'Y REFORM PROJECT, NONVIOLENT RISK ASSESSMENT IN VIRGINIA SENTENCING: THE SENTENCING COMMISSION DATA 4–5 (2018).

91. The person surveyed will receive nine points if they are younger than twenty-one at the time of the instant offense; six points if they are twenty-one to twenty-nine years old; three points if they are thirty to forty-three years old; and one point if they are over forty-three years old. See *Sentencing Guidelines Worksheet*, VA. CRIM. SENT'G COMM'N, http://www.vcsc.virginia.gov/worksheets2021/Drg_Other.pdf [https://perma.cc/7FFL-EKYN].

92. The person receives two points if they are male, and no points if they are female. *Id.*

93. The person receives one point if they are “female with prior juvenile adjudication” and seven points if they are “male with prior juvenile adjudication.” *Id.*

94. The person receives fifteen points if they have four or more prior adult felony convictions; five points if they have three convictions; one point if they have one to two convictions. *Id.*

95. The person receives eight points if they have four or more prior adult incarcerations and one point if they have one to three prior adult incarcerations. *Id.*

96. The person receives three points if they have a prior arrest or confinement within the twelve months before the instant offense. *Id.*

younger than twenty-one, one for her prior juvenile adjudication). As a result of these scores, less harsh sentencing is recommended for the woman, which can include diversion to a community-based sentence or a shorter jail sentence, while these alternatives are not recommended for the man.⁹⁷

The Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN), which the Department of Justice developed to identify which incarcerated people would be eligible for early release under the First Step Act, also incorporates gender into its risk analysis.⁹⁸ It predicts both general recidivism risk and the likelihood someone will commit a violent offense based on consideration of three or four static factors⁹⁹ and eleven dynamic factors, most of which are focused on the individual's behavior and accomplishments while they were incarcerated.¹⁰⁰ It weighs each of these considerations differently depending on gender, resulting in dramatically different composite scores for men and women with identical characteristics. For example, a twenty-year-old high school graduate who has complied with financial responsibilities while incarcerated, has no prior criminal history, has no history of violence or escape attempts, has committed no infractions while incarcerated, and has completed no work, drug treatment, or other programs while incarcerated will score twenty-two points for general recidivism risk if they are identified as a man, and seven points if they are identified as a woman.¹⁰¹

Finally, some risk assessment tools are designed specifically for women. Some of these gender-specific tools supplement gender-neutral risk tools with additional inquiries when the target of the assessment is a woman.¹⁰² Others are intended to serve as standalone assessments used only to assess women. For example, in the early 2000s, the National Institute of Corrections created the

97. If one scores fifteen points or less, they are recommended for alternative punishment. If they score sixteen or more, they are not. *Id.*

98. Emily Tiryi, Julie Samuels, Allison Feldman, Alice Feng, Ben Chatroff, Zach VeShancey & Serena Lei, *The First Step Act's Risk Assessment Tool*, URB. INST. (Apr. 30, 2021), <https://apps.urban.org/features/risk-assessment> [<https://perma.cc/A3BE-ZAW6>].

99. The tool considers three static factors for both men and women: (1) age at time of assessment; (2) whether the current offense was violent; and (3) criminal history score. It also considers whether the individual has committed a sex offense if the person being assessed is a man. *Id.*

100. The dynamic factors are infraction convictions; serious or violent infraction convictions; amount of time since last infraction; amount of time since last serious or violent infraction; number of programs completed; work programming; drug treatment while incarcerated; education; noncompliance with financial responsibility; history of violence; and history of escape attempts. *Id.*

101. *Id.*

102. See Salisbury et al., *supra* note 45, at 228 (discussing the Gender-Informed Supplement to the LS/CMI risk assessment tool).

Women's Risk and Needs Assessments (WRNA).¹⁰³ This tool was marketed as created "from the 'women up,'" focusing on research about women's pathways to crime and the dynamic factors believed to correlate with recidivism in women.¹⁰⁴ It focuses on "gender-specific criminogenic needs such as child abuse, adult victimization, depression/anxiety, unsafe housing, and economic marginalization."¹⁰⁵ It also includes "gender-neutral" factors, but interprets them in different ways. For example, an individual's employment status is calculated to correlate with recidivism: if someone is not employed, their likelihood of recidivism is presumed to be greater. Whereas "gender-neutral" tools consider a person who is unable to work outside of the home due to caretaking responsibilities to be unemployed, the WRNA will consider a woman who finds herself in that situation to be "partially employed" and therefore having a "partial risk in the Employment/Financial scale, but not full risk as if she were completely unemployed but able to work."¹⁰⁶ Other woman-specific instruments include the Orbis SPIn-W: Service Planning Instrument for Women for "justice-involved females"¹⁰⁷ and a woman-specific version of the popular COMPAS assessment tool.¹⁰⁸

In short, as a result of gender-responsive risk assessment practices, men and women convicted of the same offense with identical histories and characteristics can end up with very different risk scores or classifications solely because of

103. *Women's Risk and Needs Assessment*, NAT'L INST. OF CORR., <https://info.nicic.gov/sites/default/files/Risk%20and%20Needs%20Assessment.pdf> [<https://perma.cc/3LW8-TBVP>] ("Approximately 22 jurisdictions across the U.S. have implemented the WRNA. Additionally, countries outside the U.S. have begun to show interest in the WRNA, with implementation starting in Singapore, Switzerland, the Czech Republic, and Namibia."). It was originally created by the National Institute of Corrections and the University of Cincinnati and is now managed by Emily Salisbury at the Utah Criminal Justice Center. See *WRNA*, UNIV. OF UTAH: COLL. OF SOC. WORK, <https://socialwork.utah.edu/research/ucjc/wrna/index.php> [<https://perma.cc/PHX4-C9BB>].

104. Salisbury et al., *supra* note 45, at 228.

105. *Id.* at 236.

106. *Id.* at 229.

107. *SPIn-W The Service Planning Instrument for Women*, ORBIS, <https://www.orbispartners.com/risk-needs-assessment-women> [<https://perma.cc/RE3N-6FMZ>] (describing the Service Planning Instrument for Women).

108. See COUNCIL OF STATE GOV'TS JUST. CTR., GENDER-RESPONSIVE CRIMINOGENIC RISK AND NEEDS ASSESSMENT (2021) https://csgjusticecenter.org/wp-content/uploads/2021/08/Adopting-GR-Approach_Gender-Responsive-Criminogenic-Risk-and-Needs-Assessment.pdf [<https://perma.cc/SZ59-7U7L>] (describing gender-responsive risk assessment tools, including the Northpointe Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) for Women).

gender.¹⁰⁹ This differential risk prediction can have a very real impact. It can result in shorter overall sentences for women and the opportunity for their early release from incarceration, advantages that are denied to similarly situated men.

2. Punishment Process

Another gendered path to alternative, noncarceral punishment proceeds through “problem-solving courts.”¹¹⁰ Problem-solving courts are specialized criminal courts, such as drug courts, mental health courts, or domestic violence courts, that focus on a particular type of person or a particular type of crime.¹¹¹ Jurisdictions have begun to apply this specialized court model to create gender-specific courts. For example, “Girls Courts” are courts that are available only to girls charged with crimes or juvenile offenses. They purport to “recognize that young women enter the system with unique and gender-specific traits.”¹¹² The first such “gender-driven” court program, New Mexico’s Program for the Empowerment of Girls, opened in 2004, and was soon joined by Hawaii’s Girls’ Court.¹¹³ Jurisdictions in Texas, California, and Florida have since opened similar courts.¹¹⁴

Girls Courts explicitly incorporate principles of gender-responsive punishment.¹¹⁵ They are justified by assertions that the traditional juvenile court system was “designed for boys,” and therefore overlooks girls’ unique needs.¹¹⁶ These needs are said to stem from the girls’ experience with “physical, sexual, and

109. It is also well-established that risk assessment instruments produce unequal outcomes based on race. *See, e.g.*, Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016) (describing racial biases produced by criminal system algorithms) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/Z792-XBYL>]. *See generally* Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007 (2022) (describing the racial and socioeconomic inequities pretrial algorithms produce and identifying the causes of these disparate outcomes).

110. *See generally* Collins, *supra* note 38, at 1485–92 (describing different types of problem-solving courts).

111. *Id.*

112. Wendy S. Heipt, *Girls’ Court: A Gender Responsive Juvenile Court Alternative*, 13 SEATTLE J. FOR SOC. JUST. 803, 833 (2015).

113. *Id.* at 833–35.

114. *Id.* at 836–37.

115. The mission for the Hawai’i Girls Court, for example, is “to clarify, facilitate and enhance the Family Court of the First Circuit’s commitment to gender-responsive services for young women.” *About*, HAW. GIRLS CT., <https://www.girlscourthawaii.org/about> [<https://perma.cc/M5RL-HNXC>].

116. *Girls Court*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/special_projects/girls_court [<https://perma.cc/PM5F-Z8A8>].

emotional abuse” and “depression and low self-esteem.”¹¹⁷ Common characteristics of such courts include trauma-informed programming and trust- and empowerment-building activities. The Girls Court in Jacksonville, Florida offers activities that include luncheons with the Jacksonville Women Lawyers Association, etiquette lessons, and the opportunity to wear outfits loaned by court personnel.¹¹⁸ Participants in Hawaii’s Girls Court engage in a range of experiential activities that “allow them to explore education, recreation, meet healthy women in a variety of jobs and roles, focus on their strengths and meet new goals.”¹¹⁹ Such activities include surf lessons¹²⁰ and camping trips in national parks.¹²¹ In addition, some Girls Courts are staffed only by women, from court personnel to judges and attorneys.¹²²

The notion that courts should be gender specialized has also been embraced in adult courts. For example, heralding the success of Girls Courts, the Hawaii State Legislature recently approved a three-year pilot program to open the state’s first “Women’s Court.”¹²³ Like its juvenile court counterpart, the Women’s Court is said to be necessary because of data indicating the number of incarcerated women was increasing, and showing “that the pathways for women entering the criminal justice system [were] entirely different from men.”¹²⁴ The Women’s Court seeks to “acknowledge the distinct pathways that lead women into the criminal justice system and to address their individualized needs,” and has been allocated a budget of approximately \$700,000 as a pilot program.¹²⁵ Hawaii will join other states that have similar gender-specific courts, such as the Women in

117. *Id.*

118. Max Marbut, *Girls Court Helps Young Offenders Get Out of the System*, JACKSONVILLE DAILY REC. (Nov. 8, 2017, 9:33 AM) <https://www.jaxdailyrecord.com/news/2017/nov/08/girls-court-helps-young-offenders-get-out-of-the-system> [<https://perma.cc/MJ4V-XNT7>].

119. *Experiential Activities*, HAW. GIRLS CT., <https://www.girlscourthawaii.org/events> [<https://perma.cc/EZ7B-QRAH>].

120. *Id.*

121. *At-Risk Teens From Hawai‘i Girls Court Explore Maui’s Haleakalā National Park*, MAUI NOW (Oct. 13, 2022, 7:30 AM), <https://mauiNOW.com/2022/10/12/at-risk-teens-from-hawai%CA%BBi-girls-court-explore-mauis-haleakala-national-park> [<https://perma.cc/GL4U-V3SG>].

122. The Hawai‘i Girls Court, for example, identifies its “all-female passionate staff” as a “uniquely powerful aspect of the program.” HAW. GIRLS CT., *supra* note 115.

123. Alicia Lou, *Hawaii Will Soon Have a Women’s Court in an Effort to Reduce Recidivism*, HONOLULU CIV. BEAT (Jul. 24, 2022), <https://www.civilbeat.org/2022/07/hawaii-will-soon-have-a-womens-court-in-an-effort-to-reduce-recidivism> [<https://perma.cc/Q8FQ-DXPZ>].

124. *Id.*

125. H.B. 2421, 31st Leg., 2022 Reg. Sess. (Haw. 2022); Lou, *supra* note 123.

Need of Change (WIN) Court in Las Vegas, Nevada.¹²⁶ This court is open to women who have “amassed misdemeanor offenses,” and requires an eighteen to twenty-four month commitment, during which time a jail sentence is suspended and the women must participate in treatment, educational, and professional programs.

Some jurisdictions have created specialized courts for people charged with sex work related crimes, such as soliciting and prostitution. While these courts are nominally gender neutral, focused on offering an alternative punishment process for a particular kind of criminal charge, some limit participation to cisgender women.¹²⁷ These courts take a “trauma-informed” approach, presuming that people who engage in sex work do so primarily or exclusively because of past experiences—often involving sexual abuse—or because they are forced to do so by a man, or both.¹²⁸

Problem-solving courts in general, and gender-specific courts in particular, are not without their own problems. For example, scholars have highlighted the ways problem-solving court participation may widen the net of carceral control and questioned the efficacy of specializing criminal courts.¹²⁹ But, despite these concerns, gender-specific courts may provide access to supportive programming,

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126. *Municipal Court Resources: WIN Court*, CITY OF LAS VEGAS, <https://www.lasvegasnevada.gov/government/municipal-court/specialty-courts> (last visited Mar. 16, 2024) (select the “WIN Court” tab to view an overview of the WIN Court program). The court opened in 2007, and as of 2022 about sixty women had graduated from the court. Brett Clarkson, *As Jail Alternative, Court Program Helps Women Turn Lives Around*, L.V. REV.-J. (Sept. 2, 2022, 5:03 AM), <https://www.reviewjournal.com/local/local-las-vegas/as-jail-alternative-court-program-helps-women-turn-lives-around-2633537> [<https://perma.cc/6NY8-CRQR>]; see Lou, *supra* note 123 (identifying additional states with women’s courts).
127. Jake Blumgart, *Therapy at Gunpoint: Can This Controversial Philly Program Put an End to Sex Work?*, TALKING POINTS MEMO (Feb. 24, 2015, 10:21 AM) <https://talkingpointsmemo.com/theslice/can-dawn-court-solve-a-problem-like-prostitution> [<https://perma.cc/XB6M-445C>] (noting that “[m]ale sex workers are not allowed in [Philadelphia’s Project Dawn Court] and neither are trans women”); but see Hon. Toko Serita, *Human Trafficking Intervention Courts: Why Trauma-Informed Courts Are Necessary for Survivors of Trafficking*, PRAC. L. INST. (2018) https://nyatcp.org/assets/pdfs/handouts/PLI%20Article%20on%20HTICs%20Trauma-Informed%20Courts_.pdf [<https://perma.cc/D5W2-7VQ2>] (noting that some people in her court are transgender).
128. See Becca Kendis, Comment, *Human Trafficking and Prostitution Courts: Problem Solving or Problematic?*, 69 CASE W. RESV. L. REV. 805, 820 (2019) (discussing different “narratives” used to justify trafficking courts).
129. See generally Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1628 n.309 (2021) (summarizing critiques of problem-solving courts); see also Collins, *supra* note 38 at 1500–05 (arguing that Girls Courts engage in “moral sorting,” positioning girls as more deserving of specialized treatment than similarly situated boys).

the possibility of avoiding a jail or prison sentence, and a generally more empathetic court atmosphere to those who are allowed to participate, opportunities that would not be available but for the gender of the person accused of criminal activity.¹³⁰

3. Site of Punishment

Gender-responsive punishment practices sometimes allow women to avoid incarceration altogether. For example, gendered risk assessments like those discussed above can result in recommendations for community-based sentences in lieu of incarceration for women.¹³¹ And when some women are sentenced to incarceration, gender-responsive principles may result in a carceral environment that looks very different from that inhabited by men and many other women.

The Las Colinas Detention and Reentry Facility in San Diego County, California is held out as the model for gender-responsive incarceration. It is described as offering a welcoming, forty-five acre campus, equipped with an amphitheater for movie nights, volleyball nets, and a horticulture program, where “no razor wire is in sight.”¹³² People who are incarcerated there can earn the privilege of attending a book club run by female judges, yoga and meditation classes, and earning certificates “in culinary arts, sewing, landscaping and gardening.”¹³³

Reformers across the country are advocating—with much success—for the construction of similar jails and prisons that strive to address the gender-specific needs of the people such institutions detain. The Iowa Correctional Institution for Women, for example, has been celebrated for using architecture that is “designed specifically for women,” resulting in a “place that resembles a college campus,” through its inclusion of “airy buildings connected by concrete pathways,” and “landscaped gardens, including a ‘children’s garden’ for women to bring their

130. See Collins, *The Problem of Problem-Solving Courts*, *supra* note 129 at 1575. Like other specialized, problem-solving courts, Girls’, Women’s, and Human Trafficking Intervention Courts divert court participants from traditional punishment only if they complete required programming. If they do not do so, they may be placed back in traditional punishment pathways. *Id.* For example, the Women in Need of Change (WIN) Court website specifies that if the court participant does not fulfill program requirements, the “suspended jail sentence is imposed and they are remanded into custody.” *WIN Court*, *supra* note 126.

131. See *supra* Part I.B.1 (discussing Virginia’s gendered risk assessment instrument).

132. Blakinger, *supra* note 14.

133. *Id.*

children when they visit.”¹³⁴ Proposals for similar facilities in New York City and Travis County, Texas similarly feature “cottage style” housing that evokes a “homelike”¹³⁵ environment and prioritizes privacy.¹³⁶ These facilities are designed to emphasize connection, community building, the creation of an environment that enables access to natural light, outdoor space,¹³⁷ and the promotion of mental, physical, and spiritual wellbeing.¹³⁸

The experiences of people in gender-responsive facilities are likely very different from those of most incarcerated people. Instead of being surrounded by barbed wire, with limited access to the outdoors or diverse programming opportunities, they are detained in cottages and able to participate in yoga and gardening. Their lives appear, in some ways, like those led by nonincarcerated people, and that is the intended effect: As a report in support of the proposed gender-responsive facility in Travis County, Texas concludes, “[i]f a particular feature is not something that most people living outside a jail setting routinely experience in their daily lives, . . . it should raise serious questions about whether it is essential in this facility.”¹³⁹

4. Conditions of Punishment

When the criminal punishment system sentences people whom it identifies as women to incarceration—whether in a newly gender-specialized or traditional facility—gender-responsive principles may influence the conditions of their confinement. For example, at the behest of reformers who urge that women are less violent than men and therefore require fewer restrictions on their movement within prison, many correctional facilities have developed less strict security classification policies for women.¹⁴⁰ Under this approach, facilities will assign women to less restrictive living conditions than they would similarly situated

134. Shapiro, *supra* note 15.

135. WOMEN’S CTR. FOR JUST., *supra* note 3 at 17.

136. Mallett et al., *supra* note 54, at 12-15.

137. WOMEN’S CTR. FOR JUST., *supra* note 3, at 17-18; Mallett et al., *supra* note 54, at 12-14 to -17.

138. See generally WOMEN’S CTR. FOR JUST., *supra* note 3, at 16 (describing recommended characteristics for women’s jails).

139. Blakinger, *supra* note 14.

140. Emily M. Wright, Patricia Van Voorhis, Emily J. Salisbury & Ashley Bauman, *Gender-Responsive Lessons Learned and Policy Implications for Women in Prison: A Review*, 39 CRIM. JUST. & BEHAV. 1612, 1618 (2012); PATRICIA L. HARDYMAN & PATRICIA VAN VOORHIS, NAT’L INST. OF CORR., DEVELOPING GENDER-SPECIFIC CLASSIFICATION SYSTEMS FOR WOMEN OFFENDERS 43-68 (2004), <https://s3.amazonaws.com/static.nicic.gov/Library/018931.pdf> [<https://perma.cc/E7RT-R5VX>] (analyzing examples).

men.¹⁴¹ In light of women’s presumed “need for relational closeness with others,” gender-responsive principles suggest that facilities should foster a “therapeutic environment” focused on rehabilitation instead of punishment, in which women may “express their feelings and receive support from others.”¹⁴² This environment should be fostered, reformers suggest, through training correctional staff to be nonconfrontational and providing treatment and programming opportunities to address issues that are believed to cause women to commit crimes, such as substance abuse, trauma, unhealthy relationships, and parental stress.¹⁴³ Similarly, gender-responsive facilities often strive to employ women as staff and train them to be “skilled in active listening, possess the patience to thoroughly explain rules and expectations, demonstrate awareness of emotional and relational dynamics, and have the capacity to respond firmly, fairly, and consistently when working with female offenders.”¹⁴⁴

Facilities that integrate these gender-specific principles into their institutional policies often do so with the assistance of gender-specific risk assessment instruments. For example, California requires its Department of Corrections and Rehabilitation to develop and use a risk assessment designed “specifically for female offenders” to assess the incarcerated woman’s “educational and vocational needs, including reading, writing, communication, and arithmetic skills, health care needs, mental health needs, substance abuse needs, and trauma-treatment needs,” to “determine appropriate programming,” and to measure “progress in subsequent assessments of development.”¹⁴⁵

Gender-responsive principles continue to shape punishment after women have been released from confinement or when they are sentenced to community supervision in lieu of incarceration through probation and parole. Criminologist Merry Morash conducted a study comparing probation and parole supervision in two counties in the same state—one that followed a gender-responsive approach, and another that followed a traditional approach.¹⁴⁶ Officers in the different parole offices had different goals for the people they supervised.¹⁴⁷ Those following the

141. HARDYMAN & VAN VOORHIS, *supra* note 140, at xv (recommending facilities modify how they classify incarcerated women to avoid overclassification, including by adopting different “cutpoints” in recidivism prediction to reflect differences between men and women).

142. Wright et al., *supra* note 140, at 1618.

143. *Id.* at 1619.

144. Mallett et al., *supra* note 54, at 12-15.

145. CAL. PENAL CODE § 3430(f) (Deering 2024).

146. MERRY MORASH, WOMEN ON PROBATION & PAROLE: A FEMINIST CRITIQUE OF COMMUNITY PROGRAMS & SERVICES 10 (2010).

147. *Id.*

traditional approach had the same goal for everyone under their supervision, regardless of gender: to move them to the lowest level of supervision or eliminate supervision as quickly as possible.¹⁴⁸ Those who took the gender-responsive approach, in contrast, had different goals for the women under their supervision: they aimed to understand and address their needs, reduce their overall risk of recidivism, and ensure they followed treatment plans.¹⁴⁹ Morash observed that the gender-responsive officers took more notes about their interactions with the women they supervised, especially about the women's emotional states and about the officers' relationship with the women.¹⁵⁰ Morash identified the "gender-related" aspects of supervision as "the emphasis on needs and feelings common to women, supervising officers' relationships with women, empowering women to leave unhealthy relationships with partners, and improvements in women's financial self-sufficiency and independence."¹⁵¹

As a result of gender-responsive punishment practices, the experiences of people subjected to criminal punishment may vary greatly because of their gender. Some of the people whom the criminal punishment system identifies as women will benefit from shorter sentences, noncarceral punishment opportunities, improved conditions of confinement, and more empathetic interactions with system actors. The next Part argues that this better treatment for some will ultimately lead to worse outcomes for all.

II. ENGENDERING PUNISHMENT

Some feminists would support—and, indeed, helped create—the gender-responsive approaches discussed in Part I.¹⁵² But, as I will argue here, these interventions are actually harmful for most whom the system targets, including many women, and replicate gender stereotypes that feminism works against. Moreover, a feminism that relies on gender as an exclusive category of analysis to improve conditions for women in the criminal punishment system cannot account for the ways such interventions fortify and expand the reach of the system itself, even if it leads to arguably better outcomes for some women. For those who believe that we must attend both to the ways the criminal system targets people because of their gender (and race, socioeconomic status, sexual orientation, and

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 143.

152. *See, e.g.,* Rayman, *supra*, note 13 (discussing Gloria Steinem's support for the proposal to build a new women's incarceration facility in Harlem).

other axes of identity) *and* work to deconstruct the carceral system, an abolitionist ethic is also necessary. The following analysis draws on abolition feminist principles to critique gender-responsive punishment practices and uncover an unintended consequence of their operation: they can engender conditions and justifications necessary for the continued operation of the draconian and immense criminal punishment system.

Abolition feminism “is, quite simply, ‘feminism that opposes, rather than legitimates, oppressive state systems.’”¹⁵³ It works “in direct political opposition” to carceral feminism.¹⁵⁴ Whereas carceral feminists understand gendered violence as “primarily a problem of individual cisgender men using violence against cisgender women,” abolition feminists identify the state, its institutions, and its many actors as primary perpetrators of gender violence.¹⁵⁵ While carceral feminists seek to enhance the state’s punitive power in response to gender-based violence, abolition feminists seek to shrink that power while creating new responses to gendered violence that do not involve coercive state intervention.¹⁵⁶

A. Gender-Responsive Punishment Simplifies and Whitewashes the Racist Origins of American Carceral Punishment

The foundational premise of gender-responsive programming is that “the current system was designed for men,” and therefore separate systems and procedures must be developed for women.¹⁵⁷ Gender certainly did play a role in shaping the modern American carceral system, but gender-specific punishment practices are not as novel as they are represented to be. Before the Civil War,

153. GOODMARK, *supra* note 26, at 186 (quoting Allison Phipps).

154. DAVIS ET AL., *supra* note 29, at 107. For a robust analysis of how mainstream feminists helped expand the carceral state, see AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2020).

155. DAVIS ET AL., *supra* note 29, at 107 (discussing how carceral feminism “authorizes the state to use laws and law enforcement to legitimately exercise power: the state judges and controls behaviors deemed ‘bad,’ defining as ‘bad’ those who engage in criminal acts. This framework assumes that gender oppression is a common experience, primarily a problem of individual cisgender men using violence against cisgender women, and that the state should intervene” by ramping up the scope and application of the criminal system).

156. See, e.g., SARAH KERSHNER ET AL., *GENERATION FIVE, TOWARDS TRANSFORMATIVE JUSTICE 1* (2007), https://criticalresistance.org/wp-content/uploads/2020/05/G5_Toward_Transformative_Justice-Documents.pdf [<https://perma.cc/BNM7-KVYF>] (articulating a transformative justice approach to child sexual abuse and other forms of intimate and community violence that “responds to experiences of violence without relying on current State systems”).

157. See *supra* Part 0.

women were rarely incarcerated in prisons.¹⁵⁸ Women were punished during this time period, but the punishment was usually meted out privately, and the identity of the punishing authority varied with the race of the woman being punished.¹⁵⁹ White women, who were seen as “too delicate for the horrific environments that prevailed in prisons,” were punished by their male family members¹⁶⁰ or through other methods like coerced psychiatric treatment.¹⁶¹ Enslaved Black women, meanwhile, “were not considered women at all, but property” and their “status as property rendered them ineligible for punishment by the state.”¹⁶² Instead of state-sanctioned punishment, they were subjected to physical abuse and sexual assault by their enslavers.¹⁶³

The reformatory movement in the late nineteenth century prompted the construction of additional carceral facilities for women that operated for the purpose of “reforming” some incarcerated women through “female-specific treatments.”¹⁶⁴ Foreshadowing the emergence of the modern gender-responsive punishment approach, reformatories for women often featured cottage-style architecture,¹⁶⁵ all female staff,¹⁶⁶ and training aimed at characteristics that were believed to distinguish women from men.¹⁶⁷ In this era, such training was aimed

158. Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2208 (2018). The first prison for women did not open until 1835 and remained the only such facility for many decades, and before the opening of gender-specific institutions, some women were incarcerated in separated quarters within men’s facilities. Nicole Hahn Rafter, *Prisons for Women 1790–1980*, 5 CRIME & JUST. 129, 133, 138 (1983). Historian Nicole Hahn Rafter explains that during this period, “[t]he treatment of inmates closely resembled that accorded to male convicts. But because there were relatively few female state prisoners and because these women were regarded as unredeemable, in important respects their care was inferior to that of males.” *Id.* at 146. And until the late 18th century incarcerated people of all genders were commonly kept in the same rooms in the same facilities. *Id.* at 132–34.

159. Ocen, *supra* note 158, at 2206–08 (“In a society where white male ownership of women was the norm, women were subject to differential forms of private punishment that were fundamentally shaped by race.”).

160. *See id.* (“[W]hite women were subject to private forms of retribution and abuse at the hands of their fathers and husbands for alleged transgressions.”); SCHENWAR & LAW, *supra* note 7, at 13.

161. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 66 (Greg Ruggiero ed., 2003) (noting that “as the prison emerged and evolved as the major form of public punishment, women continued to be routinely subjected to forms of punishment that have not been acknowledged as such,” including incarceration in psychiatric institutions).

162. Ocen, *supra* note 158, at 2209.

163. *Id.* at 2207.

164. Rafter, *supra* note 158, at 147.

165. *Id.*

166. *Id.* at 159.

167. *Id.* at 149–50. In one Indiana reformatory, for example, incarcerated women were dressed in gingham-printed uniforms instead of stripes and ate meals at tables set with linen tablecloths and a vase of flowers. *Id.* at 151–52.

at creating “good wives, mothers, or domestic servants,”¹⁶⁸ and included instruction on “cleaning, cooking, sewing, and waiting on tables.”¹⁶⁹ But the reformation effort did not target all women, rather, these reforms were aimed at “restoring white women to their place as wives and mothers.”¹⁷⁰ The reformatory movement focused primarily on changing carceral practices for poor white women charged with low-level crimes, leaving Black women, other women of color, and women charged with felonies to men’s facilities or segregated from white women in reformatories.¹⁷¹ Due, in part, to the comparatively higher cost of operating reformatories, states stopped building institutions based on the reformatory model in the 1930s.¹⁷² But the project of trying to restore the femininity of some women through gendered punishment practices continued.¹⁷³

Thus, the foundational claim of the modern gender-responsive approach to punishment—that the system has been inattentive to women—is oversimplified. There have long been efforts to attend to perceived gender differences in punishing *some women*. What is even more concerning, however, is that the claim is glaringly incomplete. The full history of punishment practices in the United States tells a much more complicated story, one in which race and racism play a formative role in shaping our carceral system.¹⁷⁴ I will briefly recount some of that history here.

168. *Id.* at 160.

169. *Id.* at 162.

170. Angela Y. Davis, *Racialized Punishment and Prison Abolition*, in BLACKWELL COMPANIONS TO PHILOSOPHY: A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY 360, 361 (Tommy L. Lott & John P. Pittman eds., 2003). The project of reinforcing ideals of white femininity has also occurred through other state projects, including welfare policy. See, e.g., Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 428 (1999); April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 91–93 (2001).

171. See Rafter, *supra* note 158, at 158–59; See also Jodie M. Lawston & Erica R. Meiners, *Ending Our Expertise: Feminists, Scholarship, and Prison Abolition*, 26 FEMINIST FORMATIONS 1, 7–8 (2014); DAVIS, *supra* note 161, at 72; Ocen, *supra* note 158, at 2211–12.

172. Rafter, *supra* note 158, at 165–66.

173. See DAVIS, *supra* note 161, at 64 (noting that the “dominant model for women’s prisons” during the 1950s reflected an assumption “that ‘criminal’ women could be rehabilitated by assimilating correct womanly behaviors—that is, by becoming experts in domesticity—especially cooking, cleaning, and sewing”).

174. Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1422–24 (2012) (footnotes omitted) (“And though the growth of women and girls in the penal system has occasioned a critique of existing policies as male-centric, the ‘gender-responsive’ policies and interventions offered in response often reflect a general inattentiveness to mass incarceration’s racial-control dimensions. In this respect, many feminist or women-centered

The institution of the prison itself was originally created to make punishment practices more humane—for some. The rise of the penitentiary as a site of punishment in the early nineteenth century reflected an intentional shift away from torture and the death penalty.¹⁷⁵ The penitentiary embraced and advanced a religious model of repentance in which incarcerated people were secluded from society to reflect upon their actions until they were reformed, and then released back into society.¹⁷⁶

As Angela Y. Davis recounts, however, this new model of punishment was imposed only on those deemed capable of redemption and deserving of individual rights and liberties, namely white wage-earning men.¹⁷⁷ As the penitentiary model arose, slavery—“itself a form of incarceration”—was legal in many states and “punishment” for any alleged legal transgressions by enslaved Black people was determined and imposed by enslavers.¹⁷⁸ While the penitentiary model granted white men “the privilege to be punished in ways that acknowledged their equality,” enslaved Black people continued to be punished in ways that were “corporal, concrete, and particular.”¹⁷⁹

When slavery was abolished, southern states enacted Black Codes to criminalize newly emancipated Black people.¹⁸⁰ As the Codes were enforced, Black people came to represent the majority of convicted people in many southern states.¹⁸¹ As the racial composition of the population subject to punishment changed, so, too, did punishment practices: penitentiary-based punishment was restricted to white people, or replaced entirely with convict leasing systems that sentenced all convicted people to hard physical labor.¹⁸² Black women were subjected to “the cruelties of the convict lease system unmitigated by the

analyses of the current penal regime replicate the race-neutral framing of gender that is characteristic of the wider field of feminist criminology.”)

175. Davis, *supra* note 170, at 366 (“[T]he penitentiary system emerged from an abolitionist movement of sorts—a campaign to abolish medieval corporal punishment.”).

176. *Id.*

177. *Id.* at 361; *see also* DAVIS, *supra* note 161, at 69–70.

178. Davis, *supra* note 170, at 362. As Davis has noted in other writing, punishment inflicted by enslavers on enslaved people was itself gendered. *See* DAVIS, *supra* note 161, at 67–68. For example, enslaved pregnant women received particularly brutal punishment if they were unable to keep up with work quotas. *Id.*

179. Davis, *supra* note 170, at 362 (“Within the institution of slavery, itself a form of incarceration, racialized forms of punishment developed alongside the emergence of the prison system within and as a negative affirmation of the ‘free world’ from which slavery was twice removed.”)

180. *Id.* at 364.

181. *Id.*

182. *Id.*; *see also* SCHENWAR & LAW, *supra* note 7, at 12–13.

feminization of punishment; neither their sentences nor the labor they were compelled to do were lessened by virtue of their gender.”¹⁸³ As historian Matthew Mancini recounts, convict leasing was eventually abolished nationwide by 1928, but “nowhere in the South did prison officials simply construct penitentiaries and install prisoners and rehabilitation programs in them after leasing was abandoned.”¹⁸⁴ Instead they essentially “reallocate[ed] . . . forced labor” of convicted people “to chain gangs and prison farms.”¹⁸⁵

The last decades of the twentieth century ushered in a new era in American punishment practices. As tough on crime—and particularly tough on drug crime—policies were adopted and enforced throughout the country, jail and prison populations skyrocketed and more people were funneled into prisons than the system was equipped to handle.¹⁸⁶ But the widened carceral net was not cast evenly across the population; people of color, and in particular Black men, were its primary target, leading to the oft-cited statistics demonstrating racial disparities in jail and prison populations and the characterization of the modern criminal punishment system as “the New Jim Crow.”¹⁸⁷ It is *this* contemporary system—characterized by overcrowded, dangerous facilities in which incarcerated people are deprived of adequate health care, educational, recreational, or professional opportunities, and subjected to harsh disciplinary practices and labyrinthian visitation policies—that gender-responsive literature claims was designed for men.

Surprisingly, despite the prominence of this claim, many proponents of gender-responsive programming simply assert it without specifying what it means to say the system was made for men. To the extent they elaborate, they tend to recite statistics showing that men historically and currently comprise the vast majority of those under some form of carceral control and that men commit more

183. DAVIS, *supra* note 161, at 72.

184. MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928, 221 (1996).

185. *Id.*

186. See HERNANDEZ, *supra* note 7, at 1–2 (describing the rise of “The Age of Mass Incarceration”); see also MICHELLE ALEXANDER, THE NEW JIM CROW 75–120 (10th anniversary ed., 2010) (describing the connection between mass incarceration and the War on Drugs).

187. See ALEXANDER, *supra* note 186; ASHLEY NELLIS, THE SENT’G PROJECT, THE COLOR OF JUSTICE 4 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/LH74-3ZBH>] (noting that Black Americans are incarcerated in state prisons at nearly five times the rate of white Americans).

violent crimes than women.¹⁸⁸ But the fact that modern punishment practices were applied predominantly to men as they were developed does not mean they were designed *for* men.

The history of imprisonment in the United States *is* gendered, but this history cannot be separated from our history of white supremacy, slavery, and racism.¹⁸⁹ To the extent reformers have been attentive to the perceived needs of women in the past, they have largely limited their attention to white women.¹⁹⁰ Meanwhile, the brutal and dehumanizing practices that have come to be synonymous with contemporary incarceration have been applied disproportionately to Black men and other men of color.¹⁹¹

Gender-responsive literature's recirculation of a reductive origin story that focuses myopically on gender facilitates an account of the genealogy of American punishment practices that ignores the central role of race in their formation. Moreover, this glaring inattention to race and intersectionality in the history of punishment necessarily limits the scope and eventual impact of any reforms that emerge from the gender-responsive movement. It positions identities beyond gender as add-ons and afterthoughts, instead of considerations that should be centered—along with gender—in identifying both the harms of past and current punishment practices and paths forward.

B. Gender-Responsive Punishment Reinforces the Gender Binary

By positing that the American punishment system was designed “for men,” gender-responsive punishment ignores the central role of race and racism in the system's formation. This premise about the gendered nature of the system's origins also advances another erasure: the existence of transgender, gender non-conforming, and intersex people.¹⁹² Indeed, the claim that the system was made

188. See Shapiro, *supra* note 15 (describing gender-responsive changes at the Iowa Correctional Institution for Women).

189. DAVIS, *supra* note 161, at 365 (“[S]lavery’s underlying philosophy of punishment insinuated itself into the history of imprisonment.”).

190. See *supra* note 170. And a similar story can be told of juvenile justice practices. Early twentieth century institutions focused on producing “new citizens from a population of delinquent, white immigrant youth” and routinely excluded black youth. See Irvine-Baker et al., *supra* note 4, at 324 (summarizing GEOFFREY WARD, *BLACK CHILD SAVERS* (2012)).

191. See ALEXANDER, *supra* note 186.

192. Lawston & Meiners, *supra* note 171, at 9 (“Gender responsive programming is predicated on essentialist assumptions about who are labeled ‘women in prison.’ Julia Sudbury (2011) argues that most research and activism around women’s prisons assumes that all incarcerated in women’s jails and prisons are cis-gender women.”).

for men (and not women) presumes the existence of two distinct and static gender categories: male and female. This presumption is, simply, false.¹⁹³

Some gender-responsive reformers attempt to avoid this erasure by including references to “gender-expansive” people in the push for gender-responsive punishment practices for women. For example, Women’s Center for Justice’s proposed new jail facility in New York City would purportedly respond to the needs of women and “gender-expansive” people, a population it defines as “transgender, gender non-conforming, non-binary, and/or intersex people.”¹⁹⁴ But beyond consistently referencing “gender-expansive” people in addition to women, the proposal otherwise reiterates the basic tenets of gender-responsive literature and its reductive assumptions about what women need. This token inclusion of gender-expansive people in the proposal, in other words, does not functionally change the drafters’ analysis; they presume the needs of transgender, gender non-conforming, and intersex people are synonymous not only with each other, but with all women.

Both the erasure of transgender, gender nonconforming, gender nonbinary, and intersex people, and the superficial inclusionary efforts are harmful. The harm is compounded by the assumptions that gender-responsive punishment advances about the needs of people on either side of its exclusionary gender binary, as the next Subpart will reveal.

C. Gender-Responsive Punishment Reifies Traditional Gender Norms

When reformers advocate for practices and institutions that respond to gender, they are not advocating for a wholesale reassessment of the ways gendered roles, expectations, and experiences interact with notions of criminality in general, or criminal punishment in particular. Rather, they are only calling for practices to be modified to address needs they identify as women’s needs. Thus, the concern that practices are not “gender-responsive” is more accurately stated as a concern that they are not women-responsive.¹⁹⁵ Gender-responsive reformers therefore

193. See generally Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019) (discussing the growing awareness of nonbinary gender identities and considering the implications for legal doctrines).

194. WOMEN’S CTR. FOR JUST., *supra* note 3, at 8.

195. Irvine-Baker et al., *supra* note 4, at 327 (“[G]ender-responsive programming came to mean programming for youth who were assigned female at birth. This new focus fueled the development of well-meaning programs for girls that nonetheless reify and codify traditional gender norms.”).

presume that people who fall into the presumptively distinct and homogenous categories of “men” and “women” are distinct populations with distinct needs.¹⁹⁶

Moreover, the reforms that result are “responsive” to a particular vision of womanhood: one that reifies traditional, heteropatriarchal stereotypes about women and femininity.¹⁹⁷ First, the reforms support notions of women as passive and lacking agency by presuming that crime commission is aberrational for women, and when a woman does commit a crime, it is attributable to outside forces, beyond her control.

A primary impetus for modern gender-responsive punishment practices was a concern over the dramatic increase in the arrest, prosecution, and punishment rates of women, which was attributed to a change in women’s behavior and prompted research into women’s pathways into the criminal punishment system.¹⁹⁸ Pathways research has been criticized for failing to account for the role of system actors and structural dynamics in increasing the arrest and incarceration rates of women. Or, as Jodie Lawston and Erica Meiners have argued, it “does not fully account for the ways in which gender, race, and sexuality coalesce so that *certain* women and girls are *targeted* by the criminal justice system for incarceration.”¹⁹⁹ Pathways research also has another downside: it undermines women’s agency and autonomy.

Recall the research that inspired the pathways theory: Kathleen Daly’s identification of five categories of women who commit crimes.²⁰⁰ Four of these categories identify women who commit crimes because of things that have been done to them. “Street women,” for example, live on “the street” and commit crimes because they have escaped an abusive home; the “harmed and harming women” resort to substance abuse and, ultimately, criminal activity, because of past abuse or neglect.²⁰¹ Subsequent pathways research has expanded on these themes and continues to emphasize how past experiences influence women’s

196. See FLEMING ET AL., *supra* note 19, at 12 (footnotes omitted) (depicting chart, divided into “women” and “men,” that says women have a “sense of self-worth . . . often built from their connections with others” while “psychological theories describe men’s path to maturity as becoming self-sufficient and autonomous”).

197. Irvine-Baker et al., *supra* note 4, at 329 (“[M]uch of what we think of as gender-responsive programming is actually programming designed for cisgender (and heterosexual) girls.”). MORASH, *supra* note 146, at 2 (noting that feminist researchers have critiqued gender-responsive corrections for reinforcing “narrow gender stereotypes” and “limiting women’s role to parenting and traditional occupations, such as beautician or cook”).

198. See *supra* Part 0.

199. Lawston & Meiners, *supra* note 171, at 7.

200. See DALY, *supra* note 46, at 45–48.

201. *Id.* at 45–46.

behaviors. Researchers emphasize, for example, how abusive home environments can lead women and girls to sell drugs to gain financial independence and how abusive male partners may successfully encourage women to engage in substance use or sex work because “women’s identity, self-worth, and sense of empowerment are defined by and through their relationships with others.”²⁰² In sum, pathways research emphasizes the external influences that may cause women to commit crimes—things that have been done to them (often by men).²⁰³

In contrast, when pathways research considers men, it emphasizes the internal influences that contribute to their behavior, characterizing them as focused on “achieving autonomy and independence,” and explaining their pathways to crime as attributable to “social learning” and “antisocial attitudes.”²⁰⁴ My claim is not that the research findings about the connections between traumatic experiences, systemic oppression, and subsequent targeting by the criminal system are untrue. Rather, my point is that the emphasis on identifying and understanding the external influences on women’s behavior without the same emphasis vis-à-vis men builds on longstanding assumptions that crime commission is at odds with norms of femininity, and therefore women commit crimes only when coerced to do so by a man.²⁰⁵ As I will explain further below, identifying the connection between trauma and criminalized conduct as female or existing primarily or only in women deprives similarly situated people of other genders of the benefit of that insight.

Gender-responsive punishment also reinforces gender stereotypes through an emphasis on the connection between womanhood, motherhood, and caretaking. Facilitating and maintaining women’s relationships with their children is a centerpiece of many gender-responsive punishment practices.²⁰⁶

202. FLEMING ET AL., *supra* note 19, at 10.

203. See, e.g., BLOOM ET AL., *supra* note 18, at 8 (“Women’s most common pathways to crime involve survival efforts that result from abuse, poverty, and substance abuse.”)

204. FLEMING ET AL., *supra* note 19, at 10–13.

205. As Anne Coughlin has explained, “for many centuries, the criminal law has been content to excuse women for criminal misconduct on the ground that they cannot be expected to, and, indeed, should not, resist the influence exerted by their husbands.” Anne M. Coughlin, *Excusing Women*, 83 CALIF. L. REV. 1, 5 (1994). Under the “marital coercion doctrine,” which was codified as a defense until the 1970s, a married woman who committed a crime in her husband’s actual or constructive presence was entitled to a presumption that she was acting “under his coercion and, therefore, that she could not be held personally responsible for her misconduct.” *Id.* at 31. It was based in a belief that “married women suffered from a volitional disability.” *Id.* at 40. See also DAVIS, *supra* note 161, at 66 (“[M]asculine criminality has always been deemed more ‘normal’ than feminine criminality.”)

206. See, e.g., WOMEN’S CTR. FOR JUST., *supra* note 3, at 4–5 (identifying as a “key principle” for the proposed gender-responsive jail that the facility enact policies to strengthen “family

These practices seem to be motivated by two interrelated assumptions: first, women are the primary caregivers in their families, and second, removing them through incarceration has ripple effects on their family networks. As explained by then Attorney General Loretta Lynch, “we know that when we incarcerate a woman we often are truly incarcerating a family, in terms of the far-reaching effect on her children, her community, and her entire family network.”²⁰⁷ The connection between women, mothering, and communities has prompted alterations to traditional punishment practices for some women, such as expanded familial visiting programs for incarcerated women.²⁰⁸

Incarcerating mothers *is* harmful to children and communities. But it is simply not true that being a parent and wanting to be able to see one’s children is an experience that is exclusive to mothers. Half of all imprisoned people are parents of children under age eighteen, and the vast majority of these incarcerated parents are men (626,800 compared to 57,700 women).²⁰⁹ By framing the deleterious familial impact of incarceration practices as distinctly feminine, this approach sends a message about the gender of familial roles and responsibilities. It affirms the deeply rooted stereotype that associates women with emotionally supporting their families while men support them financially—stereotypes the U.S. Supreme Court has declared are untenable and unconstitutional.²¹⁰ Laws that embrace overbroad generalizations about the domestic roles of men and women “have a constraining impact:” they can “creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of the primary family caregiver” and “may disserve men who exercise responsibility for raising their children.”²¹¹

In sum, what emerges from gender-responsive programming is a distinct vision of womanhood, one in which all women are presumptively familial, caretaking, traumatized, and dependent. Certainly, many people who identify or are identified as women have shared experiences and similar needs. But there is

connections and maternal support”); BLOOM ET AL., *supra* note 18, at vii (“When delivering both sanctions and interventions, gender-responsive policy considers women’s relationships, especially those with their children, and women’s roles in the community.”).

207. SWAVOLA ET AL., *supra* note 19, at 7; *see also*, NAZGOL GHANDOOSH, EMMA STAMMEN & KEVIN MUHITCH, SENT’G PROJECT, PARENTS IN PRISON (2021) <https://www.sentencingproject.org/app/uploads/2022/09/Parents-in-Prison.pdf> [<https://perma.cc/WMF4-NBME>].

208. *See supra* Part 0.

209. GHANDOOSH ET AL., *supra* note 207, at 1. A higher percentage of all incarcerated women are parents of minor children than men (58 percent vs. 47 percent). *Id.*

210. *Sessions v. Morales-Santana*, 582 U.S. 47 (2017) (holding that treating unwed mothers and fathers differently for derived citizenship status violated equal protection).

211. *Id.* at 63.

not any single experience, characteristic, belief, or need that unites all women or defines what it means to be a woman. In presuming there are identifiable needs and experiences that are consistent across gender categories, the gender-responsive approach universalizes the experiences of people within those categories through stereotypes. Intersectional feminist theory reveals the fault in this logic; for we cannot identify any individual's experiences or needs based on a single category of identity, such as gender or race.²¹²

The gender-responsive approach constructs a similarly universalizing and exclusionary vision of men and masculinity, albeit implicitly. What proponents believe is “for men” about the current system is revealed in how they articulate what modifications are necessary to make the system responsive to women. For example, some traditional correctional policies pertaining to clothing, such as rules that prohibit the alteration of clothing by rolling up one's sleeves or wearing a shirt inside out, claim to prevent incarcerated people from using their clothing to signal gang affiliation.²¹³ Gender-responsive advocates insist this concern does not apply to women, who alter their clothes “for style or fit,” an action that doesn't justify disciplinary action.²¹⁴ Or, as the Warden of the Iowa Correctional Institution for Women put it, when an incarcerated woman rolls up her sleeves or wears her shirt inside out, “It's not gang related . . . Women want to have control over how they look, about how they present themselves . . . Maybe she had a coffee stain.”²¹⁵ From this perspective, it is inconceivable that men would care about their appearance; if they alter their clothes, it is presumed they do so to signal

212. The concept of intersectionality was first developed by Professor Kimberlé Crenshaw in 1989. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. Reflecting on the term more than twenty years later, Professor Crenshaw defined intersectionality as “a lens through which you can see where power comes and collides, where it interlocks and intersects. It's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there. Many times that framework erases what happens to people who are subject to all of these things.” Kimberlé Crenshaw on Intersectionality, *More Than Two Decades Later*, COLUM. L. SCH. (June 8, 2017), <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later> [https://perma.cc/EC4Q-GZKX].

213. See Blakinger, *supra* note 14.

214. *Id.* (“Whereas men might alter their clothes to show gang affiliation, women might do the same for style or fit, yet both could result in disciplinary action.”).

215. Shapiro, *supra* note 15. Another clothing-related example of how the system is designed “for men” is that correctional officer uniforms are “made to fit male bodies. About 70 percent of the guards are men. The rules are made to control male social structures and male violence.” Blakinger, *supra* note 14.

gang affiliation, not to make themselves more comfortable or because they like how an alteration looks.

Furthermore, by parceling out different needs as specifically “for women,” the gender-responsive perspective at worst ignores, or at best severely minimizes, the experiences that unite people targeted by the criminal punishment systems across genders. To illustrate, one common gender-specific need that many reforms target is the need for trauma-informed services, and specifically services designed to address trauma resulting from sexual assault.²¹⁶ The experience of being sexually assaulted and the resultant need for supportive, trauma-informed services are not restricted to people of a certain gender.²¹⁷ The Center for Disease Control’s (CDC) 2015 National Intimate Partner Sexual Violence Survey concluded that 43.6 percent of women (nearly 52.2 million) had experienced some form of sexual assault in their lifetime, and 24.8 percent of men (27.6 million) had the same experience.²¹⁸ Another 2015 study found 47 percent of all transgender people had been sexually assaulted at some point in their lives.²¹⁹ The rate of sexual assault of trans people was even higher for trans people who are Black (53 percent), Multiracial (59 percent), Middle Eastern (58 percent), or American Indian (65 percent), as well as those who have done sex work (72 percent), been homeless (65 percent), or lived with a disability (61 percent).²²⁰

216. Even literature that is focused on amplifying ways in which men of color are victims draw distinction between types of assault—and suggests men are victims of other types of violent crimes (but not, by implication, sexual assault). See DANIELLE SERED, *YOUNG MEN OF COLOR AND THE OTHER SIDE OF HARM* 6 (2014).

217. See Bennett Capers, *Real Rape, Too*, 99 CALIF. L. REV. 1259, 1261–62 (2011) (providing statistics showing the prevalence of “male-victim rape”).

218. SHARON G. SMITH, XINJIANG ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, CTRS. FOR DISEASE CONTROL, NATIONAL INTIMATE PARTNER SEXUAL VIOLENCE SURVEY 2, 3 (2018). While women experience sexual assault at rates higher than men, it is possible the difference in rates is smaller than these studies show, in part because of gender norms and expectations themselves. Cisgendered heterosexual men, for example, may be less willing to report sexual assault, even when directly asked, because admitting vulnerability and victimization violates norms of masculinity. Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1356 (2011) (“For many heterosexual men, acknowledging one’s vulnerability would violate a core tenet of masculinity. Because society gives heterosexual and gay men differential permission to express their vulnerability, it substantially limits studies attempting to show a disparity between gay and straight vulnerability to prison rape.”).

219. *Sexual Violence & Transgender/Non-Binary Communities*, NAT’L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sites/default/files/publications/2019-02/Trans_gender_infographic_508_0.pdf [<https://perma.cc/ZLS9-48WF>] (compiling statistics from the report of the 2015 National Center for Transgender Equality).

220. *Id.*

It simply cannot be that only women who have been sexually assaulted and end up incarcerated in women's facilities should receive services and programming that is attentive to the resultant trauma, while people incarcerated in men's facilities—including many trans women and cisgendered men who have been sexually assaulted—do not. By gendering trauma-informed services to address sexual assault as exclusively needed by women and limiting reform to women's facilities, gender-responsive punishment practices produce and justify that very exclusion.

It is true that some women benefit from better outcomes and opportunities because of the operation of these traditional assumptions about gender. For example, judges have been persuaded to impose shorter sentences on women because they make gendered assumptions about women's familial roles and therefore seek to reduce the harm to dependents that will result from the incarceration of the primary caretaker.²²¹ But the very same assumptions can harm other women.²²² Because criminal behavior is inconsistent with normative conceptions of femininity, a woman or girl who commits a crime may be doubly punished for both the criminal act and the violation of gender norms.²²³ It is well documented that Black women and girls are often the recipients of this double punishment.²²⁴ In the juvenile detention context, for example, Black girls who violate gendered norms can be “excluded from the privileges and protections, and related access to services and programming, that femininity affords ‘good’ white women and respectable [B]lack ladies, or girls who could grow up to be either.”²²⁵ As a result, Black girls are often treated “as if they are more like [B]lack men and

221. See, e.g., Katharina Geppert, *Explaining the Gender Gap in the Criminal Justice System: How Family-Based Gender Roles Shape Perceptions of Defendants in Criminal Court*, 14 *INQUIRIES J.*, no. 2, 2022, at 1, 7 (quoting interviewed judges as saying, “[m]others usually receive shorter sentences because jailing mothers with kids is a bigger deal given their responsibilities” and “[w]omen with young children get a break”).

222. See GOODMARK, *supra* note 26, at 39 (“Girls who are not ‘ladylike’—who are perceived as angry or confrontational, run away, act in self-defense, use illegal substances, express sexuality, or engage in sexual behavior (voluntarily or involuntarily)—lose the protection that girlhood could confer and are sometimes punished more harshly as a result.”).

223. See Coughlin, *supra* note 205, at 3 (noting that scholars have argued the harsh treatment women receive upon conviction of a crime “arises from a conviction that the woman who offends has transgressed twice; by disobeying the commands of the criminal law, she also has violated society’s expectations for appropriate conduct from one of her gender”); see also Geppert, *supra* note 221, at 9.

224. Irvine-Baker et al., *supra* note 4, at 325.

225. *Id.*; see also GOODMARK, *supra* note 26, at 41 (providing statistics showing that Black girls are more likely than white girls to be targeted by the juvenile system).

boys—a category of youth who are permanently viewed as irredeemable and incapable of reform as a function of both their masculinity and race.²²⁶

Gender-responsive punishment practices thus provide only a contingent benefit for some women: one that depends on the embodiment of a particular type of femininity and womanhood. Russell K. Robinson has explored similar consequences resulting from the creation and operation of the K6G Unit in Los Angeles County Jail for incarcerated gay men and transgender women.²²⁷ In order to qualify for admission to this specialized unit, people must pass a test of their gayness, which is largely based on stereotypes involving “effeminacy, promiscuity, and affluence.”²²⁸ This practice, he argues, not only excludes those who do not fit the white, upper middle class mold for what characterizes gay identity, it also reifies masculine stereotypes, such as that men are inherently violent and lack vulnerability.²²⁹ Consequently, it diverts “attention from the suffering among the men . . . whose need for protection does not map onto society’s gendered understanding of vulnerability” and remain in the General Population Unit.²³⁰

In sum, gender-responsive punishment embraces an exclusionary vision of womanhood that ignores the experiences and identities of many, reinforces problematic gendered stereotypes, and claims to respond to experiences and needs held exclusively by people it identifies as women, when in fact those needs and experiences are shared by people of all genders who are targeted by the criminal system. It also helps perpetuate the system in perpetuity, as the next Subpart discusses.

D. Gender-Responsive Punishment Works Against Abolition by Strengthening and Expanding the Carceral State.

On July 31, 2010, Marissa Alexander, a twenty-nine-year-old Black woman who had given birth to her third child just nine days earlier, was attacked by her abusive husband.²³¹ She fired a single warning shot into a wall to ward off the attack, injuring no one.²³² Nevertheless, she was prosecuted and convicted of

226. Irvine-Baker et al., *supra* note 4, at 325.

227. See Robinson, *supra* note 218.

228. *Id.* at 1314, 1373.

229. *Id.* at 1314, 1359.

230. *Id.* at 1314.

231. Jeannine Amber, *In Her Own Words: Marissa Alexander Tells Her Story*, ESSENCE (Oct. 27, 2020), <https://www.essence.com/news/marissa-alexander-exclusive> [https://perma.cc/33C6-84JB].

232. *Id.*

aggravated assault with a deadly weapon and sentenced to a mandatory twenty-year sentence.²³³ Outrage over the criminalization of Ms. Alexander's acts of survival and those of others who proactively defended themselves against gender violence prompted grassroots organizing across the country.²³⁴ One result of that collective anger and energy was the formation of Survived and Punished, a prison abolition organization that focuses on the criminalization of similar acts of survival "to raise awareness about the integrated relationship between systems of punishment and the pervasiveness of gender violence."²³⁵ The organization embraces a belief that "prisons, detention centers, all forms of law enforcement, and punitive prosecution are rooted in systems of violence, including racial, anti-trans/queer, sexual, and domestic violence."²³⁶

Survived and Punished articulated a set of key questions, listed below, to guide an assessment of whether criminal system reforms work towards or against an abolitionist future.²³⁷ Gender-responsive punishment practices fail each of these questions.

1. "Does [the reform] (as a whole or in part) legitimize or expand the carceral system we're trying to dismantle?"²³⁸

Gender-responsive punishment practices center carceral punishment as the default response to criminal convictions. While they start from an insight into the interconnectedness of past experience and present behavior, they presuppose a system in which we will continue to respond to behaviors deemed criminal with incarceration and focus on modifying carceral practices for a select few. This is all the more confounding because *some* (though certainly not most) gender-responsive punishment proponents acknowledge that the increase in women in the system that inspired their approach was caused by a change in policing and prosecution strategies, rather than change in women's behavior.²³⁹ Nevertheless, gender-responsive punishment reform emphasizes a need to

233. *Id.*

234. See *About S&P*, *supra* note 27 (describing organizing that occurred in response to the prosecution of Ms. Alexander).

235. *Id.*

236. *Id.*

237. SURVIVED & PUNISHED N.Y.C., PRESERVING PUNISHMENT POWER 3 (2020), <https://www.survivedandpunishedny.org/wp-content/uploads/2020/04/SP-Preserving-Punishment-Power-report.pdf> [<https://perma.cc/KP43-LX8E>].

238. *Id.*

239. See, e.g., Stephanie S. Covington & Barbara E. Bloom, *Gender-Responsive Treatment and Services in Correctional Settings*, 29 *WOMEN & THERAPY* 9 (2006) (acknowledging that the increase in women's incarceration was "fueled primarily by stringent drug laws").

change the behavior of women through modifying punishment practices, not the behavior of law enforcement, prosecutors, or judges.

Instead of scrutinizing *why* police have been arresting more women, or *why* prosecutors have been pursuing more charges against them, gender-responsive punishment searches for different ways to punish women. The problem it seeks to solve is framed only as a problem with how we punish some people—not how we surveil, charge, convict, and control entire communities. Gender-responsive punishment does not frame reforms for women as a stepping stone towards a diminished carceral state for all. Instead, it seeks to end certain harmful practices for certain women while implicitly legitimizing the operation of those practices for the rest.

In theory, gender-responsive reforms can be seen as an incremental step towards better treatment for everyone or a necessary modification until broader systemic change can be achieved.²⁴⁰ For example, one prominent gender-responsive researcher claims, “Here’s what those of us who have focused on women’s services have said for years: If we can get it right for women, we can then turn and get it better for men If you only focus on men, it never seems to get better for women.”²⁴¹ But there are at least a few key flaws in this reasoning. First, gender-responsive punishment, while receiving renewed attention lately, has existed for decades. How much longer must it operate until its insights and any attendant benefits are extended to people of other genders? Moreover, getting it “right” for women, under this framework, tends to mean more humane treatment *within the system itself*, which requires continued investment in the carceral state to perfect its practices. Finally, framing the problem to be solved as one concerning how the system responds to gender—not how the system operates writ large—inevitably results in reformist reforms: “changes that tinker at the edges of the existing system and fail to target the structural origins of inequality and injustice.”²⁴² A right result, from an abolitionist perspective, can be achieved only through non-reformist reforms, “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization.”²⁴³ Such an orientation strives for changes that diminish and decenter the authority and power of the carceral system instead of muting its impact on some.

240. WOMEN’S CTR. FOR JUST., *supra* note 3, at 3 (“Until the day that New York City is willing to decarcerate all women and gender-expansive people, there should be an accessible, humane center that is separate from men and reduces harm, rather than exacerbating it.”).

241. Blakinger, *supra* note 14.

242. Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403, 451 (2022).

243. GILMORE, *supra* note 39, at 242. *See also* GOODMARK, *supra* note 26, at 188 (describing non-reformist reforms).

2. **“Does [the reform] benefit parts of the Prison Industrial Complex, industries that profit from the PIC, or elected officials who sustain the PIC?”; “Do the effects it creates already exist in a way we have to organize against?”; “Will we, or others, be organizing to undo its effects in five years?”**²⁴⁴

Gender-responsive punishment embodies what James Kilgore has called “carceral humanism,” which is the practice of repackaging punishment practices as social service interventions.²⁴⁵ It identifies failures in the social service net—the need for quality educational experiences or mental health services, for example—and positions the criminal punishment system as the site for such service provision. This framing justifies dedicating more money to the carceral system and its governmental and private investors. These reforms “bolster the budget, the scope, and the underlying logic of the carceral systems.”²⁴⁶ Indeed, many of these gender-responsive strategies are more expensive than traditional punishment practices. For example, the “state of the art” Las Colinas Detention Facility for women costs \$240 per day per incarcerated person, which is \$35 to \$115 more per day than facilities for men in the same county. In addition, the new carceral facility in Travis County, Texas is estimated to cost approximately \$97 million to construct.²⁴⁷

By funneling more money and legitimacy into the punishment system in the name of helping women, the gender-responsive approach solidifies the criminal punishment system and its institutions—an effect that those who dream of a future without prisons will continue to organize against.

3. **“Does [the reform] create a division between ‘deserving’ and ‘undeserving’ people? Does it leave out especially marginalized groups (people with criminal records, undocumented people, etc.)? Does it cherry-pick particular people or groups as token public faces?”**²⁴⁸

Gender-responsive punishment starts from the proposition that there is something uniquely troubling about subjecting women to traditional punishment

244. SURVIVED & PUNISHED N.Y.C., *supra* note 237.

245. James Kilgore, *Repackaging Mass Incarceration*, COUNTERPUNCH (June 6, 2014), <https://www.counterpunch.org/2014/06/06/repackaging-mass-incarceration> [<https://perma.cc/C7U8-3RT3>].

246. DAVIS ET AL., *supra* note 29, at 154.

247. See Blakinger, *supra* note 14.

248. SURVIVED & PUNISHED N.Y.C., *supra* note 237.

and focuses myopically on addressing this problem by altering traditional practices for women alone. In this way, these practices embrace a “politics of exceptionalism,” singling out women for different and better treatment.²⁴⁹ In doing so, gender-responsive punishment justifies the use of traditional punishment practices for men.

Indeed, if the conventional criminal punishment system was designed “for men” as proponents claim, presumably subjecting them to that system is not cause for concern. Some reform advocates explicitly invoke the language of deservedness, such as the Vera Institute’s initiative to “End Girls’ Incarceration,” which declares that “[t]he girls who remain in the nation’s juvenile justice systems do not belong there.”²⁵⁰ Others do so implicitly. For example, the Women’s Center for Justice claims, “Depriving women and gender-expansive persons of their liberty with jail should be rare, and if it does occur, they should be treated with dignity and respect, and put on a pathway to healthy and stable lives.”²⁵¹ Whether implicit or explicit, the message is clear: Some women deserve being treated with more dignity and respect, but the indignities incarcerated men and boys face is of no moment. As Ruth Wilson Gilmore states, arguing that certain people “‘don’t belong’ in the carceral system ‘establishes as a hard fact that some people *should* be in cages.’”²⁵² Similarly, reforms that target changing certain policies for a certain population—namely, some women—suggest that those policies work just fine for the rest. Consider again the gender-responsive critique of clothing restrictions in carceral settings, namely, that they unnecessarily restrict women’s abilities to express themselves.²⁵³ That these disciplinary practices do not seem right or just when applied to women reveals flaws in the logic that animates them. That logic is not justified when applied to people of any other gender.

Meanwhile, the gender-responsive approach also justifies the operation of the criminal punishment system for most women. For example, at Las Colinas, incarcerated women must earn their way to accessing many of the gender-responsive privileges the facility offers, which include yoga classes

249. *About S&P*, *supra* note 27.

250. *Vera’s 10-Year Strategy to End Girls’ Incarceration: Our Vision and Mission*, VERA INST. OF JUST., [https://www.vera.org/publications/veras-10-year-strategy-to-end-girls-incarceration/veras-10-year-strategy-to-end-girls-incarceration](https://www.vera.org/publications/veras-10-year-strategy-to-end-girls-incarceration/veras-10-year-strategy-to-end-girls-incarceration/veras-10-year-strategy-to-end-girls-incarceration) [https://perma.cc/QT9U-G823].

251. WOMEN’S CTR. FOR JUST., *supra* note 3 at 3.

252. GOODMARK, *supra* note 26, at 194 (emphasis in original).

253. *See* Blakinger, *supra* note 14.

and a gourmet coffee cart.²⁵⁴ Only 25 percent of the incarcerated women in this facility qualify for access; for the rest, “life at Las Colinas is not that different than in a regular jail.”²⁵⁵ By positioning these benefits as prizes to be earned instead of services the incarceration system owes people under its control, Las Colinas quite literally sorts women into deserving and undeserving categories. It is not all women, it turns out, who have unique needs that the system should tend to, but rather only those who embody and abide by certain expectations.

4. “Does [the reform] preserve existing power relations? Who makes the decisions about how it will be implemented and enforced?”; “Does it undermine efforts to mobilize the most affected for ongoing struggle? Or does it help us build power?”²⁵⁶

Gender-responsive reforms are changes to how we punish, changes made within a system that invests punishment power in state actors. Accordingly, all gender-responsive reforms inevitably preserve the systemic power of the carceral state over the people it targets for punishment.

While some women who were or are incarcerated support and even helped create some gender-responsive reforms, the opportunity for some women to provide input does not shift power to them.²⁵⁷ Moreover, women who have been incarcerated do not all speak with one voice. Some of the most vocal opponents to new gender-responsive prisons are themselves formerly incarcerated women. For example, Annette Price, a Co-Executive Director of GrassRoots Leadership²⁵⁸ who herself survived twenty years of incarceration,²⁵⁹ has publicly critiqued the effort to

254. *Id.*

255. *Id.*

256. SURVIVED & PUNISHED N.Y.C., *supra* note 237.

257. See generally Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021) (discussing the notion of power shifting). Journalistic coverage of gender-responsive prisons, for example, often highlights incarcerated or formerly incarcerated women who support the prison initiatives. See, e.g., Bellafante, *supra* note 6; Blakinger, *supra* note 14. Keri Blakinger, a journalist who wrote favorably about gender-responsive prisons for the Washington Post Magazine, is herself formerly incarcerated. See KERI BLAKINGER, CORRECTIONS IN INK (2022).

258. *Meet the Team*, GRASSROOTS LEADERSHIP, <https://www.grassrootsleadership.org/ourteam> [<https://perma.cc/67Q8-8YHW>].

259. See *Annette Price: Event Speaker*, UNIV. OF TEX. AT AUSTIN SCH. OF L.: THE BERNARD & AUDRE RAPAPORT CTR. FOR HUM. RTS. & JUST., <https://law.utexas.edu/humanrights/directory/annette-price> [<https://perma.cc/F6TS-CUD7>].

build a new women’s facility in Travis County, Texas.²⁶⁰ While acknowledging that many facilities fail to provide women with the basic physical and mental health services they need, she concludes “building a jail is not going to solve that.”²⁶¹ Instead, under Ms. Price’s leadership, GrassRoots leadership urged the Travis County Commissioners to invest in community-based services and diversion programs for everyone ensnared by the criminal punishment system.²⁶² Due in no small part to advocacy by GrassRoots Leadership and other organizations, the Travis County Commissioners voted to pause its plan to construct a new facility.²⁶³

III. DE-GENDERING PUNISHMENT, UNDOING PUNISHMENT

A key premise of gender-responsive punishment practices is that many people whom the criminal system targets have experienced trauma, bias, and hardship in their past, and that this observation should change how the criminal system treats people. That is a radical shift in penal policy, and one that will be integral to ongoing efforts from both the academy and social movements to reimagine what the criminal system can and should do. But how do we retain this insight without replicating the problems identified in Part 0? And how do we acknowledge and respond to the ways the system unjustly targets people because of gender, while resisting the impulse to implement specialized responses for certain categories of people that ultimately harm and exclude most? This Part considers these questions, offering some guiding principles to respond to the concerns highlighted in Part 0, and concluding with a vision for what an abolition feminist undoing of punishment could look like.

A. Guiding Principles

1. Reject Either/Or, Embrace Both/And

Abolitionist analyses are often met with a series of purportedly pragmatic objections that sound something like the following: Isn’t the desired end of

260. Blakinger, *supra* note 14.

261. *Id.*

262. See Olivia Aldridge, *Community Groups Push Back Against Plans for New Women’s Jail East of Austin*, CMTY. IMPACT (Jun 7, 2021, 5:04 PM) <https://communityimpact.com/austin/central-austin/public-safety/2021/06/07/community-groups-push-back-against-plans-for-new-womens-jail-east-of-austin> [<https://perma.cc/BLD8-GBT4>].

263. *See id.*

abolitionism that we should open all prison doors and cease all policing practices? Given that that is unlikely to ever happen—and certainly not in the near future—aren't people who are currently being punished going to continue to suffer in the absence of reform? And if it is more politically palatable and realistic to adopt reforms that target certain populations, is it not better to help them instead of doing nothing?²⁶⁴

This common critique reflects a fundamental misunderstanding of abolitionist principles as demanding either full and immediate abolition or no action at all. While the goal for many abolitionists is a world without prisons, abolitionism does not dictate that any reforms short of total prison abolition are not worthy or wise. Rather, abolitionism “asks us to question the goal and the impact of reforms” and supports reforms that do not “expand the life, scope, or legitimacy of the prison system.”²⁶⁵ As Jodie M. Lawston and Erica R. Meiners explain in *Ending Our Expertise: Feminists, Scholarship, and Prison Abolition*,

*reform and abolition are not, by definition, mutually exclusive, but rather are often, and should be, intertwined. Services—or agencies and mechanisms that provide people with access to some form of housing, food, health care, and education—are desperately needed for many people across the carceral state, particularly those who are locked inside prisons or jails or who are exiting those punishing institutions. Yet, as many argue, equally important are structural and paradigmatic shifts that alter the contexts that produce such high levels of incarceration in the United States.*²⁶⁶

An abolitionist approach thus strives simultaneously for *both* the overarching project of creating a world without prisons *and* interim efforts to help those whom the system currently targets. In other words, abolitionism rejects an either/or approach and reveals the power of a both/and approach.

264. For example, Rachel Barkow recently argued, “Abolitionists are playing for a utopian endgame that is unlikely ever to occur and certainly not for generations.” Rachel E. Barkow, *Promise or Peril? The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 255 (2023). She argues that that the abolitionist goal of “total elimination of prisons and state detention” is not only “unlikely to materialize,” but that an abolitionist approach can “make things worse” for those under carceral control, for two reasons: 1) abolitionism may deter people who would otherwise support decarceration but who are “not prepared to rule out the possibility of incarceration entirely, at least not until there are satisfactory, concrete alternatives presented to them,” causing a political backlash, and 2) the abolitionist stance against “reformist reforms” can deny “benefits to those currently harmed by incarceration.” *Id.* at 252–55.

265. Lawston & Meiners, *supra* note 171, at 12.

266. *Id.* at 4.

The both/and framework breaks the manufactured tension between either advocating for changes within the system or working towards a different system entirely. It resists dichotomous thinking and holds space for multiple, and seemingly contradictory or conflicting, truths to co-exist. It “requires a willingness to inhabit contradictions, to eschew purity, and embrace the tensions and contradictions inherent in political and social movements that seek radical, systemic change.”²⁶⁷ It is not a compromising logic that seeks to find an agreeable middle ground between two positions. Rather, it is a capacious logic that “draws selectively and critically on both sides to build an alternative third choice that extends well beyond either of the first two possibilities.”²⁶⁸ The both/and perspective is central to abolition feminism, which itself occupies an “ambiguous terrain located in the space between necessary responses to immediate needs and collective and radical demands for structural and ultimately revolutionary change.”²⁶⁹ It is a logic that undoubtedly feels unnatural or uncomfortable for many, especially those steeped in the legal tradition’s adversarial model of thinking.²⁷⁰ But if we want to craft responses to complex issues, we must be able to see and understand people and the world in complex ways.

Importantly, a both/and approach allows us to see that we can work towards radical decarceration and also insist that meanwhile the carceral system treat people it controls with dignity and humanity. It enables us to “support our collective immediate and everyday needs for safety, support, and resources while simultaneously working to dismantle carceral systems Campaigns to close jails and prisons can move forward as we continue to teach classes inside prisons and as we support restorative justice processes and organize around parole hearings.”²⁷¹

This complexity of perspective allows abolitionists to support some of the changes promoted by gender-responsive practices, such as better health care, greater respect for incarcerated people by corrections officers, or increased access to their loved ones. But whereas the gender-responsive approach presumes that the criminal system will remain largely as it is today and seeks to change the conditions of punishment for some, abolitionists demand better treatment for all while simultaneously striving to change the system. In sum, abolitionism does not demand either supporting only immediate prison abolition or advocating for

267. DAVIS ET AL., *supra* note 29, at 155.

268. Edward Soja, *Afterword*, 48 STAN. L. REV. 1421, 1424 (1996).

269. DAVIS ET AL., *supra* note 29, at 5.

270. Soja, *supra* note 268 (“Can legal scholars so drenched in an adversarial logic, the epitome of a totalizing binary mode of thinking, ever make sense of or accept or understand this alternative of the both/and also?”).

271. DAVIS ET AL., *supra* note 29, at 5.

improved conditions for people who are subjected to punishment. We can and must push *both* for a better present for *all* people currently subjected to the system *and also* for a future in which the current system does not exist.

2. Reject Politics of Exceptionalism, Embrace Politics of Relationality

Prevailing gender-responsive punishment practices are singularly focused on gender in identifying problems with and solutions to contemporary punishment practices. This framework imagines gender as a binary system in which gender identity tracks predictably with sex assigned at birth and produces shared experiences or characteristics across gender categories, such as heterosexual relationships, motherhood, and a nurturing, relational perspective for women. An obvious fault of that framing, of course, is that it is inaccurate; it excludes the experiences and identities of many people.²⁷² It is also lacking because it fails to account for the complexity of people's real lives and experiences—how one can have experienced harm and caused harm to others, and how their experiences, actions, and reactions are influenced by gender and also race, socioeconomic status, and other axes of identity. The gender-responsive framework, limited as it is in accounting for the complexity of people's lived experiences, is also limited in the changes and futures it can imagine.

A framework based on principles of intersectionality, which that can account for the complex ways identities intersect and the equally complex ways power, privilege, and subordination operate along multiple axes, should replace this gender-responsive framework.²⁷³ Many of the observations that drive gendered punishment practices are grounded in truth. It is undeniable, for example, that many women whom the criminal system targets have experienced multiple forms of violence, bias, and oppression. We know this because they tell us.²⁷⁴ But it is not true that these experiences are unique to women. And if we understand, as gender-responsive punishment literature tells us we should, that the criminal system should account for the ways that past traumatic experiences impact present behavior, then all who have experienced trauma should benefit from that insight.

272. In a clunky attempt to address such failures, some emerging models add “gender-expansive people” to the populations they are supposedly intending to assist. See *supra* Part II.B for discussion of why this does not address this issue.

273. See *supra* note 212, for discussion of the concept of intersectionality as developed by Kimberlé Crenshaw.

274. See, e.g., Smith et al., *supra* note 25, at 4 (compiling essays by women of color “to better understand how various forms of intersecting oppressions contribute to the creation of a violent world, and to devise the strategies necessary to end violence”).

In other words, instead of working within a framework that positions women's experiences as exceptional, we should work with a "politics of relationality," which *Survived and Punished* defines as "strategies that help people engage the broader crisis of criminalization, and help create a public context for others to talk about their own experiences of surviving violence and being punished for that survival."²⁷⁵ This reorientation requires changing the questions we ask and the reforms we embrace when we identify something of concern. Take again the observation that many women whom the criminal system targets have previously been subjected to abuse. Gender-responsive reform proponents ask: How do we reform our punishment practices to take into account the lingering impact of trauma for women? This question results in reforms that involve changing the tenor and tone of court practices (as in *Women's Courts*), or providing services aimed at healing trauma in carceral facilities, such as counseling, meditation, and yoga.

An approach that embraces a politics of relationality, by contrast, asks: what does our collective discomfort over seeing traditional punishment practices applied to women who have experienced trauma tell us about the problems inherent in the practices themselves? How can we operationalize this insight in service of changes that dismantle the criminalization of trauma? Such questions could lead to a range of reforms, from the decriminalization of certain behaviors to policies that replace arrest and prosecution with the provision of services and reduce or eliminate criminal punishment for all who have survived trauma. In other words, the goal is not simply equal access to reforms coded as "gender-responsive" for all—equal funding for trauma-informed services for all people, equal opportunity to access specialized court processes, identical incarceration facilities.²⁷⁶ Rather, it is to use the observations about the limits and failings of the current system, including those that gender-responsive punishment proponents have identified, to help design changes that reduce the reach of the system itself.

In this spirit, reforms should focus on connections amongst criminalized people.²⁷⁷ For example, many of the insights of gender-responsive programming

275. *About S&P*, *supra* note 27.

276. Cf. Paul Butler, *Black Male Exceptionalism? The Problems and Potential of Black Male-Focused Interventions*, 10 DU BOIS REV. 485, 502 (2013) (advocating for use of equal funding proposals as an end goal).

277. For reasons offered by Paul Butler, the answer is not to shift our focus only to men. See *id.* Butler defines the phenomenon of Black male exceptionalism as "the premise that African American men fare more poorly than any other group in the United States." *Id.* at 485. The discourse around this exceptionalism presents Black men as in need of specialized interventions. Butler critiques these intervention programs for being not intersectional in

are about how traumatic experiences, including sexual abuse, can shape future behaviors. While women experience sexual assault at higher rates than men, it is not true that only women are vulnerable to and have experienced sexual assault and abuse.²⁷⁸ Thus, if we take gender-responsive proponents' concerns seriously, all people who have experienced sexual assault or abuse should be able to access trauma-informed care and programming.

A relational approach could and should also work against the notion that certain kinds of trauma are more exceptional than others. If we believe that traumatic experiences, in general, can influence behavior, and that such experiences render people vulnerable to targeting by the criminal system, we should not limit our attention to grappling with the lasting impact of sexual and gendered violence. Reforms should also acknowledge other sources of structural and physical violence that impact people's experiences, opportunities, and decisions, such as post-traumatic stress disorder (PTSD) resulting from violence in one's home or community, including violence inflicted by law enforcement, or the traumatic impact of being subjected to the family regulation system.²⁷⁹

A politics of relationality enables us to identify sources of connection between criminalized people without either exceptionalizing or ignoring their differences. Such a perspective both facilitates a deep understanding of the experiences that render people vulnerable to criminalization and rejects reforms that benefit some at the expense of others. Rather, a politics of relationality insists that all who are subject to the criminal punishment system deserve better than the system currently affords, because "no one is disposable."²⁸⁰

approach and antifeminist in application. He identifies ways that the programs and discourse "harm African American women, reinforce stereotypes about African American men, and undermine racial justice." *Id.* at 502. See also Crenshaw, *supra* 174, at 1451–52.

278. See discussion *supra* Subpart II.B.

279. See Collins, *supra* note 38, at 1501 (providing cites to studies showing rates of PTSD experienced by youth who witness violence in their neighborhoods match or exceed that experienced by military veterans); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097 (2022).

280. See Tourmaline & Dean Spade, *No One Is Disposable: Everyday Practices of Prison Abolition*, BARNARD CTR. FOR RSCH. ON WOMEN (Feb. 7, 2014, 4:00 PM), <https://bcrw.barnard.edu/event/no-one-is-disposable-everyday-practices-of-prison-abolition> [<https://perma.cc/F25G-EYMK>] (displaying a series of videoed conversations between activists Tourmaline and Dean Spade discussing "prison abolition as a political framework" and exploring why abolition "is a top issue for those committed to supporting trans and gender-nonconforming people").

3. Reject Crisis Framing, Embrace Structural Understandings and Solutions

The origin story of modern gender-responsive programming represents a missed opportunity for transformative change. Gender-responsive reforms responded to concern over the increase in the number of women entering the criminal system as a crisis in need of immediate response. Observations about changes in the pattern of criminal law's application were interpreted as reflecting changes in women's behavior rather than changes in the criminal system enacted by system actors. What resulted was a series of reforms aimed at understanding women's behavioral changes and adopting programs and solutions that would change women's behaviors going forward.

Crisis framing is inevitably limited both in its ability to identify structural causes of observed changes and imagine different futures.²⁸¹ The crisis is identified as a deviation from business as usual, and the goal is to address the perceived deviation and return to the status quo. Imagine instead that observations about increasing rates of women entering the criminal system had prompted different questions. For example, what changes with police and prosecution policies led to this increase?; How do we marshal this collective concern over the incarceration of women towards a system that is better for all?; What do these changes tell us about the ways in which the system polices identity and survival in the name of safety? This is exactly the approach abolitionist activists are already embracing.

In a publication titled, *What is Driving the Mass Criminalization of Women and LGBTQ People?*, *Survived and Punished* starts with now familiar statistics illustrating the high rates at which women are being funneled into the criminal system.²⁸² But instead of using this data to ask what we can change about the behavior of women, it asks: "What Policing Practices [A]re [D]riving [T]hese [T]rends?"²⁸³ And, ultimately, "How Can We Interrupt Criminalization of Women, Trans and Gender Nonconforming People?"²⁸⁴ Unsurprisingly, given the systemic orientation of their questions, the solutions *Survived and Punished*

281. As Kimberlé Crenshaw has highlighted, crisis-based frames advance "neoliberal accounts of social life that subtly shift the focus from historically constituted relations of power to the failures of family formation and gender conformity." Crenshaw, *supra* note 174, at 1466–67.

282. INTERRUPTING CRIMINALIZATION: RSCH. IN ACTION, BARNARD CTR. FOR RSCH. ON WOMEN, *WHAT IS DRIVING MASS CRIMINALIZATION OF WOMEN AND LGBTQ PEOPLE?* (2019), https://bcw.barnard.edu/wp-content/uploads/2019/12/Interrupting_Criminalization_FINAL.pdf [<https://perma.cc/RB2N-66LZ>].

283. *Id.* at 4.

284. *Id.* at 6.

proffers focus on systemic changes that target “where, how, and why women are arrested.”²⁸⁵ For example, after noting that the crimes for which many women are arrested are drug offenses, the organization recommends changes to limit opportunities for government agencies to test women for drug use, such as during prenatal medical appointments and as conditions of probation for low-level offenses.²⁸⁶

Unlike a framework that seeks to resolve a perceived crisis in how the criminal punishment system responds to women and return to business as usual, a structural understanding interprets the crisis in the criminalization of gender as symptomatic of larger structural failings, failings that require systemic change. Instead of asking what pathways lead women into the criminal punishment system as a way to change how system actors punish them, a structural analysis instead looks at how system actors and institutions create those pathways and seeks changes that will disrupt the pathways altogether.

B. Imagining an Abolition Feminist Future of Punishment

While abolition has been characterized as an impractical project focused myopically on closing prisons,²⁸⁷ it is in fact a creative enterprise concerned primarily with building and creation.²⁸⁸ It seeks not to build prisons, but rather a different future, one in which prisons become, simply, obsolete.²⁸⁹ As Leigh Goodmark explains, “Abolition . . . is not an event but a process, where the development of alternatives to the carceral system eventually eliminates any justification for maintaining that system, what Critical Resistance has called ‘shrink[ing] the system into non-existence.’”²⁹⁰ Drawing on preceding principles, this Subpart offers a sketch of what actions can and should be taken within the

285. *Id.*

286. *Id.* at 7.

287. See Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2017 (2022) (describing common critiques of abolition); see also Barkow, *supra* note 264 (arguing that an abolitionist approach can deter political support for criminal system reform).

288. See GOODMARK, *supra* note 26, at 185 (“Abolition is necessarily about building That building is not just individual—it must be structural as well, investing in health, education, and safety, creating new and resilient institutions that deliver justice without relying on state violence.”); DAVIS ET AL., *supra* note 29, at 111 (arguing that abolition “creates new analytical and material spaces to imagine and experiment with more authentic forms of safety”).

289. See generally DAVIS, *supra* note 161 (discussing the ways prisons have become obsolete).

290. GOODMARK, *supra* note 26, at 185 (alterations in original).

punishment system while we work towards an abolition feminist future of criminal punishment.

A few preliminary caveats are in order. First, this imagining is focused primarily on changes to current punishment practices, that is, the way the system responds when people have been convicted of crimes. There is much work to be done to advance an abolition feminist future in other areas of the criminal process and beyond, from advocating for the repeal of many criminal laws, including those used to target survivors of gender-based violence, to meaningful pretrial reform.²⁹¹ Second, what follows does not purport to be a comprehensive plan or the only path forward.²⁹² Rather, it is intended to offer one vision of the shape such a path could take.

Most immediately, an abolition feminist approach to punishment counsels against the building of any new carceral institutions—including purportedly feminist facilities because “prison is not feminist.”²⁹³ Therefore, abolition feminism demands an end to the criminalization of acts taken to survive gendered violence and supports tactics to achieve that goal, such as defense support for accused survivors and mass clemency campaigns.²⁹⁴

An abolition feminist approach to punishment, however, would not be limited at advocacy for criminalized survivors of gender-based violence. Rather, abolition feminism demands better treatment for *all* who are detained within existing prisons and subject to other forms of carceral control.²⁹⁵ And by “better,”

291. See GOODMARK, *supra* note 26, at 188–92 (applying abolition feminist principles to other areas of criminal system reform).

292. Indeed, I reject the idea that there is a singularly correct answer and embrace the notion that an abolitionist critique can be complete upon identifying how and why current systems cause harm. See Lawston & Meiners, *supra* note 171, at 13 (“An abolitionist analysis, like other forms of critique, does not require scholars and organizers to have the ‘right’ answer—if this is possible—before naming what does not work and how systems harm people.”).

293. This phrase is attributed to scholar and activist Mariame Kaba. See MARIAME KABA, *From “Me Too” to “All of Us”: Organizing to End Sexual Violence Without Prisons, in WE DO THIS ‘TIL WE FREE US* (Tamara K. Nopper ed., 2021) (noting that “Prison is ... not feminist” is “one of Mariame’s famous points”).

294. See GOODMARK, *supra* note 26, at 190–92 (discussing survivor defense work and clemency as abolition feminist tactics); see also *Defense Campaign Toolkit*, SURVIVED & PUNISHED, <https://survivedandpunished.org/defense-campaign-toolkit> [<https://perma.cc/6GUC-FHLF>] (providing a toolkit of tactics and guidance for organizing a defense campaign for criminalized survivors); *Commutations Campaign*, SURVIVED & PUNISHED, <https://survivedandpunished.org/commutations-campaign> [<https://perma.cc/ZK7A-XZYA>] (discussing commutation campaigns for criminalized survivors).

295. See generally Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022) (detailing the many forms of punitive surveillance that are imposed as a supposedly more “humane” alternative to incarceration); see also SCHENWAR & LAW, *supra* note 7.

I mean treatment that recognizes the dignity and humanity of those subjected to punishment. This expansive goal requires affirmative steps to ensure that people's physical and mental health are protected while they are under carceral control, such as the provision of meaningful health care and a cessation of violence inflicted both by other punished people and state actors who are empowered to punish.

Crucially, an abolition feminist future would not justify punishing people in order to provide them access to care and treatment. It would be attentive to and critical of the ways in which the carceral state's expansion has been justified in the name of service provision through reforms such as problem-solving courts and other sites of therapeutic governance.²⁹⁶ As Angela Y. Davis, Gina Dent, Erica Meiners, and Beth Richie explain, "Directly linking jails and other carceral institutions to care and treatment widens the net of the carceral state. While some might identify incarceration as the first or only place they were able to find access to health care, this should neither be praised nor become policy."²⁹⁷ Thus, on a broader reform horizon, abolition feminism seeks to decouple care from carcerality—to create systems and funding streams for the provision of life-affirming and sustaining care that is accessible independent of the criminal punishment system.²⁹⁸

Some will inevitably ask: Does an abolition feminist approach eschew any consideration of gender in generating reforms to punishment practices? Is the inevitable conclusion of this critique that we should be gender blind as we design a path forward? The answer is no. In fact, an abolition feminist approach *centers* gender and gender-based oppression in its efforts to both understand the harm caused by the carceral system and illumine the path forward. It does not, however, use gender to distinguish between people who are deserving of better treatment from the punishment system than others. Instead, it draws connections between the gendered violence and oppression that occurs within and beyond punishment practices and is attentive to the connections between gender and other axes of systemic oppression, such as race, immigration status, and socioeconomic factors.

296. See Collins, *supra* note 38, at 1524 (discussing the "net-widening" critique of problem-solving courts); DAVIS ET AL., *supra* note 29, at 66–67, 70 (noting that "drug treatment programs and mental health services, particularly in an environment where most poor people do not have access to these resources untethered to punishment, are rarely liberatory or affirming" and critiquing therapeutic governance).

297. DAVIS ET AL., *supra* note 29, at 66.

298. There is an ongoing conversation amongst abolitionists about whether such care and support can or should come from the state, or whether abolitionism should be antistate. See Charmaine Chua, Travis Linnemann, Dean Spade, Jasmine Syedullah & Geo Maher, *Police Abolition*, 23 CONTEMP. POL. THEORY 114 (2023) (discussing different perspectives on this issue and adopting an antistate position).

In this way, abolition feminism resists the pressure to ration any willingness to reform only to people of certain identities or people deemed “perfect victims.”²⁹⁹

Likewise, abolition feminism shows us that the gender exceptionalism advanced by gender-responsive punishment is not only harmful and inaccurate, but also unnecessary and counterproductive. Consider the core principles of the Women’s Center for Justice’s proposal for a new women’s facility in New York City: Dignity and Respect; Normalization; Safety; Least Restrictive Approach; Rehabilitative; Family and Community Centered; Responsive to Special Needs; Trauma-Informed; Culturally-Responsive; Health; Recognizing the Capacity for Growth and Change; Staffed for Success.³⁰⁰ These are unobjectionable principles; anyone who is truly invested in redressing the atrocities of our current carceral system (as opposed to merely right-sizing its operation)³⁰¹ and who acknowledges the humanity in the people the system targets would be hard pressed to say that these principles should not guide reform efforts. But these principles do not reflect needs that are exclusive to women and framing them as such limits our field of vision of what is owed to people who are subjected to punishment and what other futures are possible.

Consider the question of bodily differences between incarcerated people. For example, in addressing how correctional facilities should treat people who menstruate, are pregnant, or give birth while incarcerated, the gender-responsive approach starts from the premise that women have specific medical care needs, and ends with a reform that provides services to fulfill those needs.³⁰² An abolition feminist approach, by contrast, starts by resisting gender

299. GOODMARK, *supra* note 26, at 41. As Leigh Goodmark explains, abolition feminism embraces the principle that “there are no deserving and undeserving incarcerated people—almost everyone is an imperfect victim in one way or another.” *Id.* at 194.

300. WOMEN’S CTR. FOR JUST., *supra* note 3, at 15–16.

301. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (describing the “over” and “mass” frames of criminal justice reformers).

302. See, e.g., FED. BUREAU OF PRISONS, U.S. DEP’T. OF JUST., FEMALE OFFENDER MANUAL, 11 (2021), <https://www.bop.gov/policy/progstat/5200.07b.pdf> [<https://perma.cc/H46Z-9LZK>] (specifying that “institutions housing females are required to implement standardized gender-responsive commissary lists,” which include menstrual products, hair styling irons, and hair dryers); ALIX MCLEAREN, KRISTIE BRESHEARS, DOUG MOWELL & KARL LEUKEFELD, FED. BUREAU OF PRISONS, A ROOM OF THEIR OWN: PROGRESSIVE PRISON PROGRAMS FOR WOMEN 34, 37 (2021) https://www.aca.org/common/Uploaded%20files/Publications_Carla/Docs/Corrections%20Today/2021%20Articles/CT_Jan-Feb_2021_FBOP.pdf [<https://perma.cc/4EPC-Q697>] (identifying as an example of a gender-responsive correctional programs the availability of “gender specific commissary [items]” including “body wash, hair clips, deodorant, makeup, lotion, razors, shoes, socks and watches and feminine hygiene (menstrual) products” and discussing programs for incarcerated women who are pregnant).

essentialism: Not all people who get pregnant and give birth are women, and not all women get pregnant or have children. Similarly, not all people who menstruate are women.³⁰³ And, while most women menstruate at some point in their lives, not all do, and none do for their entire lives.³⁰⁴ While there are many experiences and needs that may be common amongst many women, they are not universal to all women, they are not exclusive to women, and they do not define what it means to be a woman. Therefore, an abolition feminist approach can position the denial of menstrual supplies as one of many ways the carceral system fails the people whom it incarcerates, and demand reforms that require the provision of such supplies along with all other supplies, treatments, and care necessary for physical and mental health across all genders.

Similarly, an abolition feminist approach shows us that we do not need a gender-specific analysis to show us that shackling a person while they are giving birth is inhumane and unjustified.³⁰⁵ By drawing connections between the history of misogyny, patriarchy, racism, and white supremacy, abolition feminism shows us that the treatment of people who give birth while incarcerated is simply one manifestation of the institutional disregard for the health and wellbeing of all incarcerated people. This analytical approach encourages us to ask: What does this brutal and universally despised practice tell us not only about carceral disregard for the comfort, safety, and humanity of people while they give birth, but about the degrading and unacceptable state of prison health care in general? Certainly, abolition feminism supports efforts to stop this and other forms of violence inflicted upon incarcerated people. But it also shows us that legislation banning this brutal practice does not solve the root problem.³⁰⁶ In addition to being clear about what carceral institutions cannot do, abolition

303. Many transgender men menstruate.

304. For example, some women will not menstruate because of a condition called primary amenorrhea or because they are transgender. And women who do menstruate will eventually stop doing so after menopause. *Amenorrhea*, MAYO CLINIC (Feb. 9, 2023), <https://www.mayoclinic.org/diseases-conditions/amenorrhea/symptoms-causes/syc-20369299> [<https://perma.cc/CVB3-BHJV>].

305. See, e.g., Krish Gundu, Elizabeth Rossi & Eric Reinhart, *Pregnant People Are Shackled and Abused in Harris County Jail*, THE APPEAL (Feb. 8, 2023), <https://theappeal.org/pregnant-people-shackled-abused-crisis-harris-county-jail> [<https://perma.cc/LJD8-SYLD>].

306. For example, the 2017 Dignity Act, was originally introduced in 2017 and then incorporated, in part, into the First Step Act (which banned shackling of birthing people and required access to free menstrual products). See Lindsey Linder, *Expanding the Definition of Dignity: The Case for Broad Criminal Justice Reform That Accounts for Gender Disparities*, 58 U. LOUISVILLE L. REV. 435, 442–43 (2020). This was followed by the Dignity for Incarcerated Women Act in 2019. *Id.* States also adopted a series of “Dignity” acts that seem to require access to free hygiene products, bans on shackling, and expanded visitation. *Id.* at 443–44.

feminism insists we need to expand and enforce standards for what carceral institutions owe to all who are under their control. All carceral facilities must provide all incarcerated people with required medical care and do so in a way that acknowledges their humanity and dignity, whether they are seeking gender-affirming care, treatment for a cardiac condition, or giving birth.

With regards to gender-specific facilities, as a concept and a practice, they reinforce the binary gender system and undermine the dignity and safety of trans and gender non-conforming people. Immediate steps can and should be taken to reconceptualize how the system categorizes people to acknowledge people of all genders and to accept and value how people self-identify. Further, abolition feminism urges us to see that gender-segregated facilities—even the newer, purportedly more humane prisons for women—do not keep people of any gender safe.³⁰⁷ The women, transgender men, and gender nonconforming and nonbinary people who are detained in women’s facilities are not safe.³⁰⁸ The men, transgender women, and gender nonconforming and nonbinary people who are detained in men’s facilities are not safe.³⁰⁹ In other words, regardless of how we categorize and house people in carceral facilities, prisons do not advance safety. Or, as the abolitionist collective Love & Protect explains, “Prisons do not support survivors, they punish survivors—both because incarceration is not protective and . . . prisons and detention centers are centralized locations of physical, sexual, and emotional abuse.”³¹⁰

The brutality endured by people who are incarcerated in women’s facilities illustrates larger problems with incarceration in general. Certain kinds of atrocities, such as sexual assault by guards against incarcerated people, may occur with greater frequency in women’s facilities, and these assaults are a form of gendered violence.³¹¹ Other kinds of physical violence may occur with greater

307. Meanwhile, we should also keep in mind the increasingly undeniable message from community groups that prisons—along with policing, prosecution, and other forms of punishment—do not advance safety for all. *See generally* Collins, *supra* note 242, at 455–56.

308. *See generally* GOODMARK, *supra* note 26, at 110–17 (discussing abuse of incarcerated women by correctional officers).

309. Many jurisdictions incarcerate transgender women in men’s facilities. Officers at some men’s facilities house trans women in cells with the knowledge and intent that they will be raped by the person they share a cell with. *See id.* at 114.

310. DAVIS ET AL., *supra* note 29, at 143–44 (quoting and summarizing the position of Love & Protect).

311. Kristi Riley, *Overlooked in the Era of #MeToo*, VERA (Mar. 15, 2018), <https://www.vera.org/news/gender-and-justice-in-america/overlooked-in-the-era-of-metoo> [<https://perma.cc/WRR5-U5BC>] (reporting that although women represented 13 percent of the jail population from 2009–2011, they accounted for 67 percent of all reported sexual assaults by corrections officers). And I posit that the actual instances of sexual assault in places

frequency in men's facilities. But identifying possible differences in the prevalence of different forms of violence in men's and women's facilities does not mean such differences are inevitable or linked to innate gender differences. Indeed, many of the very behaviors that are said to render men's prisons so dangerous—for example, rampant physical violence—can be seen as reasonable and predictable self-help measures taken by people who know that the correctional staff will not or cannot keep them safe.³¹² As Sharon Dolovich concludes, “It may . . . not be the prisoners who make the prison, but rather the prison—and in particular the widespread failure of the system to keep people safe—that makes the prisoners.”³¹³ Moreover, if we look at the violent conditions of both men's and women's prisons side by side, we see one common source of the problem: a state apparatus that ignores, at best, or condones, at worst, the infliction of extralegal violence and harm upon people under its physical control.

An abolition feminist future will not be brought about through mere modifications to existing punishment practices. If we take seriously the insight of survivor-abolitionist groups that prison is itself a form of gender violence, then

of incarceration are vastly higher than the data suggest, particularly when such assault occurs against men—due, somewhat ironically, to the influence of gendered norms that counsel against men reporting victimization. See Capers, *supra* note 217, at 1261 (“Because of the stigma of appearing weak and the fear of retaliation, male victims of prison rape often choose not to report their victimization to prison authorities or counselors.”). A recent Bureau of Justice Statistics study found higher rates of “substantiated incidents of sexual victimization” by prison staff against men than women. See EMILY D. BUEHLER, SPECIAL REPORT: SUBSTANTIATED INCIDENTS OF SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2016–2018 (2023), <https://bjs.ojp.gov/document/sisvraca1618.pdf> [<https://perma.cc/5GTV-4M6E>] (reporting that 2,229 substantiated incidents of sexual victimization by prison staff against incarcerated people occurring between 2016 and 2018, 71.5 percent of the victims were male, 27.3 percent were female, and 1.2 percent were transgender or intersex. 56.1 percent of the assailants were female, and 43.9 percent were male). This finding is consistent with prior studies. See Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1646–47 (2012) (summarizing studies).

312. Sharon Dolovich, *Prison Conditions*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 261, (Erik Luna ed., 2017). Dolovich continues:

[E]very day, hundreds of thousands of people, not trusting the authorities to keep them safe, feel compelled to engage in various forms of self-help in a bid to assure their own safety. Such strategies range from constant vigilance and wary reticence in all interpersonal interactions to hypermasculine posturing and even aggression toward others in the hope of deterring would-be victimizers. In this environment, gang affiliation is a rational response.

Id. at 264; see also Robinson, *supra* note 218, at 1314 (“The Jail, reflecting the broader society's gender stereotypes, requires heterosexual men to assume traditionally masculine traits, including physical aggression, a commitment to denying one's vulnerability, and a refusal to turn to government for protection.”)

313. Dolovich, *supra* note 312, at 271.

ending gendered violence within prisons must also lead us towards abolishing the prison as an institution.³¹⁴ If we imagine and work towards a world in which our punishment system is unmoored from gender violence, we must abolish and reconstruct the entire system itself.

CONCLUSION

The gender-responsive approach to punishment attempts to lessen the harm inflicted on women by the criminal system. Abolition feminism reveals how this well-intentioned approach ultimately causes more harm: It erases the experiences of many, overlooks the role of race and racism in the formation of punishment practices, reifies troubling stereotypes, and ultimately benefits a select few while justifying the systemic harms inflicted on most. On a more general level, however, gender-responsive punishment practices embrace an insight into how personal histories, including histories of trauma, can render people vulnerable to the harsh application of criminal law. But there is no reason to limit this insight based on gender. And if we are honest about the number of people whom the system targets who have experienced trauma, this acknowledgment can have only one result: radical decarceration and, ultimately, abolition.

314. See DAVIS ET AL., *supra* note 29, at 111–13.