

COMMENT

LOPSIDED LIABILITY: ANALYZING THE CONSTITUTIONAL AND STATUTORY IMPLICATIONS OF THE BOP’S FAILURE TO MEET PROGRAMMING DUTIES FOR INCARCERATED INDIVIDUALS IN FEMALE PRISONS

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† Trigger warning: this Comment includes a discussion of drug use, addiction, and sexual assault.

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INTRODUCTION

Incarceration's calamitous effects begin immediately upon conviction and persist after release, often continuing for the remainder of an individual's lifetime.¹ Every incarcerated individual faces these consequences, but certain characteristics alter how each person experiences them.² For example, individuals in male prisons generally have much different mental and physical health, parental, and rehabilitative needs than individuals in female prisons.³ However, in the federal prison system, incarcerated individuals in female prisons⁴

1. See generally Christian Jarrett, *How Prison Changes People*, BBC (May 1, 2018), <https://www.bbc.com/future/article/20180430-the-unexpected-ways-prison-time-changes-people> (discussing social psychology studies comparing hundreds of previously incarcerated individuals with non-incarcerated individuals to illustrate the hardships and changes the former group experienced and continues to experience versus the latter group).

2. See Gordon B. Dahl & Magne Mogstad, *The Benefits of Rehabilitative Incarceration*, 1 NAT'L BUREAU OF ECON. RSCH. REP., Mar. 2020, at 18, <https://www.nber.org/sites/default/files/2020-04/2020number1.pdf>.

3. See *infra* Part I (analyzing the unique characteristics between these two populations).

4. When this Comment refers to incarcerated individuals at female federal facilities or prisons, it refers to anyone who has been confined in one of those facilities, which includes any individual who identifies as a woman, nonbinary individuals, and assigned females at birth who identify as male. The Bureau of Prisons (BOP) does not enumerate definitions of "women" or "female" in its

lack sufficient programming to acknowledge these differences.⁵

One person previously incarcerated in a female federal prison is Meg Worden.⁶ Worden is a young woman who had a substance use disorder enmeshed with a toxic relationship.⁷ She has lived a life that many can, and do, relate to.⁸ Shortly after giving birth to her son, she was arrested and convicted for conspiracy to distribute narcotics and sentenced to 23 months in a federal prison.⁹ Pre-trial services did not advise Worden of any facilities that would treat her substance use disorder, and instead, she was placed in the “general population” at Bryan Federal Prison in Texas, more than five hundred miles from her infant son in Missouri.¹⁰ Inside, Worden lacked the basic right to consent, stating “there is technically no such thing. Once you are in custody, you lose all rights except the freedom to pray . . . you, and your body, are owned by the government.”¹¹ Her opinion results from her own lived experience: on two separate occasions, a male prison guard and a male X-ray technician each attempted to sexually assault her.¹²

policies. Instead, it categorizes people based on a binary system, placing individuals in facilities that match their presenting gender. Jessica Szuminski, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, 105 MINN. L. REV. 477, 479 (2020). As a problematic result, nonbinary persons and assigned females at birth who identify as male are placed in female prisons. *Id.* at 502. It is my choice as the Author to respect the individuals incarcerated in female federal prisons who may not identify according to this binary system.

5. See *infra* Part II (discussing the negative impacts imposed upon this incarcerated population due to the insufficient programming offered).

6. Interview by Sean Beaudoin with Meg Worden, (Oct. 21, 2015), <https://theweeklings.com/sbeaudoinmworden/2015/10/21/prison-in-america/> (discussing Meg Worden’s carceral experience and life afterward).

7. *Id.*

8. Jeffrey Juergens, *What is Domestic Violence?*, ADDICTION CTR., <https://www.addictioncenter.com/addiction/domestic-violence/> (Oct. 31, 2022) (“[W]omen who have been abused are [fifteen] times more likely to abuse alcohol and [nine] times more likely to abuse drugs than those without a history of abuse.”).

9. Interview by Sean Beaudoin with Meg Worden, *supra* note 6.

10. *Id.*; see Driving Directions from Bryan Federal Prison to Noel, MO, GOOGLE MAPS, <http://maps.google.com> (follow “Directions” hyperlink; then search starting point field for “Bryan Federal Prison” and search destination field for “Noel, MO”) (measuring the distance from Bryan Federal Prison to one of the nearest town in Missouri, Noel, as 516 miles—Worden’s son was likely even further away).

11. Interview by Sean Beaudoin with Meg Worden, *supra* note 6.

12. *Id.*

Poor conditions of confinement riddled Worden's carceral experience.¹³ However, reentry to society increased her trauma.¹⁴ For instance, Worden's felony conviction follows her wherever she goes, diminishing opportunities for employment and housing, and even preventing her from traveling.¹⁵ Worden knew she needed quality psychological care to address her previous substance use, but instead faced immensely punitive consequences with little ability to access the requisite help.¹⁶

Worden's situation is not unique. Since the 1980s' War on Drugs, the number of incarcerated individuals in female prisons around the nation erupted.¹⁷ During that time, individuals in female prisons increased more than seven hundred percent, twice the growth rate for male prisons.¹⁸ This is not a coincidence—drug crimes are the most frequent charges women face, and most incarcerated individuals in female federal prisons are incarcerated for drug-related offenses.¹⁹ Male federal prisons have not experienced the same effect from the War on Drugs with respect to increased incarceration rates because the crimes individuals in male prisons commit are inherently different than crimes individuals in female prisons commit.²⁰ Individuals in male facilities are three times as likely to be convicted of violent crimes relative to their representation in the carceral system,²¹ but most individuals in female prisons tend to be non-violent offenders serving time for drug crimes (fifty-nine percent) or property crimes (eighteen percent).²²

13. Some of the horrific conditions Worden experienced include intentional withholding of menstrual products, threats from guards, and guards hiding out to “wait[] to catch women kissing.” *See id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *See, e.g.,* Torrey McConnell, Comment, *The War on Women: The Collateral Consequences of Female Incarceration*, 21 LEWIS & CLARK L. REV. 493, 494 (2017); *see* Marnie L. Lenox, Note, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 281 (2011).

18. *Fact Sheet: Incarcerated Women and Girls*, THE SENT'G PROJECT 1 (MAY 2022), <https://www.sentencingproject.org/app/uploads/2022/11/Incarcerated-Women-and-Girls.pdf>; *Incarceration of Women is Growing Twice as Fast as that of Men*, EQUAL JUST. INITIATIVE (May 11, 2018), <https://ejl.org/news/female-incarceration-growing-twice-as-fast-as-male-incarceration/>.

19. McConnell, *supra* note 17, at 496; BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., NCJ 248955, PRISONERS IN 2014 1 (2015) [hereinafter PRISONERS IN 2014].

20. *See Incarceration of Women is Growing Twice as Fast as that of Men*, *supra* note 18; *see also* Caitlin Curley, *How Women May be the Biggest Victims of the War on Drugs*, GENBIZ (April 29, 2016), <https://genbiz.com/women-may-biggest-victims-war-drugs>.

21. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 227669, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES TBL.38 (2010).

22. PRISONERS IN 2014, *supra* note 19, at 1.

The heightened rate at which doctors treat women with opioids, and the resulting trauma histories caused by self-medication and substance use, further increases the incarceration rate for female federal incarcerated individuals.²³ Collateral consequences further exacerbate this statistic; individual women and their families face vast reentry barriers, such as rescission of parental rights and government benefits.²⁴ Additionally, an increased incarceration rate reflects greater “generational and cyclical effects.”²⁵ For instance, children of incarcerated parents are at high risk of involuntary foster care placement, and parents face a high risk that the state will terminate their parental rights.²⁶ Furthermore, foster care significantly increases a child’s chances of committing criminal offenses and experiencing homelessness throughout their lifetime.²⁷

Once incarcerated, facilities typically administer male-oriented programs to individuals in female prisons.²⁸ This practice ignores that incarcerated individuals in female prisons have different needs.²⁹ As a result of different needs, this male-oriented programming does not correspond with sufficient protection, care, and reentry services for incarcerated females.³⁰ While this can be prevented and reformed in many ways, the Bureau of Prisons (BOP) is accountable for the protection and care of individuals in its prisons and upon reentry.³¹ The BOP is the federal agency responsible for federal prisons with both statutory authority—18 U.S.C. § 4042—and constitutional obligations—the Fifth Amendment’s Due Process Clause—toward

23. See Heather Boyd, *Why the Opioid Epidemic Affects More Women Than Men*, SOC’Y FOR WOMEN’S HEALTH RSCH.: BLOG (Aug. 25, 2016), <https://swhr.org/why-the-opioid-epidemic-impacts-more-women-than-men/> (stating women are twice as likely to be treated with prescription pain medication, like opioids, compared to men).

24. See McConnell, *supra* note 17, at 496; see also Ann L. Jacobs, *Give ‘Em a Fighting Chance: Women Offenders Reenter Society*, 16 CRIM.J. 44, 45–46 (2001) (discussing the reentry barriers for women).

25. Beryl Ann Cowan, *Incarcerated Women: Poverty, Trauma and Unmet Need*, AM. PSYCHOLOGICAL ASS’N (April 2019), <https://www.apa.org/pi/ses/resources/indicator/2019/04/incarcerated-women>.

26. *Id.*

27. *Id.*

28. See 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/> (“The American prison system was built with men in mind.”).

29. *Id.*

30. See *infra* Part II.

31. 18 U.S.C. § 4042 (outlining the BOP’s obligations it owes all federal incarcerated individuals); U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”). See generally *Bolling v. Sharpe*, 347 U.S. 497 (1954) (imposing equal protection requirements from the Equal Protection Clause on the federal government).

incarcerated individuals.³² However, the BOP is not meeting these requisite duties for incarcerated individuals in female federal prisons.³³

These duties include adequate safekeeping, care, subsistence, reentry services, and parity of treatment for incarcerated individuals.³⁴ However, the BOP fails to meet these duties for female incarcerated individuals, even while providing a greater quality and quantity of resources, services, and protections to individuals incarcerated in male federal facilities.³⁵ It is critical the BOP reverse course.

This Comment focuses on why the BOP must promulgate more comprehensive gender-responsive programming than is currently in place, as current methods are failing incarcerated individuals in female federal prisons and are not strong enough to satisfy the BOP's enumerated duties toward these individuals. Part I examines the unique history and characteristics of individuals incarcerated in female federal prisons. Part I also discusses how the inherent differences between incarcerated individuals in female federal prisons and individuals in male federal prisons lead to distinct collateral consequences. Part II details the BOP's statutory duty to incarcerated individuals and how the agency currently fails to meet these duties. Part III enhances this analysis and discusses how the BOP's failures violate both federal law and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Finally, Part IV provides recommendations for the BOP to correct its course and meet its legal obligations toward incarcerated individuals in female federal prisons.

I. UNIQUENESS OF “WOMEN” LEADS TO UNIQUE NEEDS WITHIN INCARCERATION

Incarceration in America “was built with men in mind”: uniforms are tailored to fit male bodies, rules are created to control male violence and social structures, and services are designed to rehabilitate male-centered issues.³⁶ However, incarcerated individuals in female federal prisons have inherently distinct characteristics than those for whom the prison system was built.³⁷ These characteristics naturally result in distinct needs during

32. *About our Agency*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/agency/> (last visited Nov. 12, 2022); 18 U.S.C. § 4042; U.S. CONST. amend. V.

33. *See infra* Part II.

34. *See infra* Parts II and III.

35. OFF. OF INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INCARCERATED INDIVIDUAL POPULATION (2018) [hereinafter OIG FEMALE PRISON MANAGEMENT REVIEW].

36. *See* Blakinger, *supra* note 28.

37. For instance, these individuals are more likely to be primary caregivers of young

incarceration: pregnant individuals have unique dietary needs; individuals experiencing trauma from rape have unique programming needs; and individuals who menstruate have unique sanitary needs.³⁸

A. Caretaking

A stark difference between incarcerated individuals in female and male federal prisons is that most individuals in female prisons either have children or are pregnant while incarcerated.³⁹ There are approximately 11,000 incarcerated individuals in female federal prisons,⁴⁰ and almost two-thirds of them have children.⁴¹ This is especially concerning because the birthing parent tends to be the child's primary caregiver.⁴² Fewer than thirty percent of children with incarcerated birthing parents live primarily with their non-birthing parent, meaning that when their birthing parent enters prison, over seventy percent of children have to move in with distant relatives or enter foster care.⁴³ Most of these children are under ten years old.⁴⁴ The average age range for an individual incarcerated in female prison is thirty-six to forty years old, and the average sentence for incarcerated individuals in female prisons is thirty months.⁴⁵ This demonstrates most of these incarcerated individuals are young primary caregivers separated from their young children for over two years.⁴⁶

children, to have committed nonviolent crimes, and to have experienced substance use disorder and trauma resulting from sexual assault. *See id.*

38. While this Part highlights a portion of these distinct needs, it is crucial to note that this list is not all-encompassing; there are many more needs that are not specified in this Comment. *See infra*, Part II.A and Part II.B.

39. Press Release, Prison Policy Initiative, Women's Mass Incarceration: The Whole Pie 2019 (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> (recognizing that eighty percent of incarcerated women are mothers, and most are the primary caretakers of their children).

40. *Incarcerated Individual Gender*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp.

41. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 252645, SURVEY OF PRISON INMATES, 2016: PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2021) [hereinafter PARENTS IN PRISON].

42. *See* BUREAU JUST. STATS., U.S. DEP'T OF JUST., NCJ 182335, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 4 (2000) (explaining that mothers in federal prison are seventy-three percent more likely to have lived with and cared for their children one month before their arrest).

43. *Id.* at 1, 4.

44. *Id.* at 2.

45. U.S. SENT'G COMM'N, QUICK FACTS: WOMEN IN THE FEDERAL OFFENDER POPULATION 1 (2020).

46. *See id.*

1. *Pregnancy & Prenatal Care*

Pregnancy is a caretaking issue specific to female prisons.⁴⁷ A notable percentage of incarcerated individuals in female prisons are pregnant upon incarceration⁴⁸ or become pregnant during incarceration due to institutional rape by correctional officers and other employees.⁴⁹ This is significant because pregnant individuals have unique needs such as particular diets and nutrients,⁵⁰ quality exercise,⁵¹ and sufficient sleep.⁵²

Curiously, the BOP acknowledges that pregnant individuals should have different diets, yet the agency has not put forth any internal policy or made any recommendation to achieve this.⁵³ Pregnant incarcerated individuals must still eat the same diets as non-pregnant incarcerated individuals, risking pregnancy complications in an environment that already makes them particularly vulnerable.⁵⁴ Additionally, pregnant individuals without access to recreation time (e.g., segregated individuals), do not get the opportunity to exercise.⁵⁵ Finally, pregnant individuals lack access to adequate sleeping

47. See Emily Halter, *Parental Prisoners: The Incarcerated Mother's Constitutional Right to Parent*, 103 J. OF CRIM. L. & CRIM. 3, 539, 543 (2018).

48. Approximately five to ten percent of individuals entering female prisons are pregnant. Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 AM. MED. ASS'N J. ETHICS 779, 779 (2013), <https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2018-05/pfor2-1309.pdf>.

49. Halter, *supra* note 47.

50. Pregnant individuals should eat a balanced diet, avoid processed foods, and ingest prenatal vitamins to reduce a newborn's risks for neural defects or other developmental issues. See *Nutrition During Pregnancy*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/wellness-and-prevention/nutrition-during-pregnancy> (last visited Nov. 12, 2022).

51. Through the incorporation of aerobic and strength exercises for thirty minutes per day, pregnant individuals may decrease the risk of issues such as pre-eclampsia and delivery complications. See *Pregnancy and Exercise*, BETTER HEALTH CHANNEL, <https://www.betterhealth.vic.gov.au/health/healthyliving/pregnancy-and-exercise> (last visited Nov. 12, 2022).

52. Individuals sleeping on cots in small cells with cellmates may experience sleep deprivation, which can cause pre-eclampsia, gestational diabetes, and longer labors resulting in cesarean sections. See *Get a Good Night's Sleep During Pregnancy*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/staying-healthy-during-pregnancy/get-a-good-nights-sleep-during-pregnancy> (last visited Nov. 12, 2022).

53. See Roxanne Daniel, *Prisons Neglect Pregnant Women in their Healthcare Policies*, PRISON POLY INITIATIVE: BLOG (Dec. 5, 2019), <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/>.

54. *Id.*

55. Incarcerated individuals receive "shots" for stepping out of line and are placed in solitary confinement with no access to visitation or exercise. See Walter Pavlo, *Bureau of Prisons*

arrangements; they sleep on metal bunks in small cells with cellmates while prison guards wake them up in the middle of the night for head counts.⁵⁶

There is a singular program that pregnant incarcerated individuals currently have access to: Mothers and Infants Nurturing Together (MINT) Program.⁵⁷ Access to this program is provided *only if* they meet eligibility requirements.⁵⁸ The MINT program is a community-based residential program that allows pregnant incarcerated individuals to serve a fraction of their sentence at a MINT program site where, pre-birth, they can spend two months preparing to give birth and, post-birth, they can bond with their newborn for three months.⁵⁹ However, it is difficult to meet the eligibility requirements for this program.⁶⁰ Most pregnant individuals cannot participate in this constructive programming; instead prison officials take the newborns from them twenty-four hours after giving birth.⁶¹

2. Post-Natal Care

While a minor percentage of incarcerated individuals in female federal prisons are pregnant while incarcerated, the majority had children before they entered prison.⁶² These individuals require unique treatment because they need to maintain relationships with their children—many were their child's primary caregiver prior to incarceration.⁶³ Maintaining these

Using Solitary Confinement as a Means to Curb Covid-19 Contagion, FORBES (Jul. 16, 2020, 9:41 AM), <https://www.forbes.com/sites/walterpavlo/2020/07/16/bureau-of-prisons-using-solitary-confinement-as-a-means-to-curb-covid-19-contagion/>. Additionally, COVID-19 caused the BOP to place even minimum-security incarcerated individuals in these solitary confinement conditions. *Id.*

56. See Natalie, *Can You Sleep in Prison?*, PRISON INSIGHT (MAY 28, 2019), <https://prisoninsight.com/can-you-sleep-in-prison/> (describing loud noises, uncomfortable bedding, fears of violence, and routine head counts that happen “every few hours,” keeping incarcerated individuals awake).

57. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., P5200.07, FEMALE OFFENDER MANUAL 18 (2021) [hereinafter FEMALE OFFENDER MANUAL].

58. *Id.* at 19.

59. *Id.* at 18–19.

60. *Mothers and Infants Nurturing Together Program*, VOLUNTEERS OF AM. TEXAS, <https://www.voatx.org/mint> (last visited Nov. 12, 2022).

61. Clarke & Simon, *supra* note 48.

62. Leah Wang, *Unsupportive Environments and Limited Policies: Pregnancy, Postpartum, and Birth During Incarceration*, PRISON POLY INITIATIVE (Aug. 19, 2021), https://www.prisonpolicy.org/blog/2021/08/19/pregnancy_studies/.

63. Nazgol Ghandnoosh, Emma Stammen & Kevin Muhitch, *Parents in Prison*, SENT'G PROJECT (FEB. 2021), <https://www.sentencingproject.org/app/uploads/2022/09/Parents->

relationships helps ease the psychological stress of separation for both the parent and the child, and is positively correlated with more responsible parenting and more secure attachment and bonding.⁶⁴ This is critical because these individuals risk life-long familial repercussions and may never care for their children again.⁶⁵ In fact, the Adoption and Safe Families Act⁶⁶ stipulates parental rights may be permanently rescinded if a parent is sentenced to more than eighteen months *or* if their child spends fifteen out of twenty-two months in foster care.⁶⁷ Because the average sentence is five years, many incarcerated individuals face this consequence and need the opportunity to forge and maintain a strong bond with their children to potentially save their parental rights at termination hearings.⁶⁸

Currently, individuals in female prisons have the same visitation standards as any other federally incarcerated individual.⁶⁹ Even though individuals in female prisons are exponentially more likely to have children and be their primary caretaker than individuals in male facilities; they have four hours of visiting time per month and can only hug their visitor at the beginning and end of the visit.⁷⁰ Furthermore, the government does not provide transportation—visiting children often have to find a way to trek hundreds of miles to see their parent in a federal prison.⁷¹

in-Prison.pdf. While there are significantly more primary caretakers incarcerated in female prisons, there are primary caretakers incarcerated in male facilities as well. *Id.* Therefore, individuals in male federal prisons would likely benefit from more programs that prioritize familial relationships too. *Id.*

64. Silvia I. Mignon & Paige Ransford, *Mothers in Prison: Maintaining Connections with Children*, 27 SOC. WORK PUB. HEALTH 69, 70, 72, 85 (2012).

65. Clarke & Simon, *supra* note 48.

66. Pub. L. No. 105-89, 111 Stat. 2115 (1997). The Clinton Administration pushed for this law to prevent children from remaining in foster care for lengthy periods. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 105 (2002). However, this resulted in devastating consequences for parents who now face a battle against the clock before their child becomes legally orphaned. *See Id.* at 105, 109. Before Adoption and Safe Families Act (ASFA), “easy cases” for termination involving serious threats to children were rare. *Id.* at 109. Now, it is a common reality, and most cases of removal are a result of poverty-related neglect. *See Id.*

67. *See* H.R. 867 § 103.

68. *A Matter of Time: The Causes and Consequences of Rising Time Served in America’s Prisons*, URBAN INST. 23, 39 (2017), https://apps.urban.org/features/long-prison-terms/a_matter_of_time_print_version.pdf.

69. *General Visiting Information*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/visiting.jsp> (last visited Nov. 12, 2022).

70. *Id.*

71. *Id.* This can have a direct impact on families: “a study focused on

The BOP has implemented one program for parents in female facilities: the Residential Parenting Program (RPP),⁷² which allows new parents to live in the minimum-security unit of the Washington Corrections Center with their newborn infant for up to thirty months.⁷³ However, this program is the *only* post-natal program implemented for incarcerated parents in female federal prisons, and neglects children older than infants who account for the majority of children of incarcerated parents.⁷⁴ This program also maintains strict participation requirements, excluding many parents and children who need it.⁷⁵

B. Health

Incarcerated individuals in female federal prisons have different health needs than individuals in male federal prisons.⁷⁶ Individuals at female facilities face a particularly high risk of being diagnosed with sexually transmitted infections and cervical cancer, both often correlated with experiencing sexual violence.⁷⁷ For instance, three times more women than men report surviving sexual violence before incarceration, and individuals in female prisons are more likely to have participated in sex work and used injectable substances than individuals in male facilities.⁷⁸ Additionally, most individuals in female prisons menstruate and need access to menstruation products.⁷⁹ These menstruation-related needs tend to be urgent; research from

mothers . . . concluded that ‘perhaps the most significant determinant of whether an inmate receives visits is the distance between her home county and the prison to which she is committed.’” Anna Arons, Katherine Culver, Emma Kaufman, Jennifer Yun, Hope Metcalf, Megan Quattlebaum, et al., *Dislocation and Relocation: Women in the Federal Prison System and Repurposing FCI Danbury for Men*, YALE L. SCH. 5 (2014), https://law.yale.edu/sites/default/files/area/center/liman/document/Liman_report_Dislocation_and_Relocation_Danbury_distribution_Aug_29_2014_%281%29.pdf.

72. See OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 9–10.

73. *Id.*

74. *See id.*

75. The eligibility requirements include: (1) must be in minimum security; (2) must meet certain disciplinary and work evaluation criteria; (3) must have no history of violence, sex offenses, or child abuse; (4) and must be eligible for release or home confinement within thirty months of their expected delivery date. *Id.* at 27.

76. *See generally* Brenda van den Bergh, Emma Plugge & Isabel Yordi Aguirre, *Women’s Health and the Prison Setting*, in PRISONS AND HEALTH, WORLD HEALTH ORGANIZATION [WHO] (Stefan Enggist & Lars Møller eds., 2014), https://www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf

77. *See id.* at 159–61.

78. *Id.* at 161.

79. A menstruating person, on average, will use around twenty tampons for a period lasting

the National Commission on Correctional Healthcare demonstrates that individuals in female prisons have higher rates of gynecological conditions, such as irregular bleeding, than menstruating individuals living outside of prison.⁸⁰

Additionally, many female facilities do not have healthcare providers who are properly trained in obstetrics and gynecology, resulting in a low number of screenings, pap smears, mammograms, and accurate interpretations of test results.⁸¹ Also, these providers consistently fail to acknowledge and provide nutrients that the female biology typically requires, such as high doses of calcium to prevent osteoporosis,⁸² or iron supplements to mitigate the increased risk of anemia during menstruation.⁸³ Instead, these incarcerated individuals confront prison healthcare designed for male incarcerated individuals while their unique biological needs go largely ignored and uncared for.⁸⁴

C. *Typical Crimes*

Lastly, incarcerated individuals in female federal prisons typically commit crimes that are inherently different than crimes committed by individuals in male federal prisons.⁸⁵ In female federal prisons, most incarcerated individuals serve sentences for property or drug crimes.⁸⁶ Incarcerated individuals in female federal prisons use drugs more frequently, use harder drugs,⁸⁷ and use drugs for different reasons than those in male prisons.⁸⁸ On

five days. Jessica Kane, *Here's How Much a Woman's Period will Cost her over a Lifetime*, HUFFPOST, https://www.huffpost.com/entry/period-cost-lifetime_n_7258780 (Dec. 6, 2017).

80. *Women's Health Care in Correctional Settings (2020)*, NAT'L COMM'N ON CORR. HEALTH CARE, <https://www.ncchc.org/womens-health-care-in-correctional-settings-2020/> (last visited Nov. 12, 2022).

81. *See id.*; Taylor Nuevelle, *Breaking the Silence about Women in Prison*, VERA INST. OF JUST. (Aug. 22, 2016), <https://www.vera.org/news/gender-and-justice-in-america/breaking-the-silence-about-women-in-prison>.

82. Natalie Digate Muth, *Do Men and Women have Different Nutritional Needs?*, AM. COUNS. ON EXERCISE: BLOG (Mar. 12, 2012), <https://www.acefitness.org/education-and-resources/lifestyle/blog/2461/do-men-and-women-have-different-nutritional-needs/>.

83. *Id.*

84. *Id.*

85. *Fact Sheet: Incarcerated Women and Girls*, *supra* note 18.

86. PRISONERS IN 2014, *supra* note 19, at 17 (explaining that drug crimes include trafficking and possession, while property crimes include burglary and fraud).

87. *See* Ada McVean, *Caffeine is Considered a Hard Drug and Cannabis a Soft One?*, MCGILL UNIV. (Nov. 29, 2017), <https://www.mcgill.ca/oss/article/did-you-know/what-makes-hard-drugs-hard-and-soft-drugs-soft> (explaining that hard drugs have a greater likelihood to cause dependence and addiction).

88. A recent study analyzed 1,326 incarcerated men and 318 incarcerated women enrolled

the other hand, men commit more violent crimes.⁸⁹ Even when individuals in female prisons are found to have committed violent crimes, it is often because they acted as an accomplice, committed crimes of survival under self-defense, or responded to domestic violence.⁹⁰ In North Carolina, seventy-five percent of cases where women are convicted of homicide result from a confrontation with their abuser.⁹¹ This number is staggering but logical considering eighty-six percent of incarcerated individuals in female prisons are sexual-violence survivors,⁹² seventy-seven percent experienced intimate partner violence,⁹³ and sixty percent experienced caregiver violence.⁹⁴

The circumstances surrounding the majority of crimes that individuals in female prisons are convicted of result in severe collateral consequences.⁹⁵ Statistically, individuals convicted of property or drug crimes are more likely to be experiencing homelessness at the time of their arrest and conviction, which is typically exacerbated upon reentry once they are labeled as “convict.”⁹⁶ Additionally, many of them carry the trauma of their sexual-violence survival, which develops into mental health and behavioral issues that can contribute to recidivism.⁹⁷ Furthermore, the stigma behind drug and property crimes can cause these individuals to be denied federal cash assistance, food stamps, public housing, and educational benefits.⁹⁸

in substance abuse treatment. It found women are more frequent drug users, and linked use to issues “such as educational background, childhood family environment, adult social environment, and mental health and physical health.” The study concluded that substance abuse treatment programs that were originally designed for male incarcerated individuals are “inappropriate for the treatment of women.” Neal P. Langan & Bernadette M. M. Pelissier, *Gender Differences Among Prisoners In Drug Treatment*, 13 J. SUBSTANCE ABUSE 291, 291, 299 (2001).

89. See *Gender and Crime - Differences Between Male and Female Offending*, JRANK, <https://law.jrank.org/pages/1250/Gender-Crime-Differences-between-male-female-offending-patterns.html#ixzz7ZXetUu00> (stating that men disproportionately commit crimes such as homicide, aggravated assault, and burglary) (last visited Nov. 12, 2022).

90. Haegyung Cho, *Incarcerated Women and Abuse: The Crime Connection and the Lack of Treatment in Correctional Facilities*, 14 S. CAL. REV. L. & WOMEN'S STUDS. 137, 141 (2004).

91. Paige Hall Smith, Kathryn E. Moracco & John D. Butts, *Partner Homicide in Context: A Population-Based Perspective*, 2 HOMICIDE STUDS. 400, 410 (1998).

92. Rachel Leah, *86 Percent of Women in Jail are Sexual-Violence Survivors*, SALON (Nov. 11, 2017, 4:00 PM), <https://www.salon.com/2017/11/11/86-percent-of-women-in-jail-are-sexual-violence-survivors/>.

93. *Id.*; Nuevelle, *supra* note 81.

94. Leah, *supra* note 92.

95. PARENTS IN PRISON, *supra* note 41.

96. See *id.*

97. Leah, *supra* note 92.

98. All these benefits are lost when convicted for a felony drug crime. Marc Mauer &

These individuals' characteristics demand unique solutions, such as distinct programming and services.⁹⁹ It is crucial for the federal prison system to implement these programs because addressing the unique needs of individuals incarcerated in female facilities is one of the strongest ways to reduce recidivism and improve reentry.¹⁰⁰ However, current programming is sparse, understaffed, and rarely communicated with incarcerated individuals.¹⁰¹ This compounds the trauma these incarcerated individuals experienced pre-incarceration to go untreated, only to be exacerbated during carceral sentences.¹⁰²

II. BOP'S FAILURE TO ADHERE TO ITS STATUTORY OBLIGATIONS

The BOP's mission is to "protect society by confining offenders in . . . community-based facilities that are safe, humane . . . and that provide work and other self-improvement opportunities . . ." ¹⁰³ Not only is this the BOP's mission but it is a statutory duty under 18 U.S.C. § 4042(a), which mandates the agency "provide suitable quarters," "provide for the safekeeping, care, and subsistence," and "establish reentry planning procedures."¹⁰⁴ These duties must be applied with parity for incarcerated individuals in male and female prisons to comply with the Fifth Amendment's Due Process Clause implicitly requiring equal protection.¹⁰⁵ The BOP acknowledges there are certain treatments which different populations need for these duties to be fulfilled and attempts to implement "gender-responsive" programs within female federal prisons.¹⁰⁶ However, this is not enough. The BOP blatantly fails to comply with its duties by neglecting to supply adequate services within the meaning of "safekeeping," "care," "subsistence," or adequate "reentry" services.¹⁰⁷ This violation

Virginia McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, THE SENT'G PROJECT (Nov. 14, 2013), <https://www.sentencingproject.org/publications/a-lifetime-of-punishment-the-impact-of-the-felony-drug-ban-on-welfare-benefits/>.

99. See OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 1, 2.

100. Danya Ziazadeh, *Inadequate Health Care: A Significant Problem Affecting Incarcerated Women*, UNIV. MICH. SCH. OF PUB. HEALTH: THE PURSUIT (May 30, 2019), <https://sph.umich.edu/pursuit/2019posts/inadequate-healthcare-a-significant-problem-affecting-incarcerated-women.html>.

101. See *infra* Part II.

102. Nuevelle, *supra* note 81.

103. *About Our Agency: Pillars*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/agency_pillars.jsp (last visited Nov. 12, 2022) (mission statement).

104. 18 U.S.C. § 4042.

105. U.S. CONST. amend. V.

106. See *infra* Part II.A.

107. See *infra* Part II.A and Part II.B.

compounds under a Constitutional lens; its noncompliance with 18 U.S.C. § 4042 violates equal protection because the BOP is not applying its statute with parity for incarcerated individuals in male and female federal prisons.¹⁰⁸

A. “Provide for safekeeping, care, and subsistence”

Section 4042(a)(2) mandates the BOP provide federally incarcerated individuals with safekeeping, care, and subsistence.¹⁰⁹ This is not adequately provided to individuals in female federal prisons for three reasons: (1) the BOP is not *safekeeping* them from abuse within prisons nor is it helping them recover from trauma; (2) the BOP is not properly training its executives or effectively implementing the Female Offender Manual, resulting in poor *care*; and (3) the BOP is not providing adequate access to health care for *subsistence*.¹¹⁰

1. *Safekeeping*

First, even though incarcerated individuals in female prisons face a substantial risk of rape or sexual abuse,¹¹¹ the BOP does not maintain effective plans or programs to safekeep them from this risk.¹¹² Anyone working in female federal prisons must “train,” meaning they watch a ninety-minute hour video on “female offenders,” participate in a short discussion, and finish with a twenty-four-minute video on trauma-informed correctional care.¹¹³ Officers say this helps them “understand” “female inmates” and be “more empathic” with what those inmates have experienced,¹¹⁴ but two hours to learn about the nuances and complexities of a vulnerable population appears extremely insufficient.

The BOP also attempts to enforce the Sexually Abusive Behavior

108. See *infra* Part III.

109. § 4042(a)(2) (“The Bureau of Prisons, under the direction of the Attorney General, shall – provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States . . .”).

110. See *infra* Part II.A.1–3.

111. At least fifteen percent of incarcerated females are survivors of prison sexual assault, which does not account for likely underreporting. Christina Piccora, *Female Inmates and Sexual Assault*, JURIST (Sept. 15, 2014, 7:00 PM), <https://www.jurist.org/commentary/2014/09/christina-piccora-female-inmates/>. Additionally, individuals in female prisons are at least three times more likely to experience inmate-on-inmate sexual violence than those in male prisons. *Id.*

112. See generally OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 17.

113. *Id.* (describing trauma-informed care as a comprehensive approach to “corrections,” in which all policies and staff recognize the concept that trauma is a “real and prevalent occurrence, and that any opportunity to avoid re-traumatizing an inmate is an opportunity for healing”).

114. See *id.*

Prevention and Intervention Program,¹¹⁵ but allegations of sexual abuse continue to increase without any substantial repercussions.¹¹⁶ According to the BOP, “female offenders” represent seven percent of the federal prison system, but they represent twenty-seven percent of survivors of inmate-on-inmate sexual violence and sixty-seven percent of survivors of staff-on-inmate sexual violence.¹¹⁷

Furthermore, the BOP lacks trauma treatment to help these individuals cope with the abuses they have incurred inside the prison and before entering the prison, which directly contradicts its “values.”¹¹⁸ Specifically, the agency admits physical and emotional trauma affects as many as ninety percent of the population in female federal prisons and that it is best for incarcerated individuals to undergo trauma treatment early during incarceration.¹¹⁹ Yet, the BOP falls far short of protecting individuals incarcerated in female facilities from this mammoth issue; there is only one employee per female prison charged with implementing trauma treatment.¹²⁰ As such, very few individuals receive treatment at any point during their incarceration.¹²¹ Additionally, understaffing prevents the handful of individuals who are lucky enough to secure a spot in a trauma program from receiving treatment early in their sentence, even though the BOP believes early treatment is imperative.¹²²

2. “Care”

The BOP also fails to fulfill its duty to care for individuals incarcerated in female federal prisons.¹²³ The BOP acknowledges that individuals

115. See generally FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., P5324.12, SEXUALLY ABUSIVE BEHAVIOR PREVENTION AND INTERVENTION PROGRAM (2015).

116. See Justin Miller, *DOJ Releases Report on Staff Sexual Abuse of Federal Prisoners*, PRISON LEGAL NEWS (May 15, 2010), <https://www.prisonlegalnews.org/news/2010/may/15/doj-releases-report-on-staff-sexual-abuse-of-federal-prisoners/> (finding, between 2001 and 2008, allegations of criminal sexual abuse misconduct by BOP staff more than doubled, with allegations reported at ninety-two out of ninety-three BOP facilities).

117. Elizabeth Swavola, Kristine Riley & Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, VERA INST. OF JUST. 14 (2016), <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf>.

118. See Nuevelle, *supra* note 81.

119. See OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at i.

120. *Id.* at 19.

121. See, e.g., *id.* (explaining that 336 out of approximately 11,000 incarcerated individuals in female prisons can participate in trauma treatment at one time).

122. *Id.*

123. See generally *id.* at 25–30 (discussing deficiencies in pregnancy care and lack of access to feminine hygiene products).

incarcerated in female prisons have different needs that the BOP must care for as compared to individuals in male facilities.¹²⁴ The BOP addresses this difference in its Female Offender Manual,¹²⁵ a manual the Department of Justice (DOJ) declared the BOP follows inadequately.¹²⁶ The BOP fails to identify or fix its deficiencies regarding treatment of individuals in female prisons because, as the DOJ reported, its manual does not, alarmingly, implement requisite “program reviews.”¹²⁷

Just as problematic, there are no requirements for the BOP national-level executives to participate in training related to female incarcerated individuals, so the officials making decisions and developing policies for these prisons are unaware of and cannot adequately care for these unique needs.¹²⁸ For example, the Assistant Director of the Reentry Services Division, an executive who has not received training on incarcerated individuals in female federal prisons, said he does not believe requiring executives to take training on this population is important.¹²⁹ He then stated that the BOP cannot be gender-responsive without this training, a massive contradiction.¹³⁰ A population is likely not being adequately cared for if an agency acknowledges the population has certain needs, but neglects to properly train its staff on these needs.

3. “Subsistence”

Lastly, the BOP does not provide the adequate subsistence that is statutorily required.¹³¹ Subsistence is defined as the “action or fact of

124. *Female Offenders*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp (last visited Nov. 12, 2022).

125. *See generally* FEMALE OFFENDER MANUAL, *supra* note 57 (outlining agency requirements female facilities must follow to comply with the BOP’s mandated gender-responsive treatment).

126. For example, “[the] BOP did not track data that would allow it to ensure that pregnant inmates were informed about pregnancy programs, as required by the Female Offender Manual.” OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 28.

127. *See id.*

128. *See id.* at 17.

129. *Id.* at 18.

130. *Id.* *See* FEMALE OFFENDER MANUAL, *supra* note 57 (defining a gender-responsive approach as one based on “understanding the way females are different from men,” thus necessitating specific training for dealing with female offenders to properly utilize gender-responsive approaches).

131. *See generally* 18 U.S.C. § 4042(a)(2) (listing, alongside the subsistence requirements, the BOP’s requirement to “provide suitable quarters,” “safekeeping,” and “care”).

maintaining or supporting oneself at a *minimum* level.”¹³² Adequate subsistence requires access to necessities required for livelihood, such as menstrual products and abortions. Currently, abortions are labeled as accessible under the Birth Control, Pregnancy, Child Placement, and Abortion program.¹³³ However, the BOP only pays for abortions when the individual’s life is in danger or the pregnancy is the result of rape.¹³⁴ Because a majority of incarcerated individuals in female prisons are living below the poverty line before incarceration, this leads to a vast disparity in access.¹³⁵ Additionally, prisons are not required to report performed abortions; which shields prisons’ practices from the public.¹³⁶ Access to these services vary based on the prison without repercussion.¹³⁷ This lack of abortion access directly impacts the BOP’s duty to provide subsistence because forcing an individual to give birth can severely impede one’s livelihood.¹³⁸ There are several implications of forcing an individual to give birth, including permanent physical changes to the body¹³⁹ and risk of maternal death or other labor complications.¹⁴⁰

132. *Subsistence*, DICTIONARY.COM, <https://www.dictionary.com/browse/subsistence> (last visited Nov. 12, 2022) (emphasis added).

133. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., P.S. 6070.05, PROGRAM STATEMENT-BIRTH CONTROL, PREGNANCY, CHILD PLACEMENT, AND ABORTION, (1996) [hereinafter PROGRAM STATEMENT]. Abortions remain accessible under this policy even after the *Dobbs v. Jackson Women’s Health Organization*, 141 S. Ct. 2619 (2021), decision in which the Court held the Constitution does not confer a right to abortion. It is unclear how this ruling will affect federally incarcerated individuals in the future. What is clear, however, is the BOP is no longer required to provide access to abortions.

134. PROGRAM STATEMENT, *supra* note 133.

135. *See* Cowan, *supra* note 25.

136. *See* Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards*, 41 PERSPS. ON SEXUAL & REPROD. HEALTH 59 (2009).

137. *See id.*

138. Sheelah Kolhatkar, *The Devastating Economic Impacts of an Abortion Ban*, NEW YORKER (May 11, 2022), <https://www.newyorker.com/business/currency/the-devastating-economic-impacts-of-an-abortion-ban>.

139. *How Your Body Changes During Pregnancy*, AM. PREGNANCY ASS’N <https://americanpregnancy.org/healthy-pregnancy/changes-in-your-body/body-changes-during-pregnancy> (last visited Nov. 12, 2022).

140. Laura Santhanam, *It’s Time to Recognize the Damage of Childbirth, Doctors and Mothers Say*, PBS NEWS HOUR (May 7, 2021, 5:50 PM), <https://www.pbs.org/newshour/health/broken-tired-and-ashamed-how-health-care-fails-new-moms> (describing common forms of labor complications, such as incontinence and hormonal imbalances).

Additionally, the First Step Act¹⁴¹ mandates access to menstrual products,¹⁴² but the implementation of this mandate varies widely by prison.¹⁴³ Only a few facilities allow unlimited access, while many others only provide a handful of products per month no matter an individual's need.¹⁴⁴ The DOJ found the distribution of these products was inconsistent and insufficient with little-to-no guidance from the BOP on how to distribute them.¹⁴⁵ Access to these products allows for access to dignity and cleanliness, but depends simply on which prison individuals are placed in.¹⁴⁶ Without universal distribution, individuals who menstruate face a threat to their subsistence—risking infections by using their limited supply of menstrual products for too long or soiling their uniform.¹⁴⁷

4. “[E]stablish reentry planning procedures”

Section 4042(a)(7)(A)–(G) requires that the BOP establish reentry planning procedures for incarcerated individuals to reintegrate into society upon their release.¹⁴⁸ However, the BOP fails to fulfill this duty by neglecting to provide adequate reentry programs for incarcerated individuals in female federal prisons.

First, the BOP attempts to fulfill this duty through the work of the Women and Special Populations Branch (part of the Reentry Services Division) that helps manage programs and provide resources that could create a more gender-responsive environment.¹⁴⁹ However, the BOP's actions show otherwise. The DOJ reported only four employees staffing this reentry branch,¹⁵⁰ even though the BOP has 37,931 employees¹⁵¹ and a \$9.3 billion

141. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 34 U.S.C.)

142. § 611, 132 Stat. at 5247 (codified as amended at 18 U.S.C. § 4042 note).

143. See *OIG FEMALE PRISON MANAGEMENT REVIEW*, *supra* note 35, at 31–32.

144. *Id.* at 30–31.

145. *Id.* at ii.

146. *Id.* at 29–30.

147. Kim, *Female Homelessness and Period Poverty*, NAT'L ORG. FOR WOMEN (Jan. 22, 2021) <https://now.org/blog/female-homelessness-and-period-poverty/> (discussing the consequences of not having access to menstrual products, which can lead to an increased risk of yeast and urinary tract infections, and soiled garments).

148. 18 U.S.C. § 4042(a)(7)(A)–(G).

149. *Reentry Services Division*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/org_rsd.jsp (last visited Nov. 12, 2022).

150. See *OIG FEMALE PRISON MANAGEMENT REVIEW*, *supra* note 35, at 5, 18.

151. *About our Agency*, *supra* note 32. *Federal Prison System*, FED. BUREAU OF PRISONS, <https://www.justice.gov/jmd/page/file/1142606/download> (last visited Nov. 12, 2022)

budget for the 2021 Fiscal Year.¹⁵² That is only four employees to implement reentry programs for almost 11,000 individuals in female prisons.¹⁵³ As a result of severely insufficient staffing, the BOP cannot create or implement broad policies to fulfill its duty of assisting with reentry.¹⁵⁴

Next, the BOP offers the Resolve Program (Resolve)¹⁵⁵ in fourteen of its fifteen female facilities to help individuals with trauma-related issues implement behavioral changes aiding reentry.¹⁵⁶ While this sounds promising, it does not satisfy the BOP's duty to help individuals in female prisons reenter society because Resolve is not staffed at the level that ensures all eligible incarcerated individuals can participate.¹⁵⁷ Specifically, Resolve can only accommodate 336 female incarcerated individuals at one time.¹⁵⁸ Broken down, that is only twenty-four female incarcerated individuals per prison participating, equally three percent of the federal female incarcerated individual population.¹⁵⁹ Resolve is also only offered in English which prevents non-English speakers from participating.¹⁶⁰ Furthermore, only a few incarcerated individuals in female federal prisons are aware of Resolve because the BOP insufficiently communicates its availability.¹⁶¹ Even if an individual is aware of and eligible for Resolve, they must wait several months before they can begin participating in the program.¹⁶²

(explaining in 2020, the BOP requested a budget for 38,576 positions—200 of which were for attorneys and 20,446 of which were for correctional officers). This leaves 17,910 positions to fill the agency's programs, organizers of the programs, and executives. *Id.* Yet only four positions were dedicated to the reentry of almost 11,000 female incarcerated individuals. OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 5.

152. U.S. DEP'T OF JUST., FY 2021 BUDGET SUMMARY (2021), at 5.

153. *See* OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 4–5.

154. *Id.* at 15–16.

155. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PSYCH. TREATMENT PROGRAMS, P5330.11, CN-1 §§ 3.1–3.4.6 (2016).

156. *See* OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 19.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 22 (finding a need for Resolve programs in Spanish—something even the BOP staff recognize).

161. *Id.* at 26–27.

162. *Id.* at 21.

Lastly, the BOP offers a parenting program, MINT, for new parents in female facilities to bond with their infants to ensure a smoother reentry transition.¹⁶³ MINT provides a community-based residential program where pregnant incarcerated individuals prepare for delivery and can bond with their infant after giving birth for a portion of their sentence.¹⁶⁴ However, MINT does not fulfill the BOP's duty of helping parents reenter society because it has strict requirements for eligibility, so very few individuals can participate.¹⁶⁵ Additionally, it only allows parents to be with their child for three to six months postpartum prior to returning to prison.¹⁶⁶ Rapidly removing an infant child from an incarcerated parent does not help reentry into society; it isolates the parent from parenthood and breaks trust and bonds that were made during the program.¹⁶⁷ More intensive programming could help parents in parental rights termination hearings by allowing them to demonstrate a commitment to their children and personal growth.

The insufficiencies of the abovementioned programs have a serious consequence; they fail to adequately prepare incarcerated individuals at female federal prisons for reentry to society. As a result, the BOP is not fulfilling its explicit duty to adequately reenter all its incarcerated individuals, including those in female prisons, into society.

B. *Discretionary-Function Exception*

Section 4042's duties are discretionary, which, if true, would absolve the BOP from liability for violations.¹⁶⁸ For instance, courts absolved the BOP from liability for failing to exercise or perform obligations pursuant to § 4042 on the basis that the statute does not specify the agency's exact duties.¹⁶⁹ In the absence of specified duties, courts have interpreted the "discretionary function" exception applies, meaning BOP officials may

163. *Id.* at 9.

164. FEMALE OFFENDER MANUAL, *supra* note 57, at 18–19.

165. *See* OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 25–26 (“The MINT program is open to inmates who do not plan to place their infant up for adoption, are pregnant upon incarceration with an expected delivery date prior to release, have less than [five] years remaining on their sentence and are eligible for halfway house placement, and can assume financial responsibility for the child’s care.”).

166. *See id.* at 28.

167. Ruth Chan, *Tearing Children Away from their Incarcerated Mothers: An 8th Amendment Violation?*, U. ILL. CHI. L. REV. BLOG (Feb. 9, 2020), <https://lawreview.law.uic.edu/tearing-children-away-from-their-incarcerated-mothers-an-8th-amendment-violation/>.

168. *See* Berkovitz v. United States, 486 U.S. 531, 536–37 (1988).

169. *See* Antonelli v. Crow, No. 08-261-GFVT, 2012 U.S. Dist. LEXIS 133759, at *6–8 (E.D. Ky. Sept. 19, 2012).

determine how to fulfill these duties.¹⁷⁰ This argument fails to consider that constitutional violations, unlike federal torts, are immune from the discretionary exception.¹⁷¹ Where a claim extends beyond a federal tort to include a constitutional violation, it is immune from the discretionary exception.¹⁷² The next Part delves into constitutional violations the BOP is committing and why the “discretionary” function of § 4042 should not absolve the agency from liability.

III. THE UNCONSTITUTIONALITY OF THE BOP’S STATUTORY VIOLATIONS

The BOP’s noncompliance with its statutory duties violate the Fifth Amendment¹⁷³ because the agency’s current enforcement of § 4042 is inconsistent with equal protection under the Due Process Clause.¹⁷⁴ The BOP demonstrates that it is more concerned with men reentering society than women through its unequal application of § 4042.¹⁷⁵ Incarcerated individuals in female federal prisons are not provided the same quantity or quality of services, educational programs, or facilities as individuals incarcerated in male federal prisons.¹⁷⁶ This directly conflicts with the Fifth Amendment’s Due Process Clause that requires the federal government to practice equal protection, which means the government must treat persons in similar circumstances with similar treatment; for example, individuals in female and male federal correctional facilities.¹⁷⁷

A. “Parity” Relief

Incarcerated individuals in female federal prisons should not have exact equality in treatment because there are legitimate differences in the programming needs depending on gender.¹⁷⁸ Instead, there should be “parity”¹⁷⁹ in treatment, which is an equitable approach to relief that holds

170. *See id.* at *7.

171. *See id.* at *6–7.

172. *See* United States v. Gaubert, 499 U.S. 315, 322–23 (1991).

173. U.S. CONST. amend. V.

174. *See infra* Part III.D.

175. *See infra* Part III.D.

176. *See* Swavola, *supra* note 117, at 13–14.

177. U.S. CONST. amend. V.

178. *See supra* Part II.

179. “Parity” in treatment involves treating the individuals in male and female prisons with the same quality and quantity of care, but that care should be tailored to meet each groups’ distinct needs. In *Glover v. Johnson*, 478 F. Supp. 1075, 1079 (E.D.

comparable but not identical levels of treatment satisfactory for equal protection under the law.¹⁸⁰ Courts have also acknowledged parity should exist in equal protection challenges.¹⁸¹ Under this precedent, the BOP is held to a parity standard to satisfy Equal Protection rights it owes individuals in female prisons.¹⁸² Specifically, it should utilize the *Glover*¹⁸³–*Canterino*¹⁸⁴ approach,¹⁸⁵ which asks: (1) are male and female incarcerated individuals similarly situated; (2) what are the quality and quantity of programs for individuals in male facilities and how do they compare to those for individuals in female prisons; and (3) are the government's justifications inadequate under heightened scrutiny?¹⁸⁶

B. “Similarly Situated”

The first step in the *Glover-Canterino* approach is to establish that two groups are similarly situated.¹⁸⁷ The Equal Protection Clause provides authority to regulate similarly situated groups where one group is experiencing disparate treatment.¹⁸⁸ “To be ‘similarly situated,’ groups need not be identical in

Mich. 1979), the Court defined parity of treatment parity for treatment and facilities for individuals in female prisons as “substantially equivalent to those provided [to] the men i.e., equivalent in substance if not in form”

180. U.S. CONST. amend. V.

181. *Glover v. Johnson*, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979).

182. See generally *Batton v. North Carolina*, 501 F. Supp. 1173, 1177 (E.D.N.C. 1980) (“The court concludes that the ‘parity of treatment’ standard provides instructive guidance for analyzing the specific equal protection claims plaintiffs have raised.”).

183. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979).

184. *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982), *vacated* 869 F.2d 948 (6th Cir. 1989).

185. The *Glover-Canterino* approach is the appropriate inquiry for this constitutional analysis because it focuses on a program-by-program comparison of prison programs for male facilities versus female facilities. Other tests, such as the *Feeney* test, that require plaintiffs to prove discriminatory intent, are not appropriate here because this Comment does not attempt to prove individuals in female prisons are intentionally discriminated against in all aspects of the carceral system, but that individuals in female prisons are not treated with parity in treatment to those in male facilities. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 256 (1979); see William C. Collins & Andrew W. Collins, *Women in Jail: Legal Issues*, NAT’L INST. OF CORR. 11–12, 15 (1996), <https://www.prearesourcecenter.org/sites/default/files/library/womeninjaillegalissues.pdf>.

186. See *Canterino*, 546 F. Supp. at 174; Collins & Collins, *supra* note 185.

187. See *Glover*, 478 F. Supp. at 1079 (“substantially equivalent”); see also *Canterino*, 546 F. Supp. at 174 (“The equal protection clause requires parity, not identity, of treatment.”).

188. The “similarly situated” analysis was first used in an 1885 case regarding property law and has since expanded to many types of cases, including gender discrimination. See, e.g., *Barbier v. Connolly*, 113 U.S. 27, 32 (1885); *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

makeup, they need only share commonalities that merit similar treatment.”¹⁸⁹ In *Michael M. v. Superior Court*,¹⁹⁰ the Supreme Court held young men and young women were not similarly situated when California’s statutory rape charge encompassed a different standard for men than women.¹⁹¹ The Court reasoned the groups were not similarly situated because they were not similarly exposed to the consequences of sexual intercourse, since only one of the groups could become pregnant.¹⁹² Unlike in *Michael M.*, individuals in male and female facilities are similarly situated, even though they may not be biologically identical, because the two groups share the commonality of criminal convictions, incarceration, and limited access to freedom.¹⁹³ Additionally, some courts have recognized that these individuals are similarly situated.¹⁹⁴

C. Substantial Treatment Disparities

Per the second step of the *Glover-Canterino* inquiry, once it is established that individuals in male and female prisons are similarly situated, it is necessary to analyze if there are substantial disparities with how these two groups are treated within the BOP’s federal prison system.¹⁹⁵ In female

189. *Betts v. McCaughtry*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993).

190. 450 U.S. 464 (1981).

191. *See id.*

192. *Id.*

193. Using the *Michael M.* logic, if this Comment were exploring whether individuals in male and female prisons were similarly situated regarding pregnancy in prison, the answer would be that they are not because biological males cannot become pregnant. However, this Comment explores whether male and female incarcerated individuals are similarly situated regarding parity of treatment required to fulfill a gender-neutral statute. *See* Natasha L. Carroll-Ferray, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of “Similarly Situated”*, 51 N.Y. L. SCH. L. REV. 594, 596–97 (2006).

194. *Compare West v. Va. Dep’t of Corr.*, 847 F. Supp. 402 (W.D. Va. 1994) (holding individuals in male and female prisons are similarly situated regarding an equal protection challenge about the exclusion of individuals in a female prison from a boot camp program), *with Jackson v. Thornburgh*, 907 F.2d 194, 203 (D.C. Cir. 1990) (concluding men and women in separate correctional facilities serving similar amounts of time were similarly situated), *and McCoy v. Nev. Dep’t of Prisons*, 776 F. Supp. 521, 522–23 (D. Nev. 1991) (finding women and men in separate facilities were similarly situated during a challenge of unequal programming between the facilities).

195. To succeed under this analysis, courts must consider the differences in which individuals in male federal prisons receive treatment versus those in female federal prisons. This is important because if it is substantially disparate, it may rise to the level of heightened scrutiny, which is the last step of the *Glover-Canterino* inquiry. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

federal prisons, all facilities are medium, low, or minimum security.¹⁹⁶ Additionally, most facilities offer a parenting program, MINT, and trauma treatment for mental illnesses, Resolve.¹⁹⁷ However, only four out of fifteen

facilities offer job training to improve skills needed for reentry, Federal Prison Industries;¹⁹⁸ two out of fifteen facilities offer Cognitive Behavioral Therapy, Female Integrated Treatment;¹⁹⁹ and accessibility of various programs, such as Resolve, pale in comparison to similar programs in male facilities.²⁰⁰ In medium, low, or minimum-security male federal prisons, most facilities offer job training to improve skills for reentry, Federal Prison Industries,²⁰¹ post-secondary education,²⁰² the Residential Drug Abuse Program (RDAP),²⁰³ the Non-Residential Sex Offender Treatment Program,²⁰⁴ and the Brave program for first-time male offenders.²⁰⁵

The DOJ found major disparities in the implementation of these programs for male and female federal prisons.²⁰⁶ For instance, the DOJ found the BOP's staffing model for its Resolve program allotted fewer staff than several of the BOP's counterpart psychology treatment programs for men, including

196. Minimum security institutions have dormitory housing, low staff-to-incarcerated individual ratios, and no perimeter fencing. *About Our Facilities*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/facilities/federal_prisons.jsp (last visited Nov. 12, 2022). Low security institutions have double-fenced perimeters, mostly dormitory or cubicle housing. *Id.* Medium security institutions have fortified perimeters, mostly cell-type housing, and greater staff-to-incarcerated individual ratios and internal controls. *Id.*

197. See FEMALE OFFENDER MANUAL, *supra* note 57, at 8, 18.

198. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., FIRST STEP ACT APPROVED PROGRAMS GUIDE 17 (2022) [hereinafter BOP PROGRAMS GUIDE].

199. *Id.* at 18; OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 8–9.

200. See OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 18–20, 23–24 (describing how insufficient staffing and lengthy waitlists for programs in female prisons increase female inmates' difficulty receiving treatment they are eligible for).

201. See Ziazadeh, *supra* note 100 (explaining that federal prisons are built on a male-centric model that does not aid female federal prisons).

202. BOP PROGRAMS GUIDE *supra* note 198, at 28; Karen F. Lahm, *Equal or Equitable: An Exploration of Educational and Vocational Program Availability for Male and Female Offenders*, 64 FED. PROBATION 39, 39, 41, 45 (Dec. 2000).

203. OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 23–24.

204. Christopher Zoukis, *Sex Offender Treatment Programs in the Federal Bureau of Prisons*, ZOUKIS CONSULTING GRP. (Jan. 11, 2017), <https://prisonerresource.com/sex-offender-treatment-programs-federal-bureau-prisons/>.

205. OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 23–24.

206. See *id.* at 23. In comparison to the male programs centered around psychology and mental health, female programs like Resolve are under-staffed. *Id.* For example, in September of 2016, five of fourteen coordinator positions were vacant, making Resolve unavailable to all female inmates. *Id.*

the RDAP and the Brave program.²⁰⁷ The BOP may argue that the lower number of staff reflects the lower number of incarcerated individuals that are female rather than male; however, the ratio of staff-to-individuals at female federal prisons is not proportional.²⁰⁸ There is only one staff member assigned to facilitate Resolve in each female prison, so only twenty-four individuals in female prisons can participate at once.²⁰⁹ By comparison, hundreds of individuals at male facilities can participate in the RDAP and the Brave program.²¹⁰ Additionally, female federal prisons offer Resolve exclusively as a non-residential program due to the lack of staff at female federal prisons, whereas male federal prisons offer the RDAP and the Brave program as residential programs in male facilities.²¹¹ Residential programs are more intensive and more effective for participants.²¹² Because of insufficient staffing, Resolve is not offered in languages other than English, impacting those who can utilize the program.²¹³ This is problematic because approximately one-third of the federally incarcerated population is Hispanic, excluding many Latinx individuals in female prisons from these programs.²¹⁴

Moreover, there are approximately three times more male federal prison facilities than female federal prison facilities.²¹⁵ Consequently, incarcerated individuals in female prisons are more likely to serve sentences far from their children, while men can be placed much closer to home.²¹⁶ This results in individuals at female facilities losing touch with

207. *See id.* (explaining BOP policy for programs in male prisons requires staffing by a Program Coordinator and multiple Treatment Specialists, which allows a higher percentage of incarcerated individuals to participate than the Resolve program does).

208. *Id.* at i–ii, 13–15, 19–25.

209. *Id.* at 23–24.

210. *Id.*

211. *Id.* at 24.

212. Residential programs can be more effective than non-residential programs because they tend to provide ongoing support and monitoring of progress, while separating individuals from other incarcerated individuals who may trigger them. *See id.* at 24 (describing the logistics and intensity of residential programs); *When to Choose Residential Treatment Over Other Treatment Programs*, POLARIS TEEN CENTER (Apr. 16, 2019), <https://polaristeen.com/articles/benefits-of-residential-treatment/> (explaining the benefits of residential programs and the level of involvement and treatment residential programs provide).

213. *See* OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 20.

214. *Inmate Ethnicity*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp (Nov. 26, 2022).

215. *See* FED. BUREAU OF PRISONS, *Our Location, All Security Levels*, <https://www.bop.gov/locations/list.jsp> (last visited Nov. 12, 2022) (listing eighty-three federal male prisons and only twenty-seven federal female prisons).

216. Jared C. Clark, *Inequality in Prison*, 40 *MONITOR ON PSYCHOLOGY* 55, 55 (2009).

their children and partners and feeling a higher rate of parental guilt and relationship strain than individuals in male facilities.²¹⁷

Additionally, the BOP permits seventy percent of its correctional officers in female federal prisons to be men.²¹⁸ These male officers are trained on how to enforce a system that was built around incarcerated individuals in male prisons.²¹⁹ The only training these officers receive to better understand incarcerated individuals in female prisons is a twenty-four minute video and a subsequent discussion session.²²⁰ The BOP's lack of oversight to implement appropriate gender-responsive training results in individuals at female facilities facing rape, assault, and retribution from both officers and other inmates at staggering rates compared to incarcerated individuals in male federal prisons.²²¹

D. Heightened Scrutiny Test

When there is gender discrimination, as this Comment establishes is present within the federal prison system, a court must apply a heightened scrutiny test.²²² In *Craig v. Boren*,²²³ the Court established intermediate scrutiny as the appropriate heightened standard for gender discrimination, which provides that the classification must be substantially related to the achievement of an important government purpose.²²⁴ The BOP may argue the purpose of offering female-prison individuals fewer staff and programs for care and reentry, in quality and quantity, is substantially related to the important government purpose of ensuring its budget is properly allocated to reflect the incarcerated individual population.²²⁵ This argument is flawed,

217. *Id.*; Lynne Haney, *Motherhood as Punishment: The Case of Parenting in Prison*, 39 SIGNS: J. WOMEN IN CULTURE & SOC'Y 105, 120 (2013).

218. Mary James, *The Treatment of Women in the U.S. Prison System*, UNIV. OF IDAHO WOMEN'S CTR. (Nov. 1, 2016), <https://uiwomenscenter.wordpress.com/2016/11/01/the-treatment-of-women-in-the-u-s-prison-system/>.

219. *Id.* (quoting Dr. Stephanie Covington, "You have to acknowledge that gender makes a difference. Many places today are still trying to do everything gender-neutral. There is not gender neutral. In our society, gender-neutral is male.>").

220. See OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 17.

221. See Piccora, *supra* note 111.

222. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

223. 429 U.S. 190 (1976).

224. *Id.* at 197.

225. See *Inmate Gender*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp (Nov. 26, 2022) (showing less than seven percent of inmates in prisons are female); see also BUREAU OF JUST. STATS., U.S. DEP'T. OF JUST., NCJ 302776, PRISONERS IN 2020 – STATISTICAL TABLES 7–8 (2021) (demonstrating the female prison population is declining more rapidly than the male prison population in both federal and state prisons).

however, because the issue is not just that there is an unequal quantity of resources available, but the quality of programs for women is severely lacking.²²⁶ This demonstrates that the BOP may be using its budget to provide a higher quantity and quality of programs to males, which does not reflect an important government purpose.

The BOP violates female incarcerated individuals' Fifth Amendment due process rights. Incarcerated individuals in female and male prisons are similarly situated because they both experience incarceration due to criminal convictions.²²⁷ These similarly situated groups face significant disparities in treatment that are not substantially related to the achievement of an important government purpose.

IV. RECOMMENDATIONS

To meet its legal duties, the BOP must implement better gender-responsive programming that considers gender-specific variables, such as parental relationships, dietary needs, and mental health requirements.²²⁸ As previously described, the BOP's attempts to implement these programs are insufficient and ineffective.²²⁹ Instead, the BOP should improve the programs that already exist, add more programming, and ensure effective implementation. Analogous programs at the state level have been successful,²³⁰ and it is well within the BOP's statutory authority to shift funding to allow for these changes to happen.²³¹

226. See OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 20; see also Adam Harris, *Women in Prison Take Home Economics, While Men Take Carpentry*, ATLANTIC (Apr. 30, 2018), <https://www.theatlantic.com/education/archive/2018/04/the-continuing-disparity-in-womens-prison-education/559274/> (highlighting one of these major disparities: inequity in vocational offerings).

227. See Carroll-Ferrary, *supra* note 193, at 597.

228. See Holly Ventura Miller, *Female Reentry and Gender-Responsive Programming*, NAT'L INST. OF JUST. (May 19, 2021), <https://nij.ojp.gov/topics/articles/female-reentry-and-gender-responsive-programming>.

229. See *supra* Parts II and III.

230. The BOP could model reformed gender-responsive treatment after other states that have already implemented these programs, such as California. See generally Blakinger, *supra* note 28 (explaining California prioritizes gender-responsive programming by rebuilding female facilities to reflect a community-based system with direct supervision from officers trained to work with females).

231. See *infra* Part IV.B.1.

A. Bolstering the BOP's Programs

First, the BOP should alter existing programs and create new programs to better implement gender-responsive programming that meet its female incarcerated individuals' needs.²³² To do so, the Chief of the Budget Execution Branch can propose new programs in its annual budget request.²³³ The Chief has access to a special task force that can make detailed studies and evaluations of these areas that need improvement.²³⁴ The task force should evaluate the distinct needs of incarcerated individuals in female federal prisons and how those needs can be served. Once the task force completes its evaluation, the Chief should include the findings in its annual report to gain additional funding for these programs. If any funding is denied, the Chief should use its discretionary power to reallocate funding to gender-responsive programs.

1. Survivor Programs

Because more than sixty percent of incarcerated individuals in female federal prisons are survivors of sexual assault, there is an urgent need for the BOP to better serve them.²³⁵ One solution is to implement programs that focus on the needs of sexual assault survivors, instead of attempting to employ "trauma therapy."²³⁶ The issue with the BOP's "trauma-treatment," besides that it is hardly offered to any female incarcerated individuals, is that it mainly focuses on overcoming trauma to function at a higher level in the future, instead of taking a holistic approach to understand the individual and what they need post-assault.²³⁷ For example, instead of trying to help a an incarcerated individual overcome post-traumatic stress disorder triggers resulting from their past assault, a more holistic approach should examine what their life was like pre-assault, how they coped post-assault, and what they need to move forward. This approach could take many forms and include options to incorporate different therapies—yoga, meditation, and

232. While there are many programs the BOP could implement and improve, this Comment only focuses on a handful due to length restraints.

233. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., P2100.04, BUDGET EXECUTION MANUAL at 7–8 (2014) [hereinafter BUDGET MANUAL].

234. *Id.* at 64.

235. See *WORDS FROM PRISON - DID YOU KNOW?*, ACLU, https://www.aclu.org/other/words-prison-did-you-know#_ednref38 (last visited Nov. 12, 2022).

236. See generally Michelle C. Brooten-Brooks, *How Trauma Therapy Works: Very Well Health*, <https://www.verywellhealth.com/trauma-therapy-5212434> (June 8, 2022).

237. *Resolve Program (2022)*, PHYSICIAN PRESENTENCE REP. SERV. LLC, <https://pprsus.com/bop-psychology-treatment-the-federal-presentence-report-sentencing-and-prison-placement-preparation/resolve-program/> (last visited Nov. 12, 2022).

various therapists who practice distinct philosophies.²³⁸ Individuals in female prisons should be informed of each option available and be allowed to select the approach that is best suited for them.²³⁹

2. *Programs for Mothers and Expectant Mothers*

The BOP should improve new-mother programs because they currently are exclusive to new mothers who meet the program's strict eligibility requirements, while even fewer are told about them.²⁴⁰ Further, parents to older children have little-to-no access to programs, even though the majority of individuals in female prisons are parents to older children.²⁴¹ This lack of accessible parenting programs leads to severe collateral consequences, including severed relationships and the potential loss of parental rights.²⁴²

To better serve these individuals, the BOP should implement a parenting program that allows for longer visitation with children and family members, which would stimulate physical and emotional bonding. Additionally, the BOP should emulate the California prison system and allow individuals in female prisons to meet with parental advocacy groups to understand how to improve as a parent.²⁴³ Lastly, every parent should have the access and ability to participate in at least one of these programs in some capacity. Inclusion is important, especially for individuals who could benefit from rehabilitative programs the most, which could include those convicted of violent crimes.

B. *Enforcement*

While the aforementioned programs would help the BOP fulfill its duties that it currently ignores, the programs must be adequately administered to make a difference. Current BOP programs for individuals in female prisons

238. See generally *Trauma: A Holistic Approach*, UBUNTU WELLNESS (Aug. 5, 2018), <https://www.ubuntuwellnessohio.com/blog/2018/8/10/trauma-a-holistic-approach>.

239. These programs would not impact the BOP's budget. The BOP is already implementing trauma care; now, it can shift that care toward more constructive methodologies. See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., *DIRECTORY OF NATIONAL PROGRAMS* (Sept. 13, 2017) (describing the BOP's Female Integrated Treatment Program, which offers cognitive-behavioral treatment for female inmates with trauma-related disorders).

240. See *OIG FEMALE PRISON MANAGEMENT REVIEW*, *supra* note 35, at 25–26 (explaining the MINT program is only available to certain incarcerated individuals).

241. See *id.* at 27 (noting that only five incarcerated women entered the Residential Parenting Program between 2012 and 2016).

242. See *supra* Part I.A.2.

243. See generally *McConnell*, *supra* note 17, at 520–22 (discussing family-focused programs available in facilities in various states, including California).

are lacking substance, a massive issue with its “gender-responsive initiative” is that the BOP has invested so few resources and attention to it that ideas are not brought to fruition to the extent that they could be. The BOP can solve this issue because it has the statutory authority to designate more resources to improve gender-responsive training.²⁴⁴

1. *More Resources Needed for Gender-Responsive Programming*

First, the BOP should allot more staff and resources to enforce gender-responsive programming. The BOP can control appropriations and staffing levels as the Budget Execution Manual gives the Chief of the BOP's Budget Execution Branch the discretion to allocate portions of its funding each year.²⁴⁵ Funding can be reallocated to create new or bolster existing programs, to reallocate employees, and to increase funds or personnel for specific projects.²⁴⁶

Once the BOP has more staff and resources focused on gender-responsive programming, the agency could loosen eligibility standards and allow more participants. This should enhance the BOP's ability to fulfill its duties to care and aid reentry for its incarcerated individuals in female prisons because more will experience this targeted treatment instead of being left in the facilities with no guidance on how to improve. One way the BOP could implement this is by creating a funding task force as outlined in the Budget Execution Manual.²⁴⁷ By establishing a task force, the Chief can ask dedicated personnel to conduct studies to highlight the importance of implementing this programming.²⁴⁸ Research on gender-responsive programming will help the Chief reallocate existing funding to these programs.

2. *Better Training from the Top-Down*

The BOP should also implement better training for executives and staff at the facilities.²⁴⁹ All employees have a deep (or at the very least, adequate) understanding of each population, so BOP employees can better serve and

244. *See infra* Part IV.B.1.

245. *See* BUDGET MANUAL, *supra* note 233, at 29 (stating that the Chief of the BOP Budget Execution Branch “has overall authority for coordinating and monitoring reprogramming of funds between budget activities”).

246. *Id.*

247. *Id.* at 62 (“The Director, BOP, establishes and funds special task forces to make detailed studies and evaluations of problem areas.”).

248. *See Id.*

249. *See supra* Part II.A.

acknowledge the needs of incarcerated individuals.²⁵⁰ The BOP has authority to alter its training policies under the Bureau Mandatory Training Standards, which are revised and issued annually.²⁵¹

The BOP should begin to implement this training with a week-long program for all administrative employees during which they hear direct testimony from incarcerated individuals in female prisons to help humanize this population. Additionally, this training should bring in psychologists and social workers to explain the collateral consequences incarcerated individuals in female prisons face. This training should repeat annually to engrain the importance of gender-responsive programming and constantly reflect current conditions for female facilities. For example, the BOP could host an annual training for executives with annual reports on the conditions in female facilities including information such as the number of misconduct filings from that year, the number of successful reentries versus recidivisms, and the number of successfully completed rehabilitative programs.

3. *Regular Reports and Check-ins*

Currently, the BOP only conducts reports remotely and irregularly.²⁵² This is problematic because it does not give the agency a good idea of what the facilities are like on the ground or how the staff are treating incarcerated individuals.²⁵³ The BOP has authority to improve its reporting through its Management Control and Program Review Manual, which controls the reporting each prison must submit to the Attorney General each year.²⁵⁴

To improve the current haphazard reporting, the BOP should conduct annual on-site, rather than virtual, reviews of each program to ensure each prison meets agency-wide standards. This reporting should include collecting annual feedback from prison employees and incarcerated individuals to gain insight into how people are affected—for the better and worse—by the BOP’s policies. Lastly, the BOP should hire a “watchdog”

250. See *supra* Part II.A.

251. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., P3906.21, BUREAU MANDATORY TRAINING STANDARDS 1 (2007).

252. The Bureau of Prisons conducted remote reporting prior to the COVID-19 pandemic. See FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., MANDATORY CONTROL AND PROGRAM REVIEW MANUAL 1–2 (2002) (instructing agencies under the DOJ to certify compliance through an annual “assurance statement”).

253. See *generally* FEMALE OFFENDER MANUAL, *supra* note 57 (outlining the information collected in reports and issuing initiatives and recommendations to address noted disparities).

254. See *e.g.*, FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., PS 1210.23, MANDATORY CONTROL AND PROGRAM REVIEW MANUAL 1–2 (2002) (outlining “the requirements and responsibilities for implementing” a systematic review of all BOP programs and operations).

employee to randomly go to each prison throughout the year and report on the implementation of gender-responsive programming to incentivize individual facilities to comply with agency standards.

CONCLUSION

The rapidly growing group of incarcerated individuals in female federal prisons currently suffer under a carceral system that was not built for them.²⁵⁵ They have unique characteristics that require distinct treatment in prisons.²⁵⁶ Individuals incarcerated in female prisons are more likely to have children and be primary caretakers, more likely to have experienced sexual violence pre-incarceration, and are more likely to have a substance use disorder.²⁵⁷ Under § 4042, the BOP is the federal agency responsible for federally incarcerated individuals' safekeeping, care, subsistence, and adequate reentry.²⁵⁸ Furthermore, the BOP must implement these statutory duties with parity to both its female and male facilities to comply with the Fifth Amendment's Due Process Clause.²⁵⁹

However, the BOP violates its duty because it fails to treat all incarcerated individuals with this requisite consideration: it actively fails individuals in female prisons with inadequate programming and services.²⁶⁰ There are four BOP employees tasked with program implementation for about 11,000 incarcerated individuals, resulting in very few services with limited accessibility.²⁶¹ Further, the services the BOP does provide are substantially inferior—in both quality and quantity—to services provided to individuals in male prisons.²⁶² Under heightened scrutiny, this inequality must be substantially related to an important government goal, which is a standard the BOP blatantly does not meet, thus violating the Fifth Amendment.²⁶³

To correct these violations, the BOP should implement more effective gender-responsive programming that targets female incarcerated individuals' distinct characteristics and needs, such as parenting programs to help mothers with children of all ages, not just newborns.²⁶⁴

255. See Blakinger, *supra* note 28 (“The American prison system was built with men in mind.”).

256. See McConnell, *supra* note 17, at 498 (recognizing that females in the carceral system face “systemic prejudice”).

257. See *id.* at 497.

258. 18 U.S.C. § 4042(a)(2), (7).

259. See *supra* Part III.

260. See *supra* Part II.

261. See OIG FEMALE PRISON MANAGEMENT REVIEW, *supra* note 35, at 2, 5.

262. See *supra* Part III.C.

263. See *supra* Part III.D.

264. See *supra* Part IV.A.

Additionally, the BOP should effectively enforce these programs to avoid inconsistent application across its various female facilities.²⁶⁵ The BOP has clear statutory authority to both create these programs and successfully enforce them.²⁶⁶ These recommendations are the beginning of what the BOP should do to right the wrongs incurred by individuals in female federal prisons for decades.

265. *See supra* Part IV.B.

266. *See supra* Part IV.