Same Is Not Equal – Policy and Practice for Justice-Involved Women

Maureen Buell, Correctional Programs Specialist, National Institute of Corrections
Julie Abbate, National Advocacy Director, Just Detention International

“Treating people the same is not equal treatment if they are not the same.”

-Deborah Tannen

Facilities that detain and incarcerate women are increasingly faced with the challenge of safely and effectively managing the increasing population of justice-involved women. The number of women incarcerated in local jails and state and federal prisons increased by more than 700 percent between 1980 and 2014 – from a total of 26,378 to 222,061 – outpacing men by over 50 percent.¹ With the growing population comes the growing realization that existing policies and practices can often fall short. Correctional agencies, recognizing that women have always comprised a small percentage of our nation’s incarcerated people, have accordingly tended to look to the vastly larger male population to design policies and procedures for managing women. However, common practices that work in men’s institutional settings do not always translate into practices that are effective for women and women’s prisons. In fact, these same practices can have detrimental effects on incarcerated women.

(RISING) NEED FOR GENDER-SPECIFIC POLICIES TO ADDRESS JUSTICE-INVOLVED WOMEN

As the number of justice-involved women grows, research and practice demonstrate the differences between women and men when they are actually in custody. Increasingly, agencies recognize that “one size does not fit all” when it comes to incarcerated men and women. Agency wide practices that assess all inmates’ risks and needs—that classify, house, program, discipline, and generally manage their entire population—simply affect women differently than men. Further, one-size-fits-all practices have measurably negative effects on incarcerated women and on the jails and prisons that house them. For example, agency-wide policies tend to over-classify and over-discipline women; at the same time, the policies under-program and under-treat women’s medical and mental health needs.

Policies that do not consider incarcerated women not only affect the women themselves but negatively affect a facility and agency as well. Facilities that do not adequately assess women’s risks and needs may be more chaotic and face unnecessary security issues. Assessment and classification tools that have been developed and validated for women reveal that the majority of women in custody are medium security and lower risk. However, using a one-size-

fits-all classification system results in women being held in higher security levels than their behaviors warrant, which affects how staff perceive and manage this population.

The drawbacks to the one-size-fits-all policy are also reflected in women’s disciplinary infractions, which can be frequent but are often of a less serious nature. Facilities housing women generally view discipline and sanctioning through a gender-neutral lens, which overlooks key gender-responsive factors that often underlie institutional behaviors of women. With the high rates of childhood sexual abuse and traumatic life experiences, a woman’s reaction to certain correctional practices that trigger earlier traumatic memories can be considered as defiance rather than as a coping mechanism. Staff can have a key role in reducing the numbers of disciplinary actions by creating a culture and disciplinary system oriented toward prevention and balance. Clearly, behaviors that challenge the safety and security of an institution must be addressed, but responses must be commensurate to the behavior, which is not the effect of a one-size-fits-all policy then applied to women.

Developing policies and implementing practices built upon evidence-based, gender-responsive knowledge and providing appropriate staff training and supervision helps staff more easily manage their female population. Staff often perceive women to be “difficult,” but proper policies and training can alleviate these concerns and help reduce staff turnover. Additionally, implementing gender-responsive practices can decrease costs for the facility, by decreasing costs for higher security housing and inmate supervision, which is often less necessary for women, than is used in practice.

THE NEED TO HAVE DIFFERENT POLICIES FOR WOMEN

Increasingly, agencies and facilities are working to meet incarcerated women’s needs and to respond to the risks women face during their incarceration. Over the past three decades, the corrections profession has incorporated the use of data and evidence-based practices in decision-making. As a result, policies, practices, and programs more accurately reflect inmate risk and need. However, the areas in which female risk and need differ from their male counterparts continue to be overlooked.

The evidence-based practices that have helped improve correctional practice have been developed predominantly based on the risks and needs of men. Traditional, gender-neutral approaches either miss or underestimate the risk-and-need factors that are important with women. However, recognizing the importance of gender better serves incarcerated women. Research on developing and validating women’s risk/need classification and assessment tools reveals risks and needs specific to women, which can be missed or minimized by traditional risk-

2 Gender Responsive Discipline and Sanctions Policy Guide for Women’s Facilities, Bureau of Justice Assistance Grant No. 2010-DJ-BX-K080 NRCJJW.

and-need assessment tools. Issues that are not identified cannot be addressed. As criminologist Pat Vanvoorhis has stated, “…women’s issues do not become the focus of policy and innovation because the science that would foster such change devotes limited attention to them, and what is not observed is not attended to.”

Despite the evidence, demonstrating that women are not well served by traditional gender-neutral policies, agencies and facilities may be concerned about having different policies or standard operating procedures for women’s prisons or women’s housing units in detention facilities. How would that work for the agency or facility? Is it even constitutional to treat women differently than men?

**IS IT OKAY TO HAVE DIFFERENT POLICIES FOR DIFFERENT POPULATIONS?**

Yes. As long as an agency does not engage in discriminatory funding regarding the women they incarcerate, an agency should be able to have different policies and programming for their women’s facilities.

**Agency/Facility Differences**

Agencies often have facilities that implement the same statewide policies differently, even between men’s facilities. Facilities may create standard operating procedures to add details and specificity to how an agency wide policy will be implemented, which may consider facility layout, staffing patterns, and population risks and needs. Often, policies may be specific to a specialized population within a larger facility. Facilities housing women should also consider the particular needs of that specific population, including needs related to the following: their typical role as primary caregivers with dependent children, economic challenges (poverty, unsafe housing, childcare,), victimization histories (abuse by intimate or family member),

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substance abuse (self-medicating), and mental health issues (hospitalizations, depression, anxiety, and trauma).

Policies and practices that ignore these issues fail to address women’s risks and needs. In fact, women’s needs inform women’s risks, so failing to address these needs can actually create or increase negative institutional behavior, driving them “deeper” into the system and doing little to prepare women for re-entry into the community. Women frequently receive disciplinary sanctions for behaviors that are rooted in mental health issues or stem from a woman’s frustration at losing visitation through no fault of her own. These types of acting out behaviors can be addressed through a variety of alternative means that address women’s needs and can become avenues to applying trauma-informed practices and can provide opportunities to teach inmates valuable skills, self-awareness and self-efficacy.

Constitutional Concerns: What about Parity/Equal Protection?

So is it legal to treat women differently than men based on their different risks and needs? The Equal Protection Clause of the 14th Amendment provides that no state shall deny any person “the equal protection of the laws” and has been used, for example, to combat racial segregation and gender discrimination. Equal Protection guarantees that people who are similarly situated are treated similarly. It is not a problem to treat dissimilarly situated people differently. The threshold question, then, is whether incarcerated men and women are “similarly situated.” If they are, they must be treated similarly (or there must be a justifiable reason for dissimilar treatment); if they are not, they may be treated differently.

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10 Gender Responsive Discipline and Sanctions Policy Guide for Women’s Facilities, Bureau of Justice Assistance Grant No. 2010-DJ-BX-K080 NRCJJW.
Looking at custody, sentences, and purposes of incarceration is not enough

Initially, advocates argued that incarcerated men and women were “similarly situated” if they had similar custody levels, sentence structures, and purposes of incarceration.\footnote{Women Prisoners v. D.C., 877 F. Supp. 634, 675 (D.D.C. 1994).} That would mean, for example, that minimum-security women within two years of release and minimum-security men within two years of release, being similarly situated, should have access to the same programming opportunities. However, courts have consistently required other factors to be considered as well.\footnote{Factors include medical, educational, and employment histories; substance abuse information; impending factors related to pre-release; results of psychological testing; social services reports and security risks. Klinger v. Nebraska, 31 F.3d 727 (8th Cir.1994); Pargo v. Elliott, 894 F.Supp. 1243 (S.D. Iowa 1995); aff’d 69 F.3d 280 (8th Cir. 1995).} Those other factors will usually highlight differences between the circumstances of incarcerated men and women and prevent a finding that incarcerated women are similarly situated to incarcerated men.

Other factors to consider

Whether specific groups of incarcerated men and women are similarly situated is a very fact-specific inquiry. Accordingly, agencies and facilities must examine both population-specific factors and facility-specific factors to determine whether the populations in question are similarly situated. The factors that focus on the in-custody population include custody level, sentence structure, and purpose of incarceration. But these population-specific factors must also include any other “special characteristics” of the population, which could include prisoners’ medical, educational, and employment histories; substance abuse histories; psychological and social service reports; and security risk.\footnote{Women Prisoners v. D.C., 93 F.3d 910, 924-25 (D.C. Cir. 1996).} Facility-specific factors are also important and could include facility size, population size, structure, mission, and operating philosophy. Typically, agencies can easily articulate significant differences between their various facilities and their populations. Even facility mission statements commonly reveal the factual differences between prisons for both men and women.

In practice: different policies based on different populations

For agencies still worried about liability for treating incarcerated women differently than men, they need look no further than the Prison Rape Elimination Act Standards for Prisons and Jails.\footnote{28 CFR Part 115 at 37106 (2012).} The standards prohibit cross-gender pat searches of women prisoners but not cross-gender pat-down searches of men prisoners.\footnote{115.15 Limits to cross-gender viewing and searches, 28 CFR Part 115 at 37210.} The preamble to the standards explains that prohibiting cross-gender pat-down searches of men would have a significantly lower benefit (and a higher cost) than prohibiting cross-gender pat searches of women, because incarcerated women have a significantly higher rate of prior sexual victimization and therefore a higher likelihood of being harmed, even from proper, professionally conducted cross-gender pat-downs.\footnote{28 CFR Part 115 at 37134.} The

preamble also clearly dispenses with the issue of Equal Protection: “A ban on cross-gender pat-down searches only of female prisoners does not violate the Equal Protection Clause of the Fourteenth Amendment because male and female prisoners are not similarly situated with respect to bodily searches. Male inmates are far less likely than female inmates to have a history of traumatic sexual abuse and are less likely to experience the re-traumatization that may affect female inmates due to a cross-gender pat-down search.”17

To address the larger numbers of incarcerated men, states have multiple facilities housing males, allowing for more specificity in the mission of a given facility as well as defining and targeting policy and programs to the population. A number of states have only a single facility housing women, resulting in all custody levels, population designations, and a broad range of program needs to all be held in a single facility. The same system that has numerous facilities for men allows different facilities to focus on different needs: sex offender treatment; work release; close custody, including death row; populations with significant medical and mental health needs, etc. The result is that the women’s facility has to have it all, but the policy and procedures rarely account for the differences in women’s risk and needs. This is clearly an issue in facilities that are co-gender (some prisons, community corrections facilities, and jails) but predominantly house males.

CONCLUSION

An agency or facility should be able to justify policies and procedures that are designed to meet incarcerated women’s needs and to accommodate their risks, even if those policies and procedures differ from what is implemented for men. The dramatic increases in rates of women entering the criminal justice system, the high rates of returns to custody for technical violations over new offenses, the numbers of types of disciplinary issues for behaviors that are not assaultive or serious in nature, are all areas that underscore what research and emerging knowledge has been telling correctional practitioners. Implementing gender-responsive policy, practice, and programming contributes to a more engaged inmate population, reduces disciplinary issues, and contributes positively to reentry planning. With training, gender-responsive programs improve staff satisfaction. In fact, evidence-based practices and population statistics clearly point toward using gender-specific policies for incarcerated women.

Julie Abbate is Just Detention International (JDI)’s National Advocacy Director, based in its Washington, DC office. She leads JDI’s federal and state policy work, advocating for government action to address sexual abuse behind bars. Julie has spent most of her 25-year legal career fighting for prisoner’s rights. She comes to JDI after 15 years at the Civil Rights Division of the U.S. Department of Justice, where she focused on combating sexual abuse in

17 28 CFR Part 115 at 37134; see also Laing v. Guisto, 92 Fed. Appx. 422, 423 (9th Cir. 2004); Timm v. Gunter, 917 F.2d 1093, 1102-03 (8th Cir. 1990); Jordan v. Gardner, 986 F.2d 1521, 1525-27 (9th Cir. 1993); Tipler v. Douglas County, 482 F.3d 1023, 1027-28 (8th Cir. 2007); Colman v. Vasquez, 142 F. Supp. 2d 226, 232 (D. Conn. 2001).
women’s prisons. Julie was also a member of the Attorney General’s PREA Working Group, which drafted the national Prison Rape Elimination Act standards. She is a certified PREA auditor.

Maureen Buell is a Correctional Program Specialist with the National Institute of Corrections (NIC) www.nicic.gov. Ms. Buell has provided training and technical assistance nationally to Federal, state, local and community corrections agencies and organizations. She manages NIC’s Justice Involved Women’s initiative in the development of evidence-based and gender-informed policy, procedure and models of practice designed to improve outcomes in the management of women in correctional systems. Additionally, she manages a compassion fatigue and secondary trauma initiative, which addresses the impact on stress and fatigue on correctional organizations, correctional staff and their families. Prior to coming to NIC, Ms. Buell was with the Vermont Department of Corrections in a variety of roles to include director of women and family services, program services manager, casework supervisor and probation and parole officer. She holds a Master of Science degree in Administration.