

Introduction to the Criminal Legal System for Women in the United States

The contemporary prison is expected to deal with the failures of other social institutions, an expectation that the prison is both philosophically and practically unable to meet.

—Barbara Owen,

In the Mix: Struggle and Survival in a Women's Prison

When I first went to prison, or “the gated community” as I like to call it, the counselor there told me: “You do realize you’re going to leave here in a pine box.” And that was a slap up the back of my head.

—Brandi, personal interview

It's Not Like TV

When I asked my interviewees what they wanted people to know about the criminal justice system, many said, “It’s not what you see on TV.” Although *Orange Is the New Black* is currently the most widely recognized television representation of incarcerated women, nearly all of my interviewees mentioned it as a negative example. Yes, the show humanized some of the characters through backstory; yes, it nailed a few of the lesser-known details of everyday life, like the way women learn to make shower shoes out of sanitary pads. However, the women

I interviewed said the lack of representation of the ways women support each other in prison, not to mention the increase in sexual drama and violence as the seasons progressed, added up to a show that only added to the stigma.

On the other hand, Piper Kerman's 2011 memoir *Orange Is the New Black: My Year in a Women's Prison*, which inspired the television series, is a thoughtful description of many of the dynamics and daily realities of Kerman's experience and did not need to rely on sensationalism.

One thing Kerman made very clear was how meaningful her race and class privilege were during her incarceration. She was one of a minority of incarcerated women who could rely on community support, family, and financial resources while she was inside. She experienced and reported that being white got her better treatment from openly racist corrections officers. Beatrice Codianni, who was incarcerated with Piper Kerman and appears in the book under a pseudonym, told me, "The TV show, I can't watch. But I think the book is right on."

Beatrice grew up in a low-income area and has seen firsthand how stigma affects generations of people. "I just want to fight against bullies," she said. "I want to fight against a system that oppresses people. I will do that until my dying day. I'm seventy-three. I still have fight in me. So, you know, it's not over!" Beatrice's jet-black hair and exuberant energy show that age hasn't slowed her down. Beatrice entered prison because of her association with the Latin Kings when she was in her forties. She served fifteen years and spent them all advocating for herself and others to receive adequate medical care, access to reading materials, and other rights.

Beatrice speaks openly about the difficulties of living inside a prison and the effort it takes to make even small policy changes. "I took the Bureau of Prisons to court against cross-gender pat searches," she told me. An action like this is monumentally difficult. But Beatrice was adamant. "I was gang raped when I was twelve," she told me. "Every time a corrections officer would come behind me and make me put my arms up and spread my legs for a search, he would put his hands under my breasts, and I was retraumatized." Beatrice won an exemption that required a female corrections officer to conduct her pat downs, and this opened the door for other women who had a history of trauma to apply for the same exemption.

On the outside, Beatrice founded the Sex Workers and Allies Network (SWAN), a harm reduction organization that advocates for the decriminalization of sex work. Beatrice is the managing editor of Reentry Central, a nationally recognized website on reentry and criminal justice reform issues. She is a cofounder of the groups Real Women Real Voices, the National Council for Incarcerated and Formerly Incarcerated Women and Girls, and the Women's Resettlement Working Group. She is also on the Connecticut Bail Fund's community advisory board. Her life has been devoted to advocacy and justice for marginalized people.

When Piper Kerman's memoir *Orange Is the New Black: My Year in a Women's Prison* was adapted into a television show, Beatrice and a few other formerly incarcerated women who had lived alongside Kerman formed an educational group called "The Real Women of Orange is the New Black." They spoke out at universities, church groups, and community organizations to raise awareness about the issues facing incarcerated women. "The book is right on, but the show was made for entertainment, not to educate people," Beatrice said. "We tried to fill the gap." Violence and sexual jealousy among women may get ratings, but life inside a real women's prison is both more mundane and more painful than television can depict.

Women who live inside face daily struggles that don't lend themselves to intriguing plot twists—but when we zoom out and look at the system in its entirety, it is truly a shocking story we have to tell. The system we have was not inevitable, and it can be undone. But in order to contemplate what to do next, we have to know what we have in operation right now.

Who Gets in "The System"?

Internationally I've seen that wherever I go, the most oppressed women in the country are overly represented in the prison system. In New Zealand I saw high numbers of Māori women. In Australia it was Aboriginal women. In Germany it was women who had emigrated from Turkey. In the United Kingdom women who are called "foreign

nationals” are incarcerated at higher rates than British citizens. In Canada, First Nations women and other marginalized women are disproportionately incarcerated. Imprisonment is a worldwide indicator of the prejudice held by a majority. If the most disadvantaged women are overly represented in the prison system, then that system is not about justice.

Overwhelmingly, American women’s prisons house poor women of color. Black women are twice as likely to be arrested as white women. Black women make up 30 percent of the population of incarcerated women. Latina women are 1.4 times more likely to be arrested and incarcerated as white women. Of course, prisons keep some demographic records, because policy and advocacy campaigns are often built on those records. However, the records are not standardized across state systems, and they often lump together a number of minorities. All ethnicities aside from white, Black, and Latina—roughly 10 percent of all incarcerated women—are lumped into one category: *other*.

After years of work from policy makers and activists, some states are beginning to keep more detailed records. Advocacy groups have investigated rates of incarceration for Asian American and Pacific Islander (AAPI) communities and discovered how difficult it is to find members of these “othered” communities in the system once they are inside (1). Although Native American, Alaska Native, and Native Hawaiian women are a small percentage of the population overall, they are disproportionately represented in certain geographical locations (2).

As I mentioned earlier, all prisons operate on a gender binary, so everyone living in a women’s prison is categorized according to their sex assigned at birth, not their self-identity. We do not have much data on the number of trans, nonbinary, or gender nonconforming people who live in women’s prisons, although what we do have indicates that they are disproportionately represented as well.

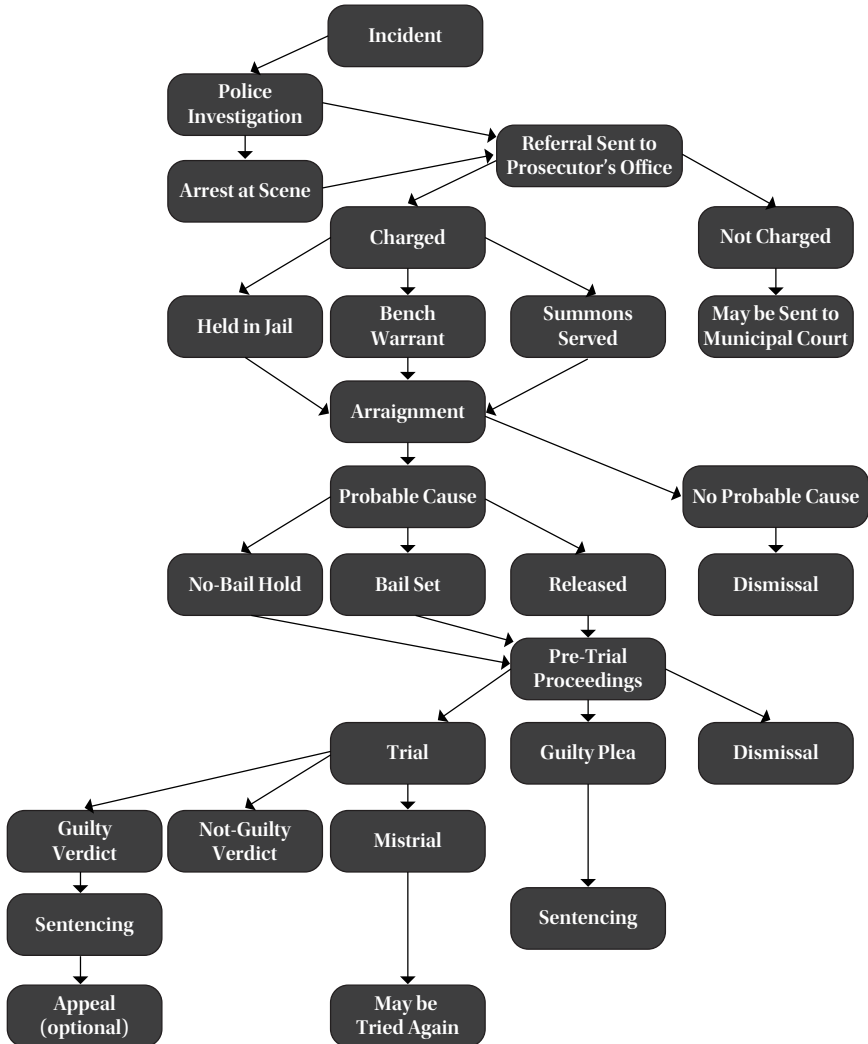
Housing, programming, clothing, safety, and medical care for transgender people are issues of ongoing and immediate concern, but as of this writing, most corrections departments are not addressing those concerns in an organized way. Even in California, where the issue of safety for incarcerated transgender people has finally been addressed by

new policy, resistance to housing trans women in women's facilities has come from diverse corners, including from some incarcerated cisgender women.

One major reason for the difference between real life for incarcerated women and what we see on television is that the real criminal legal system is extremely complicated to navigate. It is not the clear pathway from arrest to trial to incarceration indicated by police procedural shows. Once a woman is inside, she doesn't just serve her time and get released. There are many different issues that can arise to affect how long her sentence is, including the possibility of "good time" (a reduced sentence based on her behavior inside) or an extended sentence because of trouble she gets in. Many scholars and activists liken the criminal legal system, and especially the prison system, to a maze: many ways in, very few ways out, and a lot of dead ends on the inside.

There is no single criminal legal "system" in the United States. There is a plethora of autonomous systems including a federal system, fifty state systems, and around eighteen thousand local systems (3). This diagram indicates the process in one system.

Figure 1. Entering the system.



Source: Reproduced by permission from Jefferson County, WA, website, 2023,
<https://www.co.jefferson.wa.us/1243/How-the-Criminal-Justice-System-Works>.

Cash Bail and Plea Bargains

After being arrested, a person suspected of a crime goes to jail to await notification of their charges. If a person cannot make bail or is not offered bail, they are held in jail after being *arraigned* (the court proceeding where a defendant is notified of the charges filed against them) and until they are

convicted and sentenced. This is known as *pretrial detention*. If subjected to pretrial detention, a person's likelihood of taking a plea deal goes up 46 percent (4). Jails are full of people who have been arraigned but not convicted of a crime, and women are more likely to spend their pretrial time incarcerated because they are less likely to be able to make bail than men are.

One factor is that when men need to make bail, they often have women gathering—mother, sisters, wife, or girlfriend—to raise that money. Women who need bail usually do not have men or other family members gathering together to raise funds for them. A woman who needs bail also often needs someone to care for her children, and she may not be able to get both bail funds and childcare from her family. Sometimes women lie to the police and don't tell them they have children. They do this hoping their oldest child will be able to manage the rest of the kids for the next few days until she is released on her own recognizance (an option for lower-risk defendants); otherwise her children may be sent into the foster system.

Because of how obviously prejudicial it is toward those who can't afford bail, the cash bail system has been replaced by most countries in the world. The United States still uses it. Though California is one jurisdiction that's working to reform the practice, the cash bail practice is one of many ways women are disadvantaged in an already rigged system.

Another practice that disproportionately affects women is plea bargaining. We know that more than 90 percent of criminal cases that end in conviction are the result of plea bargaining, not jury trials (5). This fact alone should give us pause.

The plea bargain process is informal and private: it happens behind closed doors among lawyers, judges, and the accused. Overall, the odds of receiving a plea offer from the court that includes incarceration are almost 70 percent greater for Black people than white people (6). Still, taking a plea is often a better deal for women, regardless of their race, because women of all races are more likely to have their most severe charge dropped during the plea process than men are (7). For most women the cost of enduring a trial is simply prohibitive—they usually cannot afford a private lawyer and nearly 80 percent of them have children to plan for. So even if they are innocent or believe they should have a lesser charge, taking a plea deal often makes material sense for them. It gives them a sense of what they can expect going forward, and it seems to cut their losses.

This was the case for interviewee Patricia, who spent five years incarcerated because she took a plea. She told me it was the hardest decision she ever made, but she did it for her daughter. If she hadn't taken the plea and had lost her case, her sentence would have been much longer. "So I did plea," she said. "Because otherwise I couldn't guarantee to my daughter that I would come out in time to actually see her grow and be there to raise her."

Let's say one of the rare women who decides to go to trial does win, and—even more rare—is found not guilty and released. If she was unable to make bail pretrial, she may have been incarcerated in jail for two years while fighting her case, and there is no formal system to support her afterward in rebuilding her life, reconnecting with her children, or getting a job. This is the situation for a woman who has "won."

After pleading guilty to felony or misdemeanor charges (or a combination) and taking a deal—or after losing at trial—women are sentenced by a judge. Then they are sent to a temporary holding area—often called a *reception center*, sometimes a separate housing building within the prison—while they await their transfer to the prison unit where they will serve their sentence.

Differences between Jail and Prison

Jails and prisons are operated by different arms of a byzantine custodial system. *Jails* are usually under county jurisdiction and are operated by sheriff's departments. *Prisons* are operated by a state or the federal corrections department. Of course, the names and purposes of jails and prisons vary across the United States and around the world. In general, jails are typically local and hold people for shorter duration in a pretrial or pre-conviction status, whereas prisons are almost always post-conviction facilities for longer stays. For this reason, prisons are more likely than jails to offer comprehensive programming for women. This system is not the same in other countries; in the United Kingdom, for example, there are no jails. All women convicted of a crime, no matter the severity or length of sentence, are housed in prison together.

Longer sentences for felonies require a transfer from jail to a state or federal prison, which can sometimes take months. Women who have

been convicted of federal crimes including tax evasion, counterfeiting, wire fraud, and drug trafficking will go to federal prisons operated by the Federal Bureau of Prisons. Everyone else will go to state prisons operated by each state's independent department of corrections. In California sometimes we “joke” that in the California Department of Corrections and Rehabilitation (CDCR), the *R* is silent.

Because there are so few women's facilities in the context of the entire system, women are often sent to prisons that are quite far from their families and communities. Connecticut has one state facility. California has two. In some cases, women are sent to another state entirely. This is especially common for women in the federal prison system, because there are only twenty-nine facilities for women to serve all fifty states. In some states like California, prison overcrowding has led to women serving much longer sentences in jails.

Women living together in a dormitory-style room with bunk beds in a jail. Because there is a shortage of space for programming, all activities are in this dorm.



Source: Michele Zousmer.

Reception centers, where women are processed when they first arrive, are also places where women are unlikely to receive programming. This means that when she is first incarcerated, while she is trying to adjust,

a woman may spend two months in a place where all the staff do is ask questions to figure out how dangerous she is, whether she has a mental illness, and whatever else they are assessing in the name of security.

One of my interviewees told me that the risk of violence is highest in a reception center, where people are “settling scores” over things that happened outside and have less to occupy their time. She witnessed one very brutal attack from one resident on another and remembered that the corrections officer allowed the attack to continue until the women involved were bleeding. The women I spoke with all agreed that violence was much less common once they were living together long term inside a prison.

I’ve worked to get *Healing Trauma*, a six-session intervention program that is peer facilitated, to be run inside reception centers and have been successful in a few women’s prisons. In addition to the program content, the important benefit of getting a peer-led program running in reception centers is that women coming in can meet someone who has been there for a while, who can tell them how the place operates.

Although some of the stories in this book are about women’s experiences in jail, most of them are about what happened when they were living inside prisons.

Who’s in Charge

Prisons are paramilitary organizations. Corrections officers have a strict chain of command with titles like *lieutenant* and *captain*. In general, wardens are at the top. There are a number of different offices and jobs that intervene in the workings of a prison, such as health services, program coordinators, and counselors. Incarcerated women have to learn their system quickly.

Private prisons do house about 8 percent of our currently incarcerated population, and they do lobby to keep more people locked up. However, the Massachusetts think tank Prison Policy Initiative points to the fact that private prisons aren’t the only ones incentivized to keep expanding the population of incarcerated people.

Private industry extracts profits from our public prison systems through services and goods: telecommunications (big markups on collect phone calls from jails and prisons), food (lower-quality food served inside at low

cost), clothing (uniforms and shoes made cheaply in bulk), restraints (different sets for different purposes), and many others.

State and federal institutions are conglomerations of a publicly funded paramilitary authority plus a host of private contractors—all incentivized to keep expanding. This makes the prison system like a dilapidated old house with a poor foundation getting constantly remodeled, but without a plan. You've got stairs to nowhere and a door that opens onto a brick wall, but the builders keep working because they have been contracted to do so.

In addition to the formal structure of corrections, there is a power structure inside the prison that is developed by the women who live there. In my experience there is always someone in charge of the workings of daily life who isn't the warden. Every facility changes over time with new management, policies, and people coming through. This is one reason why women with long-term sentences end up with a lot of responsibility. They have the most institutional knowledge and experience, and so they often end up mentoring people coming in on how to survive.

Differences between Men's and Women's Prisons

Here's something that's incredibly important to understand about incarcerated women versus incarcerated men: incarcerated women are usually moms, and usually come from communities with very little resources. And so, if you have to ask out of necessity for someone to take care of your children, there's probably no money left for anyone to send you commissary, to come visit you, to send you magazines or underclothes, or any of the amenities that you would get from the outside. With men, women are taking care of them. Men usually have the amenities from the outside world, where women have to rely on themselves and one another. It's different.

—Amy, personal interview

Women living in prisons tend to be poorer on average than men. Many people do not realize how important financial support from the outside is

to people living in prisons. As one interviewee put it: “If you don’t got nothing, you ain’t nothing.”

To get their basic needs met inside, women have to rely on each other more than men do. Some of my interviewees viewed this as an inherent quality of their gender; they believe women are more nurturing and relational than men are. What I see is the combination of gender socialization and economic necessity. Men are already socialized toward dominance behavior, self-reliance, and repression of emotion. These are exacerbated by incarceration, which is all about dominance and control.

Women in prison are responding to a very different set of expectations and needs, and they are much more likely to build family-type bonds, to share resources, and to talk with each other about their struggles. Relying on each other is one of the ways women survive prison, regardless of how each woman may fit in with other gender norms.

Many people believe that women have become more violent in recent decades. There are more media portrayals of women who have used violence, but in fact the rates of violence among women have not changed much over time. Women are more likely to use violence with someone close to them than with a stranger. The percentage of incarcerated women who are in for violent crimes is about 38 percent in state prisons, compared to 58 percent for men (8).

In general, women’s facilities have less documented violence than men’s do. There are fewer attacks on corrections officers (COs), fewer altercations among residents, and there has never been a documented full-scale uprising or riot at a women’s prison. At a men’s prison, I’ve had to sign a form that said if there was a riot and I was taken hostage, I understood the staff would not rescue me. I’ve never had to sign that form at a women’s facility.

What surprises people outside the field is that for corrections personnel, it is generally understood that working in a men’s facility is preferable. I can’t tell you how many times I’ve heard COs say, “Give me ten men for every one woman.” Why is this? When you drill down on it, incarcerated women are seen as more difficult to manage. The generalization is that they ask why instead of simply following orders, and they overtly express their feelings. Prison staff have not been trained or provided the programming we know to be most effective for incarcerated women. In addition,

for people working in corrections, it is harder to move up the professional ladder from the women's side than the men's.

In prison, women are more likely to cause harm to themselves than to others. Worldwide, self-harm is a leading cause of death for prison residents (9). Women's prisons have much higher rates of mental health concerns than men's. In the United Kingdom women are four times more likely to self-harm in prison than men are, with a significant uptick in self-harming behaviors across the board during COVID-19 lockdowns (10).

Even thirty years ago, when one of my interviewees, Rose, was incarcerated in Kent, England, she recalled that "there were a lot of distressed women. Sometimes self-harm was the only way to get the attention you needed." We will take a closer look at how violence, trauma, addiction, and mental health concerns shape the lives of women before they enter prison in the next section.

A major difference between American facilities designated for men and those for women is the way people are housed according to their level of risk. In most state systems men are assessed for their "dangerousness" or risk of causing harm to others in the facility via their crime of commitment, their record, and an on-site assessment. They are housed according to their risk level, which is why we have *minimum-security facilities*, *maximum-security facilities*, and different levels of freedom or constraint within those.

The population of incarcerated women, while growing exponentially, is still small enough in most places that all women are housed together, irrespective of their risk level. This means that women are forming relationships and working side by side across a number of differences in ways that incarcerated men are not.

Although it varies by region, men's and women's facilities often differ markedly in the types of programs available to residents. I am an advocate for and creator of gender-responsive programming that seeks to meet the specific needs of incarcerated women. *Gender responsive* does not mean I intend to reinforce gender norms, although it can be very difficult to communicate this within the prison system.

Effective gender-responsive services for women must create an environment—through site selection, staff selection, program development, content, and material—that reflects an understanding of the realities of the lives of women and girls and addresses their strengths and

challenges (11). I am appalled when a women's facility calls their vocational programs "gender responsive," and then I find out they focus on cooking and sewing. What I've found is that many women's facilities struggle to provide adequate programming because they lack the funding, infrastructure, and political will to do so.

This gap between men's and women's facilities can have big consequences. One example comes from my own experience writing programs. About ten years ago I was consulting for a midwestern prison to improve their substance use disorder treatment. The state department of corrections asked me to write a therapeutic intervention program for women who had committed violent crimes. I had no experience or background in that area, so I declined. Then two events changed my mind.

First, I found out that the men's prisons already had such a program, and that men who completed it could go before the parole board early for a chance at early release. Women had no such option because they didn't have a comparable program. That was unconscionable. Next, before I left to return home, a prison resident approached me and said, "I hear you're going to write something for us around violence." I told her I had been asked, but I was not going to do it, and she started to cry. She told me she had killed her best friend of nineteen years, and she thought I was going to help her.

Flying home from that job, I carried her with me. How could I not? It occurred to me that I'd said no to the administration because the requested program was out of my subject area, but I could learn. So when I got home, I started researching. I contacted friends in the field and asked them where the programs were for women who had committed violent crimes. Over and over again I was told there weren't any. I couldn't find one being used anywhere in the United States or in any of the countries where I had contacts. This was in 2011.

I contacted the department of corrections that had requested the program and told them I would write it on two conditions: First, I needed to spend some time with the women living in the prison who had committed a violent crime. I needed to listen to them, to learn from them. My outside research would only go so far. Second, they needed to have a university-based researcher assess the program for its effectiveness.

Through focus groups, research, and pilot studies, I developed the program *Beyond Violence: A Prevention Program for Criminal Justice-Involved*

Women: a forty-hour evidence-based and manualized therapeutic program for women in criminal legal settings (jails, prisons, and community corrections) with histories of aggression and/or violence. It deals with the violence and trauma they have experienced, as well as the violence they may have perpetrated.

A randomized control study found that women who completed *Beyond Violence* experienced significantly less recidivism—25 percent at one year post-release—than women who completed a much longer comparison program designed for men, who returned at a rate of 47 percent one year post-release (12). (Here it is worth noting that many programs that call themselves “gender neutral” are in fact programs designed for men.) In the initial programming the groups were facilitated by staff. We began to offer the program elsewhere—and eventually in California with peer facilitators.

Prison residents who volunteer are interviewed and selected to attend the training pictured here. Then they participate in the intervention itself, led by a program coordinator. Upon completion they begin to co-facilitate in pairs.



Source: California Department of Corrections and Rehabilitation.

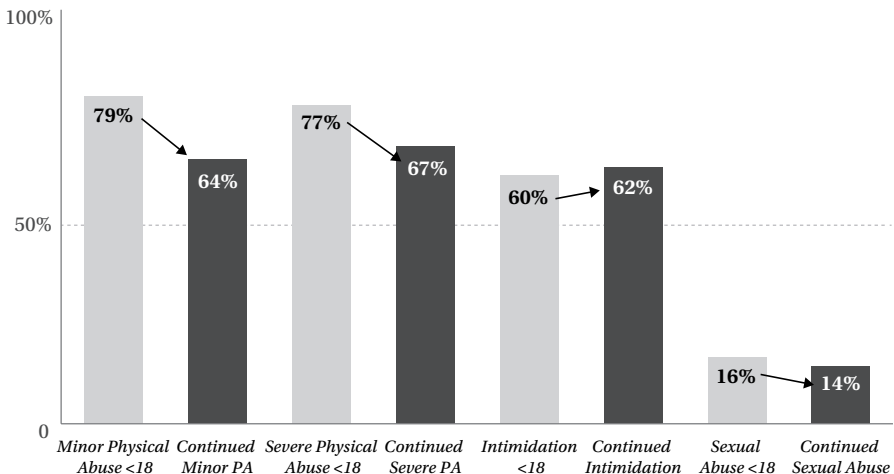
I made sure that peer facilitators were well trained and paid the highest wage possible. Although the program is not explicitly designed as vocational training, many former facilitators who have been released have gone on to translate the skills they developed running *Beyond Violence*

groups into jobs as counselors in substance use disorder programs, services for those with physical health challenges and experiencing homelessness, and advocacy work. This program is also my contact point for many of the women I interviewed for this project, an unexpected gift that came from addressing an unmet need. I have been asked to develop and provide trauma-focused, gender-responsive services for men in prison due to the success we have seen in women's programming.

Unmet need is a recurring theme in the lives of women who experience incarceration. Older research from the Bureau of Justice suggests that both men and women who have experienced incarceration report higher rates of childhood physical and sexual abuse than the broader public. Newer research indicates that when questions focus only on physical abuse and intimidation as children, incarcerated men report higher prevalence than women.

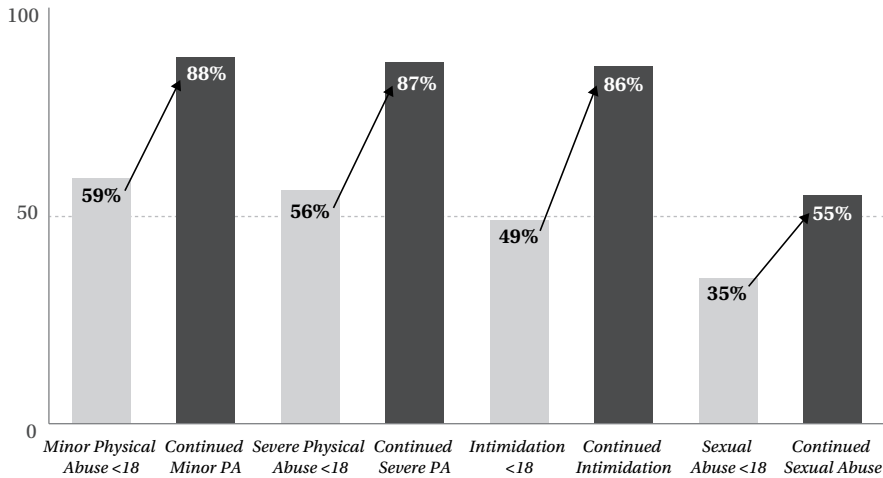
What the data reveal, then, is that for men the physical violence and intimidation against them declines as they become adults and presumably grow bigger and stronger. It does not decline for women. For women who experienced physical violence and intimidation during their childhood, it is significantly more likely to continue into adulthood. Close to 90 percent of incarcerated women who reported childhood violence and intimidation also reported continued violence and intimidation as adults.

Figure 2. Victimization trajectories for men.



Source: Nena Messina, "An Experimental Study of the Effectiveness of a Trauma-Specific Intervention for Incarcerated Men." *Journal of Interpersonal Violence* 49, no. 10 (2023): 1399–1417. <https://doi.org/10.1177/00938548221093280>.

Figure 3. Victimization trajectories for women.



Source: Preeta Saxena and Nena Messina, "Trajectories of Victimization to Violence among Incarcerated Women." *Health and Justice* 9, no. 18 (2021): 1–12. <https://doi.org/10.1186/s40352-021-00144-8>.

In other words, although men experiencing incarceration live with significant violence, they are less likely to contend with an increasing level of violence as they grow from childhood to adulthood. For women it is a different story, as the level of violence and intimidation they face is likely to hold steady or increase. What happened prior to incarceration is important in understanding how to support women as they make choices about their lives coming home. In the next section we will take a deeper look at these pathways to prison, especially the roles of trauma and addiction.

