



## Uncomfortable Places, Close Spaces: Female Correctional Workers' Sexual Interactions With Men and Boys in Custody

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### ABSTRACT

It is well known that sexual abuse occurs within the correctional system. That female correctional staff commit a significant proportion of that sexual abuse is met with discomfort bordering on disbelief. This discomfort has limited the discourse about female correctional workers who abuse men or boys under their care. Scant scholarship exists that addresses the appropriate response to sexual abuse by women; even less addresses sexual abuse by female correctional workers. Likewise, feminist jurisprudence on sexuality and desire does little to illuminate the motivations of women who engage in sexual misconduct or abuse, much less women who abuse men or boys in custodial settings. What the literature does acknowledge is that female sex offenders receive less-harsh sanctions overall than male sex offenders; they are even less likely to be prosecuted or punished when the victim is male and in custody. Additionally, although female correctional workers have access to significant power by virtue of their roles, that power may be diminished by a confluence of gender, race, and class. The literature also acknowledges that female correctional staff's entry into the correctional system was a great success for reformist feminists and that women have become power players within the correctional system because of their ability to supervise both women and men. Despite this status, however, women still experience sexual discrimination and harassment, both from male staff members and from male inmates. For black female correctional workers, gender discrimination is compounded by race and class discrimination.

This Article examines female-perpetrated sexual abuse in custodial settings and its place at the intersection of race, class, and gender in order to disentangle complex and overlapping narratives of abuse, sex, desire, and transgression. Ultimately, this Article confronts our discomfort with and reluctance to acknowledge the fact that women sexually abuse men and boys in custody, and it offers possible explanations for these behaviors.

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## INTRODUCTION

I have had a long interest in the intersections of gender, crime, and sexuality both in my professional practice as a lawyer and in my scholarly work.<sup>1</sup> Much of that work has addressed staff sexual abuse of inmates, which is widely perceived as a problem of male staff sexually abusing female inmates.<sup>2</sup> With the passage of the Prison Rape Elimination Act of 2003 (PREA)<sup>3</sup> and the robust data collection efforts that the U.S. Congress required as part of the Act,<sup>4</sup> the contours of sexual abuse and behaviors in custody are becoming clearer.<sup>5</sup> An area that remains relatively unexplored, however, is the role of female correctional workers who sexually abuse men and boys in custodial settings. This Article seeks first and foremost to explain why the statistical evidence of abuse of men and boys in custodial settings surprises reformers and disrupts perceived gender norms, and to explain why female correctional workers have sex with men and boys in custody.

Currently, scant scholarship addresses this issue, and the scholarship that exists primarily addresses the appropriate response to the behavior—resignation or prosecution.<sup>6</sup> That scholarship, while critical, necessary, and important for making interventions, does not attempt to examine the complicated reasons for the

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1. See BRENDA V. SMITH, AN END TO SILENCE: PRISONERS' HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL MISCONDUCT (2d ed. 2002), available at <http://www.wcl.american.edu/faculty/smith/prishndbk.pdf>; Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185 (2006) [hereinafter Smith, *Rethinking*]; Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571 (2006) [hereinafter Smith, *Sexual Abuse*].
  2. See generally Smith, *Sexual Abuse*, *supra* note 1.
  3. Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–15609 (2006)).
  4. 42 U.S.C. § 15603.
  5. See generally ALLEN J. BECK, PAIGE HARRISON & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, NCJ 228416, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008–09 (2010); MARK S. FLEISHER AND JESSIE L. KRIENERT, THE CULTURE OF PRISON SEXUAL VIOLENCE (2006); PAUL GUERINO & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, NCJ 321172, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007–2008 (2011); BARBARA OWEN ET AL., GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN'S FACILITIES, PART III OF III: MEASURING GENDERED VIOLENCE AND SAFETY: RESEARCH DESIGN AND METHODS (2008).
  6. See, e.g., Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357 (2006) (recognizing the inherent issues in enforcement of gender-neutral statutory rape law due to an unwillingness to see women as abusers and arguing for a more in-depth investigation into the motivations of female offenders); Lauren A. Teichner, Note, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 266 (2008) (arguing for more aggressive prosecution of both male and female perpetrators of inmate abuse).

behavior. That is not to suggest that male correctional staff do not have complicated reasons for abusing women inmates or that same-gender abuse between staff and inmates is any less complicated. Yet, female correctional workers' narratives are particularly complicated and characterized by strategic silences and accommodations by many invested actors both internal and external to the criminal justice system—women's rights groups, professional organizations, unions, correctional agencies, and states.

This Article uses intersectional analysis—adding race and class to the already combustible mix of gender, crime, and sexuality—to untangle these complicated and overlapping narratives, to identify the discomfort that many feminist scholars and others have in examining sexual abuse and misconduct perpetrated by female correctional workers, and to give voice to the silences that have attended this issue. Part I describes how female correctional workers enter and experience the corrections milieu, how the space they inhabit places them at the vertices of gender, race, class, and mass incarceration, and how that placement has complicated their experiences in and effects on the corrections environment. Part II examines research on the prevalence of sexual abuse committed by female correctional workers. Parts III and IV use competing and interlocking narratives of gender, race, and class to suggest female correctional workers' motivations for engaging in sexual interactions with men and boys in custody.<sup>7</sup> Fundamentally, the Article questions our disbelief that women victimize men and boys, and it begins to offer explanations for the conduct with the aim of developing potential preventive and policy responses.

## I. WOMEN'S EMERGENCE IN CORRECTIONAL SPACES

Female correctional workers are relatively recent entrants on the correctional landscape. There were relatively few incarcerated women in the United States until the late eighteenth–early nineteenth century.<sup>8</sup> Prior to the mid-1970s

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7. While this Article discusses the statistics related to female correctional workers' abuse of men *and* boys in custody, the primary focus of the Article is on female correctional workers' abuse of men in custodial settings. I discuss the data relating to female correctional workers' abuse of boys because that data, when revealed, validated that sexual abuse by female staff was serious and could not be explained away in the same way as when the sexual abuse involved only adult men. While many of the reasons and motivations may be the same, I plan to address female correctional workers' abuse of boys in custody in a separate article.

8. See ESTELLE B. FREEDMAN, 'THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830–1930, at 10–11 (1981).

women were only permitted to supervise female inmates.<sup>9</sup> During the eighteenth century and before, most punishment was local or community based, whether it involved men or women. The formal punishment of women remained local and very intimate, taking place in the family and primarily administered by fathers, husbands, guardians, and employers—all male.<sup>10</sup> Allowing men to chastise occupants of their homes, including their wives, children, servants, and apprentices,<sup>11</sup> was part of a larger gendered framework that recognized men as heads of households and assigned appropriate roles and behavior attributes to men and women based on biological sex.<sup>12</sup>

As women mobilized for suffrage, and later for defining post-suffrage goals of the women's movement, reformist feminists called for a gradual integration of women into patriarchal structures; more radical feminists called for immediate integration.<sup>13</sup> The reform of asylums and prisons in the nineteenth century, especially those holding women and children, was one of the first targets of that nascent women's movement.<sup>14</sup> Reformist feminists did not see themselves as feminists

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9. NICOLE HAHN RAFTER, *PARTIAL JUSTICE: WOMEN IN STATE PRISONS 1800–1935*, at 5–15 (1985). Whether women inmates had separate annexes and separate female supervision depended largely on their numbers. In places like New York, where there were sufficient numbers, women inmates had female supervision beginning in 1845 and even a separate wing where they lived away from men, though they interacted with male inmates and male staff at other times. *Id.* at 7. However, in places like Tennessee and Ohio, where there were not sufficient numbers of women inmates, women inmates were housed with men. *Id.* at 8–9.
  10. See FREEDMAN, *supra* note 8, at 10–11.
  11. See Reva B. Siegel, “*The Rule of Love: Wife Beating as Prerogative and Privacy*,” 105 *YALE L.J.* 2117, 2118, 2123 (1996) (explaining that a man, as “master of the household,” was within his legal authority to chastise his wife, children, and servants to the extent that their actions required correction).
  12. See Candace West & Don H. Zimmerman, *Doing Gender*, 1 *GENDER & SOC’Y* 125, 127–28 (1987) (“In Western societies, the accepted cultural perspective on gender views women and men as naturally and unequivocally defined categories of being with distinctive psychological and behavioral propensities . . . . The structural arrangements of a society are presumed to be responsive to these differences.” (citation omitted)).
  13. See Nancy F. Cott, *Equal Rights and Economic Roles: The Conflict Over the Equal Rights Amendment in the 1920s*, in *WOMEN’S AMERICA: REFOCUSING THE PAST* 441, 442 (Linda Kerber et al. eds., 7th ed. 2011) (chronicling the controversy over the passage of the Equal Rights Amendment in 1920, when some feminists sought women’s ability “to have the same opportunities and situations as men against the goal of enabling women freely to be different from men without adverse consequences.”).
  14. Elizabeth Cady Stanton and Susan B. Anthony, the mothers of the suffrage movement, were highly involved in prison reform. See Elizabeth Cady Stanton, *Solitude of Self*, PBS (Jan. 18, 1892), [http://www.pbs.org/stantonanthony/resources/index.html?body=solitude\\_self.html](http://www.pbs.org/stantonanthony/resources/index.html?body=solitude_self.html) (highlighting the need for prison reform while addressing Congress on the need for women’s suffrage); see also Nancy A. Hewitt, *Abolition & Suffrage*, PBS, <http://www.pbs.org/stantonanthony/resources/index.html?body=abolitionists.html> (last visited July 14, 2012).

in the way that we currently understand the term,<sup>15</sup> but rather saw themselves as engaged in charitable acts that alleviated the suffering of the vulnerable. Because of women's status as the moral foundation of society, their involvement in "good works"—visiting prisoners and alleviating poverty—was viewed as womanly and appropriate.<sup>16</sup> One of the reformists' initial goals was to push for matrons (that is, female correctional workers) in prisons.<sup>17</sup> In most correctional structures, matrons were not a regular part of the penal system supervision; their presence was typically preceded by a scandal involving the sexual abuse of female inmates in an institution.<sup>18</sup> For example, in New York's Auburn Prison, the consistent presence of matrons followed the scandal of a female inmate who conceived while in custody, was flogged while five months pregnant, and later died.<sup>19</sup>

Matrons were always subordinate to the wardens of the facilities, who, prior to 1870,<sup>20</sup> were always men.<sup>21</sup> Although matrons presented their own issues,<sup>22</sup> they at least were able to organize female inmates, make sure they had activities, and provide them some modicum of protection from physical and sexual abuse at the hands of other inmates<sup>23</sup>—primarily male—and male staff.

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15. CHARLOTTE KROLOKKE & ANNE SCOTT SORENSEN, GENDER COMMUNICATION THEORIES AND ANALYSES: FROM SILENCE TO PERFORMANCE 3, 16–17 (2006) (comparing the first wave of feminism, characterized by its platform of equal opportunities for women and its relationship to reform movements in larger society, with the third wave of feminism, characterized as rejecting notions of homogenous womanhood in favor of areas of intersectionality and greater ambiguity and diversity). The second wave of feminism in the 1960s and 1970s is credited with increasing awareness of intersectionality—race, class, and sexual orientation—in third wave feminists, as these voices critiqued gender against the backdrop of the Anti-War and Civil Rights Movements. *Id.* at 8–9.
  16. See RAFTER, *supra* note 9, at 14–15.
  17. See DANA M. BRITTON, AT WORK IN THE IRON CAGE: THE PRISON AS GENDERED ORGANIZATION 57 (2003) (noting that, initially, males were permitted to supervise female inmates); RAFTER, *supra* note 9, at 7–8.
  18. RAFTER, *supra* note 9, at 6.
  19. *Id.*
  20. See *id.* at 14–15 (noting that women did not come to be fully involved in prison operations until 1870). *But see* Kathryn Flannery, Coping Methods of Female Correctional Officers 10 (May 1, 2011) (unpublished M.S. thesis, Roger Williams University), available at [http://docs.rwu.edu/cgi/viewcontent.cgi?article=1001&context=sjs\\_thesis](http://docs.rwu.edu/cgi/viewcontent.cgi?article=1001&context=sjs_thesis), citing LeRoy B. DePuy, *The Walnut Street Prison: Pennsylvania's First Penitentiary*, 18 PA. HIST. 130, 139 (1951) (pointing out that one notable exception is the Philadelphia Walnut Street Jail, which had a female warden as early as 1793).
  21. See RAFTER, *supra* note 9, at 15 (noting that female matrons were often the wives of the wardens).
  22. See SUSAN EHRLICH MARTIN & NANCY C. JURIK, DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS 4–5 (2d ed. 2007) (noting how matrons' work in prisons served to perpetuate gender stereotypes by characterizing them as specialists in the care of "wayward youth and helpless women" and limited women's career possibilities).
  23. See CLARICE FEINMAN, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 41–42 (3d ed. 1994) (describing the deplorable conditions for women in penitentiaries); see also RAFTER, *supra* note 9, at 15 (recognizing that the removal of women from men's penitentiaries was a modest improvement).

Even during the Reform Movement, a period which lasted from the late nineteenth century into the early twentieth century, however, women's professional entry into and leadership within the penal system was limited. Women could only work in women's penal institutions.<sup>24</sup> Additionally, even matrons who supervised female inmates<sup>25</sup> or served as wardens<sup>26</sup> of institutions answered generally to male supervisors. These men either were wardens of the facilities that housed women inmates (women's prisons or co-ed facilities) or served on boards or commissions that had authority over penal institutions in a locality or a state.

Initially seen as performing primarily custodial functions, the matron's role gradually became more exemplary. The matron was to be the example that women in custody should emulate—sober, hardworking, godly, and abstemious.<sup>27</sup> By the 1860s, the prescription for female staff noted that

[i]t is especially important . . . that female officers should be distinguished for modesty of demeanor, and the exercise of domestic virtues, and that they should possess that intimate knowledge of household employment, which will enable them to teach the ignorant neglected female prisoner how to economize her means so as to guard her from temptations caused by waste and extravagance.<sup>28</sup>

While white female correctional workers<sup>29</sup> gained a consistent toehold in 1891 when the New York legislature passed legislation requiring separate housing for female and male inmates and female supervision for female prisoners, even these women had to pass the civil service exam and obtain twenty recommendations from "women of good standing."<sup>30</sup>

24. See RAFTER, *supra* note 9, at 5.

25. See FEINMAN, *supra* note 23, at 53–54 (discussing the sexual discrimination women faced in meetings with male wardens and commissioners).

26. For example, the Women's Prison Association, founded in 1854, split from the older Prison Association because women prison reformers insisted that women wardens have control over women's correctional institutions. See FREEDMAN, *supra* note 8, at 33–34. Likewise in California, disputes over who would control the development and direction of women's prisons generally split along gender lines, with matrons fighting to maintain control over programs and the administration of women's prisons and, in the end, losing or ceding power to more powerful men. See KATHLEEN A. CAIRNS, *HARD TIME AT TEHACHAPI: CALIFORNIA'S FIRST WOMEN'S PRISON* (2009).

27. See RAFTER, *supra* note 9, at 6.

28. *Id.* at 14 (citation and internal quotation marks omitted).

29. The earliest matrons were white women. African American women were not permitted to serve as matrons until the early twentieth century. See ROGER L. ABEL, *THE BLACK SHIELDS* 6–7 (2006).

30. See generally Eliza Tucker, *Women: Police Matrons*, UNUSUAL HISTORICALS (Sept. 24, 2008, 7:49 AM), <http://unusualhistoricals.blogspot.com/2008/09/women-police-matrons.html> (providing a historical overview of the slow pace of female worker advances in corrections).

Thus, female correctional workers were desexualized from their earliest entry into the penal system and were expected to conform to notions of moral rectitude and domesticity.<sup>31</sup> They were expected to be above reproach and certainly not to be associated with any outward manifestation of sexuality. This was especially true because the large majority of offenses that landed women in jails, prisons, penitentiaries, and, later, reformatories were crimes related to their gender—in particular, sexual offenses like prostitution or adultery, or offenses related to disobeying the control of patriarchal systems, such as family, marriage, or the church.<sup>32</sup> Matrons were carefully selected women who were most often able to uphold these standards. They were generally older, widowed, economically disadvantaged, and always controlled by men.<sup>33</sup> Moreover, they were all white women who had either fallen on hard times or who were engaged in reform work.<sup>34</sup>

It was only three quarters into the last century, in the 1970s, that women entered men's penal institutions.<sup>35</sup> Beginning with the U.S. Supreme Court decision *Dothard v. Rawlinson*<sup>36</sup> in 1977, which eliminated height and weight requirements for women seeking correctional officer positions in the Alabama Department of Corrections,<sup>37</sup> a line of cases cleared the way for women to hold contact positions in men's institutions.<sup>38</sup> However, while *Dothard* eliminated height and weight restraints for employment as a correctional officer, it still precluded women from working in the "jungle atmosphere" of the Alabama Maximum

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31. See FEINMAN, *supra* note 23, at 41–44 (describing how early reformists persuaded a male-dominated legislature to approve a female-run prison system by assuring that their "pure and upright characters" would create a domestic atmosphere designed to elicit feminine qualities from the female inmates).

32. See FREEDMAN, *supra* note 8, at 11 (recognizing that most crimes women were convicted of were for violations of "moral and sexual codes").

33. *Id.*; see *supra* notes 20–21.

34. FREEDMAN, *supra* note 8, at 11.

35. Prior to the 1970s, social and legal barriers precluded women from working in men's institutions. One of the early targets of what later came to be known as "governance feminism" was women's employment in nontraditional professions—such as construction, law enforcement, the military, and corrections. Women's entry into these spaces became the bellwether for women's equality and advancement, as well as for the success of feminism. See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006) (coining the term "governance feminists" to refer to feminists' participation in regulatory reform of broad social systems). This term is merely meant to be descriptive rather than prescriptive, as feminist ideologies are not fixed, but constantly evolving alongside individual feminists' approach to issues.

36. 433 U.S. 321 (1977).

37. *Id.* at 331.

38. See Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 270–73 (2003) (referencing the jurisprudential history following *Dothard*, which included important cases in Michigan, Ohio, New York, and Pennsylvania).



Security Prison.<sup>39</sup> The Court specifically noted that it feared male inmates would rape female correctional workers.<sup>40</sup> So, from the beginning of women's employment in male prisons sex between inmates and female staff was contemplated, albeit with male inmates as the aggressors.

Nonetheless, these decisions, which many feminists saw as victories, framed women in corrections as "professional"<sup>41</sup> and as a "good use of the staff,"<sup>42</sup> and they cemented female staff's role as the ultimate utility player to supervise both male and female inmates in their most intimate moments, including showering, toileting, or undressing. Like their earlier matron colleagues in the nineteenth century, the women were considered respectable, domesticated, and above desire; they would never respond to male nudity in a manner inconsistent with their prescribed gender roles.<sup>43</sup> In other words, unlike their male counterparts, women were perceived as posing no risk for sexual abuse of either the women or men in their custody.

Not only did these decisions frame female correctional workers as industrious and appropriate, they also constructed male officers and male inmates as predatory and female inmates as weak and vulnerable, thus framing female correctional workers as not only just like men in terms of work performance, but surpassing men in morality and self-control. Hence, these decisions provided little protection or dignity for male inmates and limited male staff's interactions with female inmates.<sup>44</sup> In this way, feminists were short sighted in declaring victory at the entry of female professionals in male correctional institutions. Rather than charting a wider path for female correctional workers, feminist reformers locked them in the gendered framework established earlier for prison matrons. Instead, feminists should have framed more nuanced and malleable identities for both men

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39. *Dotbard*, 433 U.S. at 334–37.

40. *Id.* at 334–35 (internal quotation marks omitted).

41. *Grummett v. Rushen*, 779 F.2d 491, 496 (9th Cir. 1985).

42. *Johnson v. Phelan*, 69 F.3d 144, 147 (7th Cir. 1995).

43. *But see* National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37,106, 37,201 (June 20, 2012) (to be codified at 28 C.F.R. § 115.15(d)), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-06-20/pdf/2012-12427.pdf> (expressly limiting both male and female nonmedical correctional workers from viewing inmates of the opposite gender while showering, performing bodily functions, or changing clothing, absent exigent circumstances).

44. *See* Smith, *supra* note 38, at 244; *see also* Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 GEO. MASON U. C.R. L.J. 291, 331 (2000).

and women<sup>45</sup> that acknowledged the complexity of the corrections environment<sup>46</sup> and the way in which gender, race, and class might affect their experiences in the environment.

#### A. Black Women's Entry as Workers in the Criminal Justice System

After African American men were extended suffrage and women were denied this privilege, racial tensions within the feminist movement peaked, as white women began to isolate themselves from larger issues related to equality for all in order to focus on issues of suffrage for white women.<sup>47</sup> The division between white and black feminists deepened as black women's experiences and challenges differed from their white counterparts.<sup>48</sup> While white women struggled to gain economic opportunities equal to those of men, black women always worked, and thus their feminist struggle was to be respectable women who did not have to work outside the home.<sup>49</sup> Ultimately, the lack of economic opportunity for African Americans after slavery, as well as white vigilante violence against

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45. Cf. Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 779 (2010) (discussing the post-World War II revision of international and regional family law in response to the women's and human rights movements based on ideas of equality and individual rights). There are numerous texts that catalogue and describe various feminist ideologies as liberal, cultural, radical, or dominance. These descriptions are helpful in seeing the development of feminist ideology and cribbing the work that has been done to theorize about women's power or lack thereof. These feminist ideologies, however, are a departure point for this Article, as none discusses situations where women are presumed powerful because of the position they hold or the institutions in which they work. See *infra* Part IV.
  46. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 1979) (1975); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971).
  47. See, e.g., ELLEN CAROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN'S RIGHTS* 82–99, 96 (1998) (criticizing the Fifteenth Amendment as “elevat[ing] the lowest orders of manhood over the higher classes of women”).
  48. See PATRICIA MADOO LENGERMANN & JILL NIEBRUGGE-BRANTLEY, *THE WOMEN FOUNDERS: SOCIOLOGY AND SOCIAL THEORY, 1830–1930*, at 149–92 (1998) (contrasting black activists like Ida B. Wells and Anna Julia Cooper with their white contemporaries, such as Jane Addams and Charlotte Perkins Gilman, to show that many white women had material security and chose to endure certain hardships, while black women, particularly after the end of Reconstruction, were subject to “Black Codes . . . and left to struggle against disenfranchisement, mob violence and organized terrorism, . . . and against pervasive racism and de facto segregation in the North,” *id.* at 150).
  49. See, e.g., CYNTHIA NEVERDON-MORTON, *AFRO-AMERICAN WOMEN OF THE SOUTH AND THE ADVANCEMENT OF THE RACE, 1895–1925*, at 73–77 (1989) (describing how laws enacted during World War I that made it mandatory to fight or work were enforced against black women and how black women were not permitted to depend solely on allotments from relatives in the armed forces). While 3 percent of all married white women worked outside the home in 1900, 26 percent of all married black women worked. *Id.* at 68.

African American men who were entrepreneurs or self-sufficient, led to black women reentering the workforce after Emancipation.<sup>50</sup> All African Americans, even those who had been free persons of color, or who had managed to obtain a measure of economic autonomy or education, were in precarious positions that served to unify them along lines of race and class.<sup>51</sup> Black women, like other women who entered the workforce, were targets for abuse given their limited legal rights and lack of protection from predatory males. Black women were even more vulnerable because they had fewer protections than white women and were perceived, because of their race, as being particularly loose and immoral.<sup>52</sup> It should come as no surprise, then, that black women would also be more at risk for incarceration than their white counterparts.<sup>53</sup>

Black women have been present in the American penal system almost since its beginnings, initially as prisoners and then as workers. I turn to a discussion of their trajectory as a way to introduce another lens for examining the experience of female correctional workers.

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50. See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 22–23 (1981) (explaining that during slavery there was no gendered slave work: Black women were expected to perform the same labor as black men, with the exception of some tasks performed by slaves who worked inside the home). Today, black women are still often forced to seek employment outside the home because of the unemployment or underemployment of black men. *Id.* at 76–77.
51. LENGERMANN & NIEBRUGGE-BRANTLEY, *supra* note 48, at 160 (“Black women recognized that class differences among them were largely unperceived in a white world in which race was the first identifier imposed on them and gender the second. Class and individual attainment could go all but unnoticed and never count enough to overmaster the two identities.”); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991) (“Sexualized images of African Americans go all the way back to Europeans’ first engagement with Africans. Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented. These sexualized images of race intersect with norms of women’s sexuality, norms that are used to distinguish good women from bad, the madonnas from the whores.”).
52. See Linda K. Kerber, *The Republican Mother and the Woman Citizen: Contradictions and Choices in Revolutionary America*, in *WOMEN’S AMERICA: REFOCUSING THE PAST* 147, 150 (Linda Kerber et al. eds., 7th ed. 2011) (characterizing women who sought autonomy as masculine and sexually aggressive); see also Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1039–51 (contrasting the presumption that white women are good, and by extension believable victims, with the presumption that race makes black women inherently suspect, particularly given racial stereotypes of black women).
53. See FREEDMAN, *supra* note 8, at 14 (connecting lack of economic opportunities for women and sexual taboos to crimes targeting “fallen women,” such as prostitution, vagrancy, fornication, and adultery). See generally Regina A. Arnold, *Processes of Victimization and Criminalization of Black Women*, SOC. JUST., Fall 1990, at 153 (describing the relationship between lack of economic opportunities, abuse, and vulnerability caused by gender, class, and race, and the trajectory for imprisonment among African American women).

### 1. Black Women as Inmates

As early as the late nineteenth century, black women were more likely to be arrested and imprisoned than white women because they were perceived as less feminine, less worthy, and less salvageable than white women.<sup>54</sup> New York, which led the nation in early penal reform for both male and female inmates, has long had disproportionate numbers of black women in its correctional institutions, including the Auburn Prison for Women, established in 1893, and the Bedford Hills Reformatory for juveniles, established in 1901. Although blacks never composed more than 5 percent of the population of the state during the relevant time period, Auburn's records from 1893 to 1933 show a total of 1674 inmates, of which 536 were black women.<sup>55</sup> Relying on eugenic theories of criminality, black women were cast as sexually loose and aggressive in their behavior, and unfeminine and animal-like in their appearance.<sup>56</sup> These misperceptions made African American women exceptionally vulnerable to arrest for prostitution, vagrancy, and disorderly conduct.<sup>57</sup> Of course, these misperceptions did not consider black women's vulnerability to abuse because of their past histories as slaves and descendants of slaves, nor their independence and physical strength as a direct result of having had to make their own paths in the world.<sup>58</sup>

Today, black women are about two and three times more likely than Hispanic and white women, respectively, to be imprisoned,<sup>59</sup> are less likely to receive downward departures<sup>60</sup> under sentencing guidelines,<sup>61</sup> and are less likely than other inmates

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54. See RAFTER, *supra* note 9, at 5.

55. CHERYL D. HICKS, TALK WITH YOU LIKE A WOMAN: AFRICAN AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890–1935, at 4–5 (2010).

56. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 159.

57. See HICKS, *supra* note 55, at 4–5; Crenshaw, *supra* note 56, at 159 (“In sum, sexist expectations of chastity and racist assumptions of sexual promiscuity combined to create a distinct set of issues confronting Black women.”).

58. See Crenshaw, *supra* note 56, at 156 (explaining how patriarchal norms are not as relevant in black communities, as women there have always had to work, “[y]et the very fact that Black women must work conflicts with norms that women should not, often creating personal, emotional and relationship problems in Black women’s lives”); see also RAFTER, *supra* note 9.

59. PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 236096, PRISONERS IN 2010, at 27 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

60. Departures refer to instances when judges deviate from prescribed sentences to give lower or higher sentences to offenders. See 18 U.S.C. § 3553(b) (2006) (permitting a court to make a departure when there is “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described”).

61. Celesta A. Albonetti, *The Joint Conditioning Effect of Defendant’s Gender and Ethnicity on Length of Imprisonment Under the Federal Sentencing Guidelines for Drug Trafficking/Manufacturing Offenders*, 6 J. GENDER RACE & JUST. 39, 52–53 (2002) (showing that white women receive more substantial

to be on probation.<sup>62</sup> Black women continue to be seen as less worthy of lenience,<sup>63</sup> more culpable for crime, and less salvageable.<sup>64</sup> These perceptions may be fueled by black women's more significant involvement in criminal enterprises.<sup>65</sup> That involvement is directly related to the lack of protection and support from men that women in low-income communities experience, relative to that of women of higher social or economic status.<sup>66</sup> Additionally, the perception that black women are stronger, more independent, and more powerful than white and Hispanic women disadvantages them in bids for leniency or claims of coercion.<sup>67</sup> So, the trajectory of African American women inmates has been consistent since their earliest entry into the American penal system—more likely to be imprisoned, less likely to be redeemed.

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assistance departures than Hispanic and black women, and that Hispanic and white women receive significantly higher reductions from non-substantial assistance departures than do black women); see also *Koon v. United States*, 518 U.S. 81, 92 (1996) (allowing District Court judges to use their discretion in individual circumstances to deviate from the U.S. Sentencing Guidelines where the case presents issues not properly taken into account when the guidelines for sentencing were drafted).

62. For example, in 2001, nearly two-thirds of all women on probation were white, while nearly two-thirds of the women who were incarcerated were African American, Hispanic, or other minorities. BARBARA BLOOM ET AL., NATIONAL INSTITUTE OF CORRECTIONS, GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS, at vi (2002).
63. See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 106 (1993) (demonstrating that courts often treat African American women more harshly than their white counterparts, thus creating a racial imbalance between female prisoners); see also Angela J. Davis, *Incarceration and the Imbalance of Power*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 61, 65–67 (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing the inclusion of race in charging decisions as an improper use of prosecutorial discretion).
64. See Roberts, *supra* note 63, at 108 (noting a judicial inclination to view white women as more capable of rehabilitation than African American women).
65. See Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in *INVISIBLE PUNISHMENT*, *supra* note 63, at 136, 138–39 (reporting that African American women are more likely to be incarcerated than white or Hispanic women). The incarceration rate for women is linked to “survival crimes,” in which women participate to earn a living, to support a drug addiction, or to escape an abusive relationship. *Id.*
66. See *id.* at 146–47 (noting that mass incarceration in minority communities has resulted in “women struggling to manage budgets consumed by addictions; women trying to hold families together when ties are weakened by prolonged absence; women attempting to manage the shame and stigma of incarceration; and women trying to prevent children from becoming casualties of the war on drugs”).
67. See, e.g., Davis, *supra* note 63, at 65 (chronicling the story of Kemba Smith, charged with and convicted of drug conspiracy despite her minimal involvement in the scheme directed and controlled by her then boyfriend).

## 2. Black Women as Correctional Staff

While white women gained entry into penal systems as prison matrons as early as 1793,<sup>68</sup> black women did not penetrate correctional environments as officers until 1919.<sup>69</sup> Cora I. Parchment was the first black policewoman in the New York City Police Department.<sup>70</sup> She succeeded four white women who were hired, at the urging of the American Female Reform Society and the Women's Prison Association, as prison matrons in 1845 to supervise female and minor inmates on Blackwell's Island and the Tombs in Manhattan.<sup>71</sup>

The first black women in corrections, like women who are firsts in any endeavor, had a heavy burden. Undoubtedly, they carried the expectations of their communities, which had been targeted by the police.<sup>72</sup> Unlike for their white matron counterparts, it was difficult for black matrons to distinguish themselves from the black, female inmates they supervised; they were separated from them by the thinnest margins of race and class.<sup>73</sup> And at the same time, like their white matron counterparts, black matrons had to be beyond reproach, especially given the social construction of black women as immoral, dangerous, and ignorant.<sup>74</sup> These burdens often left the pioneer women with few strategies for success in these environments: to perform better than their white matron counterparts in the environment;<sup>75</sup> to adopt the characteristics of those in the workplace and thereby fit in;<sup>76</sup> or to deny race, gender, and class affinity with the oppressed group and be the exception to the rule.<sup>77</sup>

Black women and other women of color working in prisons play an even more important role in the corrections system by virtue of their class and race—they

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68. Flannery, *supra* note 20, at 10.

69. Tucker, *supra* note 30.

70. ABEL, *supra* note 29, at 31–32, 46. Ms. Parchment was followed by Lawron Bruce in 1920 and Nettie Harris in 1925. *Id.*

71. Tucker, *supra* note 30.

72. See Jess Maghan & Leasa McLeish-Blackwell, *Black Women in Correctional Employment, in CHANGE, CHALLENGES, AND CHOICES: WOMEN'S ROLE IN MODERN CORRECTIONS* 82, 96 (Joann B. Morton ed., 1991).

73. ABEL, *supra* note 29, at 40 (describing the alienation of African American officers from their white counterparts because of race and perceived lack of education and qualifications for the job).

74. See HICKS, *supra* note 55, at 125–59.

75. See, e.g., ABEL, *supra* note 29, at 32 (narrating Mrs. Lawron Bruce's accomplishments as a black female officer).

76. See *id.* at 6 (noting that black matrons and doormen (black male police officers) became "humble to the system" in order to keep their jobs).

77. See *id.* at 40 (relating how black officers were typically seen as unsuited for the job based on racial stereotypes).

both blunt critique of and legitimize the prison–industrial complex<sup>78</sup> and the impact of mass incarceration on communities of color.<sup>79</sup> Angela Y. Davis frames the critique in her autobiography:<sup>80</sup> In discussing the employment of black women matrons during her imprisonment in the New York City Department of Corrections, she notes that “[l]ike their predecessors, the Black overseers, they were guarding their sisters in exchange for a few bits of bread.”<sup>81</sup> In making this comparison between prison and slavery,<sup>82</sup> Davis elucidates the use and complicity of people of color in systems that dominate and survive because of the subjugation of people like them.<sup>83</sup> Poor black women are essential to the survival and maintenance of the prison–industrial complex, which is fed by the imprisonment of other black men and women. So, while there is power in being on the outside even while on the inside—on the top of the bottom—black women still pay a price by participating in the destruction of their communities.<sup>84</sup> A key feature of this destruction and dismantling is the removal of black men, women, and children from the community and the creation of permanent barriers to their reintegration.<sup>85</sup> An additional consequence of this removal is the absence of men as intimate partners and the resulting diminishment of women’s power and ability to bargain for better treatment and quality in the relationships they have with men remaining in their communities.<sup>86</sup>

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78. See Julia Sudbury, *Celling Black Bodies: Black Women in the Global Prison Industrial Complex*, 70 FEMINIST REV. 57, 58 (2002) (defining the prison–industrial complex as “an intricate web of relations between state penal institutions, politicians and profit-driven prison corporations”).

79. See, e.g., *id.*

80. ANGELA DAVIS, AN AUTOBIOGRAPHY (1974).

81. *Id.* at 43.

82. Cf. Smith, *Sexual Abuse*, *supra* note 1, at 579 (“[A] congruency of both sexual abuse of women in prison and women in slavery is that sexual abuse was and is used as a tool of oppression.”).

83. DAVIS, *supra* note 80, at 43; see also FOUCAULT, *supra* note 46.

84. See, e.g., Brooke Hauser, *The Changing of the Guard*, N.Y. TIMES, Sept. 26, 2008, <http://www.nytimes.com/2008/09/28/nyregion/thecity/28guar.html> (recognizing the familiar scenario of female correctional workers who supervise inmates from their own communities); see also Maghan & McLeish–Blackwell, *supra* note 72, at 96 (noting the tension that can occur when black female correctional workers oversee members of their community in prison).

85. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004) (“African Americans experience a uniquely astronomical rate of imprisonment, and the social effects of imprisonment are concentrated in their communities.”); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 138 (2010) (“A criminal record today authorizes precisely the forms of discrimination we supposedly left behind—discrimination in employment, housing, education, public benefits, and jury service. Those labeled criminals can even be denied the right to vote.”).

86. Roberts, *supra* note 85, at 1290 (citing to interviews conducted by Donald Braman in which the subjects described the high incarceration rates in the African American community as disenfranchising to women); see also RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE*

## B. The Current State of Female Correctional Workers

Much has changed about the presence and participation of women in corrections since women's first entrance into our penal system as correctional workers. In 2001, women made up 24.5 percent of all correctional officers in male facilities.<sup>87</sup> In 2008, women composed 42 percent of staff in juvenile facilities,<sup>88</sup> and in 2007 women composed 40 percent of the entire adult correctional workforce.<sup>89</sup> For example, in the New York City Department of Corrections, women represent 45 percent of the approximately 9300 uniformed employees and hold positions as correctional officers, wards, and four-star chiefs.<sup>90</sup> There are a number of reasons for the increased participation of women in the correctional workforce. In the instance of the New York City Department of Corrections, black women have greater access to these positions because the qualifications for employment as a correctional officer have changed: They now require either thirty-nine college credits, two years of military service, or two years of experience—and no criminal record.<sup>91</sup> Further, the New York City Department of Corrections excludes many men—especially minority men—from qualifying for these positions.<sup>92</sup> Currently, women work in a variety of professions in both state and federal correctional settings.<sup>93</sup> Their participation is largely triangular, with few women of any race as executives or deputies of corrections agencies and most women concentrated in nonmanagement positions.<sup>94</sup>

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AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 60–61 (2011) (attributing a surplus supply of desirable, single African American women to the ability of successful African American men, much scarcer, to negotiate for relationship conditions, including multiple concurrent relationships, which favor their desires over those of African American women who wish to marry).

87. Joann Brown Morton, *ACA & Women Working in Corrections*, CORRECTIONS TODAY, Oct. 1, 2005, at 86, 87.
88. BECK, HARRISON & GUERINO, *supra* note 5, at 1.
89. MTC INST., *WOMEN PROFESSIONALS IN CORRECTIONS: A GROWING ASSET 1* (2008).
90. Hauser, *supra* note 84 (noting also that 75 percent are African American).
91. City of N.Y. Dep't of Citywide Admin. Servs., *Notice of Examination, Correction Officer*, NYC.GOV, [http://www.nyc.gov/html/doc/downloads/pdf/0517\\_001\\_1.pdf](http://www.nyc.gov/html/doc/downloads/pdf/0517_001_1.pdf) (last visited July 15, 2012).
92. This assessment is consistent with recent national data that shows that men of all races have lower educational achievement than women and that black men have the widest gap in educational achievement. *Achievement Gap*, EDUC. WEEK (Jul. 7, 2011), <http://www.edweek.org/ew/issues/achievement-gap>.
93. See JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, NCJ 222182, *CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES*, 2005, at 4–5 (2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/csf05.pdf> (listing the various roles in which women are employed in the corrections field).
94. MTC INST., *supra* note 89, at 23. The number of women in positions of authority in correctional institutions, although still small, is growing: The number of female jail administrators increased from 4 percent in 1991 to 22 percent in 2003. *Id.*



Moreover, while no group is monolithic, women in corrections, particularly in the positions in which they have the most direct contact with inmates, have challenging demographics. A 1984 survey of forty female officers found that they are better educated than their male counterparts: 42.5 percent had finished college compared to 29 percent of male staff.<sup>95</sup> Seventy-five percent (compared to 40 percent of male staff) were single, divorced, separated, or never married.<sup>96</sup> Female officers are often single parents who chose corrections as a position that offers stability, benefits, and flexible hours.<sup>97</sup> Unlike male officers, they come to these positions from service professions rather than from law enforcement or military professions.<sup>98</sup> Now correctional workers are “former soldiers, beauticians and bank tellers. They are single mothers who took the job to support their children. They are grandmothers . . . .”<sup>99</sup> And today, mainly in urban settings, women of color (mainly black women) have become the majority of women in corrections—working primarily at the uniformed positions where they most often come into contact with men in custody. Given the demographics of those under correctional control—disproportionately men of color—female correctional workers resemble women (mothers, sisters, and mates) from their communities of origin.

### C. The Work Experiences of Female Correctional Workers

While feminists devoted a tremendous amount of energy and resources to securing women’s places in these previously closed spaces, they largely ignored efforts to address women’s experiences once they entered these male-dominated enclaves.<sup>100</sup> But researchers have noted that “access to equal employment is no guarantee that women and other minorities will receive fair access to the resources, informal networks, and other considerations needed to assure job satisfaction.”<sup>101</sup>

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95. Nancy C. Jurik & Gregory J. Halemba, *Gender, Working Conditions and the Job Satisfaction of Women in a Non-traditional Occupation: Female Correctional Officers in Men’s Prisons*, 25 SOC. Q. 551, 556 (1984). A more recent study from 2011 surveying eighty female correctional workers confirms the findings of the Jurik and Halemba study. Flannery, *supra* note 20, at 51. Of this group, 44 percent held an associate’s degree or higher. *Id.* at 52. 78 percent were single or divorced. *Id.* at 51.

96. *Id.*

97. BRITTON, *supra* note 17, at 90.

98. *Id.*

99. See Hauser, *supra* note 84.

100. See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir. 1995) (evaluating claims brought by male inmate against female guards monitoring him while he was naked); see also *Abreu v. Fischer*, 923 N.Y.S.2d 783, 784 (App. Div. 2011) (finding male prisoner’s challenge to his punishment for intentionally masturbating in front of female correctional officer to be without merit).

101. Erik G. Lambert et al., *Gender Similarities and Differences in Correctional Staff Work Attitudes and Perceptions of the Work Environment*, 8 W. CRIMINOLOGY REV. 16, 18 (2007) (quoting Patricia Van

Thus, feminists opened the door for women to be employed in male-dominated environments but did not help them negotiate these complex environments. This is not surprising because securing legal rights and space for women was the project of governance feminists.<sup>102</sup> After declaring victory, feminists moved on to conquer other domains,<sup>103</sup> and they neglected more complex theorizing about how women would behave in these spaces and how gender, race, and class would complicate their existence therein.<sup>104</sup> The failure of feminists to do that complex imagining and to include the experiences of women of color and poor women has alienated these women and, indeed, created the impetus for other theories to account for those experiences.<sup>105</sup>

In all fairness, the governance feminists may have assumed that, given the same opportunities, women would do as well as, or better than, men. In that regard they were correct, but they did not take into account the way that gender, race, and class might have prompted decisionmaking about how women should manage in these largely male, overwhelmingly hostile environments. They did not consider the complexities of environments like prisons, where the authority to discipline and punish concentrate immense power in the state and its representatives.<sup>106</sup> Women, who at one point had been a subject of discipline, graduated to disciplinary careers and became part of the system of control on the inside while they were still subject to other forms of control both within and outside the prison.<sup>107</sup>

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Voorhis et al., *The Impact of Race and Gender on Correctional Officers' Orientation to the Integrated Environment*, 28 J. RES. CRIME & DELINQ. 472, 475–76 (1991) (internal quotation marks omitted).

102. See Adelaide H. Villmoare, *Feminist Jurisprudence and Political Vision*, 24 LAW & SOC. INQUIRY 443, 450 (1999) (reviewing FEMINIST LEGAL THEORY I: FOUNDATIONS AND OUTLOOKS (Frances E. Olsen ed., 1995), FEMINIST LEGAL THEORY II: POSITIONING LEGAL THEORY WITHIN THE LAW (Frances E. Olsen ed., 1995), FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993), and APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION (D. Kelly Weisberg ed., 1996)) (chronicling the first wave of feminists' struggle to extend existing rights and gain recognition of new constitutional rights for women).
103. See generally *id.*
104. See generally Dana M. Britton, *Perceptions of the Work Environment Among Correctional Officers: Do Race And Sex Matter?*, 35 CRIMINOLOGY 85 (1997) (analyzing how race and sex intersect and affect job satisfaction among correctional officers).
105. See, e.g., MARJORIE SPRUILL WHEELER, *NEW WOMEN OF THE NEW SOUTH: THE LEADERS OF THE WOMAN SUFFRAGE MOVEMENT IN THE SOUTHERN STATES* (1993) (detailing the exclusion of black women from organizations such as the National American Woman Suffrage Association and white advocates' appeals to white men for suffrage for white women in order to prevent black men from obtaining higher social status than white women).
106. See FOUCAULT, *supra* note 46, at 235–36 (recognizing that prison is an “exhaustive disciplinary apparatus,” retaining complete control over a prisoner); see also ROTHMAN, *supra* note 46, at 105, 151 (presenting the same argument in the context of military and mental health facilities).
107. See FOUCAULT, *supra* note 46, at 235–36.

However, as the poster child for the success of feminism, female correctional workers are a force to be reckoned with. Female correctional workers' equal employment opportunities trump those of male inmates and male correctional workers.<sup>108</sup> The only space where there has been resistance from the courts has been where female correctional workers' employment rights have endangered the safety of female inmates.<sup>109</sup> Surprisingly, female correctional workers have been very careful to distinguish their struggles from those of female inmates,<sup>110</sup> thereby opting for class privilege. Yet, ever since their entry into correctional spaces, women workers have been subject to the same sexual predation and marginalization as women inmates.<sup>111</sup> For example, in the District of Columbia and New York, major litigation challenged the conditions of confinement, including widespread sexual abuse of women in custody, while similar cases in the same jurisdictions challenged the sexual harassment of female correctional workers.<sup>112</sup> In both the District of Columbia and New York cases, female staff made claims about treatment that was remarkably similar to that of female inmates—sex in exchange for favors, forced sex, and discrimination in work opportunities.<sup>113</sup>

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108. See *Johnson v. Phelan*, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, J., concurring and dissenting) (criticizing the majority for placing women's equal employment rights above the privacy rights of inmates).
  109. See *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (rejecting prison superintendent's argument that males must be allowed to conduct cross-gender searches because of the unbalanced work atmosphere that would result if only female correctional workers were permitted to conduct searches of female inmates); see also *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 740 (6th Cir. 2004) (finding gender was a bona fide occupational qualification). But see *Breiner v. Nev. Dep't of Corr.*, 610 F.3d 1202, 1216 (9th Cir. 2010) (deciding sex was not a bona fide occupational qualification that would justify the Nevada Department of Corrections' policy of hiring only female correctional officers at a women's prison).
  110. See Nancy C. Jurik, *Individual and Organizational Determinants of Correctional Officer Attitudes Toward Inmates*, 23 *CRIMINOLOGY* 523, 525–27 (1985) (citing various studies that suggest that regardless of guards' individual attributes, correctional officers uniformly put greater emphasis on “work environment, organizational roles, and working conditions,” even among minorities and female guards who have been traditionally viewed as having less punitive attitudes toward inmates).
  111. Cf. Flannery, *supra* note 20, at 11–12 (detailing the workplace superiority of male counterparts throughout the early history of women corrections workers and the practice, implemented by male wardens, of forcing matrons to live in prisons and to live subordinately to male employees).
  112. Compare *Women Prisoners of the D.C. Dep't of Corr. v. Dist. of Columbia*, 93 F.3d 910, 929 (D.C. Cir. 1996) (claiming widespread sexual abuse of female prisoners), and *Amador v. Andrews*, 655 F.3d 89, 93 (2d Cir. 2011) (concerning rape and improper touching of female inmates by prison guards), with *Neal v. Dir.*, D.C. Dep't of Corr., No. 93-2420, 1995 WL 517244, at \*1 (D.D.C. Aug. 9, 1995) (memorandum opinion) (claiming sexual harassment of female correctional workers), and *Adams v. City of New York*, No. 07-CV-2325, 2011 WL 4434226, at \*1 (E.D.N.Y. Sept. 22, 2011) (claiming gender and race discrimination against correctional workers).
  113. *Neal*, 1995 WL 517244, at \*1; *Adams*, 2011 WL 4434226, at \*1.

### 1. Sexual Harassment: Male Inmates and Coworkers as Perpetrators

Mass imprisonment in the current era has meant that more men are being imprisoned.<sup>114</sup> Often, these men bring with them negative stereotypes of women in general and negative stereotypes of female correctional officers in particular.<sup>115</sup> These negative perceptions have caused men to challenge their supervision by women<sup>116</sup> and to target female correctional workers with particularly hostile conduct, including assaults,<sup>117</sup> masturbation in view of female staff,<sup>118</sup> and disrespectful and demeaning language.<sup>119</sup>

Female correctional workers face resistance not only from male inmates but also from male coworkers.<sup>120</sup> Male coworkers may be more hostile toward women. The experiences of female correctional officers can lead them to have a more negative

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114. See *infra* notes 251–253 and accompanying text; see also ALEXANDER, *supra* note 85, at 59 (attributing mass incarceration to an 1100 percent increase in the number of individuals incarcerated for drug offenses today compared to 1980); GUERINO ET AL., *supra* note 59, at 7 (2012) (finding that men were imprisoned at a rate of 943 per 100,000 male U.S. residents, fourteen times higher than the female rate of incarceration).
  115. See Kelly Ann Cheeseman & Robert Worley, *Women on the Wing: Inmate Perceptions About Female Correctional Officer Job Competency in a Southern Prison System*, 3 SW. J. CRIM. JUST. 86 (2006) (highlighting the complexity of male inmates' perceptions of female correctional officers and observing that inmate custody level, among other factors, seems to influence inmates perceptions); see also Rose Etheridge et al., *Female Employees in All-Male Correctional Facilities*, 48 FED. PROBATION 54, 56 (1984) (noting that men generalize female officers based on their previous interactions with women in the noncorrectional context); LIL WAYNE, *Mrs. Officer, on THA CARTER III* (Cash Money Records 2008) (detailing a romantic and sexual liaison with police officer: "I got stopped by a lady cop, she got me thinkin' I can date a cop, 'cause her uniform pants are so tight.").
  116. See *Oliver v. Scott*, 276 F.3d 736, 739 (5th Cir. 2002) (affirming the dismissal of suit brought by a male prisoner challenging the constitutionality of cross-gender supervision); *Madyun v. Franzen*, 704 F.2d 954, 955 (7th Cir. 1983) (raising a First Amendment argument as to the constitutionality of cross-gender search).
  117. See *United States v. Kutz*, 439 F. App'x 751, 753 (10th Cir. 2011) (affirming male prisoner's conviction of assault for grabbing a female correctional officer); see also *Jones-Bey v. Davis*, 80 F. App'x 472, 472 (7th Cir. 2003) (upholding a prisoner's conviction for assault of female officer).
  118. See *Abreu v. Fischer*, 923 N.Y.S.2d 783 (App. Div. 2011) (upholding punishment of a male prisoner for intentionally masturbating in front of a female correctional officer).
  119. See *Stringer v. Lane*, No. 89 C 7030, 1992 WL 59101, at \*1 (N.D. Ill. 1992) (upholding punishment for an inmate exhibiting disrespect for a female guard through personal poetry).
  120. See Lambert et al., *supra* note 101, at 16–17; *Neal v. Dir., D.C. Dep't of Corr.*, No. 93-2420, 1995 WL 517248, at \*10 (D.D.C. Aug. 9, 1995) (memorandum opinion) (holding that the District of Columbia Department of Corrections was guilty of systematic practices of sexual harassment against female staff and retaliating against those who resisted the harassment); *Negron v. Ulster Cnty.*, No. 1:08-CV-692, 2010 WL 4609296, at \*8 (N.D.N.Y. Nov. 4, 2010) (denying summary judgment for defendants where plaintiff was sexually harassed and assaulted by coworkers and retaliated against by her supervisor when she reported the harassment).

perception of their work life than their male counterparts.<sup>121</sup> Women are also more likely to attribute problems they experience at work to their coworkers.<sup>122</sup> Some specific examples of the environment that female correctional officers must tolerate are sexual jokes, remarks regarding their female status, and rumors about their sexual involvement with coworkers and inmates.<sup>123</sup>

The impact of this negative work environment is amplified for women of color, who are often supervising inmates from the same racial, ethnic, and socioeconomic background and who are often concentrated in the lowest-paying positions with the most inmate contact. For example, at the same time that the New York City Department of Corrections was lauding the changing demographics of its workforce, female correctional workers were filing complaints with the U.S. Equal Employment Opportunity Commission alleging a pattern of racial and sexual harassment of female correctional officers.<sup>124</sup> Along with race-neutral sexual harassment such as requests for rubdowns, orders to call superiors “daddy,” denial of bathroom breaks, and bottles of urine left at women’s posts, black female officers were referred to as slaves by their coworkers.<sup>125</sup>

## 2. Lack of Organizational Power

Another barrier that women face in traditionally male institutions is their lack of organizational power. Women are the minority sex in male correctional institutions and frequently do not hold positions of authority.<sup>126</sup> This lack of access to authority means that women are lowest on the totem pole; often, they receive the least favorable shifts, assignments, and duties.<sup>127</sup> Because they lack organizational power (or access to it) through their gender, social activities, and familial connections—factors often shared by men in professions like construction, the military, law enforcement, firefighting, and corrections—women do not get information

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121. Jurik & Halemba, *supra* note 95, at 559 (finding that women correctional officers and women workers were more likely than male workers to have negative attitudes toward their coworkers).

122. See Lambert et al., *supra* note 101, at 18 (attributing some of the reported stress of female correctional officers to the “hostile work environment faced by many female staff”).

123. *Id.* at 17.

124. See *Adams v. City of New York*, No. 07-CV-2325, 2011 WL 4434226, at \*1 (E.D.N.Y. Sept. 22, 2011).

125. *Id.* at \*4.

126. See Lambert et al., *supra* note 101, at 18.

127. See BRITTON, *supra* note 17, at 172–74, 189 (illustrating the presumption among male correctional officers that women are not fit for corrections work and detailing the less desirable assignments within corrections work that are typically assigned to women.); Lambert et al., *supra* note 101, at 18.

or coaching that can help them rise through the ranks.<sup>128</sup> Often, their only access to this power is through attaching themselves to powerful men who may extract sex in exchange for advancement.<sup>129</sup> Likewise, they often lack access to information about impending negative consequences.<sup>130</sup> The combination of racist and sexist treatment in the correctional environment, combined with lack of access to organizational power, may mean that female staff see themselves as outsiders like other less-powerful people, male inmates for instance, and may form relationships, both sexual and otherwise, for support and protection.<sup>131</sup> Finally, this lack of access to personal and organizational power may make female staff more vulnerable to exploitation and predation by male staff and inmates, putting them at risk for complaints of abuse<sup>132</sup> and at the same time depriving them of the early warning system about impending negative outcomes that men typically enjoy in male-dominated institutions.<sup>133</sup>

However, even if the hostility of the corrections environment, women's lack of power in that environment, and women's identification with similarly disempowered inmates are plausible and probable explanations for women's sexual involvement with adult males in custody, questions still remain about these sexual interactions.

## II. SEXUAL ABUSE OF MALES IN CUSTODY: FEMALE CORRECTIONAL WORKERS AS PERPETRATORS

While widely rumored, sexual interactions between female correctional workers and adult and youth male inmates were only recently studied systematically,<sup>134</sup>

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128. See BRITTON, *supra* note 17, at 190–95 (attributing women's and minorities' lack of inclusion in informal networks with supervisors and administrators to disparities in advancement opportunities).

129. See *Neal v. Dir.*, D.C. Dep't of Corr., No. 93-2420, 1995 WL 517248, at \*1 (D.D.C. Aug. 9, 1995) (memorandum opinion) (claiming, in part, that women who complained about sexual harassment or refused to accede to sexual advances of male supervisors were treated less favorably than women who either did not complain or engaged in sexual relationships with male supervisors).

130. See Jo G. Holland, *The Feminization of the Community Corrections Workforce*, CORRECTIONS TODAY, Aug. 2008, at 44, 45 (describing how women in corrections tend to be excluded from "informal work cultures" and lack access to networking and social systems that their male counterparts enjoy).

131. See BRITTON, *supra* note 17, at 135.

132. See *id.* at 181–82 (highlighting the common perception that inmates will attempt to solicit female staff and female staff will not be able to resist their advances).

133. See, e.g., ABEL, *supra* note 29, at 15 (commenting on the tradition of African American male officers giving other African American male officers a "head up on situations that adversely affected them").

134. See MARTIN & JURIK, *supra* note 22, at 191 (reporting findings of a comprehensive analysis of women working in traditionally male-dominated justice occupations, including corrections and policing). *But see* Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEXUAL RES. 67 (1996) (discussing the prevalence of sexual abuse of inmates in custody).

as a direct result of the passage of the PREA.<sup>135</sup> Research conducted in connection with PREA, and other research that has come in its wake, has shown that female staff's involvement in sexual misconduct has been seriously underestimated.

As part of PREA, the Bureau of Justice Statistics (BJS) was required to collect data on the incidence of sexual violence in custody.<sup>136</sup> One of the most surprising findings of the research was the widespread involvement of female correctional staff in sexual incidents—both with adult and juvenile males in custody.<sup>137</sup> From the inception of data collection—both data collected from correctional authorities and data from surveys collected from inmates and youth—female staff have been involved in abuse of men and boys in custody in numbers disproportionate to their numbers in the workforce.<sup>138</sup> In the last Census of Correctional Authorities, women composed about 33 percent of the entire adult correctional workforce,<sup>139</sup> an estimated 148,203 employees at the end of 2005. And among correctional workers in direct contact with inmates, men outnumbered women by a ratio of three to

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135. Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–15609 (2006)); *see* 42 U.S.C. § 15603(a)(1) (2006) (“The Bureau of Justice Statistics of the Department of Justice . . . shall carry out, for each calendar year, a comprehensive statistical review and analysis of the incidence and effects of prison rape.”).

136. *See, e.g.*, ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUSTICE STATISTICS, NCJ 210333, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004 (2005), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca04.pdf>; ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, NCJ 214646, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005 (2006) [hereinafter BECK & HARRISON, 2005 CORRECTIONAL AUTHORITIES REPORT], *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca05.pdf>; ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 218914, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006 (2007) [hereinafter BECK ET AL., 2006 CORRECTIONAL AUTHORITIES REPORT], *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf>; ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, NCJ 219414, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 (2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfpri07.pdf>; ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, NCJ 221946, SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES, 2007 (2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljri07.pdf>; ALLEN J. BECK ET AL., SEXUAL VIOLENCE REPORTED BY JUVENILE CORRECTIONAL AUTHORITIES 2005–06 (2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjca0506.pdf>.

137. ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS, NCJ 237363, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, at 6 (2012) [hereinafter BECK & JOHNSON, 2008 FORMER STATE PRISONERS REPORT], *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf> (revealing that 79 percent of victims of staff sexual misconduct were males reporting sexual activity with female staff); BECK, HARRISON & GUERINO, *supra* note 5, at 13 (finding 92 percent of male youth reporting sexual misconduct implicated female staff).

138. *Compare* STEPHAN, *supra* note 93, at 4, *with* GUERINO & BECK, *supra* note 5.

139. STEPHAN, *supra* note 93, at 4.

one.<sup>140</sup> Nonetheless, according to the latest BJS Report, correctional authorities report that female staff commit 61 percent of sexual staff misconduct and 21 percent of staff harassment.<sup>141</sup> Sixty-nine percent of jail and prison inmates reporting victimization by staff sexual misconduct reported that it was perpetrated by female staff.<sup>142</sup> These figures are consistent with a recent survey of former state prisoners, which found that female staff accounted for roughly 85 percent of all incidents of staff sexual misconduct.<sup>143</sup> Likewise, surveys of juvenile correctional authorities and youth in custody reflect that female correctional workers have been involved in sexual abuse of youth in custody disproportionate to their numbers in the juvenile corrections workforce.<sup>144</sup> Women account for 42 percent of staff in juvenile facilities,<sup>145</sup> yet youth implicate female staff in 95 percent of incidents of staff sexual abuse, where 92 percent of those abused youth are boys.<sup>146</sup>

In 2010, Janet Warren completed a study aimed at identifying those most at risk for sexual predation in the prison system.<sup>147</sup> The study identified three types of inmate sexual predation—coercive, bartered, and consensual and defined sexual conduct as either contact or noncontact; the two groups are not mutually exclusive.<sup>148</sup> 8.7 percent of male inmates reported perpetrating noncontact coercive sexual conduct with correctional officers, while 2.8 percent reported contact sex acts.<sup>149</sup> 9.7 percent of male inmates reported engaging in noncontact bartered sexual activity, while 8 percent reported contact bartered sexual activity.<sup>150</sup> Finally, 24.3

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140. *Id.* (noting that the largest disparity between genders was in federal facilities, where 87 percent of correctional officers were men and 13 percent were women; the smallest difference was in private facilities, where 52 percent were men and 48 percent were women; and, in state-operated facilities, 74 percent of correctional officers were men and 26 percent were women).

141. GUERINO & BECK, *supra* note 5, at 8.

142. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 231169, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09, at 24 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

143. BECK & JOHNSON, 2008 FORMER STATE PRISONERS REPORT, *supra* note 137, at 15.

144. BECK, HARRISON & GUERINO, *supra* note 5, at 13.

145. *Id.*

146. *Id.*

147. JANET I. WARREN ET AL., RISK MARKERS FOR SEXUAL PREDATION AND VICTIMIZATION IN PRISON (2010), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/230522.pdf>.

148. *Id.* at 18; *see* Smith, *Rethinking*, *supra* note 1, at 194 (recognizing that sexual conduct between staff and inmates can in fact be consensual, though it may be an uncomfortable or legally indefensible topic).

149. WARREN ET AL., *supra* note 147, at 76.

150. *Id.* at 86.



percent of male inmates reported engaging in noncontact consensual encounters with correctional staff, and 17.4 percent reported contact consensual activity.<sup>151</sup>

In its initial study of correctional authorities, the BJS clearly struggled with defining the nature of inmate sexual interaction with staff. In the 2005 report, the BJS characterized 68 percent of sexual interactions with correctional workers as “romantic.”<sup>152</sup> In its 2006 Correctional Authority Report, the BJS characterized them as “reported to be romantic,” and it finally settled on “sexual interactions that appeared to be willing” in its 2007 Report.<sup>153</sup> The participants in the Warren study described encounters with staff as “consensual” and romantic in nature.<sup>154</sup> In the Warren study, a majority of the inmates who described themselves as sexually predatory toward staff and others were male:

[I]f taken at face value, these data suggest that sexual coercion of prison staff by male inmates is as much a concern as the more widely publicized incidents of inmate coercion by correctional staff. These data suggest that at least some male prison inmates view themselves not only able to consent to sexual encounters with correctional staff but to perpetrate it in a way that implies they are predatory in their efforts and effect.<sup>155</sup>

These data raise interesting and important questions for feminist scholars. First, what accounts for the surprise at the numbers of female staff who are alleged and found to have been sexually involved with men and boys in custody, especially given that males make up over 90 percent of the adult and juvenile correctional population?<sup>156</sup> Is it the notion that women are victims rather than victimizers?<sup>157</sup> Many of the explanations offered by correctional authorities fall into this frame—they portray female staff as vulnerable women who are the victims of sophisticated and canny inmates,<sup>158</sup> and Warren’s study would seem to support that view.<sup>159</sup>

However, the predatory, canny, and sophisticated inmate trope seems less salient an explanation when one accounts for female staff’s sexual interactions

151. *Id.* at 89. The Warren study indicates that there has been little data addressing same-sex incidents between staff and inmates, though there is a fair amount that addresses same-sex interactions between inmates. *Id.* at 88.

152. See BECK & HARRISON, 2005 CORRECTIONAL AUTHORITIES REPORT, *supra* note 136, at 9.

153. See BECK ET AL., 2006 CORRECTIONAL AUTHORITIES REPORT, *supra* note 136, at 6.

154. WARREN ET AL., *supra* note 147, at 82.

155. *Id.* at 76.

156. GUERINO ET AL., *supra* note 59, at 2.

157. See Levine, *supra* note 6 (discussing societal reluctance to view women as sexual aggressors).

158. See Robert Worley et al., *Prison Guard Predators: An Analysis of Inmates Who Established Inappropriate Relationships With Prison Staff, 1995–1998*, 24 *DEVIANT BEHAV.* 175, 175–76 (2003).

159. See WARREN ET AL., *supra* note 147, at 75–76 (characterizing male inmates as the instigators of sexual conduct with female staff).

with youth in custody. A different explanation is offered for such interactions. Expressing surprise that youth reported that female staff committed 95 percent of staff sexual abuse with boys composing 93 percent of the victims, a census employee whose agency participated in the study of sexual victimization of youth commented, “[W]hy would these boys report they were abused by female staff. They should be happy to have sex.”<sup>160</sup> Another theory is that it is simply demographics: Given that 93 percent of persons in adult and juvenile custody are male,<sup>161</sup> and assuming for the moment that heterosexuality is the norm, then perhaps a disproportionate number of men in the system compels a disproportionate involvement of female staff.

While each of these theories is appealing and probably has some kernel of truth, I suggest that the story is much more complicated and is entangled in discourses about gender—femininity and masculinity—sexuality, class, and crime. These discourses are occurring against the backdrop of major demographic, economic, and societal shifts caused by the mass imprisonment of poor and colored communities—and women correctional workers have been at the epicenter of those shifts since their entry into the correctional workforce.

### III. INTERSECTIONAL ANALYSIS AND FEMALE CORRECTIONAL WORKERS WHO ABUSE MEN AND BOYS IN CUSTODY

Thus far, this Article has looked at how women have fared in correctional settings with regard to their demographics and their experiences as nontraditional workers in hostile work environments. Specifically, the Article has explored how black women’s experiences as correctional workers has differed because of the combination of their race, class, and gender, making their experiences an excellent venue to test the robustness of intersectional analysis.

Intersectional analysis allows scholars to examine the relationship between overlapping identities such as black, female, poor, or gay.<sup>162</sup> The confluence of

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160. Bureau of Justice Statistics, Seminar: Sexual Victimization in Juvenile Facilities Reported by Youth, 2008–09 (Feb 25, 2010).

161. GUERINO ET AL., *supra* note 59, at 2.

162. See Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 308 (2001) (using the intersectionality theory to unwrap “the diverging social statuses among and between ‘women’ and ‘persons of color,’ differences caused by racial, gender, and class positionality”); see also Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 702–03 (2001) (defining intersectionality as the relationship between overlapping status identities and recognizing that different social groups comprise multiple status identities—for example, black women are marginalized by both race identity and sex identity).

multiple identities within one individual can create additional burdens and benefits on top of those associated with any singular identity. Below, I discuss how the disaggregation of female correctional workers' multiple identities has left gaps in analyses of their sexual interactions with men and boys in custody and thus has created silence, a lack of discourse, and a dearth of concrete policy proposals to address the abuse.

The most obvious way to begin to analyze female correctional workers' abuse of men and boys in custody is from the vantage point of gender. Therefore, in looking at women in corrections, we see them from their place of privilege, the beneficiary of feminist equality and governance projects—being legally framed as able to supervise both men and women in virtually any situation—but we can also see how multiple identities of race and class may change and complicate female correctional workers' experiences. Against this backdrop of intersectionality, we can examine the female staff's abuse of men and boys in custody and the intersection of their identities with concepts of power, sexuality, and desire.

#### A. Power, Hegemony, and Sexual Abuse of Men and Boys in Custody

Much feminist theory is built on the notion that women are less powerful than men.<sup>163</sup> However, critical race feminists have rejected that notion and posited that one's power or subordination depends on where she stands,<sup>164</sup> and where women stand is uniquely affected by race, gender, class, and other identities.<sup>165</sup> There is no site where women are perceived as less powerful than in the area of sexuality and desire.<sup>166</sup> Given the origins of the feminist movement, that is not surprising.<sup>167</sup> There has been significant critique of the gap in feminist jurisprudence in defining an affirming space for women's sexuality and desire.<sup>168</sup> Much of feminist scholarship and discourse focuses on sex and desire as a place of peril and subordination

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163. See generally CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

164. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990) (rejecting the idea of a universal women's experience, as it masks the unique experience of black women).

165. See, e.g., Hutchinson, *supra* note 162, at 297–98 (criticizing the tendency of essentialism within progressive social movements to silence those who are subject to multiple forms of subordination).

166. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 99 (1987) (“[U]nder conditions of gender inequality, sexual liberation . . . does not free women; it frees male sexual aggression.”).

167. See *id.*

168. See generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COLUM. L. REV.* 181 (2001) (recognizing the gap in feminist jurisprudence in defining female sexuality outside of dependency or danger).

rather than pleasure.<sup>169</sup> Additionally, the critiques that exist, both those positing women's lack of power in the sexual sphere and those arguing that women have a greater potential and range for sexual expression, rarely examine spaces where women are powerful, like in law enforcement, military, or prison.<sup>170</sup> These settings and institutions can give women power traditionally conferred to or associated with men.<sup>171</sup> Given that, there is little in feminist scholarship that helps to explain female workers' sexual interactions with men and boys in custody. To the extent that feminist scholarship does not address these gaps in current theory, it should, because power—whether wielded by men or by women—has the ability to corrupt.<sup>172</sup> And while a common claim of cultural and radical feminism is that women will wield power better or are never powerful,<sup>173</sup> I disagree.

### 1. Female Correctional Workers Are Less Powerful Than Men

First, female correctional workers—regardless of their authority—are constructed as less powerful than men in the correctional environment, even if those men are in custody.<sup>174</sup> Female corrections workers' narratives are replete with accounts of their

169. *See id.* at 198.

170. *See* JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 320 (2006) (suggesting that describing the subordination of women in terms of injury makes women “innocuous, harmless,” and men “the subordinator[s], understood to be immune from injury” (internal quotation marks omitted)). The injury model rarely examines situations in which women are in a position to harm men, and from the standpoint of some feminist theories to suggest that women harm men and other people is to deny their victimhood. *Id.* at 320–22.

171. *See, e.g.*, *Walker v. Taylorville Corr. Ctr.*, 129 F.3d 410, 413 (7th Cir. 1997) (allowing a male inmate to proceed with a claim of sexual harassment against a female counselor); *Watson v. Jones*, 980 F.2d 1165, 1166 (8th Cir. 1992) (holding there were triable issues of fact in inmates' sexual harassment suit against a female correctional officer for patdowns and strip searches).

172. *Cf.* Letter From John Emerich Edward Dalberg-Acton to Bishop Mandell Creighton (Apr. 5, 1887), *in* JOHN EMERICH EDWARD DALBERG-ACTON, *ESSAYS ON FREEDOM AND POWER* 358, 364 (Gertrude Himmelfarb ed., 1948) (“[A]bsolute power corrupts absolutely.”).

173. *See* HALLEY, *supra* note 170, at 58–59 (arguing that cultural feminists focus on factors unique to the experiences of womanhood, such as child bearing, which shape not only women's perceptions of the world but their advocacy for the protection of life). Radical, or liberal, feminists focus their advocacy on areas and institutions in which women have, and still are, traditionally underrepresented. *Id.* at 80.

174. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1298–99 (1991) (“Composed of all its variations, the group women has a collective social history of disempowerment, exploitation, and subordination extending to the present. To be treated like a woman [sic] is to be disadvantaged in these ways as an incident of being assigned to the female sex.” (footnote omitted)). *See generally* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Gilligan posits that women and men develop differently in terms of values. Where women focus more on relationships, men do not. In the context of power, for example, “men represent powerful activity as assertion and aggression, [while] women in contrast portray acts of nurturance as acts of strength.” *Id.* at 167–68.

struggles to gain respect for their positions of authority.<sup>175</sup> At the same time, they wield tremendous power over men in their work environments and much of that power is sexualized, by virtue of the duties they perform—searching men’s bodies, observing men while they disrobe, and watching men toilet and shower<sup>176</sup>—and by virtue of the sexual feedback they receive from male inmates and coworkers.<sup>177</sup> Add to this the fact that, except for women’s presence as staff, these are single-sex environments where women can be a powerful and disruptive force, and this environment creates a fertile ground for bartered, coerced, or purportedly consensual sex between female staff and male inmates.

Because of our construction of women as less powerful by virtue of gender and the common conception of women as submissive, complacent, or coerced in sexual interactions with men, female correctional workers’ sexual interactions with men<sup>178</sup> are framed as predatory on the part of male inmates.<sup>179</sup> Male inmates are deemed conniving manipulators who lure, compromise, or intimidate unsophisticated and vulnerable female staff who just happen to possess the vestiges of correctional power and authority—uniform, weapons, radio, and the power of the state.<sup>180</sup> In accepting this narrative, we accept a scrubbed, clean, simple version of female power that reifies victimhood and passivity and does not make women responsible

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175. See *Dothard v. Rawlinson*, 433 U.S. 321 (1976); *Gunther v. Iowa State Men’s Reformatory*, 462 F. Supp. 952 (1979); *Neal v. Dir.*, D.C. Dep’t of Corr., No. 93-2420, 1995 WL 517244 (D.D.C. Aug. 9, 1995) (memorandum opinion); FREEDMAN, *supra* note 8, at 58, 71–78; RAFTER, *supra* note 9, at 3–99.
176. See Miller, *supra* note 44 (highlighting how men tend not to examine gender interactions although a power dynamic at odds with traditional gender-conforming roles exists in these environments).
177. See *Negron v. Ulster Cnty.*, No. 1:08-CV-692, 2011 WL 6284585 (N.D.N.Y. Nov. 4, 2010) (ruling for the plaintiff, who had been sexually harassed and assaulted by coworkers and retaliated against by her supervisor when she reported the harassment); see also Susan Kuczka, *Changing of Guard: Female Jail Officers Fight Back Against Harassment*, CHI. TRIB., Oct. 15, 1993, [http://articles.chicagotribune.com/1993-10-15/news/9310150359\\_1\\_sexual-harassment-female-correctional-officers-female-guards](http://articles.chicagotribune.com/1993-10-15/news/9310150359_1_sexual-harassment-female-correctional-officers-female-guards) (describing how, in addition to male inmates’ sexual remarks to female correctional officers, male correctional officers harass them as well—for example, by pinching them on the butt).
178. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 495–96 (1981) (Brennan, J., dissenting) (“[C]hastity was considered particularly precious, [and] young women were felt to be uniquely in need of the State’s protection. In contrast, young men were assumed to be capable of making decisions for themselves; the law therefore did not offer them any special protection.” (footnote omitted)).
179. See, e.g., NEV. REV. STAT. ANN. § 212.187 (LexisNexis 2010) (classifying voluntarily sexual contact between a prisoner and another person as a category D felony); see also Worley et al., *supra* note 158, at 175–76 (discussing interviews with male inmates who aggressively pursued intimate relationships with female corrections workers).
180. See James W. Marquart et al., *Fatal Attraction: An Analysis of Employee Boundary Violations in a Southern Prison System, 1995–1998*, 18 JUST. Q. 877, 878 (2001) (“Prison employees maintain only a theoretical dominance over inmates.”).

for their choices, even when they are poor ones.<sup>181</sup> This narrative serves the interests of liberal and radical feminism, and in the short term, female correctional workers.

## 2. The Law Does Not Recognize Female Rape of Men as Rape

The law reinforces the narrative that women can only be passive victims of rape by virtue of their gender. For example, the legal definitions of rape often do not include intercourse forced by a female onto a male.<sup>182</sup> Even when statutes use gender-neutral language, rape often requires that the perpetrator penetrate the victim.<sup>183</sup> The federal definition of rape, used in the Uniform Crime Report for gathering statistics about crime rates, was recently changed to include gender-neutral language, recognizing that not only women are the victims of rape.<sup>184</sup> The previous definition required “penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).”<sup>185</sup> The definition now defines rape as “penetration . . . of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person.”<sup>186</sup> Although the definition allows for rape of men, the requirement of penetration means that forced sexual intercourse does not constitute rape when the perpetrator is female and the victim is male.

Furthermore, statutory rape laws were historically more protective of females, thereby promoting a sexual double standard perpetuating the idea that women are noble, pure, passive, and ignorant.<sup>187</sup> This results in the view that women are unable

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181. *Accord* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802 (1989) (deferring to gender differences “serves to perpetuate our traditional blindness to the ways in which men are nurturing and women are competitive and power-seeking”).

182. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 19 (2004) [hereinafter FBI, UCR HANDBOOK], available at [http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr\\_handbook.pdf](http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf). The UCR Handbook also specifies that “[b]y definition, sexual attacks on males are excluded from the rape category and must be classified as assaults or other sex offenses depending on the nature of the crime and the extent of injury.” *Id.* at 20.

183. *See, e.g.*, DEL. CODE ANN. tit. 11 § 761(g) (Supp. 2010) (defining “sexual intercourse” as occurring “upon any penetration, however slight”). Many states do classify intercourse forced by a woman on a man as rape and have amended requirements for penetration. *See, e.g.*, TENN. CODE ANN. § 39-13-503 (2010) (defining rape as occurring when the perpetrator penetrates the victim or the victim penetrates the perpetrator). *But see* ME. REV. STAT. ANN. tit. 17-A § 251(C) (West 2006) (“A sexual act may be proved without allegation or proof of penetration.”).

184. *See* Tracy Russo, *An Updated Definition of Rape*, USDOJ JUST. BLOG (Jan. 6, 2012), <http://blogs.usdoj.gov/blog/archives/1801>.

185. FBI, UCR HANDBOOK, *supra* note 182, at 19.

186. Russo, *supra* note 184.

187. Levine, *supra* note 6, at 364 (“Simply stated, the law’s protection of females and not of males reflects the belief that female sexual morals should be restricted more than male sexual morals. . . . First, the protection of only women legitimates the notion that young women are ‘by nature noble and pure and therefore to be protected from immoral activity.’ According to this model, because young women

to commit sexual crimes, and when they do, it is somehow less offensive.<sup>188</sup> Even more modern legal scholarship, while recognizing the emergence of gender-neutral rape laws, tends to focus on male-perpetrated statutory rape.<sup>189</sup> When literature does consider a male as a victim of sexual abuse, it tends to provide excuses rationalizing such behavior.<sup>190</sup> Indeed, because of traditional cultural norms, women may be less likely to face the same consequences as men who are convicted of statutory rape.<sup>191</sup>

### 3. Public Perceptions Persist That Female Rape of Men Is Not Rape

An attitude persists that rape of heterosexual men is more traumatizing than rape of women or homosexual men. This attitude mainly applies, however, in cases of male-on-male rape. From social science research, it appears that many people view male-on-heterosexual-male rape as more traumatic because it deviates from sex acts that the victim has experienced in the past.<sup>192</sup> Male rape of women or of homosexual men looks more like the consensual acts in which the victims are expected to

are passive and ignorant, they are more vulnerable to emotional, physical, and social harm resulting from sexual intercourse. Secondly, by qualifying only young females for victim status, gendered statutory rape laws presume that minor females, unlike minor males, are incapable of understanding the nature and consequences of sexual intercourse.” (footnotes omitted)).

188. *See id.* (“Gender-based statutory rape laws thus embody and reinforce a stereotypical idea that girls are intellectually deficient and incompetent in a way that boys are not. . . . Boys need no such protection from women. . . . [Y]oung boys are by nature sexual aggressors: males will corrupt and exploit young females unless they are deterred by serious criminal sanctions.” (footnotes omitted)).
189. *Id.* at 368–69 (“[A] review of recent literature about statutory rape reveals that most scholarly writers continue to presume heterosexuality in the caseload, analyzing cases of male perpetrators and girl victims almost entirely to the exclusion of any other sex or age combination.”).
190. *See id.* at 371 (“In fact, some authors seem to assume that the law’s gendered treatment may be justified, as the threat posed by female sexual abuse appears minimal. A 1996 article hypothesizes that it may actually be societally correct for women rarely to be prosecuted for sex with minor males because ‘men and women stand on very different footings with respect to physical and social power.’ An empirical study of child/adult relationships similarly posits that boys may feel less of a threat of physical coercion, which may provide them at least a feeling of more control over their relationships and make them less likely to feel victimized. Indeed, the fact that a woman is simply disproportionately older often does not alone suffice to ‘victimize’ a boy, even if her behavior is egregious.” (footnotes omitted) (quoting Richard Delgado, *Statutory Rape Laws: Does It Make Sense to Enforce Them in an Increasingly Permissive Society? No: Selective Enforcement Targets “Unpopular” Men*, 82 A.B.A. J. 87, 87 (1996))).
191. *See* Carolyn E. Cocca, *Prosecuting Mrs. Robinson? Gender, Sexuality, and Statutory Rape Laws*, 16 MICH. FEMINIST STUD. 61, 62 (2002) (arguing that gender is the “operative category in statutory rape law . . . [where] the older woman perpetrator is more often described as a manipulative or mentally ill seductress while the older man perpetrator is usually likened to an abusive predator” (internal quotation marks omitted)). The unwillingness to view women as sexual criminals can also be attributed to gender stereotypes that characterize women as mothers and nurturers. Levine, *supra* note 6, at 384.
192. *See* Kathy Doherty & Irina Anderson, *Making Sense of Male Rape: Constructions of Gender, Sexuality and Experience of Rape Victims*, 14 J. COMMUNITY & APPLIED SOC. PSYCHOL. 85, 94 (2004).

participate.<sup>193</sup> A gay man or woman likely has already experienced bodily penetration by a penis, which is seen to minimize the trauma of a similar experience that is forced on him or her. Some people express the opinion that male-on-female rape is a heterosexual act, whereas male-on-male rape is a homosexual act.<sup>194</sup> In that manner, they disregard that rape is an act of violence and an expression of one's power over another, viewing it rather as an expression of sexuality, sexual desire, and sexual orientation.<sup>195</sup> When rape is seen as sexual, and more specifically as a sexual act that the victim has already experienced consensually, it is easier to minimize the trauma of rape for those victims who have experienced those sexual acts in the past and to maximize it for those victims who have not. For similar reasons, male victims of female rape are seen as less traumatized than male victims of male rape.<sup>196</sup> Heterosexual men are assumed to have experienced consensual sexual contact with women, similar to the view that homosexual men have experienced sexual contact with men.<sup>197</sup>

#### 4. Males Will Always Want Sex Even When They Are Boys

The reluctance to label female sexual violence against males as rape or assault is also shaped in part by views about dominant male sexuality and passive female sexuality. Sexual crimes committed by women are minimized, partially because they are often seen as sexual in nature, rather than as violent.<sup>198</sup> This is true even when the perpetrating female is much older than the male victim, as in the case of female staff who abuse juveniles in custody. Similarly, men and boys are often seen as less harmed by such an assault again because of its sexual, rather than violent,

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193. *See id.* at 94.

194. *Id.* at 95 (suggesting that male-on-male rape of a heterosexual man can be perceived as a threat to the victim's sexuality).

195. *Id.* at 98 (“[Rape] is constructed and evaluated as, primarily, a sexual act. Consequently, the violent nature of rape remains hidden . . .”).

196. *See Levine, supra* note 6, at 397 (recognizing the common assumption that sexual abuse is not as harmful for males as it is for females); *cf.* Ruth Jones, *Inequality From Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting From Their Victimization?*, 36 GA. L. REV. 411 (2002) (highlighting failure to enforce rape statutes in gender-neutral manner, as males can be required to pay child support for a child born from statutory rape as an example of ways in which we do not take male harm seriously).

197. *See, e.g.,* Doherty & Anderson, *supra* note 192, at 98 (describing a perceived “hierarchy of suffering” that judges rape as more or less traumatic depending on the gender and sexual orientation of the perpetrator and victim).

198. *See, e.g.,* Ronald E. Smith et al., *Social Cognitions About Adult Male Victims of Female Sexual Assault*, 24 J. SEX RES. 101, 110 (1988) (suggesting that male subjects “failed to grasp the assaultive nature of the [female-on-male] rape”).



nature.<sup>199</sup> This is influenced by the attitude that men always desire sex, regardless of circumstances,<sup>200</sup> and that because of the nature of masculinity, even young boys want sex.<sup>201</sup>

Moreover, there is a common belief that men are incapable of performing sexually—becoming aroused—if they do not consent.<sup>202</sup> Research indicates that sexual arousal is both psychological and physiological.<sup>203</sup> Rape victims—both male and female—can become aroused and experience orgasm even when they have been forced to have sex.<sup>204</sup> Rape counseling centers commonly counsel victims that even if they responded physiologically, being forced to have sex against one’s will is rape.<sup>205</sup> Note, however, that few services exist for adult male victims of rape or sexual assault. While there is a robust community of services for women who are sexually assaulted, many of these programs do not provide services for men.<sup>206</sup> In part, that is because the nature of masculinity is such that few men will admit to

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199. *See id.* (suggesting that some male subjects did not appreciate the trauma of male rape victims and instead viewed the victims as lucky for having a sexual encounter).

200. *See* Kristine M. Chapleau et al., *Male Rape Myths: The Role of Gender, Violence, and Sexism*, 23 J. INTERPERSONAL VIOLENCE 600, 603 (2008) (noting the myth that men are always ready to accept sexual opportunity).

201. *See, e.g.,* Levine, *supra* note 6, at 387 (finding that participants in a study believed that a male student would think a sexual encounter with a female teacher was “cool” and would be likely to brag to friends (citing Katherine M. Dollar et al., *Influence of Gender Roles on Perceptions of Teacher/Adolescent Student Sexual Relations*, 50 SEX ROLES 91, 95 (2004)).

202. *See, e.g.,* Michelle Davies, *Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Support Services*, 7 AGGRESSION & VIOLENT BEHAV. 203, 206 (2002) (“It is also difficult to believe that men can become sexually aroused and even ejaculate during a sexual assault, but still report that they did not want the situation to take place, [and] tried to stop it . . .”).

203. *See, e.g.,* Levine, *supra* note 6, at 386 (suggesting that “male sexual responsiveness can be stimulated by fear or anger,” not only by sexual desire); Louise, *Sexual Arousal & Sexual Assault*, PANDORA’S PROJECT (2008), <http://www.pandys.org/articles/arousalandassault.html> (quoting science research about arousal during sexual assault).

204. *See* Louise, *supra* note 203 (“Sexual response in sexual assault is extremely common [and] well-documented. . .”); *Male Rape*, NAT’L CTR. FOR VICTIMS OF CRIME (2008), <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32361> (noting ejaculation among male victims of rape).

205. Louise, *supra* note 203 (citing scientific research suggesting physiological reasons for arousal and suggesting that perpetrators deliberately cause arousal to exercise more control over victims). Unfortunately, there are few services focusing on adult male victims of rape. *See, e.g.,* Davies, *supra* note 202, at 203–04 (suggesting that support services for male victims are twenty years behind those for female victims and noting the scarce research on the particular needs of male victims).

206. *See* Davies, *supra* note 202, at 204; Elizabeth Monk-Turner & David Light, *Male Sexual Assault and Rape: Who Seeks Counseling?*, 22 SEXUAL ABUSE 255, 257 (2010) (finding that only 5 percent of sexual abuse treatment programs were designed to accommodate male survivors of sexual assault).

or report being sexually violated by other men and certainly not by women.<sup>207</sup> The same is true for boys who often experience great shame in admitting their victimization by other boys, men, and women.<sup>208</sup>

### 5. Real Men Don't Get Raped

Views of masculinity also shape opinions about female-on-male rape. A man cannot be a strong, dominant man and a victim at the same time.<sup>209</sup> To be a man, as defined by societal expectations, a male must be able to defend himself against attack.<sup>210</sup> If he is unable to do so, or chooses not to, even as a boy, then he is not a real man. Some might think that if a man has been raped, particularly by a woman, that he must have demonstrated some type of “unmanly weakness to provoke or permit the assault.”<sup>211</sup> In female-on-male sexual assault cases, men are disbelieved, mocked, or thought to have initiated, encouraged, or enjoyed the assault in some manner.<sup>212</sup> This contributes to men’s reluctance to report forced or coerced sex, especially by women. It may also create deep uncertainty among men and boys about whether abuse occurred, which might explain the much lower numbers of men and boys who report sexual abuse.<sup>213</sup> If common perceptions are that men always want sex, from women at least, then men who experience discomfort with coerced or forced sex by women may feel less manly and may not

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207. See Levine, *supra* note 6, at 385 (listing the fear of being disbelieved or ridiculed, the lack of recognition of such experiences as sexually abusive, and the beliefs that males are invulnerable and their bodies “impenetrable” as reasons for this lack of reporting).

208. See *id.* at 402–03 (noting that male victims often feel embarrassment and a sense of emasculation when discussing victimization).

209. See Doherty & Anderson, *supra* note 192, at 99; Levine, *supra* note 6, at 403 (quoting a research subject stating, “[F]or a man to be a victim is an embarrassment . . . . A real man is not a victim, a real man is always in charge, always resists, and is always in control. A man who is a victim is a failure.” (alterations in original) (quoting Myriam S. Denov, *The Long-Term Effects of Child Sexual Abuse by Female Perpetrators: A Qualitative Study of Male and Female Victims*, J. INTERPERSONAL VIOLENCE 1137, 1149 (2004))).

210. See Chapleau et al., *supra* note 200, at 611–12 (suggesting that “benevolent sexism” presents men as invincible, and therefore unable to be victims); Doherty & Anderson, *supra* note 192, at 95 (quoting a participant in a research study who stated, “[P]eople would say, ‘you’re a bloke why couldn’t you fight them off.’”).

211. Chapleau et al., *supra* note 200, at 612.

212. See, e.g., *id.* at 603.

213. See, e.g., Levine, *supra* note 6, at 385 (suggesting that constraints of traditional gender roles prevent men and boys from recognizing their experiences as abuse).

even acknowledge their abuse.<sup>214</sup> For these reasons, society perceives that men are less traumatized than women in similar circumstances,<sup>215</sup> and hence, women perpetrators are perceived as less culpable for the harm.

## 6. Women Face Few Legal Sanctions for Sexual Abuse of Men and Boys

That women are viewed as powerless, and that harm to males is viewed as less serious, also affects how women are treated when they commit offenses. First, female correctional workers who are found to have abused men and boys in custody are rarely prosecuted.<sup>216</sup> Most often, they are permitted to resign—the theory being that the shame is sufficient punishment.<sup>217</sup> While an attractive option, there is no question that male staff are treated differently for perpetrating sexual abuse.<sup>218</sup> When prosecuted, female correctional workers are also more likely to receive fines, probation, and community service.<sup>219</sup> This treatment is also consistent with the prosecution and sanctioning outcomes for female sex offenders more generally. Men who commit sexual offenses are condemned and vilified, while women are excused for similar crimes.<sup>220</sup> Rather than being seen as predatory, they are seen as mentally ill, as responding to their own trauma, or as not responsible for their

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214. See generally Cindy Struckman-Johnson & David Struckman-Johnson, *Men Pressured and Forced Into Sexual Experience*, 23 ARCHIVES SEXUAL BEHAV. 93 (1994) (describing tactics used by men and women to gain sex with male targets and the targets' reluctance to report the abuse for fear of being viewed as less manly or as homosexual).

215. See, e.g., Smith et al., *supra* note 198, at 110; Chapple et al., *supra* note 200, at 603.

216. Teichner, *supra* note 6, at 289 (contrasting rates of prosecution and sentences for male and female correctional staff and noting “fervent prosecution of male staff perpetrators and relatively half-hearted prosecution of female staff perpetrators”).

217. See Brenda V. Smith & Mary E. Pavlik, *Legal Responses to Sexual Violence in Custody: Sex Offender Registration Statutes: Impact on Addressing Sexual Abuse in Custodial Settings* 34 (Project on Addressing Prison Rape White Paper, 2012) (recognizing that investigations into correctional staff misconduct are commonly terminated after a staff person resigns, and no further attempts at prosecution are made).

218. Cf. Randa Embry & Phillip M. Lyons, Jr., *Sex-Based Sentencing: Sentencing Discrepancies Between Male and Female Sex Offenders*, 7 FEMINIST CRIMINOLOGY 146, 158 (2012) (stating that, in general, even taking into account that men offend at higher rates than women, men receive “disproportionately higher sentences for a variety of offenses, including sex offenses”).

219. Teichner, *supra* note 6, at 288–89 (listing some punishments for female offenders as “scolding,” ten days in prison and probation, or probation and a fine and contrasting these punishments with sentences for male offenders, which include months or years of incarceration and registration as sex offenders).

220. See, e.g., *id.*; cf. Susan M. Strickland, *Female Sex Offenders: Exploring Issues of Personality, Trauma, and Cognitive Distortions*, 23 J. INTERPERSONAL VIOLENCE 474 (2008) (focusing on psychological illnesses and histories of trauma or abuse of most female offenders).

actions.<sup>221</sup> In some environments, they are even seen as sexually desirable.<sup>222</sup> Indeed, an industry has developed around finding “hot female sex offenders.”<sup>223</sup> Women’s sexuality is perceived as so weak that even when women are convicted and registered sex offenders, they are seen as desirable. These responses are not routinely available to male sex offenders.

Research on female sex offenders focuses on their own traumatic sexual experiences, mental illnesses, substance abuse, or personality disorders.<sup>224</sup> There is also a significant focus on the relationships often established with their younger victims. Some researchers explore how past trauma affects a person’s ability to form adult relationships and how that may lead to adult women seeking out teenagers whom they see as having similar emotional maturity.<sup>225</sup> Women who have suffered trauma may also feel an ongoing sense of helplessness, and sexual offending may be a method of exercising control over a person to lessen that feeling.<sup>226</sup> Parallel research on male sex offenders emphasizes their impulsivity, their predatory nature, and the need for long-term control and supervision.<sup>227</sup>

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221. Cf. Miriam Wijkman et al., *Women Don’t Do Such Things! Characteristics of Female Sex Offenders and Offender Types*, 22 *SEXUAL ABUSE* 135, 137–38 (2010) (noting high rates of personality disorders, substance abuse problems, and coercion or force by male partners as common among females who abuse children). *But see* Cocca, *supra* note 191, at 75 (contributing Mary Kay LeTourneau’s willingness to describe herself as psychologically unstable to the her quest for a more lenient sentence). LeTourneau has since admitted that she “preferred being in jail and being true to herself, rather than pretending in the sex offender program that she felt remorseful and wanted treatment.” *Id.*
222. *See, e.g.*, COED Staff, *Hot for Teacher: 18 Sexiest Sex Offenders*, COED MAG. (Feb. 26, 2008), <http://coedmagazine.com/2008/02/26/hot-for-teacher-top-18-sexiest-sex-offenders> (focusing on teachers’ relationships with students).
223. *See, e.g., id.* (using the term “lover” to describe the victim of the offense committed); Richard Connelly, *The 10 Hottest Women on the Texas Sex Offenders List*, HOUS. PRESS CRIME BLOG (May 12, 2011, 6:01 AM), [http://blogs.houstonpress.com/hairballs/2011/05/hot\\_female\\_sex\\_offenders.php](http://blogs.houstonpress.com/hairballs/2011/05/hot_female_sex_offenders.php) (listing crime and victim). *But see* Richard Connelly, *The “Hot Sex Offenders” List: An Explanation and Apology*, HOUS. PRESS CRIME BLOG (May 12, 2011, 7:58 PM), [http://blogs.houstonpress.com/hairballs/2011/05/hot\\_sex\\_offenders\\_list.php](http://blogs.houstonpress.com/hairballs/2011/05/hot_sex_offenders_list.php) (published the same date as the original article, offering apologies and claiming the article was an attempt to show how many predators are “normal-looking” people, not the stereotypical sex offender image).
224. *See* Strickland, *supra* note 220, at 476 (noting high rates of childhood abuse, sexual dysfunction, physical and emotional abuse, substance abuse, emotional immaturity, dependency, and anger over unmet needs among female sex offenders).
225. *See id.* at 483–84 (suggesting that lack of guidance, security, and social skills in childhood leaves women unable to form adult relationships, which can lead to social isolation and an inability to form reciprocal relationship with adults).
226. *See id.* at 485.
227. *See, e.g.*, Naomi J. Freeman & Jeffrey C. Sandler, *Female and Male Sex Offenders: A Comparison of Recidivism Patterns and Risk Factors*, 23 *J. INTERPERSONAL VIOLENCE* 1394, 1396 (2008) (suggesting that female offenders pose less danger to the community and are less likely to commit violent offenses than male offenders).

## B. Race, Class, and Social Capital

Feminist and racial theories alone do not provide an adequate representation of how race and gender affect black female correctional workers.<sup>228</sup> Intersectional theory teaches that the intersection of race and gender can further marginalize black women.<sup>229</sup> Competing interests of feminism and antiracism mean that “women of color can be erased by the strategic silences of antiracism and feminism.”<sup>230</sup> For example, it can be difficult for black women to succeed in sex discrimination claims in which white women did not face discrimination and in race discrimination claims in which black women are not allowed to include black men in their suits.<sup>231</sup> The theory behind the intersectionality of race and gender does not necessarily hypothesize that black women are “doubly disadvantaged.” Rather, it takes into account the unique perspective of a woman who is also black; a black woman will experience a situation differently than a white woman or a black man.<sup>232</sup>

### 1. Race, Gender, and Female Correctional Workers

So, as we have seen in the correctional context, all women face discrimination and lack the social capital and organizational power to move through the ranks to higher positions.<sup>233</sup> Because of their gender, they are constructed as less powerful by men in the system—both inmates and staff.<sup>234</sup> Although the combination of race and gender can operate to get women access to more *perceived* power—consider,

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228. Crenshaw, *supra* note 51, at 1252 (“The failure of feminism to interrogate race means that the resistance strategies of feminism will often replicate and reinforce the subordination of people of color, and the failure of antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women.”).

229. *See generally id.* For instance, in the context of domestic violence, feminist activists discouraged releasing statistics about domestic violence for fear that it would be viewed as a “minority problem” and would not warrant the requisite attention from the public. Racial activists also discouraged the release of domestic violence statistics, as it would paint the minority population in an unflattering light. *Id.* at 1252–53.

230. *Id.* at 1253.

231. *See* Crenshaw, *supra* note 56, at 141–48 (examining three cases that show the difficulty black women have had in maintaining class action suits alleging discrimination).

232. *See* Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1468 (1992) (“This dual vulnerability does not simply mean that our burdens are doubled but instead, that the dynamics of racism and sexism intersect in our lives to create experiences that are sometimes unique to us. In other words, our experiences of racism are shaped by our gender, and our experiences of sexism are often shaped by our race.”).

233. *See supra* Parts I and II.

234. *See* Jurik & Halemba, *supra* note 95, at 553.

for example, the strong black woman stereotype<sup>235</sup>—this combination simultaneously disadvantages women through reduced access to positions of power.<sup>236</sup> Professional organizations for correctional workers provide an excellent example of how this operates—if you are a black woman, do you join the Association of Women Executives in Corrections,<sup>237</sup> the National Association of Blacks in Criminal Justice,<sup>238</sup> the American Correctional Association,<sup>239</sup> or all of them? Each has faced criticism for its failure to include black women in the ranks of its leadership; however, black women are not present in these organizations because they are underrepresented in positions of power in corrections relative to white men, white women, and black men.<sup>240</sup>

A recent survey of 850 correctional staff in a Midwest juvenile justice agency illustrates how women's perceptions of their roles within the correctional facility hierarchy prevent them from obtaining leadership roles. On a survey about their perceptions of the agency's culture, black female staff had persistently less favorable perceptions of institutional fairness, coworkers, and leaders relative to white men, white women, and black men.<sup>241</sup> There is abundant support not only in this survey but also in others for the fact that black women are particularly underrepresented in correctional leadership because of perceptions based on inherent sexual discrimination.<sup>242</sup>

## 2. Race, Class, and Female Correctional Workers

Yet, there is also an intersection of race and class underlying the experiences of correctional officers and inmates. The race-and-class explanation is that,

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235. Mary McRae, *How Do I Talk to You, My White Sister?* (Ctr. for Gender in Orgs. Commentaries No. 2, 2004), available at [https://www.simmons.edu/som/docs/centers/commentaries\\_2.pdf](https://www.simmons.edu/som/docs/centers/commentaries_2.pdf) ("Black women[s] internalized perceptions of themselves as strong, assertive, and nurturing [make it] difficult to identify with a sense of powerlessness and vulnerability.").

236. See Jurik & Halemba, *supra* note 95, at 555.

237. See ASS'N OF WOMEN EXECUTIVES IN CORRECTIONS, <http://www.awec.us> (last visited July 15, 2012).

238. See NAT'L ASS'N OF BLACKS IN CRIM. JUST., <http://nabcj.org> (last visited July 15, 2012).

239. See AM. CORRECTIONAL ASS'N, <http://www.aca.org> (last visited July 15, 2012).

240. BRITTON, *supra* note 17, at 167.

241. See Dan Lucas, Building Staff and Youth Capacity to Address Sexual Violence Against Youth in Custody Project, Organizational Climate Survey Analysis Report of Midwestern Juvenile Justice Agency (Dec. 2011) (unpublished manuscript) (on file with author).

242. See Maghan & McLeish-Blackwell, *supra* note 72, at 83 (describing how the pervasive gender discrimination that women have come to expect can color the perception that black female correctional officers have of their roles within correctional facilities).

overwhelmingly, people in custody lack social and other capital.<sup>243</sup> Adequate capital, either political or financial, decreases the likelihood that you will be imprisoned.<sup>244</sup> For that reason, poor people and people of color find themselves in custody in circumstances under which wealthy or white people may not have been incarcerated.<sup>245</sup> This results in large numbers of men of color in custody<sup>246</sup> because women of any race or ethnicity are less likely than men to be imprisoned.<sup>247</sup> In addition, because of restrictions based on ex-offenders for employment in law enforcement, corrections, and the military,<sup>248</sup> women increasingly compose the staff in men's facilities.<sup>249</sup> Because of their ability to supervise both men and women, women—in particular black women—enter corrections both from a place of

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243. See Dina A. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 *CRIMINOLOGY* 441, 454 (1998) (“Social capital is the essence of social control for it is the very force collectives draw upon to enforce order. . . . Disorganized communities, then, suffer from crime and other negative conditions partly because they have insufficient supplies of social capital.”).
244. See THOMAS P. BONCZAR & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, NCJ 160092, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON (1997). For some high-profile examples of famous, well-connected people receiving lenient sentences for their crimes, see Alexei Barrionuevo, *Enron’s Skilling Is Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006, <http://www.nytimes.com/2006/10/24/business/24enron.html>; Kurt Eichenwald, *THE MILKEN SENTENCE; Milken Gets 10 Years for Wall St. Crimes*, N.Y. TIMES, Nov. 22, 1990, <http://www.nytimes.com/1990/11/22/business/the-milken-sentence-milken-gets-10-years-for-wall-st-crimes.html>; Brooke A. Masters, *Martha Stewart Sentenced to 5 Months in Prison*, WASH. POST, July 16, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A54591-2004Jul16.html>.
245. See BONCZAR & BECK, *supra* note 244.
246. See ALEXANDER, *supra* note 85, at 48, 50 (linking the increase in unemployment and lack of education for all people, especially in African American communities, to the increased incentives to sell drugs during an era in which political actors were using fears of crime to increase federal power in areas traditionally under the jurisdiction of local and state police forces).
247. BONCZAR & BECK, *supra* note 244, at 1; see also Steven Greenhouse, *HOME FRONT; Economic Slump Hits Men the Hardest*, N.Y. TIMES, July 13, 2003, <http://www.nytimes.com/2003/07/13/jobs/home-front-economic-slump-hits-men-the-hardest.html> (explaining that men are more likely to be unemployed or underemployed than women, particularly because of disparities in education and downsizing in industries that disproportionately hire men). Given the connection between lack of economic opportunity and incarceration, men are more at risk for incarceration than women.
248. See 10 U.S.C. § 504(2) (2006) (disqualifying any person who is a convicted felon from enlisting in any branch of the armed forces); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT*, *supra* note 63, at 16, 24 (stating that it is harder for individuals convicted of criminal offenses to find work); *Eligibility and Pre-Employment Statements*, FED. BUREAU PRISONS, <http://www.bop.gov/jobs/eligibility/index.jsp> (last visited July 15, 2012) (listing satisfactory completion of a background check, which includes a criminal record check and inquiries to previous employers, as a prerequisite to employment); *What to Expect After You Apply*, DEP’T HOMELAND SECURITY, [http://www.dhs.gov/xabout/careers/gc\\_1292340000847.shtm](http://www.dhs.gov/xabout/careers/gc_1292340000847.shtm) (last visited July 15, 2012) (requiring all employees, including Federal Protective Service employees, to receive a security clearance, which requires satisfactory completion of criminal background check).
249. See Hauser, *supra* note 84.

vulnerability and from a place of opportunity. While they may have to work because they are single heads of households,<sup>250</sup> they have access to a greater range of opportunities than men in corrections environments. Consequently, women of the same class and race are guarding their male counterparts. This presents a situation that is ripe for exploitation on both sides.

Until the 1970s there were roughly 110 prison inmates for every 100,000 people.<sup>251</sup> The 1990s saw an increase in this figure to 445 per 100,000.<sup>252</sup> Among adult men, that figure now reaches nearly 943 per 100,000.<sup>253</sup> At all times, black men and women have been overrepresented in these numbers. Currently, there are 1.6 million individuals in prison in the United States, roughly the combined populations of Atlanta, St. Louis, Pittsburgh, Des Moines, and Miami. Currently, 4749 men for every 100,000 African American men are in prison.<sup>254</sup>

Since the early 1980s, over a thousand new prisons and jails have been built in the United States.<sup>255</sup> With the prison population increasing at such astronomical rates, however, America's prisons are incredibly overcrowded.<sup>256</sup> This increase in the prison population has had ill effects for the employees who supervise incarcerated people and for the inmates themselves. Prison gangs have grown in size, power, and dangerousness, resulting in race wars and riots that put both prisoners and correctional staff in danger.<sup>257</sup> Overcrowding has created higher rates of aggression, increased the prevalence of random acts of violence, caused higher rates of stress-induced mental disorders for both staff and inmates, and resulted in death and injury for inmates.<sup>258</sup>

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250. See BRITTON, *supra* note 17, at 90 (confirming that many women who choose corrections work are single mothers).

251. Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC, Dec. 1998, <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/4669>.

252. *Id.*

253. GUERINO ET AL., *supra* note 59, at 4.

254. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, NCJ 230113, PRISON INMATES AT MIDYEAR 2009, at 21 tbl.18 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>. In 2009, approximately one in every three hundred African American females was held in custody. *Id.*

255. See Schlosser, *supra* note 251.

256. This overcrowding has reached such high levels in California—the state that has not only the largest but also the most overcrowded prison system in the United States—that the U.S. Supreme Court recently upheld a decision requiring the transfer or release of thousands of state prisoners. See *Brown v. Plata*, 131 S. Ct. 1910 (2010).

257. See Schlosser, *supra* note 251; see also GERALD GAES ET AL., THE INFLUENCE OF PRISON GANG AFFILIATION ON VIOLENCE AND OTHER PRISON MISCONDUCT 1, 9–10 (2001), [http://www.bop.gov/news/research\\_projects/published\\_reports/cond\\_envir/oreprcrim\\_2br.pdf](http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprcrim_2br.pdf) (describing prison gangs' acts of violence and threats of violence toward staff and other inmates).

258. See PRISON VALLEY (Association Relative à la Télévision Européenne 2010); see also EVE GOLDBERG & LINDA EVANS, THE PRISON INDUSTRIAL COMPLEX AND THE GLOBAL ECONOMY 6–7



Some have blamed this growth in the prison population on the growth of the prison–industrial complex, which is characterized by the “confluence of special interests that has given prison construction in the United States a seemingly unstoppable momentum.”<sup>259</sup> Politicians—liberal and conservative alike—have used the fear of crime to gain votes and used the building of prisons to produce economic development in rural communities.<sup>260</sup>

At first blush, the link between the growth in the prison–industrial complex and the rise in cases of female staff sexual misconduct could be viewed as a mere numbers game—more prisoners equals more prisons, which in turn results in more staff, of which females are a growing denomination. This, of course, cannot account for the disparity between the percentages of female employees alleged and found to be involved with sexual abuse of men and boys in custody. That is not to say that the numbers do not bear weight in relation to the increase in sexual misconduct, but merely that the racial and social impact of the prison–industrial complex work in conjunction with the increased number of correctional staff and prisoners to produce an atmosphere that fosters sexual misconduct by female staff.

While many theorists have documented the effects of mass incarceration on those imprisoned and those facing the likelihood of imprisonment<sup>261</sup> few have directly looked at the results of mass incarceration on the workers who have come to fill the positions created by such growth in the prisoner population.<sup>262</sup> Because there has been such an increase in these types of jobs with the growth of the prison population, many blue-collar employees view a career in corrections as a stable, well-paying option when there are few or no other alternatives.<sup>263</sup> These dangerous, high-stress jobs are staffed by employees who can begin to feel as isolated as the prisoners that they supervise.<sup>264</sup>

Another feature of the prison–industrial complex is that correctional institutions are generally staffed by individuals who come from similar, if not the same,

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(1998) (noting that by allowing private companies to capitalize on the growth of the prison population, “[s]ubstandard diets, extreme overcrowding, and abuse by poorly trained personnel . . . can be expected in these institutions which are unabashedly about making money”).

259. Schlosser, *supra* note 251.

260. Editorial, *Alabama's White Elephant*, N.Y. TIMES, Jun. 24, 2012, at SR12 (noting how Alabama Senator Richard Shelby justified the construction of a new federal prison in Alabama based on need for economic development and jobs).

261. See generally ALEXANDER, *supra* note 85; INVISIBLE PUNISHMENT, *supra* note 63.

262. See, e.g., Tracy Huling, *Building a Prison Economy in Rural America*, in INVISIBLE PUNISHMENT, *supra* note 63, at 197, 201 (investigating the distribution of employment opportunities created by prison development projects).

263. PRISON VALLEY, *supra* note 258; see Huling, *supra* note 262, at 200–01.

264. PRISON VALLEY, *supra* note 258; see Huling, *supra* note 262, at 201.

economic and social backgrounds as those they are supervising.<sup>265</sup> The growth of the prisoner population has led to the growth of rural prison towns whose entire economy relies upon the existence of one or more prisons.<sup>266</sup> Shared backgrounds can enhance correctional staff's ability to relate to the incarcerated individuals they supervise, which can be beneficial for rehabilitation purposes.<sup>267</sup> But these shared backgrounds can also lead to inappropriate interactions. For example, many female correctional officers come from environments that are not very different from those in which many of the inmates they supervise grew up.<sup>268</sup> As more people are incarcerated, correctional staff may more frequently encounter family members who are imprisoned and may more often come into contact with inmates whom they recognize from the community. The New York Times covered one such example of this when it reported an interview with a female correctional officer at Rikers Island who stated that she had "recognized inmates from her own neighborhood, including an old acquaintance who dared to call her by her first name. She arranged for the inmate to be transferred to another jail."<sup>269</sup> For this officer, past acquaintance did not trump her duties: "All right, you did what you did, but I do what I do. You're going to respect my position. If we passed sugar over the fence, there's no more passing sugar over the fence. You got to go! This is my space now."<sup>270</sup>

But for every female correctional officer who responds in this way, there are others who form alliances with inmates to gain protection from other inmates and staff or because of sexual attraction. Another New York female correctional officer was fired for undue familiarity with an inmate in 2004 and has gone on to pen a novel entitled *Taboo* about the "out-of-control sex scene" at Rikers Island.<sup>271</sup> One reviewer described this book as follows:

Though she claims she never had sex at work, Dickinson, 41, admits that she met a Rikers inmate on her watch, a gang member from her neighborhood who had admitted to killing a rapist.

"People looked up to him for that. He said he did the world a favor," she said.

She says her soft spot for him developed after he defended her honor behind bars by beating up another inmate who groped her.

"It made me look at him differently," she said.

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265. See *supra* note 84.

266. PRISON VALLEY, *supra* note 258; see Huling, *supra* note 262, at 201.

267. Hauser, *supra* note 84.

268. See *supra* note 84.

269. Hauser, *supra* note 84.

270. *Id.*

271. See YOSHE, TABOO (2011).

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She was fired for “undue familiarity” in 2004 after an inmate called her from Rikers . . . .<sup>272</sup>

Thus, shared history and backgrounds, alliances for protection, and attraction can break down barriers between female correctional workers and the men they supervise.

#### IV. SEX, DESIRE, AND TRANSGRESSION

A possible explanation for female staff’s sexual interactions with men and boys is that these interactions are based on sexual desire.<sup>273</sup> While an uncomfortable position to take, we cannot discount that female staff and the men and boys with whom they have sex may share an attraction that transcends their respective roles.

Having framed sex for women as a place of subordination and danger, dominance feminist discourse<sup>274</sup> leaves little room for women to explore their sexuality as a site for pleasure and transgression.<sup>275</sup> Rejecting the idea of dominance feminism, other feminist discourses sometimes call for women to look beyond the traditionally oppressive view of sex and to explore pleasure and sexuality.<sup>276</sup> When women are able to move past the theories of oppression and dominance, “[a] transgressive, exploratory sexual life might, finally, constitute a form of resistance itself, permitting women to experience pleasures that were sanctioned or proscribed under patriarchal social norms.”<sup>277</sup> Commentators have noted that this branch of feminist thought has not gained much traction because giving women access to pleasure seems less important than other feminist commitments, like ending violence

272. Brad Hamilton, *Ex-guard Tells of Inmate Lovin’ at Rikers*, N.Y. POST, Mar. 20, 2011, [http://www.nypost.com/p/news/local/it\\_sex\\_cells\\_at\\_racy\\_rikers\\_YIRERnv604nc91QeTCIQTO](http://www.nypost.com/p/news/local/it_sex_cells_at_racy_rikers_YIRERnv604nc91QeTCIQTO).

273. See generally Carole S. Vance, *Pleasure and Danger: Towards a Politics of Sexuality*, in PLEASURE AND DANGER: TOWARDS A POLITICS OF SEXUALITY 1 (Carole S. Vance ed., Pandora Press 1992) (1984) (putting forth the idea of a positive theory of sexuality for women, in which women act on sexual desires).

274. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304 n.1 (1995) (invoking the term “dominance feminism” to describe “feminists who have worked to raise consciousness about male sexualization of, and aggression against, women”).

275. See Franke, *supra* note 168, at 200 (“The overwhelming attention we have devoted to prohibitions against bad or dangerous sex has obscured, if not eliminated, a category of desires and pleasures in which women might actually want to indulge.”).

276. See Abrams, *supra* note 274, at 305 (“[Some sex radicals argue] that depictions of women as sexually subordinated encourage a wounded passivity on the part of women and a repressive regulatory urge on the part of state authorities. They have argued for a greater emphasis on women’s agency: a program directed not toward the transgressive self-exploration of the sex wars writers, but toward exploiting the sexual, economic, and political power these writers claim women already possess.”).

277. *Id.* at 312.

against women, increasing women's access to reproductive choices, and increasing their economic opportunities.<sup>278</sup> While those commitments are important, however, so are pleasure, desire, sex, curiosity, and transgression.<sup>279</sup>

Feminist theories offer differing explanations for the motivations of women who engage in sexual behavior.<sup>280</sup> For dominance feminism, the inseparable relationship between sex and power makes it impossible for a woman to exert sexual power over a man.<sup>281</sup> Moreover, in traditional dominance feminist discourse, female correctional workers' intimacy with prisoners does not register as rape, even if the intimacy would be legally constructed that way.<sup>282</sup> Female desire is a socially constructed concept centered on the domination of females; in essence, females begin to desire being dominated.<sup>283</sup> Female sexual pleasure is derived from subordination, while male pleasure is derived from power.<sup>284</sup> For dominance feminists, even sadomasochism is male dominated, despite its outward appearance.<sup>285</sup> Thus, a dominance

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278. See, e.g., *id.* at 315 ("Unlike equality/difference theory, [sex radicals' analysis] has not generated a framework for legal analysis, and unlike dominance theory, it has not introduced an influential account of gender injury or the female legal subject." (footnote omitted)). Additionally, the sex radicals do not provide guidance on how to address abusive sexual interactions initiated by female staff, especially those involving boys in custody.

279. See Franke, *supra* note 168, at 200 (advocating for the need to add desire to the current discourse on female sexuality).

280. Radical feminism emerged as a push-back on dominance feminism, focusing on women's sexuality and pleasure as an explanation for female sexual behavior. See Abrams, *supra* note 274, at 310. Queer theorists, in contrast, focus on the potential to act outside of one's assigned gender role—rather than a strict adherence to gender-conforming behaviors—as an explanation for sexual behavior. See Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 445 (2005).

281. MACKINNON, *supra* note 166, at 3 ("[T]he social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual—in fact, is sex.").

282. See MACKINNON, *supra* note 163, at 178 ("[R]ape is a man's act, whether it is a male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman's experience, whether it is a female or a male woman and whether it is a woman relatively permanently or relatively temporarily.' To be rapable, a position that is social not biological, defines what a woman is." (quoting Carolyn M. Shafer & Marilyn Frye, *Rape and Respect*, in FEMINISM AND PHILOSOPHY 333, 334 (Mary Vetterling-Braggin et al. eds, 1977))).

283. See MACKINNON, *supra* note 166, at 54 ("[S]exual desire in women . . . is socially constructed as that by which we come to want our own self-annihilation. That is, our subordination is eroticized in and as female; in fact, we get off on it to a degree . . .").

284. See *id.* at 6–7 ("Aggression against those with less power is experienced as sexual pleasure, an entitlement of masculinity. For the female, subordination is sexualized, in the way that dominance is for the male, as pleasure as well as gender identity, as femininity."); *supra* note 236. But see Crenshaw, *supra* note 56, at 155 ("But this 'observation' overlooks the anomalies created by crosscurrents of racism and sexism. Black men and women live in a society that creates sex-based norms and expectations which racism operates simultaneously to deny; Black men are not viewed as powerful, nor are Black women seen as passive.").

285. See MACKINNON, *supra* note 163, at 142 ("The relational dynamics of sadomasochism do not even negate the paradigm of male dominance, but conform precisely to it . . .").

feminism explanation for female correctional workers sexual interaction with male inmates cannot involve any kind of female sexual desire other than the desire to be dominated.

Sex radical literature, which first appeared in the early 1980s,<sup>286</sup> opened the door to the possibility of female desire and sexual pleasure. Finding dominance feminists' discussion of female sexuality in terms of either dependency or danger to be unnecessarily limiting, sex radicals emphasize the potential for female desire and pleasure.<sup>287</sup> For sex radicals, rather than acting out a dominance-oriented scenario, female correctional workers are instead embracing the potential for sex and pleasure of their own, notwithstanding that the object of their desire is under their authority.<sup>288</sup> Indeed, the fact that these men and boys are under their authority may bring its own pleasure. The fact that the desire, as well as acting on that desire, is transgressive with men and boys who have themselves transgressed is part of the allure.<sup>289</sup> Katherine Franke sums it up well:

Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation. It is also what makes pleasure, not a contradiction of or haven from danger, but rather a close relation. These aspects of desire have been marginalized, if not vanquished, from feminist legal theorizing about women's sexuality.<sup>290</sup>

Therefore, sex radicals offer a more persuasive explanation for female correctional workers' sexual interactions with men and boys in custody. It is simply desire—unmodified, uncensored, and unexplainable. Rather than deny the relationship between female desire and transgression, sex radicals argue that feminism should acknowledge that relationship and articulate a place for it.<sup>291</sup>

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286. See Abrams, *supra* note 274, at 315.

287. See Vance, *supra* note 273, at 7 (“[T]he overemphasis on danger runs the risk of making speech about sexual pleasure taboo.”).

288. See *id.* at 1 (“For some, the dangers of sexuality . . . make the pleasures pale by comparison. For others, the positive possibilities of sexuality . . . are not only worthwhile but provide sustaining energy. Nor are these positions fixed, since a woman might chose one perspective or the other at different points in her life in response to external and internal events.”).

289. See *id.* at 7 (“If women increasingly view themselves entirely as victims through the lens of the oppressor and allow themselves to be viewed that way by others, they become enfeebled and miserable.”).

290. Franke, *supra* note 168, at 207.

291. See *id.*

Still, other feminists believe that feminism does not, or should not, have an explanation for all of women's endeavors. While there is something appealing in "taking a break from feminism,"<sup>292</sup> though, it seems to me that taking a break in this instance leaves an institution and groups of women—low-income women and women of color—bereft and outside the ambit of being worthy of the time, energy, and attention that a strong feminist discourse might illuminate.

Queer theory may help fill the gap left by the dominance and sex radical theorists. Queer theory recognizes that gender roles have the capacity to be flipped and therefore focuses on gender constructs rather than actual differences between the sexes. Under queer theory, the power in a sexual relationship is fluid; women can play the role of sexual aggressors while men can be submissive partners or vice versa.<sup>293</sup>

Queer theorists acknowledge that the roles of top and bottom have their own power and pleasure. In custodial settings, female correctional workers are on top with men in custody because of their position of power and because they are the only real women (gender conforming) in this single-sex environment.<sup>294</sup> They are also on top because they have the power of leaving and returning to the community each day, while male inmates have limited freedom. Female correctional officers also have the power to make the corrections environment easier for men by giving them access to goods and services—food, clothing, phone calls—that are denied other inmates. Finally, they also have the power to provide real sex (sex with a woman from a heteronormative perspective), a commodity in short supply in custody.

At the same time, men and boys in custody have power even on the bottom. The power that female correctional workers wield is tempered by the power they have ceded by breaking institutional rules and policies and state and federal laws.<sup>295</sup> Male inmates also have the power because there may be competition for their

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292. See generally HALLEY, *supra* note 170 (arguing that rather than strict adherence to a single theory of feminism, promoting critiques and various theories outside of feminism are of more value in tackling political and social issues).

293. See Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 445 (2005) ("So long as these eroticized roles—*butch*, *femme*, *top*, *bottom*, *dominator/trix*, *submissive*, *master*, *slave*, etc., etc., etc.—are subject to reversal, or are the product of free play, or are the product of desire rather than social construct, they are hardly something to worry over. Rather, they are something to embrace.")

294. See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 17 (2011) ("Prisoners who are weak and defenseless are vulnerable to rape and other forms of sexual victimization, not merely because of their weakness, but because they are regarded as available for emasculation—or, in prison parlance, for being 'turned out'—and, thus, transformed into women for purposes of life in the prison.")

295. See Teichner, *supra* note 6, at 268–69 (outlining the punishment regime for correctional staff caught engaging in sexual acts with prisoners and noting that twenty-five states and federal law do not allow the defense of consent for staff sexual misconduct with inmates).

attentions from other female staff.<sup>296</sup> According to one female officer, “There are a lot of lonely single women on the job, and you’re surrounded by these cute guys. They’re working out. They’re attractive”<sup>297</sup> and attentive.<sup>298</sup> For many female correctional workers, these relationships may be particularly desirable because they combine the work they must do with a relationship that has eluded them in the community.<sup>299</sup> For many women, they may be able to get a sexual upgrade and gain access to men they would never have access to in the community—the attractive but dangerous men who would never have had time for them or have been attracted to them outside the correctional setting.<sup>300</sup> The combination of access to sex, desire, and the transgressive nature of having sex with men and boys in custody may be inexplicable for most individuals who do not work in correctional or other settings of total control, but it may have a powerful allure to those who are similarly enmeshed in those systems as workers.<sup>301</sup>

At issue in theorizing sexual interactions between female staff and men and boys in custody is whether those individual interests matter when women represent the state. I have taken the position previously that it does matter—that as a policy matter the state cannot condone sexual relationships between staff and inmates even though inmates may have their own interests in those sexual interactions.<sup>302</sup> I continue to hold that position, but will not return to that subject here, as it is the appropriate position given the power that accompanies correctional officers’ position and the power of the state. I acknowledge, however, the complexity of these interactions, especially when female staff, particularly black female correctional workers, are at the junction of competing social and political forces—feminisms, racism, and the prison–industrial complex. Those concerned with gender and racial equality see female staff as evidence of the success of their efforts to open the workforce to women and people of color. For correctional authorities, they serve the important purpose of providing supervision with the maximum efficiency. They also further

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296. See Hamilton, *supra* note 272.

297. *Id.*

298. See Amy Friedman, *Kept Together by the Bars Between Us*, N.Y. TIMES, Feb. 13, 2009, <http://www.nytimes.com/2009/02/15/fashion/15love.html> (recalling the particular attention an inmate paid to her).

299. BRITTON, *supra* note 17, at 89–90 (highlighting the motivations for taking work as a corrections officer, namely financial circumstances created by divorce).

300. See Friedman, *supra* note 298 (chronicling the relationship of a female reporter and inmate who began their relationship during prison visits).

301. Cf. FOUCAULT, *supra* note 46 (theorizing about the ultimate power and control in the hands of prison workers and the corruptive and seductive influence of that power).

302. See Smith, *Rethinking*, *supra* note 1, at 201–02.

the interests of the prison–industrial complex by providing a ready workforce that also legitimates its existence.

### CONCLUSION: WHAT WOULD A GOOD FEMINIST DO?

I ask what would a good feminist do, but as described above, feminists overall, no matter the ideology, have devoted very little time to imagining or theorizing women in transgressive spaces, except as it relates to their sexuality.<sup>303</sup> It is as if, even now, to be worthy women must be blameless and their narratives must be uncomplicated.<sup>304</sup> Just as nineteenth-century narratives that supported female matrons' employment required women to be without sexual desires or interests, the discussion of female correctional officers' sexual interactions with men and boys in custody refuses to acknowledge that complex sets of factors—including desires for power, strategic advantage, and sexual pleasure—probably all figure into explanations of the phenomena and the identification of paths forward in addressing it. Yet, I have aspirational hopes for feminism, especially given its attention to narratives of power. This Article is also a nudge to feminism to step outside its comfort zone and look at challenging situations and challenging women; it is a call to look both at the intersection of race and class and at the gaps in theory, such as how to address situations where women in institutions of control like law enforcement, military, and prisons abuse power and position.<sup>305</sup>

Female workers are as culpable as their male counterparts when they have sexual interactions with persons in custody—male and female, adult and juvenile.<sup>306</sup> At the same time, there may be differences between sexual interactions between female staff and female inmates and between female inmates and male staff—the former

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303. See *infra* Part IV.

304. Cf. Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 77 (2008) (positing that in the context of domestic violence adjudications, the legal system is less likely to treat a battered woman who fights back against her aggressor as a victim).

305. See Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. (forthcoming 2012) (arguing that feminism can help to examine the role of U.S. military women who torture and abuse Muslim men); see also *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Judgement and Sentence (Int'l Crim. Trib. for Rwanda June 24, 2011), available at <http://www.unictr.org/Cases/tabid/127/PID/83/default.aspx?id=4&cmnid=3> (convicting Rwandan woman of inciting troops to rape women during the 1994 Rwandan Genocide).

306. See NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (2009), available at <http://www.wcl.american.edu/endsilence/documents/50StateSurveyofSSMLawsFINAL2009Update.pdf>; see also *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855 (W.D. Mich. 2000) (allowing plaintiffs' claim that female officers viewed prisoners naked to proceed).



more egalitarian, less coercive, and less violent and the latter more immersed in love, fear, and retaliation. Some male inmates may not feel the same sense of investment in, or fear of, the sexual interactions they have with female staff. They may see the interactions as useful, convenient, or required, but when confronted with discovery they are more than willing to give up the female staff member. And if that female staff member is perceived as less powerful—by virtue of gender, her status in the institution, or class—then there is even less fear of the consequences of disclosure.<sup>307</sup>

The residue of women's contested entry into corrections—much like the military and law enforcement—is that they are not “one of the boys.”<sup>308</sup> They do not have the same systems of protection and patronage that often exist for male staff.<sup>309</sup> They may fear both their coworkers and the inmates and as a result may overidentify with male staff to become part of the group and engage in harmful or abusive conduct themselves.<sup>310</sup> Alternatively, they may align with male inmates, whom they perceive as less powerful and therefore allies, for protection from other inmates and from male staff.<sup>311</sup> Finally, they may claim the privilege of their position, race, or class to exert power over others who do not possess similar privilege.<sup>312</sup>

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307. See, e.g., *Riley v. Olk-Long*, 282 F.3d 592, 593 (8th Cir. 2002) (recounting a story of an inmate who did not report sexual harassment and abuse that occurred in prison for fear of discipline).
308. See Ahmed, *supra* note 305, at 16 (offering insight into the fight for women's inclusion and equality in the military and the unexpected result of female-perpetrated sexual abuse against male prisoners); Mary Anne Case, Address at Univ. of Chi.: “You're Telling Me It's Wrong to Do to the Prisoners What the Army Does to Its Own Soldiers?,” (Apr. 13, 2011), <http://www.law.uchicago.edu/audio/case041311> (discussing the interrogation technique of employing gender constructs to feminize prisoners and its negative impact on gender equality); Mary Anne Case et al., *Gender Performance Requirements of the U.S. Military in the War on Islamic Terrorism as Violence By and Against Women*, in PROCEEDINGS OF THE 102D ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 270 (2008).
309. See BRITTON, *supra* note 17, at 175 (discussing the inherent sexism in correctional work due to the social norm of men as protectors and noting that after being told by a male officer that he would never assign her to a dangerous position, one woman responded, “I think that's so sweet! I think it's so sexist, but I mean, I appreciate it!”).
310. See *id.* at 181 (explaining that the fear of being thought to be sexually involved with an inmate drives female correctional officers to be tougher on inmates so coworkers and supervisors do not make accusations of favoritism based on a sexual relationship).
311. YOSHE, *supra* note 271.
312. See, e.g., Philip Zimbardo, *Slide Tour*, STANFORD PRISON EXPERIMENT, <http://www.prisonexp.org/psychology/1> (last visited July 15, 2012). Philip Zimbardo ended the Stanford Prison Experiment after only five days when the guards, given positions of power, began to act sadistically, and prisoners began to exhibit evidence of severe emotional stress. Both prisoners and guards were young, middle-class men who volunteered to participate in the prison simulation experiment. See also A CLASS DIVIDED (Frontline 1985), available at <http://www.pbs.org/wgbh/pages/frontline/shows/divided> (describing the results of Jane Elliot's experiment in which a homogenous group of white children was told that

At the same time, we cannot rule out female sexual attraction and desire as part of the explanation for prison sex that female correctional officers have with those in their custody. While all agency policies prohibit sexual contact of any kind between inmates and staff, both in the facility<sup>313</sup> and often even after inmates are released to the community,<sup>314</sup> female staff and male inmates continue to form relationships. Statistically, individuals often find sexual partners and mates in their work environments.<sup>315</sup> Problems exist, however, when the work environment prohibits those relationships and when the work environment and the employee are representatives of the state.<sup>316</sup> Given what we know of the demographics of imprisonment and employment in correctional agencies, the impact on female correctional staff—particularly black female correctional workers—is significant.

Finally, what is the appropriate response? Obviously, female staff should be prosecuted if their conduct is criminal. Thus far, research has shown allegations of sexual abuse are rarely prosecuted.<sup>317</sup> There are several reasons for the low prosecution numbers. First, like sexual assault in the community, there is significant

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one group had brown eyes and one group had blue eyes, resulting in acts of violence and subordination depending on the group whose eye color correlated to a position of power).

313. See, e.g., MICH. DEP'T OF CORR., POLICY DIRECTIVE: PROHIBITED SEXUAL CONDUCT INVOLVING PRISONERS (2010), available at [http://www.michigan.gov/documents/corrections/03\\_03\\_140\\_342175\\_7.pdf](http://www.michigan.gov/documents/corrections/03_03_140_342175_7.pdf) (“Staff sexual harassment/sexual misconduct and staff overfamiliarity are violations of Department work rules . . .”); COMMONWEALTH OF PA. DEP'T OF CORR., CODE OF ETHICS 6 (1995), available at [http://www.pscpa.org/wp-content/uploads/PA\\_DOC\\_Code\\_of\\_Ethics\\_DC-174.pdf](http://www.pscpa.org/wp-content/uploads/PA_DOC_Code_of_Ethics_DC-174.pdf) (“There shall be no fraternization or private relationship of staff with inmates, parolees, or members of their families.”).
314. See SUSAN D. CARLE ET AL., NAT'L INST. OF CORR., LABOR AND EMPLOYMENT LAW: TOOLS FOR PREVENTION, INVESTIGATION AND DISCIPLINE OF STAFF SEXUAL MISCONDUCT IN CUSTODIAL SETTINGS 10 (2009), available at <http://www.magnetmail.net/images/clients/ICCA/attach/LaborandEmploymentLawFINALOctober2009.pdf> (noting that many corrections departments have instituted rules that prohibit employees from having contact with those they formerly supervised); Memorandum From the NIC/WCL Project on Addressing Prison Rape on Policies Prohibiting Staff-Felon Relationships in Oregon: Relevant Case Law (Jan. 27, 2006) (on file with author) (summarizing cases on the authority of courts to limit relationships between staff and inmates and finding that the majority of cases involved female staff and male inmates).
315. See Anna C. Camp, *Cutting Cupid Out of the Workplace: The Capacity of Employees' Constitutional Privacy Rights to Constrain Employers' Attempts to Limit Off-Duty Intimate Associations*, 32 HASTINGS COMM. & ENT. L.J. 427, 430–31 (2010) (recognizing that many romantic relationships begin in the workplace).
316. See *Smith v. Cochran*, 339 F.3d 1205 (10th Cir. 2003) (upholding denial of summary judgment where a state employee who acted as a supervisor for a prisoner in a work release program was accused of sexual assault); *Akers v. McGinnis*, 352 F.3d 1030, 1037 (6th Cir. 2003) (upholding a Michigan Department of Corrections policy that barred all employees from any non-work related contact with prisoners, parolees, probationers, their relatives, and visitors).
317. See Brenda V. Smith & Jaime M. Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perceptions*, AM. U. CRIM. LAW BRIEF, Spring 2008, at 19.

underreporting.<sup>318</sup> Even those incidents that are reported rarely move beyond the investigation stage.<sup>319</sup> Poor grievance procedures, fears of retaliation, and poor investigations siphon off even more complaints.<sup>320</sup> Even when incidents are substantiated, prosecutors are reluctant to take the case—again for a variety of reasons: lack of jury appeal, credibility issues of the victim, and the cost of prosecution.<sup>321</sup> In those instances in which the cases are accepted for prosecution, women are treated more leniently than male staff.<sup>322</sup> Female correctional workers are prosecuted for or plead to less serious offenses than what is warranted by the behaviors alleged and often receive community service, probation, and fines, while men often receive significant prison sentences and sex offender registration.<sup>323</sup> Often, women are only prosecuted if they have committed sexual offenses that involve not only sex but some other major rule violation, like helping a prisoner escape<sup>324</sup> or providing contraband.<sup>325</sup> Finally, there is not a comprehensive system to identify staff who either have resigned or have been terminated for sexual abuse of persons in custody, so often these officers obtain jobs in other custodial settings with prisoners, youth, and other vulnerable populations.<sup>326</sup>

Given that the prospect for prosecution in these cases is small, preventive measures are critical. Many of these preventive measures are outlined in the report of the National Prison Rape Elimination Commission,<sup>327</sup> which was issued on June 23, 2009 along with proposed standards for preventing, reducing, and prosecuting

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318. See NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 39 (2009) (recognizing the potential for underreporting in prison sexual abuse and harassment due to concerns about confidentiality).
319. See GUERINO & BECK, *supra* note 5, at 1 (finding that only 13 percent of all allegations of sexual abuse were substantiated, thus successfully crossing the investigation stage).
320. See NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 318, at 33 ("Most victims were silent, in many cases fearing retaliation and knowing that authorities were unlikely to believe or help them—or even to record their reports.").
321. Smith & Yarussi, *supra* note 317, at 20.
322. See Chimène I. Keitner, Note, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38, 69–70 (2002) ("Proponents of the 'chivalry thesis' argue that 'women's weak and passive nature makes them less attractive, if not less eligible, candidates for imprisonment' . . . . The corollary of the chivalry thesis is that, when women are condemned rather than exonerated, they are portrayed as not only cunning and even demonic, but also—and perhaps above all—unwomanly." (footnotes omitted)).
323. Brenda V. Smith & Suzanne Carlson, Research on Incidence and Outcomes for Correctional Staff Accused of Sexual Abuse of Individuals in Custody (2011) (unpublished manuscript) (on file with author).
324. *Id.*
325. See, e.g., Teichner, *supra* note 6, at 288–89 (citing examples comparing the conduct and punishment of male and female staff).
326. Smith & Pavlik, *supra* note 217, at 34 (detailing Congress's failure to create a national registry for staff members who abused individuals under their supervision).
327. The author served as a member of the National Prison Rape Elimination Commission from November 2003 until August 23, 2009.

sexual abuse in custody.<sup>328</sup> These standards were largely ratified by U.S. Attorney General Eric Holder, who is obligated under PREA to review the Commission's proposed standards and adopt a final rule.<sup>329</sup> While these standards apply to all staff and all inmates, both youth and adult, they have the potential to have a significant impact on sexual abuse of men and boys in custody by female staff. They include provisions to limit pat searches, cross-sex supervision, and observation of men and boys by female staff while they are unclothed;<sup>330</sup> training for staff and for inmates on preventing sexual abuse in custody by staff or inmates;<sup>331</sup> improved investigation; and clear and consistent administrative and criminal enforcement of prohibitions on sexual interactions between staff and persons in custody.<sup>332</sup> The Department of Justice released the final standards on May 17, 2012.<sup>333</sup> Although the final standards take the important steps of prohibiting cross-gender searches of female inmates and of limiting the ability of staff to observe inmates while they shower, perform bodily functions, and change clothing, they still fail to address the issue of female correctional workers performing pat searches of male inmates.<sup>334</sup>

There are other measures that are not in the proposed standards but that could have a great impact on female correctional worker's sexual abuse of men and boys in custody. For example, in addition to providing institutional training about policies and procedures for preventing and addressing sexual abuse in custody, female and male staff should receive training that informs them that they may become attracted to a person under their custody, and that the attraction is normal, but that because of their position of power and their representation of the state, that conduct is prohibited. Most staff still receives training along the lines of *Games*

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328. See generally NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 318.

329. 42 U.S.C. § 15606(e)(1) (2006) ("In conjunction with the report submitted under subsection (d)(3), the Commission shall provide the Attorney General and the Secretary of Health and Human Services with recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape.").

330. See NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS 11–12 (2009).

331. See *id.* at 21–22.

332. See *id.* at 46–47.

333. See Press Release, U.S. Dep't of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html>.

334. See National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37,106, 37,201 (June 20, 2012) (to be codified at 28 C.F.R. § 115.15(b)), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-20/pdf/2012-12427.pdf> ("[T]he facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances."). Male inmates were excluded from this protection.

*Criminals Play*.<sup>335</sup> This training teaches that inmates aim to manipulate staff into breaking rules and complying with their demands.<sup>336</sup> The curriculum casts inmates as evil, conniving, and undesirable. Inmates who present as intelligent, attractive, and familiar, create cognitive dissonance for staff, leading them to ignore their training. A more effective approach might be to talk about the demographics of the correctional population, the likelihood that correctional staff will meet someone they know, someone toward whom they will develop sexual attraction, or both. With more information of this kind, training could focus on the appropriate response to the attraction and emphasize the importance of maintaining professionalism and avoiding acting on such impulses. Rather than perpetuating the nineteenth century myth of women's lack of sexual interest, best practices in twenty-first-century corrections training must address the reality of women's work in correctional environments.

Second, training on addressing sexual abuse of inmates in custody needs to be gender responsive.<sup>337</sup> Current gender-responsive training reflects strongly on the abuse histories of women in custody and the harm that further abuse can cause.<sup>338</sup> Little training exists on the incidence of past physical and sexual trauma and its impact on men and boys or on how continued abuse (including that from female staff) harms males.<sup>339</sup> This type of training is critical to help correctional agencies and staff understand that female correctional abuse of men and boys in custody is not a no-harm, no-foul situation, but that this lack of understanding and attention to the harm has serious consequences for the male inmate and youth victims, agencies, and staff.

Third, correctional authorities should address the sexualized culture that exists in many agencies. This sexualized culture breeds sexual predation by both inmates and staff, much of which involves female staff as target and aggressors. While policies prohibiting sexual contact between staff and inmates are an important part of that response, enforcement of policies that prohibit sexual harassment, sex discrimination, and demeaning language between staff are also important.

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335. BUD ALLEN & DIANA BOSTA, *GAMES CRIMINALS PLAY: HOW YOU CAN PROFIT BY KNOWING THEM* (1981).

336. *See id.*; *see also* GARY CORNELIUS, *THE ART OF THE CON: AVOIDING OFFENDER MANIPULATION* (2d ed. 2009).

337. *See* Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in *GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS* 1, 11 (Barbara E. Bloom ed., 2003).

338. *See id.* at 12 ("The standard procedures used in correctional settings (e.g., searches, restraints, and isolation) can have profound effects on women with histories of abuse, trauma and mental illness.")

339. *See id.* (focusing gender-responsive training exclusively on women because of the higher incidents of female prisoners who have experienced sexual trauma).

Additionally, there must be strong consequences for those who create and perpetuate hostile work environments.<sup>340</sup> These measures would have the additional benefit of improving the culture of agencies and redound to the benefit of female correctional workers that are often the targets of inappropriate and unprofessional behavior. Existing research indicates that female correctional workers view their work environment as hostile, not only because of the sexualized nature of the workforce but also because they face discrimination from coworkers and superiors. A promising approach would be to develop programs to support and mentor women in these jobs, which are still nontraditional for women.<sup>341</sup> Likewise, women and all employees should have access to strong employee assistance programs that offer counseling and support.

Fourth, policies and practices for monitoring, investigating, and punishing staff sexual abuse in custody—whether through prosecution or administrative procedures—must be applied fairly and consistently to both women and men. The failure to deploy these strategies fairly means that abuse perpetrated by female staff is viewed less seriously. It may be that staff perpetrators receive lesser or greater sanctions because of their histories of good conduct or their acknowledgement of responsibility and remorse (or lack thereof), but those opportunities and consequences should be available to both men and women.

Fifth, researchers and policymakers should pay greater attention to the impact of mass incarceration on workers, in particular on women of color, and on their opportunities for developing intimate relationships with men outside of work.<sup>342</sup> Female correctional workers, particularly women of color, are less likely to be married; are more likely to be single parents,<sup>343</sup> and are often double minorities—of color and female—in their workplaces.<sup>344</sup>

While this Article focuses on sexual relationships between female correctional officers and men and boys in custody to illustrate major gaps in theory and

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340. Many agencies have created such programs in response to litigation. *See* Consent Decree, *Neal v. Dir.*, D.C. Dep't of Corr., No. 93-2420 (D.D.C. Aug. 28, 1997), *available at* <http://www.clearinghouse.net/chDocs/public/EE-DC-0061-0002.pdf>.

341. *See* MTC INST., *supra* note 89, at 2 (drawing a connection between the importance of accomplished female role models in traditionally male-dominated occupations and the success of mentoring programs); *see also* BRITTON, *supra* note 17, at 103–05 (opining that because the ideal correctional officer is masculine and the structure of senior level staff of correctional institutions mirror the military, another overwhelming masculine occupation, training and standards of care are often based around the all-male prison model).

342. *See supra* Part III.

343. BRITTON, *supra* note 17, at 90 (noting that many women who come to corrections work are either divorced or single mothers).

344. *See* Crenshaw, *supra* note 232, at 1472–73.

practice, that is not to suggest that female correctional staff are not engaging in sexual interactions with female inmates and youth in custody.<sup>345</sup> While the reported statistics suggest that same-sex abuse involving female staff is quite low,<sup>346</sup> there is some indication from qualitative studies that these relationships do occur.<sup>347</sup> Further examination of the incidence and nature of these interactions is important.

Sixth, female correctional officers should have access to training and opportunities that show them the path for advancement and career enhancement in the corrections profession. Several of these programs exist at the national level (for example, the Association for Women Executives in Corrections and Women Working in Corrections and Juvenile Justice Conference<sup>348</sup>) and at the local level.<sup>349</sup> Like men, women need access to good models of ethical leadership and should be rewarded for following the highest standards of conduct rather than being expected to go along in order to get along.

Finally, researchers must pay greater empirical attention to female staff abuse of men and boys in custody. There is abundant research on psychiatrists, physicians, and teachers who abuse individuals under their care,<sup>350</sup> yet there is little research on female correctional workers who abuse men and boys in custody.<sup>351</sup> The research that exists is summary in nature and does not explore the demographics, motivations, or consequences of the abuse for female correctional workers and their

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345. Ruben Castaneda, *Ex-Inmate Says She Had Relationship With Prince George's Jail Guard*, WASH. POST, May 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051203467.html> (detailing the story of a female head of security who engaged in a sexual relationship with a female inmate). I plan to address same-sex relationships involving female correctional staff in future scholarship.
346. BECKET AL., *supra* note 142, at 24 (reporting that only 19 percent of staff sexual misconduct involving a female victim was committed by a female staff member).
347. OWEN ET AL., *supra* note 5.
348. WOMEN WORKING CORRECTIONS & JUV. JUST., <http://www.womenincorrections.info> (last visited July 15, 2012).
349. 'Women in Public Safety' Workshop Draws Rave Reviews, OR. AFSCME COUNCIL 75 (Apr. 19, 2012, 3:06 PM), [http://www.oregonafscme.com/index.cfm?zone=/unionactive/view\\_article.cfm&homeID=242939](http://www.oregonafscme.com/index.cfm?zone=/unionactive/view_article.cfm&homeID=242939).
350. See, e.g., THOMAS G. GUTHEIL & ARCHIE BRODSKY, PREVENTING BOUNDARY VIOLATIONS IN CLINICAL PRACTICE 290 (2008) (discussing education and training strategies for the prevention of boundary violations in clinical settings); Tara Star Johnson, *Crossing the Line: When Pedagogical Relationships Go Awry*, 112 TEACHERS C. REC. 2021 (2010) (theorizing whether the female-orientated sexual dynamic present in many education environments can rightfully be considered education sexual misconduct); Robert L. Nuttall & Helene Jackson, *Predicting Sexual Boundary Violations*, in ANNALS OF THE JOINT MEETING OF THE ASSOCIATION FOR THE ADVANCEMENT OF EDUCATIONAL RESEARCH AND THE NATIONAL ACADEMY FOR EDUCATIONAL RESEARCH, 1998-1999, at 29 (Robert M. Hashaway ed., 2001) (identifying factors that increase the likelihood of clinician abuse).
351. See Marquart et al., *supra* note 180, at 884 & n.4 (noting that many studies tended to focus on male staff abuse of female inmates and finding female-perpetrated staff misconduct to be more prevalent).

adult and juvenile victims.<sup>352</sup> Additionally, the existing research does not explore the quality of those interactions, whether the parties viewed them as coercive, consensual, or something in between. As described above, there is important empirical work to do to document same-sex staff abuse involving female staff and whether these sexual interactions differ from those between female staff and men and boys.

In conclusion, female correctional workers are at the intersection of powerful axes of identity—race, gender, and class. At the same time, they inhabit a space—the correctional milieu—where norms about privacy, sexuality, and power are upended and barely comparable to those that exist in the community. These forces and realities create uncomfortable spaces for female correctional workers and those who try to understand their sexual interactions with men and boys in custody. While we understand that these interactions are illegal and prohibited by law and policy, they still discomfit us because we expect more and better from women. We are accustomed to theorizing and imagining women as preyed on rather than predatory, as moral rather than transgressive, and as sexually timid rather than sexually aggressive. My hope is that, having illuminated the issue, we can become more comfortable with seeing women as powerful and capable but also create space for them to be imperfect.

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352. See, e.g., ALLEN J. BECK, PAIGE HARRISON & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, NCJ 228416, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008–09 (2010) (focusing on instances of sexual victimization of youth inmates); WARREN ET AL., *supra* note 147 (analyzing sexual coercion of male and female adult inmates); Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67 (1996).