



THE DAWN OF A NEW JURISPRUDENCE?

JAILS, PRISONS, AND EQUAL RIGHTS

The Panel

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OVERVIEW

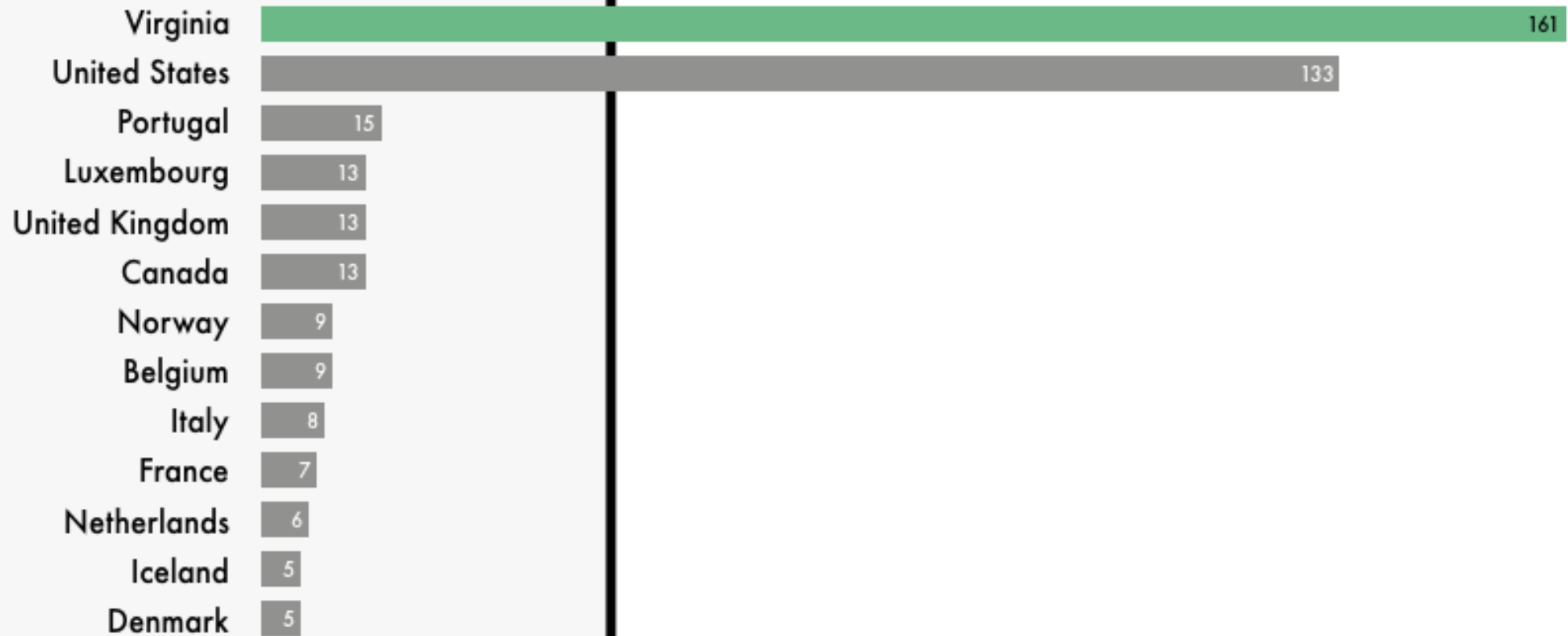
Status of Women in
Jails & Prisons

Current Legal
Landscape

Future Jurisprudence
Under the Equal
Rights Amendment

WOMEN'S INCARCERATION

COMPARING VIRGINIA
AND FOUNDING NATO COUNTRIES



Incarceration rates per 100,000 women

Source: <https://prisonpolicy.org/global/women/2018.html>

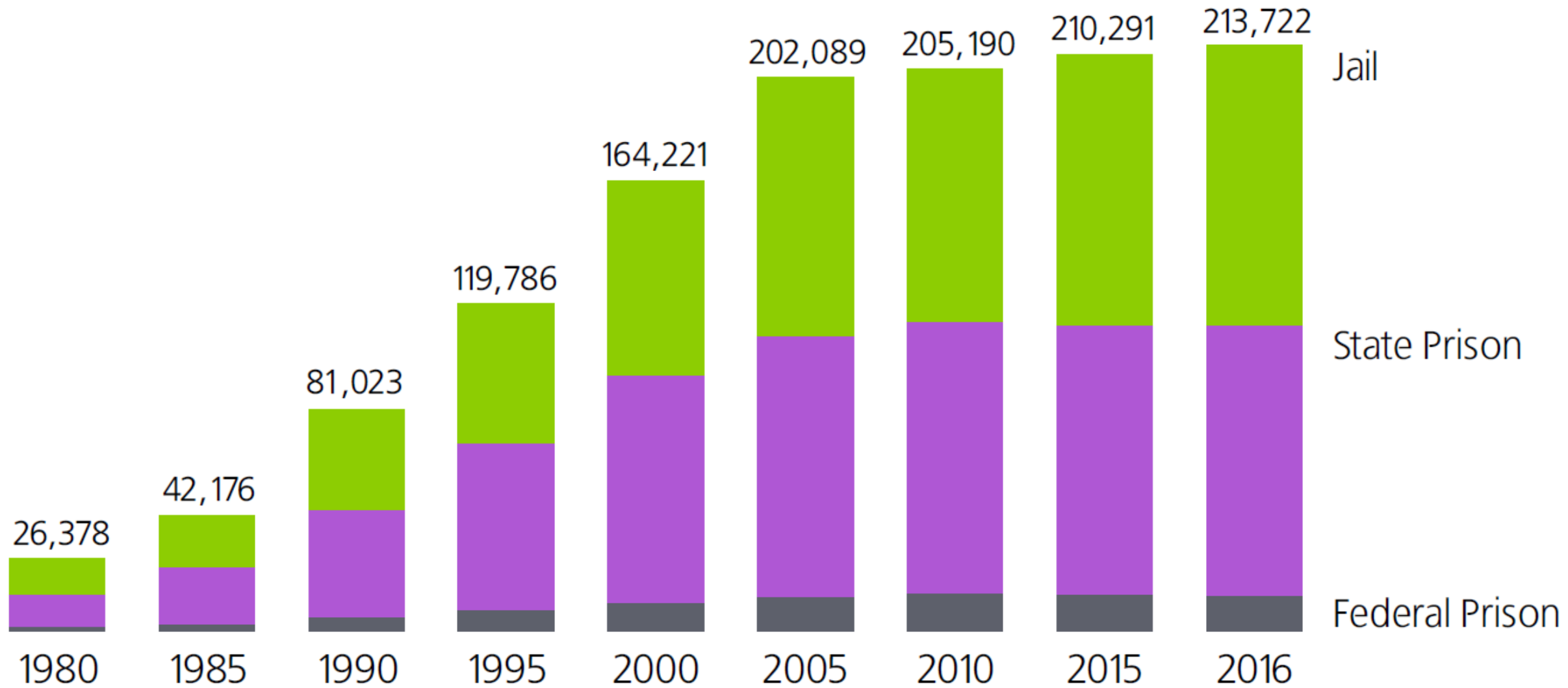
Incarceration Rates of Women Nationally

- Across the country, women are the fastest growing population of individuals incarcerated in prisons and jails.
- In 2015, nearly 2.2 million people were incarcerated in the United States.
- The number of men incarcerated in the U.S. decreased by 1.8% between 2014 and 2015
- The number of women incarcerated in the U.S. increased by 0.7% between 2014 and 2015.

Incarceration Rates of Women Nationally

- The number of women incarcerated in local jails is increasing at a faster rate than any other segment of the correctional population.

Rise in Women's Incarceration, 1980-2016



Sources: *Historical Corrections Statistics in the United States, 1850-1984*. (1986); *Prison and Jail Inmates Series*. (1997-2014.) Washington, DC: Bureau of Justice Statistics; *Prisoners in 2016*. (2018). Washington, DC: Bureau of Justice Statistics.

Incarceration Rates of Women In Virginia

- Virginia has generally followed national trends of the population of incarcerated men decreasing while the population of incarcerated women either increases or remains stagnant.
- In 1980, Virginia prisons housed only 303 women inmates. By June 30, 2015, that number had reached 3,123 – a 930% increase over 35 years.

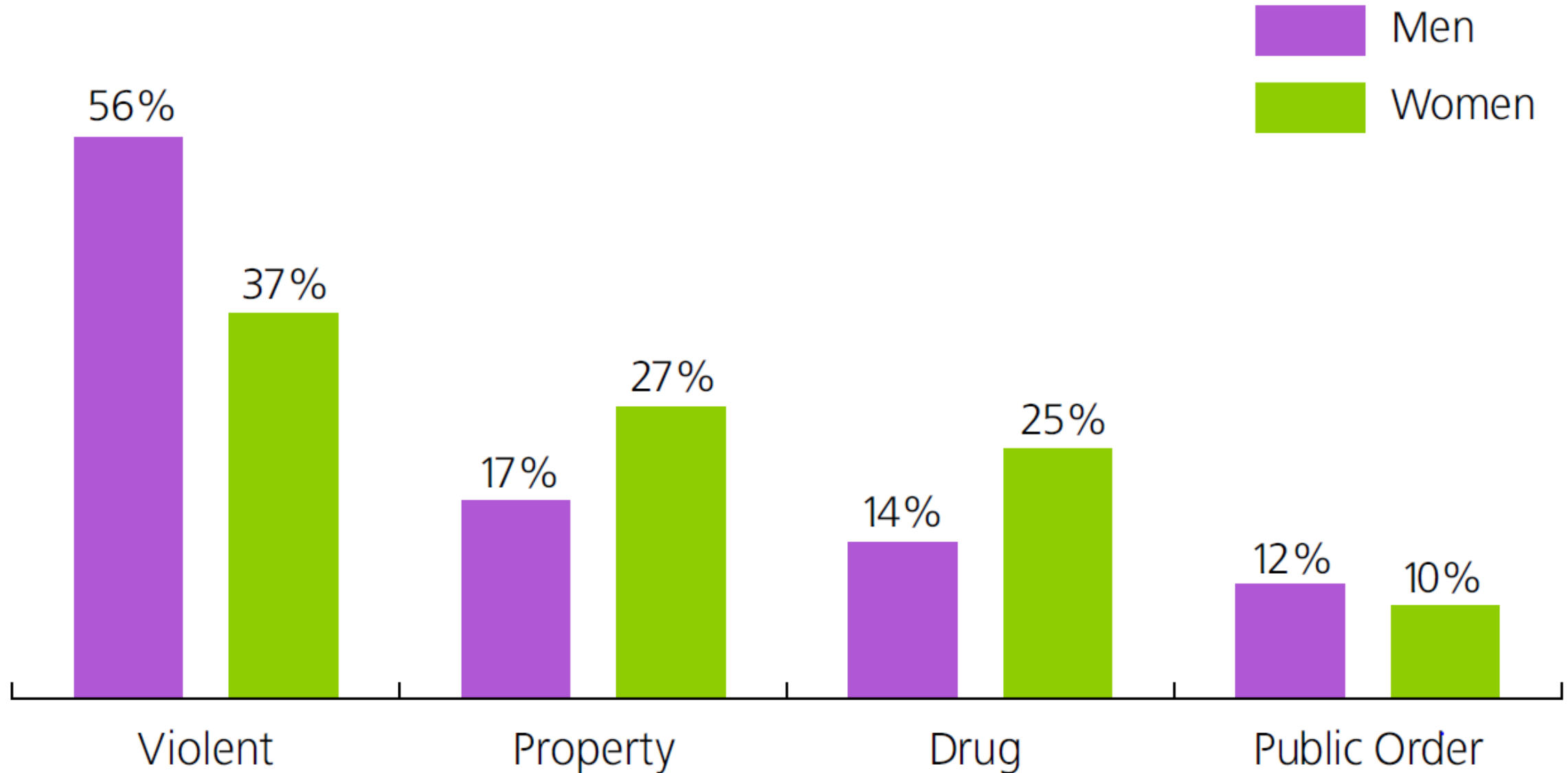
Women in the Criminal Justice System

- Women incarcerated in the U.S. tend to be young, unmarried, plagued by poverty, and lacking in education and job skills.
- More than half of all women in prison, and 80% of all women in jails, are mothers. Most were the sole or primary caregiver to young children before their incarceration.

Pathways to Incarceration

- Incarcerated women often become engaged with the criminal justice system as a result of their attempts to cope with challenging aspects of their lives, such as poverty, unemployment, and physical or mental health struggles – especially those arising from drug addiction and past instances of trauma.

Offense Type by Gender in State Prisons, 2016



Source: Carson, E.A. (2018). *Prisoners in 2016*. Washington, DC: Bureau of Justice Statistics.

Pathways to Incarceration

- Three of the four primary crimes for which women are incarcerated in Virginia – drug possession and distribution, larceny, and shoplifting – are often economically motivated and committed to support drug dependencies.

Distribution of monthly incomes for women unable to meet bail in local jails (prior to incarceration) and non-incarcerated women, ages 23-39



Source: Compiled by the Prison Policy Initiative from the Bureau of Justice Statistics Survey of Inmates in Local Jails, 2002 and the American Community Survey Integrated Public Use Microdata Series, 2002. See methodology at <http://www.prisonpolicy.org/reports/incomejails.html>.

PRISON
POLICY INITIATIVE

Inequitable Treatment of Incarcerated Women - 1

- Initial assessment tools that determine where inmates will be housed, what programs are eligible to them, whether they can work.
- Educational programming: opportunities for GEDs; associate's, bachelor's, and advanced degrees; professional or trade certifications.
- Punishment for relatively minor offenses.
- Women's unique healthcare issues.
- Women's unique mental care issues.

Women in prisons and jails are more likely than men to have a history of mental health problems

Percentage of incarcerated men and women reporting any history of mental health problems

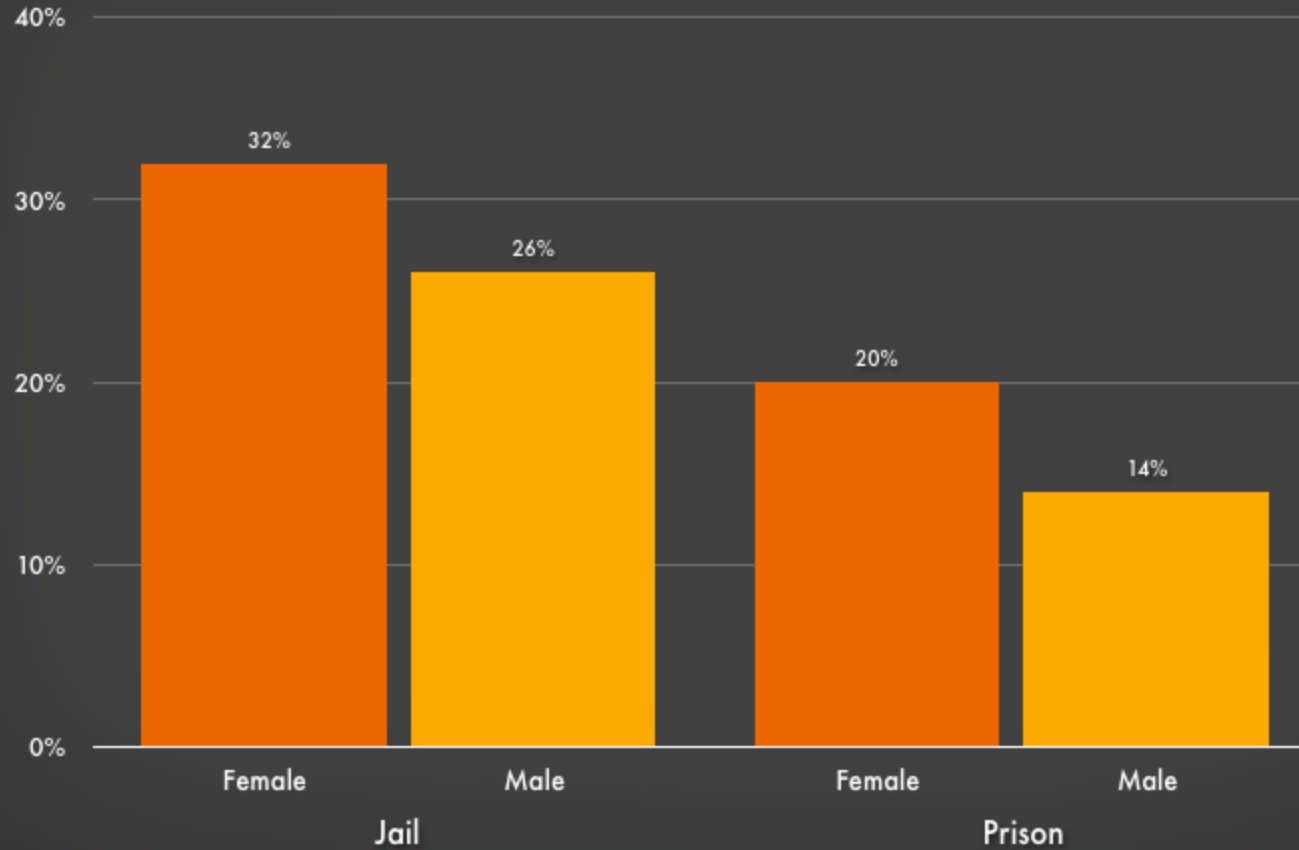


PRISON
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Source: Bureau of Justice Statistics, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*

Women in prisons and jails are more likely than men to experience serious psychological distress

Percentage of incarcerated men and women experiencing "serious psychological distress" in the past 30 days



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Source: Bureau of Justice Statistics, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*

Inequitable Treatment of Incarcerated Women - 2

- Among women in jail, 86% experienced sexual assault and 77% experienced intimate partner violence prior to incarceration.
- Staff-on-inmate sexual abuse is also a gendered issue – 2 out of 3 victims of staff-on-inmate sexual victimizations were women, even though women comprised only 13% of the total jail population.

Current Legal Landscape - 1

“similarly situated”

- What factors do courts consider to determine whether women and men are “similarly situated”?
- Does “similarly situated” test apply outside the prison context?
- Does the test work?

Current Legal Landscape - 2

What standard applies?

- Rational basis : *Turner v. Safley*
- Strict scrutiny: *Johnson v. California*
- Intermediate scrutiny: *Bukhari v. Hutto* (E.D. Va.)

Parity?

“the Equal Protection Clause requires in a prison setting . . . parity of treatment, as contrasted with identity of treatment, between male and female inmates”

What other laws and legal hurdles may disproportionately affect women?

Sovereign and Qualified Immunity:

- Immunity doctrines make civil recovery under tort theories very difficult for inmates
- Medical providers may be protected from malpractice suits (and incarcerated women could face unique medical situations while incarcerated, including pregnancy and childbirth)
- Public employees may have immunity protection in suits involving an inmate who has been assaulted or raped

What other laws and legal hurdles may disproportionately affect women?

Adoption and Termination of Parental Rights:

- “...while long-term incarceration does not, per se, authorize termination of parental rights...it is a valid and proper circumstance which, when combined with other evidence concerning the parent/child relationship, can support a court’s finding by clear and convincing evidence that the best interests of the child will be served by termination.” *Ferguson v. Stafford County Dep't of Social Services*, 14 Va. App. 333, 417 S.E.2d 1 (Va. Ct. App. Apr. 14, 1992).

What other laws and legal hurdles may disproportionately affect women?

Adoption and Termination of Parental Rights:

- “Virginia law recognizes the maxim that, sometimes, the most reliable way to gauge a person's future actions is to examine those of his past.” *Redman v. Roanoke City Dep't of Soc. Servs.*, 2016 Va. App. LEXIS 181, (Va. Ct. App. June 7, 2016).
- “It is clearly not in the best interests of a child to spend a lengthy period of time waiting to find out when, or even if, a parent will be capable of resuming his [or her] responsibilities.” *Moore v. Lee Cnty. Dep't of Soc. Servs.*, 2015 Va. App. LEXIS 322 (Va. Ct. App. Nov. 10, 2015).

What other laws and legal hurdles may disproportionately affect women?

Adoption and Termination of Parental Rights:

- It is well-established under Virginia case law that, when an incarcerated birth parent refuses to consent to an adoption, or otherwise objects to the involuntary termination of his or her parental rights, evidence of that parent's incarceration and criminal history are major and heavily weighted factors for a court to consider in finding that the objecting parent is withholding consent contrary to the child's best interests - both in adoption and TPR contexts.
- Is there a gender disparity when applying these standards in practice?

Would the ERA be a new tool for the claims of incarcerated individuals?

- Scrutiny standard
- “Similarly situated” bar?
- Encourage more data?
- But what about:
 - Immunity issues
 - General “toothlessness” of many current protections
- ERA Panic – Co-Ed prisons?



Q&A