

THE WAR ON WOMEN:  
THE COLLATERAL CONSEQUENCES OF  
FEMALE INCARCERATION

by  
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*This Comment examines the long-term impacts that facially neutral, yet evidently gendered, drug and property sentencing laws have on the nation's most vulnerable women. Part I introduces the problem. In recent years, the number of women behind bars has risen astronomically. Yet, much of the scholarship on this phenomenon has focused on intergenerational criminality and, in doing so, perpetuates paternalism and fails women. Part II discusses the significant differences between male and female offenders, such as the higher rate at which women are convicted of "crimes of survival" necessitated by the extreme hardships they face. In Part III, the Comment discusses how the War on Drugs and Sentencing Reform have disproportionately impacted women because of the severe punishments crimes of survival carry under these new penal regimes. Part IV emphasizes the lasting collateral consequences women experience as a result of the gender discrepancies within the prison system. Women receive inappropriate treatment for both mental illness and addiction while imprisoned. Once they are released back into their communities, they face limited resources due to War-on-Drugs era welfare reform. And, as many scholars have noted, the imprisonment of women has long-lasting impacts on intergenerational criminality. In Part V, I propose a comprehensive approach—involving sentencing reforms, gender-focused treatment programs, employment legislation, access to public benefits, and community-based sentencing alternatives—to mitigate these problems. Ultimately, without such an approach, women will continue to be treated as second-class citizens under the current regime.*

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## I. INTRODUCTION

The United States incarcerates more people than any other developed nation.<sup>1</sup> The U.S. prison population continues to climb, having increased nearly 13% between 2000 and 2013.<sup>2</sup> While the rate of male incarceration has grown steadily, the female inmate population has been growing at an alarming rate, with the number of females incarcerated at either state or federal prisons having grown nearly 20% between 2000 and 2013.<sup>3</sup> However, the increase in female criminality is not a recent phenomenon—as the number of female offenders has risen from 26,378 in 1980 to 215,332 in 2014.<sup>4</sup> Given the historical timeline, it is unsurprising that many theorists have linked the increase of female incarceration with the War on Drugs.<sup>5</sup>

Researchers and policymakers evaluating the societal harm resulting from female incarceration have largely focused on the effects on intergenerational criminality.<sup>6</sup> However, this narrow focus only perpetuates

<sup>1</sup> The current incarceration rate of 698 per 100,000 residents places the United States first in the world in this regard. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1 (2015), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

<sup>2</sup> LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013, at 2 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> (showing that the number of people incarcerated increased from 1,394,200 in 2000 to 1,574,700 in 2013).

<sup>3</sup> *Id.* at 6 (showing that the female prison population grew from 93,200 to 111,300 between 2000 and 2013).

<sup>4</sup> THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS 1 (2015), <http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> [hereinafter INCARCERATED WOMEN AND GIRLS].

<sup>5</sup> See Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 281 (2011); Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 286 (2007).

<sup>6</sup> See, e.g., Beth M. Huebner & Regan Gustafson, *The Effect of Maternal Incarceration on Adult Offspring Involvement in the Criminal Justice System*, 35 J. CRIM. JUST. 283 (2007); Daniel P. Mears & Sonja E. Siennick, *Young Adult Outcomes and the Life-Course Penalties*

the paternalistic world in which these women often feel trapped—a world that finds their sole value in childbearing. While the effect that maternal incarceration has on the future criminality of the affected children is an essential and noble concern, the impact that incarceration has on women extends far beyond their identity as mothers. The rapid growth of female incarceration, and the collateral consequences that both the offenders and society face as a result, cannot be examined purely from the viewpoint of incarcerated mothers—it is necessary to investigate this epidemic from the perspective of the average female offender, regardless of her maternal status, in order to best determine how to welcome every single one of these women back into their communities.

This Comment aims to examine the long-term impacts that facially neutral, yet evidently gendered, drug and property sentencing laws have on the nation's most vulnerable women. This Comment also looks at the collateral consequences that often preclude these women from being contributing members of society back in their communities. Part II unearths the commonalities of these female offenders, as well as examining the types of crimes that they most often commit. Part III discusses how the law and societal viewpoints have driven the increase in female incarceration. Part IV looks at the negative effects of female incarceration, including a brief discussion on the impact of maternal incarceration. Part V provides recommendations for not only stalling the rampant increase in female offenders, but also reducing the recidivism rate of these unsupported women. This Comment concludes at Part VI, suggesting a holistic approach to female criminal justice reform.

## II. GENERAL OVERVIEW OF FEMALE INCARCERATION

Female offenders differ vastly from male offenders. The majority of women are incarcerated for nonviolent offenses,<sup>7</sup> with almost a third of women in state prisons sentenced for property crimes and another quarter of women sentenced for drug convictions.<sup>8</sup> Women are being convicted of property crimes at a rate next to which male offenders pale. These property crimes include (among others) larceny, fraud (including forgery and embezzlement),<sup>9</sup> and burglary.<sup>10</sup> When examining the nature of

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*of Parental Incarceration*, 53 J. RES. CRIME & DELINQ. 3 (2016); Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, in 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 133, 133 (Michael Tonry ed., 2008).

<sup>7</sup> E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, at 16 tbl.11 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf> (finding that 37.1% of women were sentenced to state prisons for violent crimes compared to 54.4% of men).

<sup>8</sup> *Id.* (compared with 18.6% and 15.1% of men respectively).

<sup>9</sup> LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 10 (2000), <http://www.bjs.gov/content/pub/pdf/wo.pdf> (showing that approximately “26% of women are convicted of larceny or fraud (including forgery and embezzlement),” compared to 10% of males convicted).

these property crimes, it becomes clear that economic gain is a strong underlying motivation.<sup>11</sup> Despite the large number of overall property-crime convictions, in 2014, the largest explicit category of convictions (17.8%) were “drug crimes other than possession,” such as drug trafficking.<sup>12</sup> The frequency at which women are charged with drug crimes is even more apparent in federal prisons, where 59% of women are serving time for drug-related charges.<sup>13</sup>

These nonviolent offenses, both property and drug-related, have been deemed by academics and theorists as “crimes of survival.”<sup>14</sup> While the term is not used as frequently in the context of violent crimes, women who commit violent offenses “often do so in self-defense and as a response to domestic violence.”<sup>15</sup> Of women convicted of murder, 42.3% were charged with killing either their spouse or significant other.<sup>16</sup> Studies show that many women charged with killing their partners do so in the heat of the moment, as an immediate reaction to abuser-initiated violence. For example, in a study of 223 “battered women’s homicide cases,” approximately 75% involved a confrontation between the abuser and the battered woman at the time of the murder.<sup>17</sup> Evidence largely suggests that many women convicted of even the most serious crimes commit their crimes as a result of years of victimization.

The majority of female offenders, regardless of whether they are convicted of a violent or nonviolent crime, are truly survivors. Many fe-

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<sup>10</sup> MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP’T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2002: STATISTICAL TABLES tbl.2.1 (2005), <http://www.bjs.gov/content/pub/pdf/scscf02.pdf>.

<sup>11</sup> See KRISTIN M. FINKLEA, CONG. RESEARCH SERV., ECONOMIC DOWNTURNS AND CRIME 5 (2011).

<sup>12</sup> CARSON, *supra* note 7, at 16 tbl.11.

<sup>13</sup> *Id.* at 17.

<sup>14</sup> Gregg Barak, *Introduction to CRIME AND CRIME CONTROL: A GLOBAL VIEW* xvi (Gregg Barak ed., 2000) (“Examples of the crimes of survival include offenses like property crimes of theft and illegal entrepreneurial activities involving drug sales, gambling, and prostitution.”).

<sup>15</sup> Haegyung Cho, *Incarcerated Women and Abuse: The Crime Connection and the Lack of Treatment in Correctional Facilities*, 14 S. CAL. REV. L. & WOMEN’S STUD. 137, 141 (2004).

<sup>16</sup> GREENFELD & SNELL, *supra* note 9, at 4 (compared with 10.7% of men).

<sup>17</sup> In order to put a case in the confrontation category, the following factors had to exist: “(1) the man was awake; (2) he behaved in a way that the woman interpreted as posing an imminent or immediate threat of death or serious injury to her; and (3) there was evidence that she did not provoke his behavior by unlawful conduct and was not the initial aggressor.” Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 394, 396–97 (1991); see also Paige Hall Smith, Kathryn E. Moracco, & John D. Butts, *Partner Homicide in Context: A Population-Based Perspective*, 2 HOMICIDE STUD. 400, 410 (1998) (finding in a North Carolina study of partner-homicides that 75% of incidents where women killed their male partners were preceded by male-initiated violence, compared to 0% of homicides by men preceded by female-initiated violence).

male offenders grew up in impoverished households, many with alcohol or drug-abusing parents.<sup>18</sup> “Nearly 6 in 10 women in State prisons had experienced physical or sexual abuse” prior to their admission to prison.<sup>19</sup> The vast majority of female inmates (a much higher percentage than male inmates) self-report that they suffer from mental health problems.<sup>20</sup> The relationship between abuse and mental illness is demonstrable, as nearly 80% of mentally ill females report a history of physical or sexual abuse.<sup>21</sup> The high rate of mental illness and history of abuse only makes the other daily hardships that the average female offender faces prior to incarceration more challenging.

Female inmates are also categorically more impoverished and more likely to be single parents than their male inmate counterparts. Approximately one third of female inmates reported receiving welfare assistance just prior to arrest, with almost 40% reporting incomes of less than \$600 per month.<sup>22</sup> While 41.7% of female inmates reported living in a single-parent household with minor children prior to arrest, the percentage of males in the same position is significantly lower at 17.2%.<sup>23</sup> Additionally, many female offenders with minor children are uneducated<sup>24</sup> and lack the stability of full-time employment.<sup>25</sup>

Upon examination of the many hardships that female offenders historically face, the turbulent relationship between abuse, drug use, and poverty becomes clear. It is this multitude of linked causal factors that

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<sup>18</sup> LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 18 (2010), <http://www.bjs.gov/content/pub/pdf/pptmc.pdf> (finding that 41.3% of female inmates in state prison grew up in a household receiving public assistance (compared to 39.8% of males) and 43% of female inmates in state prison grew up with parents or guardians who abused alcohol or drugs (compared to 32.9% of males)).

<sup>19</sup> GREENFELD & SNELL, *supra* note 9, at 1; *see also* CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), <http://www.bjs.gov/content/pub/pdf/parip.pdf> (finding that 57.2% of females reported ever being abused before incarceration, compared to 16.1% of males).

<sup>20</sup> DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> (showing that 73% of women in state prisons, and 75% of women in local jails, self-report mental illness, compared to 55% and 63%, respectively, of men).

<sup>21</sup> PAULA M. DITTON, U.S. DEP’T OF JUSTICE, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (1999), <http://www.bjs.gov/content/pub/pdf/mhtip.pdf> (finding that 78% of female mentally ill inmates reported “physical or sexual abuse”).

<sup>22</sup> GREENFELD & SNELL, *supra* note 9, at 8 (compared with 8% and 28% of males, respectively).

<sup>23</sup> GLAZE & MARUSCHAK, *supra* note 18, at 4 tbl.7.

<sup>24</sup> *Id.* at 14 tbl.4 (finding that only 58.7% of female inmates with minor children had a high school diploma prior to admission).

<sup>25</sup> GREENFELD & SNELL, *supra* note 9, at 8 (finding that about 4 in 10 women in state prison reported having full-time employment the month prior to their arrest, compared to 6 in 10 men).

makes it so difficult for successful intervention. In order to effectively address the recent rise in female incarceration, it is essential to acknowledge the circumstances of these women and to challenge the systemic prejudice against female offenders.

### III. HOW LAW HAS INFLUENCED FEMALE INCARCERATION

#### A. *The War on Drugs and the Rise of Mandatory Minimum Sentencing*

Within the past 15 years, it is indisputable that the nationwide female offender population has grown at a rate far exceeding the male population.<sup>26</sup> This rapid growth of female offenders is disproportionately due to the War on Drugs—women in prison are more likely than men (24% versus 15%) to be serving a sentence for a drug charge.<sup>27</sup> The War on Drugs has inadvertently become the War on Women. When President Nixon declared a “war on drugs” in 1971,<sup>28</sup> the call for war was intended to be a call for treatment.<sup>29</sup> However, the 1980s showed that Congress had a different idea, as various mandatory minimum sentencing regimes continued to be adopted.<sup>30</sup> Individual states soon followed, imposing sentences that left nonviolent drug offenders serving longer sentences than those convicted of rape, manslaughter, and assault.<sup>31</sup> “Between 1986 and 1996, women’s incarceration in state prisons for drug offenses rose 888%.”<sup>32</sup>

For women incarcerated on drug charges, there are often many underlying circumstances that were ignored by those in power who enacted the punishment-focused sentencing guidelines.<sup>33</sup> These circumstances, as discussed above, including poverty,<sup>34</sup> higher rates of depression and mental illness,<sup>35</sup> and high rates of sexual and physical abuse,<sup>36</sup> can lead to drug

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<sup>26</sup> GLAZE & KAEBLE, *supra* note 2, at 7 (“The number of females under the jurisdiction of state or federal prisons grew by 21% between 2000 and 2010, compared to about a 15% increase in the number of male prisoners.”).

<sup>27</sup> INCARCERATED WOMEN AND GIRLS, *supra* note 4, at 4.

<sup>28</sup> *Thirty Years of America’s Drug War: A Chronology*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron> (last visited Feb. 22, 2017).

<sup>29</sup> See Lenox, *supra* note 5, at 285–86 (describing the transition of the War on Drugs from a treatment-focused declaration to a punishment-focused implementation).

<sup>30</sup> *Id.* at 286.

<sup>31</sup> *Id.* at 287.

<sup>32</sup> *Id.* at 284 (compared to incarceration rates for males convicted of drug offenses rising 522% between 1986 and 1996).

<sup>33</sup> *Id.* at 286–87.

<sup>34</sup> GREENFELD & SNELL, *supra* note 9, at 8 (showing that nearly 30% of female inmates, compared with 8% of males, in state prisons reported receiving welfare assistance at the time just before the arrest that brought them to prison).

<sup>35</sup> *Id.* at 8 tbl.19 (showing that 23% of female inmates in state prisons were receiving some form of medication for an emotional disorder); JAMES & GLAZE, *supra* note 20, at 1 (showing that 73% of female state prison inmates self-reported experiencing mental health problems, compared to 55% of males).

use that is rationalized as self-medicating, or even necessary for survival.<sup>37</sup> Women who experience poverty and mental illness are also women who “are under greater government supervision—by public hospitals [or] welfare agencies”—prior to their arrest, which increases the likelihood of their drug use, or other involvement, being detected.<sup>38</sup> Due to the mandatory minimum sentencing guidelines that have been adopted alongside the War on Drugs, judges have largely lost a level of discretion they could once use, by evaluating family ties and other circumstances, to consider a departure from the state or federal guidelines where appropriate.<sup>39</sup>

The War on Drugs has also resulted in an increase of women being charged with drug trafficking.<sup>40</sup> Unfortunately, because of the way drug conspiracy laws are designed, women caught up in relationships wrought with coercion and domestic violence can be charged for even the most marginal roles in the sale of drugs: “merely permitting the drugs within the home, answering the door, or answering the telephone,” can land a woman in federal prison for a disproportionately long sentence.<sup>41</sup>

#### B. *A Rebirth of the “Good Girl/Bad Girl” Dichotomy*

The War on Drugs exemplifies how the criminal justice system is blind to the contexts in which female offenders exist. The general population’s failure to recognize the interrelation of the circumstances that lead to female criminality further demonstrates the rooted ideology of the good girl/bad girl dichotomy.<sup>42</sup> The good girl/bad girl dichotomy rises out of women’s subordinate position in society.<sup>43</sup> This systemic prej-

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<sup>36</sup> See *supra* note 9.

<sup>37</sup> Margarete Parrish, *Substance Abuse, Families and the Courts*, 3 J. HEALTH CARE L. & POL’Y 191, 201 (1999).

<sup>38</sup> See LENOX, *supra* note 5, at 289.

<sup>39</sup> *Id.* at 291.

<sup>40</sup> GREENFIELD & SNELL, *supra* note 9, at 3 (showing a 34% increase in drug trafficking convictions for state female inmates between 1990–96).

<sup>41</sup> Shimica Gaskins, Note, “Women of Circumstance”—*The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1537–38 (2004). For a discussion of how the interaction between federal conspiracy laws and mandatory minimum sentencing guidelines have resulted in low-level female offenders and the most culpable co-conspirators (often male) being treated in exactly the same manner, see *id.* at 1533.

<sup>42</sup> “Often courts fit women into one of two categories—good girl or bad girl—without taking into account the complexity of differences in women.” Donna L. Laddy, Comment, *Burns v. McGregor Electronic Industries: A Per Se Rule Against Admitting Evidence of General Sexual Expression as a Defense to Sexual Harassment Claims*, 78 IOWA L. REV. 939, 958 n.134 (1993).

<sup>43</sup> See Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 514 (1993) (discussing how the use of the good girl/bad girl dichotomy seeks to legitimize the subordination of women).

udice against women, frequently seen in domestic violence,<sup>44</sup> rape,<sup>45</sup> and prostitution cases,<sup>46</sup> has been resurrected by the War on Drugs.

Despite the prevalence of mental illness, addiction, and victimization in female offenders, the War on Drugs has labeled women accused of drug crimes as “bad girls” who are only worthy of punishment. The focus on punishment has occurred because policymakers have incorrectly interpreted the starting point from which the pattern of criminality begins, and have used that data to influence the system in adverse ways.<sup>47</sup> Similar to the challenges that women face when bringing allegations of sexual assault,<sup>48</sup> women facing drug crimes and low-level property crimes (i.e. “crimes of survival”) have to challenge the misconception that they are no more than second-tier citizens who, because of their failure to fit the obedient feminine mold, have actively chosen a lifestyle of drugs and crime.<sup>49</sup>

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<sup>44</sup> See, e.g., Cheryl Hanna, *Ganging up on Girls: Young Women and Their Emerging Violence*, 41 ARIZ. L. REV. 93, 136 (1999) (discussing the agent-victim dichotomy of battered women cases, which argues that women are solely victims or solely agents).

<sup>45</sup> Another prime example of the good girl/bad girl dichotomy is the virgin/whore dichotomy relevant to rape cases. Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 929 (1996). While rape shield statutes that exclude evidence of a rape victim’s prior sexual conduct are generally perceived as beneficial evidentiary rules, they perpetuate a paternalistic culture. The prohibition is based on the inference that women who engage in consensual, non-marital sex are either generally promiscuous, and hence more likely to have consented in the case at issue, or they are deemed generally disreputable, and hence more likely to fabricate rape accusations. *Id.* at 930.

<sup>46</sup> See, e.g., Vicki Schultz, *Sex and Work*, 18 YALE J.L. & FEMINISM 223, 226 (2006) (discussing how historically society has labeled women who have traded sex for money as “bad girls, ‘criminals or “toss-aways” who deserve their own misery and victimization”).

<sup>47</sup> For example, it can be easy to allege that acts of theft and robbery are simply driven by the desire to fuel a drug addiction, as opposed to a means to obtaining the resources a woman and her family need. See, e.g., Hannah Hoffman, *Jail Birds*, WILLAMETTE WK. (Jan. 17, 2012), <http://www.wweek.com/portland/article-18696-jail-birds.html>. However, by failing to acknowledge the underlying factors that led a woman to a life of drug abuse, any attempted intervention through incarceration is unlikely to be successful. See *infra* Part IV.A (“Lack of Appropriate Treatment for Mental Illness and Addiction”).

<sup>48</sup> See *Rape, Sexual Assault & Evidentiary Matters*, 116 GEO. J. GENDER & L. 191, 206–07 (2010).

<sup>49</sup> For example, “some have used a gender-based paradigm to explain the nature of female offenders, citing the usual factors of opportunity compounded by traditional gender stereotyping.” Eugene M. Hyman, *The Scarlet eLetter and Other Roadblocks to Redemption for Female Offenders*, 54 SANTA CLARA L. REV. 119, 144 (2014). Gender is also used as a reason why there are fewer female criminals. Jennifer Schwartz & Darrell Steffensmeier, *The Nature of Female Offending*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 43, 61 (Ruth T. Zaplin ed., 2008) (“Femininity stereotypes are the antithesis of those qualities valued



## IV. COLLATERAL CONSEQUENCES OF FEMALE INCARCERATION

Although the female inmate population continues to grow at an unprecedented rate, little has been done to regenderize the prison system. Because women still make up such a minority of the prison population, facilities lack the motivation and the financial resources to take into account the key differences between male and female offenders. Additionally, as the War on Drugs gained speed in the 1980s and 1990s, the legislature and the Clinton Administration passed legislation largely restricting public benefits for felony drug convictions. Because of the failure to recognize these systemic barriers, many women will be released from prison with collateral consequences that will last long beyond the completion of their sentence.

A. *Lack of Appropriate Treatment for Mental Illness and Addiction*

Histories of physical and sexual abuse, inadequate health care, drug use, and poverty all present as significant risk factors for addiction and mental illnesses.<sup>50</sup> The prevalence of addiction and mental illnesses in female prisoners is demonstrated both by the rates at which they exceed men<sup>51</sup> and also by the types of crimes for which they are incarcerated, often involving alcohol, drugs, and property.<sup>52</sup> In light of the nature of crimes most often committed, and the risk factors that underlie so many female offenders, it is clear that programs aimed at chronic physical and mental illness, including addiction, would have a positive impact on recidivism.

The most common treatment for mental illness inside prison walls is by way of prescription medication. Treatment through medication has been found to be frequent among both male and female prisoners, and “there is some evidence that female inmates are subjected to [the prescription of mood-altering, psychotropic drugs] . . . with a much greater frequency than male inmates.”<sup>53</sup> The adverse impact of the extensive use

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in the criminal subculture . . . . The cleavage between what is considered feminine and what is criminal is sharp—crime is almost always stigmatizing for females.”)

<sup>50</sup> Angela Wolf, Barbara E. Bloom & Barry A. Krisberg, *The Incarceration of Women in California*, 43 U.S.F. L. REV. 139, 145–47 (2008) (discussing factors that put women more at risk for physical and mental health issues and how the lack of services during imprisonment and upon release only exacerbate the same problems).

<sup>51</sup> NAT’L COUNCIL ON CRIME & DELINQUENCY, *THE SPIRAL OF RISK: HEALTH CARE PROVISION TO INCARCERATED WOMEN* 7 (2006), <http://www.policyarchive.org/handle/10207/5874>.

<sup>52</sup> See *supra* Part II.

<sup>53</sup> Kathleen Auerhahn & Elizabeth Dermody Leonard, *Docile Bodies? Chemical Restraints and the Female Inmate*, 90 J. CRIM. L. & CRIMINOLOGY 599, 606–07 (2000). This situation reflects a general medical propensity. “The tendency of medical professionals to overprescribe mood-altering, psychotropic drugs for women is not exclusive to correctional institutions. Throughout the country, significantly more

of psychotropic drugs to treat the female offender population is two-fold. First, the use of psychotropic drugs may perpetuate the offenders' drug-related avoidance strategies that were employed prior to incarceration.<sup>54</sup> The natural consequence of this treatment method is that once women are released from incarceration, they are discharged into communities where they lack the same access to health care that they faced prior to incarceration.<sup>55</sup> Unable to continue their previously prescribed medication, mental illness prevails, which may result in an increased likelihood of self-medication through illicit drugs. Thus, failure to adequately address the underlying mental illness within prison walls make women much more likely to become repeat offenders once they are released.<sup>56</sup>

The second adverse effect of this limited approach to mental health treatment is the failure to account for past abuse. For example, some of the "most common mental health issues affecting women in prison are . . . anxiety [and] post-traumatic stress disorder" resulting from a history of violence.<sup>57</sup> Trauma-informed treatment is necessary, but not widely recognized.<sup>58</sup> Incarceration can result in a spiraling effect for these women. Women experiencing PTSD associated with a history of physical and sexual abuse can be retraumatized by prison practices such as isolation<sup>59</sup> and mandatory pat-downs and searches performed by male correctional officers.<sup>60</sup> These victims who enter the prison system with a pre-existing mental health condition thus not only fail to be properly treated, but also face the possibility of their condition worsening.

While the substantially smaller female offender population may appear to underlie the blanket application of treatment programs primarily driven by male considerations, equal protection jurisprudence has pre-

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women than men receive prescriptions for antidepressants, tranquilizers, and sedatives." *Id.* at 606.

<sup>54</sup> Mitchell K. Byrne & Kevin Howells, *The Psychological Needs of Women Prisoners: Implications for Rehabilitation and Management*, 9 *PSYCHIATRY, PSYCHOL., & L.* 34, 38 (2002) (pointing to the high rate of "paradoxical reactions to benzodiazepines, often prescribed for anxiety related conditions").

<sup>55</sup> Wolf et al., *supra* note 50, at 149.

<sup>56</sup> *Id.*

<sup>57</sup> NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 51, at 13.

<sup>58</sup> Nena Messina & Stacy Calhoun, *Trauma-Informed Treatment Decreases Posttraumatic Stress Disorder Among Women Offenders*, 15 *J. TRAUMA & DISSOCIATION* 6, 8 (2014) (discussing the positive effects that trauma-informed treatment can have on offenders suffering from posttraumatic stress disorder).

<sup>59</sup> NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 51, at 13.

<sup>60</sup> Heather Moss, *Invisible Aggression, Impossible Abuse: Female Inmate-on-Inmate Sexual Assault*, 10 *GEO. J. GENDER & L.* 979, 987–88 (2009) (discussing the potential for coercive sexual exploitation that can occur in female correctional facilities, as "[s]ome correctional officers leverage their authority to force and coerce sexual contact with female inmates, using mandatory pat-downs . . . [and] engaging in improper surveillance to view female inmates" while undressing or using the toilet).

sented the true barrier.<sup>61</sup> Courts presented with equal protection claims of inferior programming for women have turned on the gender-neutrality of the prison programming.<sup>62</sup> However, it is precisely because of this focus on gender neutrality that litigation under the Equal Protection Clause has largely failed to improve treatment programs for female offenders. The patriarchal assumption that equity in resources between male and female inmates is sufficient to provide rehabilitative treatment adversely affects women who suffer more frequently from past physical and/or sexual abuse and mental illness.<sup>63</sup>

The irony of the prison system's failure to adequately treat women with mental illness is palpable. Historically, female criminality has often been linked to psychological and mental afflictions, reflecting the critically acclaimed theory of the "feminine ideal."<sup>64</sup> While in the past society easily adopted the viewpoint that women are not inherently "bad," but rather victims of their own feminine frailty, more recent jurisprudence is slower to consider the relationship between mental illness, trauma, and female criminality.<sup>65</sup> There continues to be little recognition of the actual differences between male and female dispositions that should be actively considered in mental health treatment. Until a broad societal shift occurs that recognizes the need to treat female offenders differently than male offenders, it will not matter whether claims are brought under the less-than-successful Equal Protection mechanism, or by way of a more creative legal argument. The failure to recognize and appropriately treat the underlying factors that drive women to criminality, combined with the damaging effects of incarceration, will result in the release of women who are increasingly unable to cope with the hardships of day-to-day living outside prison walls and ultimately find themselves again behind bars.

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<sup>61</sup> Cho, *supra* note 15, at 149 (discussing how equal protection jurisprudence has led to "a correctional environment that cannot adequately address the abusive histories of many female prisoners").

<sup>62</sup> Lopez *ex rel.* Lothes v. Butler Cty. Juvenile Rehab. Ctr., No. 1:04-CV-508, 2006 WL 462437, at \*10 (S.D. Ohio Feb. 24, 2006), *aff'd sub nom.*, Lothes v. Butler Cty. Juvenile Rehab. Ctr., 243 Fed. App'x 950 (6th Cir. 2007) (denying plaintiff's equal protection claim partly because the same rehabilitation programs were offered to both males and females); *see also* Klinger v. Dep't of Corr., 31 F.3d 727, 733-34 (8th Cir. 1994) (emphasizing statutes are facially neutral regarding prison programs and services).

<sup>63</sup> Kendra Weatherhead, Note, *Cruel but Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 HEALTH MATRIX 429, 454-55 (2003).

<sup>64</sup> Auerhahn & Leonard, *supra* note 53, at 609-13 (discussing Caesar Lombroso's explicit link between women's criminality and hysteria, as well as the link between premenstrual syndrome and women's crime).

<sup>65</sup> *Compare id.* (discussing theories linking crime with physical differences between men and women), *with* Cho, *supra* note 15, at 148-49 (describing the lack of emphasis on the underlying factors driving women to become incarcerated and the court's application of the "same standards for both male and female prisoners").

*B. Lack of Access to State Welfare and Benefits*

Reentry back into the community presents an entirely different myriad of obstacles for female offenders. Not only do women often face the same environment that led them to incarceration, but they also face a variety of collateral consequences as a result of their convictions. Recently released women are often laden with debt<sup>66</sup> and can face strict housing deadlines due to conditions imposed by either probation or child protective services.<sup>67</sup> Even having the resources to survive day-to-day becomes a challenge when women with felony drug convictions discover that they are essentially barred from the very job positions for which they are qualified.<sup>68</sup>

Historically, women have dominated health and social services positions and have occupied childcare and educational roles at rates exceeding males.<sup>69</sup> “These occupations are . . . highly sensitive to and intolerant of any criminal record.”<sup>70</sup> With the vast majority of employers requiring applicants to disclose criminal records at the outset of the application process, many women, even low-level, nonviolent drug and property offenders, are precluded from the applicant pool prior to even being considered for an interview.<sup>71</sup> Women face additional challenges if they seek employment that requires some sort of license. For example, women seeking careers in hairdressing or cosmetology, trades that are often taught in women’s prisons, can face statutory limitations to obtaining the necessary licenses.<sup>72</sup> The inability for recently released female offenders to find employment creates a greater demand for government assistance.

In 1996, President Bill Clinton answered the call of frustrated taxpayers by signing into action the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>73</sup> The Act reformed the welfare system by transferring the burden on society to the individual recipients—a shift in welfare to workfare.<sup>74</sup> Under PRWORA, states are giv-

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<sup>66</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 154 (rev. ed. 2012).

<sup>67</sup> JUDITH BERMAN, *WOMEN OFFENDER TRANSITION AND REENTRY: GENDER RESPONSIVE APPROACHES TO TRANSITIONING WOMEN OFFENDERS FROM PRISON TO THE COMMUNITY* 23 (2005), <http://nicic.gov/library/021815>.

<sup>68</sup> ALEXANDER, *supra* note 66, at 151–54.

<sup>69</sup> Hyman, *supra* note 49, at 122.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 125–26.

<sup>72</sup> *Id.* at 128; see also CAL. BUS. & PROF. CODE § 480 (West 2012).

<sup>73</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code).

<sup>74</sup> See *id.* Whether the reform was successful is a matter of debate. Compare SCOTT WINSHIP, *POVERTY AFTER WELFARE REFORM* (2016), <https://www.manhattan-institute.org/sites/default/files/R-SW-0816.pdf> (finding significant improvement in poverty trends since PRWORA), with KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A

en wide discretion on how to disperse federal funds; while it provides some eligibility criteria for state recipients of federal aid,<sup>75</sup> there are additional restrictions that states have the option of implementing.<sup>76</sup> States can submit their welfare plans with the Department of Health and Human Services and obtain waivers of the nonfavorable federal provisions.<sup>77</sup>

One area of federal restriction is the denial of assistance and benefits for certain drug-related convictions.<sup>78</sup> PRWORA recommends denial of “[a]n individual convicted (under Federal or State law) of any offense which is classified as a felony . . . and which has as an element the possession, use, or distribution of a controlled substance . . . shall not be eligible for . . . benefits under the food stamp program.”<sup>79</sup> It also recommends that these same individuals are denied assistance under the program of Temporary Assistance for Needy Families (TANF),<sup>80</sup> the cash-assistance benefits that the general population typically associates with welfare. PRWORA, signed into action at the height of the War on Drugs, while facially gender-neutral, had and continues to have a clear adverse impact on women, as approximately one third of women leave prison with a felony drug conviction.<sup>81</sup> Six states have adopted the federal ban as to food stamps, while ten states have adopted the TANF ban, without modification.<sup>82</sup> Those states have chosen to permanently deny benefits, regardless of whether the underlying drug crime occurred years prior.<sup>83</sup> In these

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DAY: LIVING ON ALMOST NOTHING IN AMERICA (2016) (critiquing the welfare reform).

<sup>75</sup> 42 U.S.C. § 604 (2012).

<sup>76</sup> 42 U.S.C. § 608.

<sup>77</sup> For a description of one state’s PRWORA implementation process, see Dixie R. Switzer, Comment, *Welfare Reform: Oregon’s Response to the Personal Responsibility and Work Opportunity Reconciliation Act*, 77 OR. L. REV. 759, 772–74 (1998).

<sup>78</sup> 21 U.S.C. § 862a(a) (2012).

<sup>79</sup> 21 U.S.C. § 862a(a) (2).

<sup>80</sup> 21 U.S.C. § 862a(b)(1). PRWORA created Temporary Assistance to Needy Families (TANF). The specific purpose of TANF is to “end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.” *Id.* § 601(a)(2). For information about TANF, see *An Introduction to TANF*, CTR. ON BUDGET & POL’Y PRIORITIES (July 15, 2015), <http://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf>.

<sup>81</sup> GLAZE & MARUSCHAK, *supra* note 18, at 22 tbl.17 (showing that 33% of women in state and federal prisons are charged with drug offenses, compared to 26% of men).

<sup>82</sup> As of August 2016, 10 states had adopted a lifetime disqualification for drug felons under TANF: Arizona, Delaware, Georgia, Mississippi, Missouri, Nebraska, South Carolina, South Dakota, Texas, Virginia. As of August 2016, the following states had imposed a lifetime disqualification for drug felons for SNAP benefits: Arizona, Guam, Mississippi, South Carolina, Virgin Islands, and West Virginia. MAGGIE McCARTY ET AL., CONG. RESEARCH SERV., DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE 9 tbl.1, 13 tbl.2 (2016), <https://www.fas.org/sgp/crs/misc/R42394.pdf>.

<sup>83</sup> *Id.*

states, positive life choices, such as participation in drug and alcohol treatment or obtaining gainful employment, do not carry any weight.

Another gender-neutral federal statute that has had an adverse impact on female offenders is the Housing Opportunity Program Extension Act (HOPE).<sup>84</sup> Signed into action by Congress in 1996 at the height of the War on Drugs, HOPE has since adversely affected drug offenders, regardless of the time that has passed since the drug offense.<sup>85</sup> The sole temporal restriction included in the law is that that denial of housing assistance is expressly limited to three years after an eviction for drug-related activity.<sup>86</sup> Since the implementation of HOPE, public housing authorities are mandated to put forth policies to deny public housing to individuals engaged in proscribed criminal behavior.<sup>87</sup> Housing authorities, including Section 8 housing providers, are not only authorized to perform criminal background checks on adult applicants<sup>88</sup> but also encouraged to develop their own exclusion criteria.<sup>89</sup> President Bill Clinton's enthusiasm for a "one-strike" policy here only further demonstrated the large amount of discretion granted to public housing authorities.<sup>90</sup> HOPE

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<sup>84</sup> Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codified as amended in scattered sections of 12 U.S.C. & 42 U.S.C.). Note that HOPE was enacted the same year as PRWORA (1996). Two years later, Congress passed the Quality Housing and Work Responsibility Act (QWHRA), amending HOPE to bring it more in line with the "one strike" policy advocated at the time. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461 (codified as amended in scattered sections of 38 U.S.C. & 42 U.S.C.). For more about "one strike" policy, see *infra* note 90 and accompanying text.

<sup>85</sup> See Quality Housing and Work Responsibility Act, § 547(q)(1)(A), 112 Stat. at 2605 (codified as amended at 42 U.S.C. § 1437d(q)(1)(A) (2012)). See generally Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOLEDO L. REV. 545 (for an analysis of the effects of HOPE and similar laws have had on release offenders).

<sup>86</sup> 42 U.S.C. 13661(c) ("Any tenant evicted . . . by reason of drug-related criminal activity . . . shall not be eligible for federally assisted housing [under this title] during the 3-year period beginning on the date of such eviction . . ."); see also Carey, *supra* note 85, at 561.

<sup>87</sup> § 42 U.S.C. 13661(b)(1)(B) (mandating that a public housing authority must establish standards for occupancy if there is "reasonable cause to believe that such household member's illegal use (or pattern of illegal use) of a controlled substance, or abuse (or pattern of abuse) of alcohol, may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents").

<sup>88</sup> *Id.* § 1437d(q)(1)(A).

<sup>89</sup> U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF PUB. & INDIAN HOUS., NOTICE PIH 96-16 (HA), "ONE STRIKE AND YOU'RE OUT" SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (HAS) 6 (1996).

<sup>90</sup> "In my State of the Union address I challenged local housing authorities and tenant associations to adopt this one strike and you're out policy, to restore the rule of law to public housing. To simply say, if you mess up your community you have to turn in your key; if you insist on abusing or intimidating or hurting other people you'll have to live somewhere else." President Bill Clinton, Remarks by the President

was and remains particularly problematic for female offenders upon release, as mothers are already twice as likely as fathers to have been homeless prior to incarceration.<sup>91</sup>

Women released from prison “typically return to the same communities from which they left to go to prison.”<sup>92</sup> Housing challenges create particularly dire challenges, especially for recently incarcerated mothers who are required by child welfare agencies to locate adequate housing in order to regain custody of children in foster care.<sup>93</sup> Halfway housing that is made available through reentry programs brings potential dangers as well, as some are places that are “operated more for profit than an interest in helping offenders return to society.”<sup>94</sup> Escapes are common, and recently released females may share housing facilities with recently released males.<sup>95</sup> In one instance, a group of males escaped and threatened female residents.<sup>96</sup> Women who have spent their recent years largely surrounded by other women, who have a history of domestic violence and abuse, are unlikely to feel safe when released amongst men who not only share the same history of drug abuse and mental illness, but who also have not been around women in a number of years. The lack of transitional housing that caters specifically to women is the result of women making up such a small percentage of the prison system.<sup>97</sup> Similar to how women face a lack of gender-focused treatment facilities behind prison walls, women face a lack of gender-focused transitional services upon their release.

The irony that exists amongst these federal statutes, and the states that have chosen to implement “total bans” of public benefits, is the federal assurance of such welfare and housing benefits to domestic violence

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at One Strike Crime Symposium (Mar. 28, 1996), <http://clinton6.nara.gov/1996/03/1996-03-28-president-remarks-at-one-strike-crime-symposium.html>.

<sup>91</sup> LENOX, *supra* note 5, at 302.

<sup>92</sup> BERMAN, *supra* note 67, at 8.

<sup>93</sup> *Id.* at 23.

<sup>94</sup> Derek Gilna, *When Halfway Houses Pose Full-Time Problems*, PRISON LEGAL NEWS 1 (Jan. 10, 2015), <https://www.prisonlegalnews.org/news/2015/jan/10/when-halfway-houses-pose-full-time-problems/>.

<sup>95</sup> *See id.* at 5–6.

<sup>96</sup> *Id.* at 5 (“Hurricane Sandy and a lack of preparation or training for unusual weather allowed residents at one New Jersey halfway house to run rampant . . . . [W]hen the power failed . . . all of the doors unlocked. The opened doors allowed dozens of males . . . to get into the hallways. Once there they threatened . . . female residents.”). Single-sex halfway homes are no guarantee of safety in this corrupt environment. One reentry home for women is facing two lawsuits for alleged employee sexual harassment and abuse of the residents. Joe Watson, *Sexual Harassment, Abuse Alleged at Oklahoma Halfway House for Women*, PRISON LEGAL NEWS (Feb. 29, 2016), <https://www.prisonlegalnews.org/news/2016/feb/29/sexual-harassment-abuse-alleged-oklahoma-halfway-house-women/>; *see also* Gilna, *supra* note 94, at 17.

<sup>97</sup> BERMAN, *supra* note 67, at 17; Kim White, *Women in Federal Prison: Pathways In, Programs Out*, 14 WM. & MARY J. WOMEN & L. 305, 311–12 (2008).

survivors. A general internet query would undoubtedly provide a sense of security to domestic violence survivors, touting that low-income domestic violence victims are eligible for food assistance through the SNAP program, cash assistance welfare through TANF, and housing assistance through HUD's Public Housing Program.<sup>98</sup> As demonstrated by this paradox, the federal government has failed to acknowledge what is too commonly a close relationship: domestic violence and drug crimes. With 46% of previously abused female inmates found to have committed their current offense while under the influence of drugs,<sup>99</sup> the relationship between abuse and drug use is too prominent to deny.

PRWORA and HOPE present significant barriers for a successful reentry. As previously discussed, female offenders already experience higher rates of poverty, mental illness, and lack of support prior to incarceration.<sup>100</sup> Regardless of life skills learned or treatment obtained during incarceration, the inability to access the benefits that previously provided food and housing undoubtedly has detrimental effects. These regulations leave formerly incarcerated women without support systems, with few places to go except the street, making them once again vulnerable to drug use and victimization. Even if these women gain adequate housing, if they live in one of the states that bans welfare benefits to those previously convicted of drug crimes, they may face hardships putting food on the table. The irony of this seemingly unbreakable cyclical pattern of poverty, drug-use, and crime is somehow lost on legislatures, as women continue to be left without resources that the lack thereof led to their convictions in the first place.<sup>101</sup>

### C. Maternal Incarceration and Intergenerational Criminality

As the number of female inmates continues to grow, it only follows that the system has also seen a vast increase of the number of mothers in prison. Between 1991 and 2007, the growth in the number of mothers held in state and federal prisons was up 122%.<sup>102</sup> Over that same period, "the number of children with a mother in prison ha[d] more than doubled," surpassing the growth rate of incarcerated mothers at 131%.<sup>103</sup> Thus, not only are women, specifically mothers, continuing to be incarcerated at a high rate, but the number of children affected by maternal incarceration also exceeds the rate at which women are entering the sys-

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<sup>98</sup> See *Access to Federal Benefits for Domestic Violence Survivors*, ASSETS FOR INDEP. RES. CTR., <http://idaresources.acf.hhs.gov/page?pageid=a047000000DfWdU> (last visited Feb. 24, 2017).

<sup>99</sup> HARLOW, *supra* note 19, at 3.

<sup>100</sup> See *supra* Part II (discussing the common financial, medical, and familial circumstances of female offenders).

<sup>101</sup> *Id.* (emphasizing that many of the crimes committed by women are "crimes of survival").

<sup>102</sup> GLAZE & MARUSCHAK, *supra* note 18, at 2.

<sup>103</sup> *Id.*



tem. When examining the potential of a correlation between maternal incarceration and intergenerational criminality, it is easy to see the threat of the prison population's exponential growth, should these children follow the paths of their mothers.

Maternal incarceration has been a growing concern because of the obvious societal role that women continue to play in child rearing. Approximately 64% of all mothers in state prisons were living with their minor children prior to incarceration.<sup>104</sup> Furthermore, 42% of these women reported living in a single-parent household.<sup>105</sup> This statistic on its own demonstrates one of the detrimental effects of maternal incarceration: the loss of a primary caregiver. However, the net that is cast as a result of maternal incarceration is far wider than the sole impact on children raised by single mothers—in dual parent households, while nearly 90% of fathers are able to pass off parenting to the mother upon incarceration, only 37% of mothers are able to rely on the other parent upon their own incarceration.<sup>106</sup> Thus, a child's continuity of care is much more likely to be disrupted when their mother is incarcerated, as compared to their father.

While the majority of children are relocated to live with either grandparents or other relatives, with a surprising minority ending up in foster care,<sup>107</sup> the separation can still result in a high level of trauma. These new familial caretakers often do not have the financial resources to support the newly passed-off child, who is already suffering “financially due to either the loss of legal or illegal income . . . or access to the public assistance previously provided by the incarcerated mother.”<sup>108</sup> Because the female offender's family origin is often reinvented in the offender's own hardships, placement with the offender's relatives can pose the risk of an environment characterized by alcohol, addiction, and abuse.<sup>109</sup> Thus, while one may initially view the placement of a child with family as a saving grace, it must be recognized that the child could be entering an even more unstable environment—one that is completely unprepared to meet the demands of a now even more at-risk youth.

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<sup>104</sup> *Id.* at 4.

<sup>105</sup> *Id.* at 5.

<sup>106</sup> *Id.* at 5 & tbl.8 (implying that while 58% of women consider their household as dual parent prior to incarceration, only 37% of those women are able to rely on their partner as the primary caregiver after they enter the system).

<sup>107</sup> *Id.* at 5 tbl.8 (showing that 44.9% of children of female inmates are cared for by grandparents, 22.8% of children are cared for by other relatives, and 10.9% of children are cared for in a foster home).

<sup>108</sup> Huebner & Gustafson, *supra* note 6, at 284; see also Patricia Allard, *When the Cost Is Too Great: The Emotional and Psychological Impact on Children of Incarcerating Their Parents for Drug Offences*, 50 FAM. CT. REV. 48, 51 (2012) (“The caregiver may have limited resources and may struggle to address the emotional, psychological and financial needs of the children.”).

<sup>109</sup> See Susan F. Sharp & Susan T. Marcus-Mendoza, *It's a Family Affair: Incarcerated Women and Their Families*, 12 WOMEN & CRIM. JUST. 21, 26 (2001).

Although the placement of a child in a healthy, safe home of a family member or foster family can certainly mitigate the damaging impact of maternal incarceration, the separation alone can be enough to trigger a traumatic event for a child.<sup>110</sup> The significant and long-lasting trauma that children can experience when separated from their primary caretaker has been well recognized within the legal realm in the context of divorce.<sup>111</sup> However, the acknowledgement that children experience the same, if not worse trauma, when separated as a result of imprisonment has only recently begun gaining ground in the legal community.<sup>112</sup> Children whose mothers are incarcerated often experience a lack of stability and security, which can result in the fear of forming bonds with new caregivers, as well as present other attachment issues.<sup>113</sup> Recent research has found that children whose mothers are imprisoned exhibited symptoms of “post traumatic stress disorder, . . . flashbacks of parent’s arrest, and, in some cases, vivid memories of their mothers’ voices.”<sup>114</sup> Lawmakers, judges, and attorneys have recently been urged to recognize the essential role that attachment plays in children’s psychological development, particularly when determining the placement of left-behind children and prison policies, such as visitation procedures.

Even prior to being separated from their primary caretakers, children whose mothers are ultimately incarcerated are already more inherently at-risk than the general population, as parents in prison are more likely to experience a multitude of problems that largely affect any child’s emotional and social well-being. The most common problems among incarcerated parents are drug/alcohol abuse and mental health issues.<sup>115</sup> Incarcerated parents are often more likely to have previously experienced homelessness, physical or sexual abuse, a lack of education and medical problems.<sup>116</sup> These hardships transfer to dependent children—for example, it has been shown that children who witness their mothers become victims of domestic violence are more likely to perpetuate the cycle of violence, either through violent victimization or becoming the violent victimizer themselves.<sup>117</sup> Additionally, lack of formalized educa-

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<sup>110</sup> Allard, *supra* note 108, at 52 (finding that “[t]he ‘comings and goings’ of parents inhibit their children’s developing sense of personal safety”).

<sup>111</sup> *Id.* at 50.

<sup>112</sup> *Id.* (finding that children who experience parental incarceration will often suffer the social stigma along with the societal expectation that the child will also ultimately resort to a life of crime).

<sup>113</sup> *Id.* at 52, 54.

<sup>114</sup> *Id.* at 54.

<sup>115</sup> GLAZE & MARUSCHAK, *supra* note 18, at 7 tbl.12.

<sup>116</sup> Among parents in prison, 8.9% were homeless in the year before the arrest leading to their current imprisonment; 19.9% were physically or sexually abused prior to their imprisonment; 40.6% have medical problems; 56.5% have current mental health problems and; 67.4% have a history of alcohol or drug abuse. *Id.*

<sup>117</sup> Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN’S L.J. 205, 207 (1997)

tion in a parent has been shown to correlate with an increased likelihood of juvenile delinquency.<sup>118</sup>

Research has demonstrated that these previously mentioned, nonincarceration-related lifestyle factors manifest in children in ways such as antisocial behavior, mental health problems, drug abuse, and school failure.<sup>119</sup> Children who experience the same hardships that the average female offender faces prior to incarceration are already at risk of reinventing the wheel—when maternal incarceration becomes yet another hurdle for these children to cross, the risk for intergenerational criminality significantly rises.<sup>120</sup> The higher rate at which these children experience criminal activity is most prominent in young adulthood, demonstrating how maternal incarceration can effectively strip a child of the skill set needed to navigate the transition into adulthood.<sup>121</sup>

This correlation between the rise of female incarceration and the impact on the future generation of criminals has gained notable traction in both the media and academia,<sup>122</sup> especially in light of the U.S. prison population swelling at an unprecedented rate. Nonetheless, policymakers and lawmakers have shown a demonstrable lack of foresight in developing laws and implementing programs that would yield long-term results. Despite the validity of the recently conducted research surrounding the effects of maternal incarceration, it is unlikely that the risk of childhood trauma or intergenerational criminality will be the driving force behind any substantial changes in policy and law surrounding female incarceration.

#### D. Termination of Parental Rights

In addition to the negative impact of maternal incarceration on children, incarcerated mothers face the threat of a very harsh reality: the possibility of losing their parental rights. In termination proceedings, a

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(explaining the “ripple effect” of violence through generations when children are exposed to abuse).

<sup>118</sup> Huebner & Gustafson, *supra* note 6, at 291.

<sup>119</sup> Murray & Farrington, *supra* note 6, at 135; *see also* Sharp & Marcus-Mendoza, *supra* note 109, at 39 (finding that children of incarcerated mothers often experience difficulties at school and have problems with drugs, alcohol, and depression).

<sup>120</sup> Huebner & Gustafson, *supra* note 6, at 291–92 (finding that even after controlling for nonincarcerated related maternal absence and other independent risk factors, “offspring of incarcerated mothers were significantly more likely to be involved in the criminal justice system as adults”); Murray & Farrington, *supra* note 6, at 135.

<sup>121</sup> Mears & Siennick, *supra* note 6, at 7 (finding that “parental incarceration’s effects on young children’s educational performance, behavior, and mental health may create a poor foundation for negotiating adolescence and the challenges of becoming independent and assuming adult responsibilities”).

<sup>122</sup> *See, e.g.*, Julie Smyth, *Dual Punishment: Incarcerated Mothers and Their Children*, 3 COLUM. SOC. WORK REV. 33 (2012); Nicolas Kristof, *Mothers in Prison*, N.Y. TIMES (Nov. 25, 2016), <https://nyti.ms/2k4l3Ql>.

number of states allow courts to consider incarceration or the length of incarceration without necessarily requiring proof of risk of harm to the child.<sup>123</sup> These states, adopting an “impliedly bad parent” approach, take the position that parents can be deemed unfit as a “result of factors primarily related to their imprisonment as opposed to behavior or conduct directly related to parenting.”<sup>124</sup> Thus, regardless of a mother’s previously demonstrated parenting capabilities, and despite the parenting skills she may be working to learn while in prison, the fact that she is incarcerated may be a sufficient enough reason for her to lose her parental rights.

Not only does the separation between mother and child during incarceration cause increased stress, anxiety, and feelings of guilt for mothers,<sup>125</sup> but maintaining familial bonds while a mother serves her sentence has also been shown to decrease rates of recidivism.<sup>126</sup> Thus, women who experience loss of parental rights are likely to be released back into the community without one of their main motivations to stay crime-free. Additionally, while prisons provide parenting classes designed to leave a

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<sup>123</sup> See, e.g., ALA. CODE § 12-15-319(a)(4) (2016) (“conviction of and imprisonment for a felony” can be factor in a termination of parental rights decision); ALASKA STAT. §§ 47.10.011(2), 47.10.080(o)(1), 47.10.086(c)(10), 47.10.088(a)(3) (2014) (recommends parental termination if in child’s best interest and “parent or guardian is incarcerated and is unavailable to care for the child during a significant period of the child’s minority, considering the child’s age and need for care by an adult”); ARK. CODE ANN. § 9-27-341(b)(1)(A), (3)(B)(viii) (2016) (The court can end parental rights if “[t]he parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile’s life.); COLO. REV. STAT. § 19-3-604(1)(b)(III) (2016) (“long-term confinement of the parent” is a basis for finding a parent unfit); DEL. CODE ANN. tit. 13, § 1103(5)(a)(3) (2016) (parent failed to plan for child’s needs and respondent “incapable of discharging parental responsibilities due to extended or repeated incarceration”); FLA. STAT. ANN. § 39.806(1)(d)(1)–(3) (West 2016) (parent incarcerated for a “substantial period of time,” or is a violent criminal, or parental relationship is harmful to child); IDAHO CODE § 16-2005(1)(a)–(e) (2016) (risk of harm to child is one factor of “one or more” factors); 705 ILL. COMP. STAT. 405/1–2(1)(a) (2016) (one possible “aggravating circumstance[]” is possible harm to child).

<sup>124</sup> Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER, L. & JUST. 78, 98 (2011).

<sup>125</sup> *Id.* at 91.

<sup>126</sup> See, e.g., Anne E. Jbara, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs*, 87 IND. L.J. 1825, 1831, 1838–39 (2012) (discussing results of a Women’s Prison Association study which “found that women who completed the nursery program [at Nebraska Correctional Center for Women] were only about one-third as likely to recidivate [as] women who gave birth and were immediately separated from their children while incarcerated”); see also Jessica Y. Kim, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 CARDOZO WOMEN’S L.J. 221, 238–39 (2001) (finding that a community corrections program, the Elizabeth Fry Center in San Francisco, that allows mothers to maintain day-to-day interactions with their children, has shown a 20% reconviction rate, compared to the 39% reconviction rate of traditionally incarcerated women in California state prisons).

mother better equipped to return to her maternal duties, women whose parental rights are terminated are left without the tools or the wherewithal to transition to a life on the outside that is different than one they ever knew.

## V. RECOMMENDATIONS

### A. *Sentencing Reform*

In order to truly have a powerful effect on the rising rate of female incarceration, sentencing reform is essential. Coincidentally, the previous presidential administration placed an emphasis on reform within the criminal justice system. “In April 2014, the United States Sentencing Commission reduced the penalties for many nonviolent drug crimes” and made the decision that the new “guidelines could be applied retroactively to many prisoners serving long drug sentences.”<sup>127</sup> In October, 2015, President Barack Obama flooded headlines with his announcement that over 6,000 federal prisoners would be released, as an effort to ease the strain on overpopulated prisons and to also “roll back the harsh penalties” that resulted from the War on Drugs.<sup>128</sup> Any effort to recognize the devastation that the War on Drugs has had on the prison system is important, especially a release such as this one, which is one of the largest in America’s history.<sup>129</sup> Approximately 46,000 federal prison inmates are eligible for sentence reductions under the new guidelines, with about 17,000 prisoners so far having applied for review.<sup>130</sup> Of the 13,187 who have been granted sentence reductions so far, 7.8% of them are women.<sup>131</sup> The average sentence reduction was 25 months. President Obama and his legislature’s prioritization of sentencing reform was particularly significant in the message that it sent to the states: The War on Drugs and the mandatory minimum sentences of the 1980s and 1990s were a step too far, and nonviolent drug offenders should be considered for release.<sup>132</sup>

In order for there to be true reform in how the criminal justice system views nonviolent female offenders, states must follow the steps the Obama Administration took in scaling back mandatory minimum sen-

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<sup>127</sup> Michael S. Schmidt, *U.S. to Release 6,000 Inmates from Prisons*, N.Y. TIMES (Oct. 6, 2015), <https://nyti.ms/2kgSTlr>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Maya Rhodan, *What to Know About the 6,000 Federal Prisoners Being Released*, TIME (Oct. 14, 2015), <http://time.com/4072182/prisoners-release-6000/> (When federal judges are asked by inmates to reassess their sentences, the judge will examine the inmates’ behavior in prison, as well as the likelihood they will act out violently if they are released); Schmidt, *supra* note 127.

<sup>131</sup> Rhodan, *supra* note 130.

<sup>132</sup> *Id.*

tences and other harsh drug penalties.<sup>133</sup> Fortunately, states have begun to enact meaningful legislation in the last few years. For example, Connecticut's "Second Chance Society" legislation approved in June 2015 drastically "[r]educes the penalty for possession of drugs from a felony with a seven-year maximum sentence . . . to a misdemeanor with a maximum of one year in jail, no mandatory jail sentence."<sup>134</sup> In addition to an expedited parole process for nonviolent, no-victim offenses, the legislation includes initiatives to improve "adult education and employment training for ex-offenders" and to "reduce the 'school-to-prison pipeline.'"<sup>135</sup> Connecticut's progressive initiative follows California's Proposition 47, which was passed in 2014 and sought to "reclassify six low-level property and drug offenses from felonies to misdemeanors."<sup>136</sup> Connecticut and California are not alone; between 2009 and 2013, 40 states took some action to ease their drug laws.<sup>137</sup> The independent action of these states is not only influential in how it sets the stage for reform in other areas of the law—such as availability of state public assistance benefits—but is also significant because of the many people that it affects, with "[s]tate prisons hous[ing] more than six times as many prisoners as federal prisons."<sup>138</sup>

Some states have been slower to effectuate sentencing reform. For example, Oregon brought forth harsher penalties for drug-related and property offenses with the passage of Measure 57 in 2008.<sup>139</sup> However,

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<sup>133</sup> Since the writing of this Comment, President Donald Trump has taken office. It remains to be seen whether the trend towards more lenient sentences for nonviolent drug offenses will continue, or whether the War on Drugs will be rehabilitated. There are indications that it will be the latter. *See, e.g.,* AMES C. GRAWERT, BRENNAN CTR. FOR JUSTICE, ANALYSIS: SEN. JEFF SESSIONS'S RECORD ON CRIMINAL JUSTICE, <https://www.brennancenter.org/sites/default/files/analysis/SenatorJeffSessionsRecordonCriminalJustice.pdf> ("Sen. Sessions opposes efforts to reduce unnecessarily long federal prison sentences for nonviolent crimes, despite a consensus for reform even within his own party."); *see also* Charles P. Pierce, *Jeff Sessions Suggests You Say Yes to the War on Drugs*, ESQUIRE (Apr. 10, 2017), <http://www.esquire.com/news-politics/politics/news/a54401/jeff-sessions-war-on-drugs/>.

<sup>134</sup> Press Release, Office of Conn. Governor Dannel P. Malloy, Gov. Malloy Signs 'Second Chance Society' Bill to Further Reduce Crime and Successfully Re-Integrate Nonviolent Offenders into Society (July 9, 2015), <http://portal.ct.gov/office-of-the-governor/press-room/press-releases/2015/07-2015/gov-malloy-signs-second-chance-society-bill-to-further-reduce-crime-and-successfully-reintegrate-non>.

<sup>135</sup> *Id.*

<sup>136</sup> *California Voters Pass Proposition 47 Sentencing Reform*, SENTENCING PROJECT (Nov. 5, 2014), [http://67.199.50.100/detail/news.cfm?news\\_id=1882&id=128](http://67.199.50.100/detail/news.cfm?news_id=1882&id=128) (last visited Mar. 2, 2017).

<sup>137</sup> Drew Desilver, *Feds May Be Rethinking the Drug War, but States Have Been Leading the Way*, PEW RESEARCH CTR. (Apr. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/04/02/feds-may-be-rethinking-the-drug-war-but-states-have-been-leading-the-way/>.

<sup>138</sup> *Id.*

<sup>139</sup> OR. DEP'T OF CORR., ISSUE BRIEF—2009: SENTENCING RELATED TO MEASURE 57 (2009), <http://library.state.or.us/repository/2009/200911040953393/>. Measure 57

Oregon has made some positive modifications to drug laws, by providing for probation in lieu of prison time for certain felony marijuana convictions in 2013<sup>140</sup> and ultimately legalizing recreational marijuana in 2015.<sup>141</sup> Oregon's sentencing reform still has a ways to go. Other states, rather than directly reducing sentences for drug convictions, have implemented legislation that offers alternative sentencing programs,<sup>142</sup> diversion programs,<sup>143</sup> and deferred prosecution for certain drug charges.<sup>144</sup> While changes such as these are still a step in the right direction, more needs to be done. States should closely evaluate and modify drug laws implemented during the War on Drugs and mandatory minimums relating to drug offenses should be modified to increase judicial discretion. Furthermore, states should increase funding for reentry programs in order to assist those who have already been incarcerated for far too long.

As demonstrated in other areas of social policy, such as same-sex marriage, state-by-state advocacy and policy change at the federal level build upon each other—states will often look to the federal government for guidance and use their laboratories of experimentation to further progress an issue, while state-by-state implementation allows the federal government to make changes based on demonstrated public opinion.<sup>145</sup> Therefore, while the changes at both state and federal level may appear

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increased penalties and sentencing ranges for drug traffickers and manufacturers, enhanced sentencing under the repeat property offender statute and increased the sentence for identity theft. LEGISLATIVE COMM. SERVS., BACKGROUND BRIEF ON FELONY SENTENCING, 1, 23 (2012), [https://www.oregonlegislature.gov/citizen\\_engagement/Reports/FelonySentencing.pdf](https://www.oregonlegislature.gov/citizen_engagement/Reports/FelonySentencing.pdf). Although those sentenced between February 15, 2010 and January 1, 2012 did not have enhanced sentences by Measure 57 due to budget shortfalls, it was reinstated in 2012. *Id.* at 3.

<sup>140</sup> H.R. 3194, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (codified at OR. REV. STAT. § 475.900 (2015)).

<sup>141</sup> Ballot Measure 91 (Or. 2014) (codified at OR. REV. STAT. § 475B.005–395 (2015)).

<sup>142</sup> *See, e.g.*, ARK. CODE ANN. § 5-4-104(d)(2) (2016) (focusing on alternative sentencing for nonviolent offenders and increased use of probation and parole).

<sup>143</sup> *See, e.g.*, OHIO REV. CODE ANN. §§ 307.932, 2967.14, 2961.22 (LexisNexis 2016) (designed to reduce recidivism by increasing rehabilitative treatment, improving education and teaching employment skills to low-level, nonviolent offenders).

<sup>144</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-361 (2016) (prohibiting county attorneys from diverting or deferring the prosecution of anyone with three or more convictions of either drug possession or paraphernalia, as opposed to the previous law which prohibited deferred prohibition for anyone previously convicted of a felony).

<sup>145</sup> As demonstrated by statistics calculated by Pew Research Center, public opinion is indeed changing in this area. In a 2014 survey, “67% of Americans [said] that the government should focus more on providing treatment for those who use illegal drugs such as heroin or cocaine.” Only 26% of Americans felt that “the government’s focus should be on prosecuting users of such hard drugs.” Desilver, *supra* note 137; *see also America’s New Drug Policy Landscape*, PEW RESEARCH CTR. (Apr. 2, 2014), <http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/>. This is in stark contrast to 1990 “when 73% of Americans favored a mandatory death [sentence] . . . for ‘major drug traffickers.’” Desilver, *supra* note 137.

sluggish to those who are deeply concerned, any discussion on reducing harsh drug penalties and mandatory minimum sentences is still a discussion that this nation was not having 20 years ago—this is progress worthy of applause on its own.

*B. Gender-Focused Treatment Programs*

One of the greatest risk factors linked to female criminality, and which may present the biggest hurdle to a successful reentry, is the presence of mental illness and drug and alcohol addiction.<sup>146</sup> The lack of treatment programs that cater to the unique circumstances of many female inmates has led to mentally ill and emotionally vulnerable women not receiving the treatment they need (and deserve) and also continues to contribute to the growing population of female offenders.<sup>147</sup> Adopting gender-focused treatment programs will not only curb the recidivism rate, but will also increase the likelihood of overall success for formerly incarcerated females as they transition back into their communities. Finally, recognizing the role that mental illness plays amongst female offenders is essential to effectively change how society views the “criminality” of women charged with drug and property crimes.

Research has shown that “confrontational techniques and group settings, typically used in treatment [of male offenders],” are less effective for female offenders.<sup>148</sup> Rather, it has been found that women “respond more positively to . . . techniques that reduce feelings of guilt and self-blame, and that [focus on] improv[ing] self-esteem and self-awareness.”<sup>149</sup> However, this is not to say that women cannot be treated successfully in group settings—in fact, it has been suggested that women recovering from abuse or addiction should be given the opportunity to develop “[h]ealthy, growth-fostering relationships” while in treatment.<sup>150</sup> Women previously involved in abusive relationships can often feel disconnected, disempowered, and a lack of self-worth.<sup>151</sup> Programs that focus on relationships and mutuality have been deemed beneficial because they allow women to experience healthy relationships, while also building trust and self-empowerment.<sup>152</sup> Finally, due to the fact that the majority of incarcerated women have a history of some form of abuse, it has been suggest-

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<sup>146</sup> See *supra* Part IV.A.

<sup>147</sup> See Preeta Saxena, Christine E. Grella & Nena P. Messina, *Continuing Care and Trauma in Women Offenders’ Substance Use, Psychiatric Status, and Self-Efficacy Outcomes*, 26 *WOMEN CRIM. JUST.* 99, 99–100 (2016).

<sup>148</sup> See Robert A. Shearer, *Identifying the Special Needs of Female Offenders*, 67 *FED. PROB.* 46, 47 (2003).

<sup>149</sup> *Id.*

<sup>150</sup> Stephanie S. Covington, *Women in Prison: Approaches in the Treatment of Our Most Invisible Population*, 21 *WOMEN & THERAPY* 141, 148 (1998).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*



ed that trauma-focused treatment should become priority.<sup>153</sup> This is especially important for women who have addiction issues, as drug and alcohol abuse is often a coping mechanism for earlier trauma.<sup>154</sup>

Women's treatment needs are unique. And this is not to say that men do not have their own recognized psychological needs for treatment programs. However, the corrections system is already largely accounting for men's needs, even within facilities that entirely house women. The research is well-documented that female offenders end up in prison for very different reasons than their male counterparts,<sup>155</sup> and unless these differences are addressed within the prison system, they are being released with the same limitations.

### C. *Employment Legislation and Access to Public Benefits*

When evaluating the cyclical pattern of criminality, especially as it relates to impoverished, abused, and mentally ill women, it can be difficult to pinpoint where in the cycle the policy change should start. Because "at least 95% of offenders will likely be released back to their communities,"<sup>156</sup> supporting the women in this group will be essential to curbing recidivism. In order to increase opportunities for employment, state and city laws should reconsider the weight that employers are allowed to give criminal records early in the application process. Additionally, federal acts, such as PRWORA and HOPE, should be amended as they greatly limit the availability of resources that women desperately need when they are unable to find employment and are in need of housing.

When a woman returns to her community and begins her search for work, depending on what state she lives in, she may or may not see standard job applications that include a box to be checked if the applicant has ever been convicted of a crime. As of last year, "over 150 cities and counties have adopted what is widely known as 'ban the box'" initiatives.<sup>157</sup> The idea behind these initiatives is that by removing the conviction history question on job applications, and delaying the background check until later in the hiring process, employers will consider a job applicant's qual-

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<sup>153</sup> *Id.* at 148–49.

<sup>154</sup> *Id.* (discussing the importance of addressing trauma in the early stages of addiction recovery).

<sup>155</sup> See *supra* Part II for a discussion of the crimes for which women and men are most frequently convicted.

<sup>156</sup> Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, BUREAU JUST. STAT. <https://www.bjs.gov/content/reentry/reentry.cfm> (last revised Jan. 24, 2017).

<sup>157</sup> MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP'T L. PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2016), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

ifications first, without the stigma of a conviction record.<sup>158</sup> The primary purpose of “ban the box” legislation is to reduce recidivism, as extensive research finds that “an employed person with a criminal record is less likely to reoffend than an unemployed person with a criminal record.”<sup>159</sup>

Given how recently the “ban the box” initiatives have been implemented in many states, statistics regarding the effects on employment levels are slim. However, research that has been conducted has found favorable results. For example, since adopting the “ban the box” policy in 2011, the city of Durham, North Carolina has increased the proportion of city employees with criminal records by nearly seven-fold.<sup>160</sup> Once hired, ex-offenders have proven to perform well. Another study involving John Hopkins Hospital, where 491 ex-offenders were hired between 2003 and 2006, found that performance evaluations between ex-offenders and nonoffenders had no discernible differences.<sup>161</sup> Although neither the Durham or John Hopkins study was gender-specific, the findings are encouraging. In order for “ban the box” initiatives to continue to spread, more research should be done to highlight the positive effects of fair-chance hiring processes, specifically for female ex-offenders.

Under PRWORA, the federal recommendation for states to deny the availability of food stamps to those convicted of felony drug offenses should be abolished. Denying women access to food, based on a previous conviction for which they have already served time, is not a legitimate means to any government interest. Denying women the basic resources to feed themselves and their families, while they work to become contributing members of society, serves no purpose other than driving women to meet those needs in alternate, and potentially illegal, ways. The federal recommendation to restrict cash benefits under TANF to formerly convicted drug felons, while slightly more logical than the restriction on food stamps, should also be amended. A more reasonable recommendation would be to implement a rebuttable presumption against cash benefits, mandating an appeals process where women have the opportunity to show compliance with drug treatment or probation conditions in exchange for benefits.

In order to ensure that recently released women are not left homeless, and further subjected to abuse and drug use, HOPE should be largely amended. Rather than excluding those with felony drug convictions from public housing, a percentage of Section 8 housing should be feder-

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<sup>158</sup> *Id.*

<sup>159</sup> Adriel Garcia, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current “Ban the Box” Legislation*, 85 TEMP. L. REV. 921, 921 (2013).

<sup>160</sup> DARYL V. ATKINSON & KATHLEEN LOCKWOOD, S. COAL. FOR SOC. JUSTICE, THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC (2014), [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper-2.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf).

<sup>161</sup> Ian B. Petersen, *Toward True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks*, 94 TEX. L. REV. 175, 187 (2015).

ally mandated to be available for those facing reentry. While active drug use is a legitimate concern for communities, the presumption should be that women who have completed their drug conviction sentences are safe to live in public housing. Thus, the three-year ban on housing after eviction for a drug-related crime should be lifted, unless the agency can prove beyond a reasonable doubt that the woman is still engaged in drug-related activity. By banning these women from public housing for three years, often after they have already served time for their crime, society is continuing to label them as second-class citizens, while providing them less due process than they would receive in the court of law. To continue to restrict a woman's liberty after she has served the time for a criminal conviction should present the same heavy burden that is placed on the state during the initial conviction—proof beyond a reasonable doubt.

Although the availability of public assistance can largely depend on federal legislation, state law plays an essential role as well. Louisiana has demonstrated how amending state law can have a positive impact on federal restrictions, even in the absence of federal legislation amendments. In 2012, the Louisiana legislature enacted a law that allowed a court to expunge the record of a felony conviction if the person had been originally been convicted of a first-time offense involving methamphetamine or cocaine, was not sentenced as a habitual offender, had completed their sentence, and if 19 years had passed since completion of the sentence.<sup>162</sup> While 19 years is a significant amount of time, for a young, first-time offender who completes her sentence in her early to mid-twenties, the ability to have her felony drug conviction expunged could re-open many doors that would have otherwise remained shut. Even in the absence of federal amendments to acts such as PRWORA and HOPE, states should take positive steps to ensure that their citizens are given the best opportunity possible for success. For a 45-year-old woman in Louisiana who has continuously struggled to find safe, affordable housing or stable employment, having her felony drug conviction expunged could be a true saving grace.

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<sup>162</sup> S. 403, 2012 Leg., Reg. Sess. (La. 2012) (codified at LA. STAT. ANN. § 44:9 (repealed 2014)). In 2014, Louisiana enacted even more comprehensive provisions to their expungement law. H.R. 55, 2014 Leg., Reg. Sess. (La. 2014) (codified as amended at LA. CODE CRIM. PROC. ANN. arts. 971–95 (2016)). See generally Shenequa L. Grey, *Contemporary Issues in Louisiana Law: Expungement*, 43 S.U. L. REV. 41 (2015) (for an overview and analysis of Louisiana's current expungement law). For another example of a state expungement statute, see MO. ANN. STAT. § 610.140(5)(1) (West 2016) (allows for a record to be expunged after 20 years has elapsed for a specified felony since the person has completed imprisonment or any period of probation or parole).

*D. Family-Focused Programs and Community-Based Sentencing Alternatives*

Maintaining familial bonds has been demonstrated to decrease rates of recidivism.<sup>163</sup> Specifically, for mothers facing incarceration, studies have shown that having the opportunity to develop hands-on, intimate relationships with their newborn children, even if only temporarily, can vastly increase the likelihood that these women will stay out of prison in the future.<sup>164</sup> Because the majority of women in prison are mothers,<sup>165</sup> evaluating ways to reduce recidivism rates among these women is a logical place to start for policymakers. Additionally, because of the negative effects that maternal incarceration has on children, any success in reducing the recidivism rate of mothers in prison can be viewed as a two-fold success.

Recognizing the positive impact that maintaining relations with children can have on female inmates, states have begun to adopt prison nurseries and other progressive family-focused programs. The state of New York has largely served as a model in the arena of prison nurseries, with “Bedford Hills Facility [as] the first institution to adopt a prison nursery system in 1901.”<sup>166</sup> The nursery system at Bedford Hills Facility serves 27 women and their babies, allowing select women who give birth while serving time to return to the facility with their infants, and to raise their children within the prison until the child is 12 months old, or 18 months if the mother is scheduled to be released by then.<sup>167</sup> Bedford Hills, like the numerous other facilities that have begun similar programs in recent years,<sup>168</sup> has requirements such as: the women must take parent-

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<sup>163</sup> See *supra* Part IV.C (“Maternal Incarceration and Intergenerational Criminality”).

<sup>164</sup> See *supra* note 126 and accompanying text; see also Jennifer Warner, Note, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN’S L.J. 65, 72–73 (2015) (discussing a 1997 study by the New York Department of Correctional Services which found that after three years, the recidivism rate of women who had passed through the prison nursery program was 13%, compared with the 26% recidivism rate of the average female offender).

<sup>165</sup> GLAZE & MARUSCHAK, *supra* note 18, at 3 tbl.5 (finding that 61.7% of women in state prison are mothers and 55.9% of women in federal prison are mothers).

<sup>166</sup> Nicole Mauskopf, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN’S L.J. 101, 107 (1998).

<sup>167</sup> Kim, *supra* note 126, at 236. The Bedford Hills Facility provides “everything that a mother needs for her baby . . . without [additional] charge, including diapers, strollers, baby food, formula, and health care.” Mauskopf, *supra* note 166, at 108. Other prison nurseries, such as the one at the Nebraska Correctional Center, provide the mothers participating in the program with private rooms, compete with cribs. *Id.* at 109. Additionally, the mothers are granted special privileges, such as not being locked down at night, in order to promote the realities of the responsibilities of a new mother, such as warming bottles and walking with sleepless infants. *Id.*

<sup>168</sup> Currently there are nine states that offer prison nurseries. These programs range in the number of women served at a time (10 mothers in Indiana’s Wee Ones Nursery Program versus an unlimited number in South Dakota’s Prison Nursery

ing classes before and after the child is born; the women may not be convicted of violent crimes; and women with drug addictions must be in treatment.<sup>169</sup> While concern has undoubtedly been expressed about whether a prison is an appropriate place to raise a child, those who have evaluated the women and children actively engaging in these programs have found the children to be well-adjusted to life behind bars, finding psychological stable, happy, alert, and appropriately attached children.<sup>170</sup>

In addition to the concern of children being raised within the prison walls, critics have also countered that the separation of the child from the mother after the one-year mark may be equally as traumatizing as if the child had never returned to the facility with the mother in the first place.<sup>171</sup> However, there are many states that have recognized the importance of maintaining the mother/child bond throughout incarceration and have implemented programs that allow mothers to create more intimate relationships than would typically be developed during normal visiting periods. For example, Bedford Hills, in addition to the prison nursery program, has a community-based program where older children stay with host families in the community “for a week at a time to allow the children to spend time with their mothers [in the children’s playroom or parenting center] each day.”<sup>172</sup> Many of the host families also allow “the children [to stay] one Saturday night each month during the school year so that they may visit their mothers.”<sup>173</sup> Another example of such a program is Early Head Start, implemented at Coffee Creek Correctional Facility in Oregon.<sup>174</sup> There, children ages zero to three years old, along with their mothers, spend two days a week in a classroom setting with programming designed to strengthen the mother-child relationship.<sup>175</sup> Not only do such programs help maintain the mother-child bond for future reunification, but they also double as valuable incentives for women to make it through each week with clear conduct.

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Program), as well as the amount of time that children are allowed to stay (up to 18 months in Nebraska’s Prison Nursery Program versus 30 days in South Dakota’s Prison Nursery Program). Warner, *supra* note 164, at 72–74.

<sup>169</sup> Mauskopf, *supra* note 166, at 108–09.

<sup>170</sup> Warner, *supra* note 164, at 84–85; *see also* Mauskopf, *supra* note 166, at 111 (discussing Mary W. Byrne’s research, finding that prison nursery programs can create positive environments for child development, with participants in the prison nursery programs achieving healthy attachment between mothers and children).

<sup>171</sup> James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 507–13 (2014) (arguing that once children are separated from their mother at the one-year mark, “the rate of secure attachment to birth mother [is] likely . . . zero or close to zero”).

<sup>172</sup> Kim, *supra* note 126, at 236.

<sup>173</sup> *Id.* at 237.

<sup>174</sup> OR. DEP’T OF CORR., CORRECTIONAL REHABILITATION PROGRAMS, [http://www.oregon.gov/doc/ops/prison/docs/pdf/cccf\\_program\\_full\\_list.pdf](http://www.oregon.gov/doc/ops/prison/docs/pdf/cccf_program_full_list.pdf) (last visited Feb. 24, 2017).

<sup>175</sup> *Id.*

Although parenting classes and other prison-based, family-focused programming are aimed at teaching incarcerated mothers skills that will be needed upon release, as with any lesson taught in isolation, the application of such skills often proves much more challenging in the real world. The recognition that female offenders often lack the day-to-day skills necessary for success post-release has led to an increase in community-based, family-focused sentencing alternatives. While community-based drug treatment programs are a common alternative for first-time, low-level drug offenders, the family-focused approach has not been as widely adopted.

One of the most widely recognized community-based, family-focused facilities is the Elizabeth Fry Center in San Francisco, California. The Elizabeth Fry Center is one of seven centers around the state of California that houses female offenders.<sup>176</sup> At any given time it serves 10 of the 100 incarcerated women statewide<sup>177</sup> who are benefitting from such community-based housing facilities that have been implemented under California's Pregnant and Parenting Women's Alternative Sentencing Program Act.<sup>178</sup> At the Elizabeth Fry Center ten women and their children share housework and childcare.<sup>179</sup> The women have the choice of pursuing education or looking for a job, while the older children attend school.<sup>180</sup> Although these women are still serving time,<sup>181</sup> they are doing so in an environment where they are able to maintain ties with their families, begin reintegration back into society, and are doing so while they have the support of both trained professionals and each other. Part of the reason that the Elizabeth Fry Center is so well known is because of its enviable recidivism rate, which is "an impressive 20% compared to the 39% reconviction rate of traditionally incarcerated women in state prisons."<sup>182</sup>

The largest obstacle for family-focused programs, such as in-prison nurseries and community-based incarceration facilities, is the same obstacle most frequently cited in any discussion on prison reform: lack of funding. Despite the proven decrease in rates of recidivism, when programs serve such small numbers of inmates it can become difficult to justify the higher costs associated with family-focused alternatives. However, the costs associated with these alternatives become a lot more reasonable

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<sup>176</sup> Julie Lays, *Babies Behind Bars: Programs for Incarcerated Mothers and Pregnant Women*, NAT'L CONF. ST. LEGIS. (May 1, 1992), [http://www.thefreelibrary.com/\\_/print/PrintArticle.aspx?id=13601886](http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=13601886).

<sup>177</sup> *Id.*

<sup>178</sup> CAL. PENAL CODE § 1174-74.9 (West 2016).

<sup>179</sup> Lays, *supra* note 176.

<sup>180</sup> *Id.*

<sup>181</sup> Women must be screened prior to consideration for the Elizabeth Fry Center. Women who have been convicted of violent crimes or found to be unfit parents are ineligible for such programming. *Id.*

<sup>182</sup> Kim, *supra* note 126, at 238-39.

when compared to the future costs of maintaining the status quo of maternal incarceration—costs associated with foster care and housing a re-offender for another year.<sup>183</sup> Finally, it must be recognized that some benefits will be priceless, such as the invaluable culture change that could occur within the vast prison system if the focus changed to what we can do for these women, and their families, as opposed to how we can best punish them for their crimes.

## VI. CONCLUSION

The rise of female incarceration, and the subsequent lack of related policy reform, reflects the systemic prejudice against women, especially women who are impoverished, mentally ill, and facing addictions. Female offenders, who already reflect a lower socioeconomic caste prior to incarceration,<sup>184</sup> are being released back into communities even less equipped to contribute to society. Data suggests that the majority of female offenders committed crimes because they lacked the economic and emotional support required to succeed in everyday life.<sup>185</sup> Punishing these women by separating them from their families, taking away government benefits, and then neglecting to provide them with the appropriate treatment and tools necessary to meet basic needs upon reentry sends the message that these women are not only less valued because of their criminal past, but also less valued because they are female.

Of the recommendations discussed above, sentencing reform has already begun to take shape. However, specific discussions on those most affected by the unfair application of the War on Drugs consistently center around racial minorities.<sup>186</sup> While it is undisputed that minority groups are overrepresented within the prison population,<sup>187</sup> this fact cannot be the only driver behind criminal justice reform. Although many laws that adversely affect women have disproportionately harmed minorities as well, should policy and lawmakers narrowly focus on race, many women will still be unnecessarily incarcerated. Female offenders are not worthy

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<sup>183</sup> Nicole Lawson, *It's a Man's Prison: How the Traditional Incarceration Model Fails Female Offenders in Kansas*, 25 KAN. J.L. & PUB. POL'Y 273, 287–88 (2016).

<sup>184</sup> See *supra* note 34.

<sup>185</sup> See Part II for a discussion of the “crimes of survival” most often committed by female offenders.

<sup>186</sup> See ALEXANDER, *supra* note 66, at 60; Charlie Savage, *Obama Commutes Sentences for 8 in Crack Cocaine Cases*, N.Y. TIMES (Dec. 19, 2013), <https://nyti.ms/2kqKcEW> (“The [War on Drug] policies fueled an 800 percent increase in the number of prisoners in the United States. They also carried a racial charge: Offenses involving crack, which was disproportionately prevalent in impoverished black communities, carried far more severe penalties than those for powder cocaine, favored by affluent white users.”).

<sup>187</sup> CARSON, *supra* note 7, at 15 tbl.10 (finding that black males accounted for 37% of the male prison population while black females accounted for 21% of the female offenders).

of criminal justice reform just because they are black. Nor are female offenders worthy of reform just because they are mothers. Female offenders deserve fair sentencing laws and rehabilitative opportunities because they are each members of society who are just trying to survive.