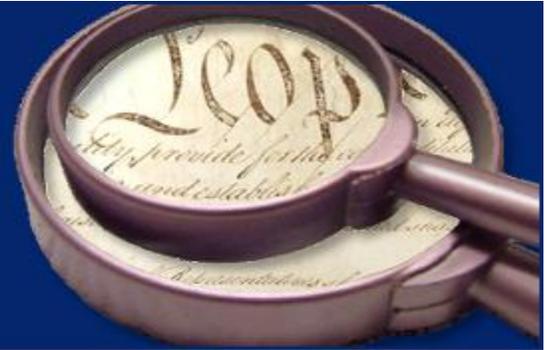




AMERICAN  
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LAW AND POLICY



Issue Brief

# **The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women**

**By Geneva Brown**

**November 2010**

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# The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women

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To deliver up bodies destined for profitable punishment, the political economy of [the prison-industrial complex] relies on racialized assumptions of criminality – such as images of black welfare mothers reproducing criminal children – and on racist practices in arrest, conviction, and sentencing patterns.<sup>1</sup>

The nexus of the declaration of the War on Drugs, the actions of state legislatures, and the fact that prisons are becoming for-profit institutions has created the largest incarcerated population in the world.<sup>2</sup> One percent of all Americans has been or will be incarcerated.<sup>3</sup> Professor Angela Davis has warned of the growing prison industrial complex and the ways in which it devastates communities.<sup>4</sup> The devastation caused by mass incarceration is particularly pronounced in African-American communities which saw dramatic increases in incarceration.<sup>5</sup> African-American men are the largest incarcerated population in the United States.<sup>6</sup> Mass incarceration has decimated the African-American community.<sup>7</sup> The unintended consequences

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<sup>1</sup> Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), <http://www.colorlines.com/article.php?ID=309>.

<sup>2</sup> See JENIFER WARREN ET AL., PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 35 tbl.A-7 (Feb. 2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/One in 100.pdf](http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf) (comparing the inmate population of the United States with that of other countries by total inmate population, as well as by inmates per 100,000 residents).

<sup>3</sup> *Id.* at 7 (“One in every 99.1 U.S. Adults are behind bars”); see *id.* at 24–27 (describing the methodology and assumptions taken to make the calculation).

<sup>4</sup> See Davis, *supra* note 1 (opining on the bases for the growth of the prison industrial complex, and on the havoc that results for the communities involved).

<sup>5</sup> See *infra* Part I.A (outlining the “intensified criminalization of drugs” as it relates to the growth in prison populations and, in particular, the African-American prison population).

<sup>6</sup> See WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2008 (Dec. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> [hereinafter PRISONERS IN 2008].

<sup>7</sup> See D. H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 454 (2003) (observing that the annual arrest rate among African-Americans is more than two and a half times the white rate); MaryBeth Lipp, *A New Perspective on the “War on Drugs”: Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 1022 (2004) (“[O]ne-third of black males born today likely will spend at least some part of their lives behind bars[,] . . . nearly one-tenth of black males in their twenties already live in prison, and almost one out of three black males currently remains under criminal justice control.”); Dorothy Roberts, *The Social and Moral Costs of Mass Incarceration in African-American Communities*, 56 STAN. L. REV. 1271, 1279 (2004) (commenting that mass imprisonment takes a tremendous toll on black communities); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 343 (2006) (detailing how mass imprisonment has created obstacles to reliable administration of the criminal justice system and created unjustifiable procedures that bar prisoner appeals); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the “Race Question” in the US*, 13 NEW LEFT REV. 41, 53–54 (2002) (arguing that mass imprisonment presents an institutional impediment to progress and equality for African-Americans that has

of mass incarceration include the effects on the African-American family, including the rise of African-American women in federal and state prisons.

The racialized nature of mass incarceration has arisen from the philosophy of law and order regimes;<sup>8</sup> as a result, racial overrepresentation exists at every level of the criminal justice system, from the front lines of law enforcement to prison sentences.<sup>9</sup> The strategy used by local police departments of policing as an “occupying force”<sup>10</sup> in low-income African-American communities leads to discriminatory treatment by police officers.<sup>11</sup> This discriminatory treatment pervades the court system. The disparate sentencing of crack versus powder cocaine is a prime example, and was responsible for sending a generation of African-American men and women to prison.<sup>12</sup>

Mass incarceration of African-Americans leads to massive reentry into communities. Consequently, communities are expected to absorb ex-offenders with limited funding and services to assist in the reintegration. Legal reforms have created impediments to ex-offenders’ participation in employment, education, and housing.<sup>13</sup> Race and gender further complicate the challenges of reentry.

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historical antecedents in slavery and American racial apartheid laws); MARC MAUER & TUSHAR KANSAL, THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES 1 (2005), *available at* <http://www.sentencingproject.org/pdfs/barredforlife.pdf> (describing the practices of states that strip people who have been convicted of felonies of voting rights after imprisonment, as well as the practices of states that permanently bar voting rights unless the person is pardoned).

<sup>8</sup> See Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 223 (2009) (arguing that the law and order themes of political movements were related to the genesis of mass imprisonment).

<sup>9</sup> See Fair Sentencing Act, S. 1789, 111th Cong. (2010) (reducing the disparity in powder versus crack cocaine sentencing from 100-to-1 to 18-1); see also Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses*, 31 LAW & SOC’Y REV. 789, 789 (1997) (revealing a disparity in sentencing for drug related crimes based on ethnicity, gender, educational level and citizenship); Marvin D. Free, Jr., *The Impact of Federal Sentencing Reforms on African-Americans*, 28 J. BLACK STUD. 268, 268 (1997) (showing that African-Americans are disproportionately incarcerated in Federal penal institutions); TUSHAR KANSAL, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE (Marc Mauer ed., The Sentencing Project 2005), *available at* [http://www.soros.org/initiatives/usprograms/focus/justice/articles\\_publications/publications/racial\\_disparity\\_20050128/disparity.pdf](http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/racial_disparity_20050128/disparity.pdf) (finding that black and Latino males are subject to particularly harsh sentencing, are disadvantaged in the course of the legal process, and are more likely than whites to receive death sentences); HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2007, at 3 tbl.5 (2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p07.pdf>. [hereinafter PRISONERS IN 2007] (illustrating that African-Americans are imprisoned in greater numbers than whites, even though whites significantly outnumber African-Americans in the general population); U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002), *available at* [http://www.ussc.gov/r\\_congress/02crack/Ch5.pdf](http://www.ussc.gov/r_congress/02crack/Ch5.pdf) (illustrating the racial disparity in sentencing based on powder versus crack cocaine. In 1992, 91% of crack cocaine offenders sentenced were African-Americans. By 2000, that number decreased to 84.7%).

<sup>10</sup> Cf. Hague Convention IV Respecting the Laws of War on Land Section III, art. 42, Oct. 18, 1907, 36 Stat. 2277 (defining occupied territory as territory that is “actually placed under the authority of the hostile army.”).

<sup>11</sup> KATHERYN K. RUSSELL, THE COLOR OF CRIME 36-38 (1998) (proving disproportional and irrational hostile treatment of black men by police departments across the United States).

<sup>12</sup> *Id.* at 132 (showing significantly more severe treatment of possessors of crack cocaine over possessors of powder cocaine).

<sup>13</sup> See *infra* Part III.C (discussing the legal obstacles facing former drug offenders seeking to take advantage of governmental programs and services).

The legal community has overlooked the impact of the intersectionality of race and gender, and the criminal justice system suffers from the same dilemma.<sup>14</sup> Law enforcement, the government, and research institutions measure “gender” as “white women” and “race” as “African-American men.”<sup>15</sup> African-American women remain invisible until the policies being pursued have had a devastating impact on their lives. Our criminal justice policies are nearing that point, as the rates of incarcerated African-American women are at historic highs.<sup>16</sup>

African-American women face challenges in reentry and reintegration that other populations do not have to face. Additionally, incarcerated African-American women are often mothers, care givers, and heads of household before they become offenders.<sup>17</sup> Once they become offenders, their children become displaced and income that is desperately needed by their families is lost.<sup>18</sup> African-American children languish in foster care, awaiting their parents’ release from prison or, alternatively, become permanently severed from their families.<sup>19</sup> Furthermore, African-American women suffer health consequences that are largely ignored by mainstream society. Rates of HIV transmission are rampant in low-income African-American communities, and African-American women are now the fastest growing HIV positive (HIV+) population.<sup>20</sup> Incarcerated women are overrepresented in rates of HIV transmission.<sup>21</sup>

Federal laws frustrate the transition from prison to community with draconian consequences. Drug offenders are not able to obtain public benefits, housing, or education.<sup>22</sup>

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<sup>14</sup> See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991) (arguing that women of color face conditions and burdens significantly harsher than those faced by white women).

<sup>15</sup> See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African-American Women in Crime and Sentencing*, 4 AM. U. J. GENDER SOC. POL’Y & L. 1, 6 (1995) (stating that there is a dearth of analysis of African-American women due to a dualistic approach towards social studies, in which relevant categories are race or gender).

<sup>16</sup> See Stephanie R. Bush-Baskette, *The War on Drugs as a War on Black Women*, in *GIRLS, WOMEN AND CRIME: SELECTED READINGS* 185, 193 (Meda Chesney-Lind & Lisa Pasko eds., 2004); see also Joseph Cudjoe & Tony A. Barringer, *More than Ripples: The Interwoven Complexity of Female Incarceration and the African American Family*, 2 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 265 (2002).

<sup>17</sup> The percentage of poor black children who live with their single mother with no involvement of the father is 49.3%; 45% live in arrangements where there is significant visiting by the biological father. Ronald B. Mincy & Helen Oliver, *Age, Race, and Children's Living Arrangements: Implications for TANF Reauthorization*, No. B-53 THE URB. INST. 1, 5 (2003), available at [http://www.urban.org/UploadedPDF/310670\\_B-53.pdf](http://www.urban.org/UploadedPDF/310670_B-53.pdf).

<sup>18</sup> See Jeremy Travis et al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, THE URB. INST. 1,1 (2003), available at [http://www.urban.org/UploadedPDF/310882\\_families\\_left\\_behind.pdf](http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf) (addressing the significant impact of incarceration on the children of those incarcerated).

<sup>19</sup> See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (addressing the significant intervention of child welfare services with black families).

<sup>20</sup> See *infra* Part II.B.3 (discussing the HIV+ female prison population and the difficulties those women face during reintegration).

<sup>21</sup> See Ann S. De Groot, et al., *Women in Prison: The Impact of HIV*, 2 HEPP NEWS 1, 1 (1999), available at <http://www.aegis.com/files/hepp/hepp1999-06.pdf> (providing statistics of and addressing explanations for the high percentage of HIV+ women in the prison population, and suggesting that gynecological care in prisons could reduce the transmission of HIV and positively impact the health of HIV+ incarcerated women).

<sup>22</sup> See Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L. J. 462, 488-93 (2006) (examining the severe obstacles facing convicted female drug offenders after incarceration).

Reentry without obtaining employment, education, or income leads to failure. African-American women are disproportionately victimized by these policies that frustrate reentry and maintain poverty.<sup>23</sup> They become the true casualties in the War on Drugs.

This Issue Brief is divided into three sections. The first identifies the trends of mass incarceration in the African-American community, and discusses reentry policies and the challenges created by such policies. The second elucidates intersectionality through the lives of African-American women offenders and the problems that African-American women offenders have with reentry. The third section concludes with reviewing legislative trends and proposals for gender and race-based treatment considerations for reentry.

## I. Mass Incarceration and the African-American Community

### A. The War on Drugs Created Mass Incarceration

Public support for the War on Drugs gave Congress the political will to pass tough drug enforcement initiatives.<sup>24</sup> Each initiative to pass spawned greater rhetoric, and no politician, Democrat or Republican, could afford to be seen as soft on drugs. Consequently, the War on Drugs became a favored public policy initiative. Kenneth Nunn, a critic of the War on Drugs, found that the rhetoric of war allowed policy to be framed as employing military strategies and facing military enemies.<sup>25</sup> African-Americans and Latinos became the socially constructed enemy in the Reagan Administration's drug war.<sup>26</sup> The war would imprison an entire generation of African-American men and women at alarming rates.<sup>27</sup>

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<sup>23</sup> *See id.* at 488.

Once women with drug convictions are released from prison, they face systematic denial of access to public benefits such as cash grants, food stamps, and participation in public housing programs. For single mothers struggling to provide for their children, access to such benefits are critical and could mean the difference between stability and life on the streets for women and their children.

*Id.*

<sup>24</sup> *See* Kenneth Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why 'War on Drugs' Was a 'War on Blacks*, 6 J. GENDER RACE & JUST. 381, 389 (2002).

Congress itself soon became a beehive of activity in support of the War on Drugs. First, the Administration persuaded Congress to enact all of its "legislative offensive" toughening the laws governing bail, sentencing, criminal forfeiture, and the exclusionary rule. Second, Congress was called upon to finance the war, and it responded in the first year of the war with a special appropriation that gave the Administration 100 percent of what it had requested in addition to the regular fiscal 1983 drug enforcement budget.

*Id.* at 390 n.65 (quoting STEVEN WITSOTSKY, *BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY* 4 (1990)).

<sup>25</sup> *Id.* at 388 (2002).

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

The rate of incarceration since the start of the War on Drugs defies historic norms. Between 1925 and 1973, the average incarceration rate was 100 per 100,000.<sup>28</sup> Incarceration rates grew dramatically starting in 1974. In 1974, the total number of persons ever imprisoned was 1.8 million including 595,000 African-American men and 51,000 African-American women.<sup>29</sup> Since the implementation of the War on Drugs, the incarcerated population in the United States increased threefold.

By 2001, the total number of persons ever imprisoned was 5.6 million, with 1.9 million African-American men and 231,000 African-American women in that population.<sup>30</sup> African-American imprisonment increased 20% since 1974 and imprisonment of African-American women doubled.<sup>31</sup> At the end of 2008, 2.4 million people were in prisons.<sup>32</sup> Of the 1.6 million inmates in state and federal prisons, African-American males composed the largest incarcerated population with 591,900 (white males numbered 428,200).<sup>33</sup> African-American women numbered 29,100.<sup>34</sup> U.S. incarceration rates for 2008 averaged 506 per 100,000.<sup>35</sup> The disproportionate nature of African-American incarceration rates becomes more pronounced when understanding that African-Americans are 12.9% of the U.S. population.<sup>36</sup> African-American male prisoners numbered 3,161 per 100,000 African-American men. African-American women prisoners numbered 149 per 100,000 African-American women.<sup>37</sup> In contrast, white male prisoners numbered 487 per 100,000 white males,<sup>38</sup> and white female prisoners

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<sup>28</sup> Western & Wildeman, *supra* note 8, at 227.

<sup>29</sup> THOMAS C. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

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

<sup>31</sup> *Id.* The total imprisoned population from 1974-2001 was 3,800,000. African-Americans composed 56% of the population with 2,131,000 persons imprisoned. African-American women composed 3% of the total persons ever imprisoned. From 1974-2001, African-American women composed 6% of the total persons ever imprisoned.

<sup>32</sup> PRISONERS IN 2008, *supra* note 6. The total population includes inmates held in all state or federal public facilities, local jails, U.S. Immigration and Customs Enforcement owned and contracted facilities, jails in Indian country and juvenile facilities. *Id.* at 8.

<sup>33</sup> *Id.* at 2 (graphing the number of male prisoners under state or federal jurisdiction by categories of White, Black, Hispanic, or Latino).

<sup>34</sup> *Id.* (graphing the number of female prisoners under state or federal jurisdiction by categories of White, Black, Hispanic, or Latino).

<sup>35</sup> BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS SUMMARY FINDINGS 1 (June 30, 2008), available at <http://www.ojp.gov/bjs/prisons.htm>. “[T]here were an estimated 509 sentenced prisoners per 100,000 U.S. residents – up from 506 at yearend 2007.” *Id.*

<sup>36</sup> JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION: CENSUS BRIEF 2000, at 1 (Aug. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf> (“Census 2000 showed that the United States population on April 1, 2000 was 281.4 million. Of the total, 36.4 million, or 12.9%, reported Black or African-American.”).

<sup>37</sup> PRISONERS IN 2008, *supra* note 6; see also PRISONERS IN 2007, *supra* note 9, at 4:

Black male offenders had the highest imprisonment rate . . . of all racial groups, male or female. This was 6.5 times the imprisonment rate of white males and 2.5 times that of Hispanic males. Similarly, the black female imprisonment rate . . . was almost double the imprisonment rates for Hispanic (79 prisoners per 100,000) and 3 times the rate for white females (50 per 100,000).

<sup>38</sup> PRISONERS IN 2007, *supra* note 9, at 4 tbl.6 (listing the prison rate for sentenced prisoners in the years 2000, 2006, and 2007).

numbered 50 per 100,000 white females.<sup>39</sup> At particular points in the historic arc of the War on Drugs, African-American men and women became the most incarcerated populations in the United States. “Women in Prison,” a Department of Justice Report published in 1991, noted that women who were most likely in prison were black, aged 25 to 34, unemployed at the time of arrest, high school graduates or holders of a GED with some college, and were never married.<sup>40</sup> As the number of incarcerated African-Americans declines from historic highs in the 1990s, the challenge and focus shifts to life after prison, reuniting with family and reentry into community life.

## B. Reentry Policy and Challenges

### 1. Sentencing Policy

Certain facets of reentry have changed since the implementation of the War on Drugs. The changes in sentencing philosophy directly influenced thousands of offenders facing reentry. One such change was the shift away from indeterminate sentencing, which had received heavy criticism from critics on the left and right.<sup>41</sup> The left found that too much judicial discretion distorted justice.<sup>42</sup> Critics from the right believed that indeterminate sentences were too low and wanted proportional punishment.<sup>43</sup> By 1998, 17 states created sentencing commissions that designed sentencing grids that significantly restrained judicial discretion.<sup>44</sup> Mandatory minimum sentences were enacted in all 50 states.<sup>45</sup> Twenty-four states enacted three-strikes laws.<sup>46</sup> Forty states enacted truth in sentencing laws, requiring offenders serve a minimum of 50% of their sentence.<sup>47</sup> Some states required violent offenders to serve 85% of their sentence.<sup>48</sup>

These changes in sentencing policy created larger prison populations serving longer sentences.<sup>50</sup> The change also meant parole boards made fewer release decisions. The adoption of truth in sentencing statutes not only removed discretion from parole boards, but increased

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

<sup>40</sup> TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, WOMEN IN PRISON: SURVEY OF STATE PRISON INMATES, 1991, 2 (March 1994), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1073> [hereinafter WOMEN IN PRISON].

<sup>41</sup> Jeremy Travis & Joan Petersilia, *Reentry Reconsidered: A New Look at an Old Question*, 47 CRIME & DELINQ. 291, 294 (2001) (describing the characteristics of women in prison).

<sup>42</sup> *Id.* (“Liberal critiqued indeterminate sentencing by judges and discretionary release decisions by parole boards as presenting opportunities for distortions of justice.”)

<sup>43</sup> *Id.* (“The criticism from the right was equally fierce. The imposition of indeterminate sentences, with low minimum and high maximum prison terms, was criticized as a fraud on the public.”)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (noting that 24 states have lengthened prison terms for repeat offenders as a result of three-strikes laws).

<sup>47</sup> See Nakima Levy-Pounds, *Beaten by the System and Down for the Count: Why Women of Color and Children Don't Stand a Chance Against U.S. Drug Sentencing Policy*, 3 U. ST. THOMAS L. J. 462, 488-93 (2006) (examining the severe obstacles facing convicted female drug offenders after incarceration).

<sup>48</sup> See Travis & Petersilia, *supra* note 41, at 294-95.

<sup>49</sup> *Id.* at 295 (recognizing that of the 40 states having truth-in-sentencing laws, 27 states and the District of Columbia require violent offenders to serve at least 85% of their sentences in prison).

<sup>50</sup> See Nunn, *supra* note 24, at 399 (discussing how the “cumulative effect” of new sentencing policies from the War on Drugs has been an increase in the proportion of convicted drug dealers sentenced to prison and an increase in the length of their sentences).

caseloads for parole officers.<sup>51</sup> The nature of parole supervision shifted from a rehabilitation model to that of law enforcement.<sup>52</sup> The introduction of surveillance technology, including electronic monitoring, provided enhanced capacity to detect violations and increased parole revocations. In 1985, 70% of parolees successfully completed supervision. By 1997, the completion rate plummeted to 44%.<sup>53</sup> Successful reentry and reintegration back into communities is not the norm.

Reentry is a difficult process for ex-offenders. States offer little to no assistance in the transition from prison to community.<sup>54</sup> Reentry programs generally should contain substance abuse counseling, education, job readiness training, and access to community resources.<sup>55</sup> In reality, offenders are given a small stipend, ranging from \$25 to \$200.<sup>56</sup> After which, they are mostly left to fend for themselves, and typically return to the communities that became the initiator of their criminal behavior.

Offenders face many additional challenges upon returning to their communities. A majority of prisoners are released into major metropolitan areas, which makes reintegration difficult.<sup>57</sup> They are released into communities with minimal treatment, few skills, little exposure to the work world, and little planning for transitioning from prison to community.<sup>58</sup> These issues are compounded because offenders are returning to neighborhoods that are already facing economic disadvantages. Research has found that high rates of returning offenders destabilize communities. Todd Clear and Dina Rose indicate that high incarceration rates and return rates may disrupt a community's social network, affecting family formation, reducing informal social control of children and income to families, and lessening ties amongst residents.<sup>59</sup>

## 2. Reentry and African-American Women

Reentry can be particularly difficult for female offenders because of their particularized needs. Female offenders form a complex population who require gender based services and treatment, and often have suffered from harsher social and economic circumstances than male

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<sup>51</sup> See Travis & Petersilia, *supra* note 41, at 295 (asserting that the widespread adoption of truth-in-sentencing statutes will make release by parole board decisions “a vestige of a bygone era.”).

<sup>52</sup> *Id.* at 298 (noting that recent surveys of parole officers have shown that the law enforcement function of parole has been prioritized, rather than the rehabilitative functions).

<sup>53</sup> *Id.* (finding that the rate of parole violations has “increased significantly over recent years.”).

<sup>54</sup> James Austin, *Prisoner Reentry: Current Trends, Practices and Issues*, 47 CRIME & DELINQ. 314, 326 (2001) (“[I]n general, most inmates are released directly from the facility in which they are presently housed with no concerted effort to initiate a reentry process.”).

<sup>55</sup> *Id.* (noting that the content of reentry programs “almost always” includes exposure to education, job readiness, substance abuse counseling, and information on resources available in the community from various agencies).

<sup>56</sup> *Id.* (“All inmates receive a minimal level of financial support that ranges from \$25 to \$200 plus clothing and bus fare to some location within the state.”)

<sup>57</sup> Travis & Petersilia, *supra* note 41, at 300 (suggesting that release into disadvantaged neighborhoods can alter the social framework).

<sup>58</sup> *Id.* (identifying the “inescapable conclusion” that the price society has paid for prison expansion is a decline in preparation for prisoners’ return to the community).

<sup>59</sup> Todd Clear & Dina Rose, *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQ. 335 (2001); see also Travis & Petersilia, *supra* note 41, at 301.

offenders before being incarcerated. Only about 40% of women reported that they were working prior to being incarcerated.<sup>60</sup> Almost 30% of women offenders reported receiving welfare assistance prior to being arrested.<sup>61</sup> Moreover, 60% of female offenders admitted to using drugs prior to their offense, and 40% admitted using on the day of offense.<sup>62</sup> Forty-four percent of women offenders report being either physically or sexually abused and 69% reported the abuse took place before the age of 18.<sup>63</sup>

Reentry services for women must focus on specific issues that male offenders do not encounter. Physical and sexual abuse, along with the prevalence of drug and alcohol abuse make reintegration difficult unless services are available. The recidivism rate for women offenders averages 45%.<sup>64</sup> Only 11% of women offenders were successfully discharged from parole.<sup>65</sup> African-American women in particular face even greater challenges. African-American female offenders are seven times more likely to be incarcerated over their lifetime than white women.<sup>66</sup> African-American children are “seven and a half times more likely than white children” to have an incarcerated parent.<sup>67</sup> HIV rates for incarcerated African-American women are higher than for white or Latino women.<sup>68</sup> The intersectionality of race, gender, and criminal background compounds reentry and reintegration issues for African-American women.

## II. Intersectionality and Problems of Reentry for African-American Women Offenders

### A. Intersectionality and African-American Women Offenders

Kimberle Crenshaw identifies the unique, and often ignored, political and social position that African-American women endure by being neither white women nor African-American men.<sup>69</sup> Crenshaw explicates the intersectionality of race and gender:

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<sup>60</sup> LAWRENCE A. GREENFIELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, WOMEN OFFENDERS 8 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf> [hereinafter WOMEN OFFENDERS] (contrasting with the statistic that almost 60% of male inmates had fulltime employment before being arrested).

<sup>61</sup> *Id.* (distinguishing from the figure that under 8% of male inmates received welfare before incarceration).

<sup>62</sup> Female offenders report higher usage of drugs and alcohol during the time of their arrest than male offenders. *Id.* at 9 (comparing with the statistic that 32% of male inmates reported using drugs during their commission of the crime).

<sup>63</sup> *Id.* at 8 (announcing that, in addition, 44% of women offenders reported sexual assault during their lives).

<sup>64</sup> WOMEN OFFENDERS, *supra* note 60, at 11 (“Overall, about 45% of women for whom parole supervision was ended in 1996 were returned to prison or had absconded.”).

<sup>65</sup> *Id.* (“In 1996, women accounted for about 11% of successful discharges from parole and 8% of unsuccessful parole terminations.”)

<sup>66</sup> *Id.* (“The estimates further show that about 5 out of 1,000 white women, 36 out of 1,000 black women, and 15 out of 1,000 Hispanic women will be subjected to imprisonment during their lifetime.”)

<sup>67</sup> LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pptmc.pdf> [hereinafter PARENTS IN PRISON].

<sup>68</sup> WOMEN AND HIV/HEPATITIS FACT SHEET, WOMEN IN PRISON PROJECT, CORR. ASS’N OF N.Y. 2 (2008), available at [http://www.correctionalassociation.org/publications/download/wipp/factsheets/HIV\\_Hep\\_C\\_Fact\\_Sheet\\_2009\\_FIN\\_AL.pdf](http://www.correctionalassociation.org/publications/download/wipp/factsheets/HIV_Hep_C_Fact_Sheet_2009_FIN_AL.pdf) [hereinafter WOMEN AND HIV].

<sup>69</sup> See Crenshaw, *supra* note 14; see also Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women and Feminist Legal Theory*, 11 CARDOZO WOMEN’S L.J. 303, 308 (2005). Nash explains the dearth of diversity in prior waves of feminist thought by stating that

[T]he experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and ... the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.<sup>70</sup>

The praxis of intersectionality becomes palpable by viewing the lives of African-American women through the prism of incarceration and reentry.

Over 7.3 million persons are serving prison sentences or are under community supervision.<sup>71</sup> Race and gender do not serve as identifiers in serving offender populations. The current system subsumes thousands of African-American women offenders into the prison population without consideration for the inimitable traits that make circumstances for African-American women more difficult. The African-American community, and African-American women in particular, have unique needs in the areas of family and health care that are not taken into consideration by current reentry systems.<sup>72</sup>

African-American children have become the face of the child welfare system. They are more likely than white or Latino children to have a parent who is incarcerated.<sup>73</sup> They are also more likely to be in foster care and remain in foster care longer than white or Latino children.<sup>74</sup> African American families suffer systemic problems that are compounded by the health care problems of African American women.

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We currently inhabit a “post-feminist” or “third wave feminist” cultural moment. A moment that is ostensibly marked by multiculturalism, diversity, and racial and ethnic plurality. Nevertheless, the second-wave feminist critique remains a potent one as there continues to be a dearth of meaningful feminist scholarship that integrates and draws on the voices, narratives, and experiences of women of color.

*Id.*

<sup>70</sup> Crenshaw, *supra* note 14, at 1244.

<sup>71</sup> LAUREN GLAZE & THOMAS P. BONCZAR, PROBATION AND PAROLE IN THE UNITED STATES, 2007 STATISTICAL TABLES 1 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf> (detailing the number of incarcerated individuals and the corresponding percentages compared to the total United States population from 2000 to 2007).

<sup>72</sup> See Margaret E. Finzen, *Systems of Oppressions: The Collateral Consequences of Incarceration and their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299 (2005); see also Michael G. Vaughn et al., *Variations in Mental Health Problems, Substance Abuse, and Delinquency Between African American and Caucasian Juvenile Offenders: Implications for Reentry Services*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 311 (2007).

<sup>73</sup> PARENTS IN PRISON, *supra* note 67, at 2 (breaking down the percentages of how likely children of different races have parents in jail).

<sup>74</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, AFRICAN-AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS NEED TO HELP STATES REDUCE THE PROPORTION IN CARE, H.R. Rep. No. 07-816 (2007) [hereinafter GAO REPORT] (reporting to the Chairman of the Committee on Ways and Means about the effects that poverty has on African-American children in foster care and potential strategies aimed at combating this problem).

Women who are incarcerated are exceptionally vulnerable to becoming HIV+ due to their poverty and their time in jail.<sup>75</sup> AIDS has become the number one killer of African-American women between the ages of 25 and 34.<sup>76</sup> Compounding the problem is a generation of African-American men who are not present in the community to assist in child rearing and provide income for the home.<sup>77</sup> African-American women have this extra burden that white and Latino women do not face. Incarceration affects employment, wages, community attachment and other factors that bind a family to a community and to each other.<sup>78</sup> Reentry services do not account for the additional complexities of African-American women who not only suffer the aftermath of incarceration but face the additional consequences of mass incarceration that destabilize the African-American community.

## B. African-American Offenders and Reentry Issues

### 1. African-Americans and the Child Welfare System

African-American children are overrepresented in most states' foster care systems. African-American children make up less than 15% of the children in the United States but represented 27% of the children entering foster care and 34% of the children remaining in foster care.<sup>79</sup> Thirty-three states cite poverty as the reason for children being placed in foster care.<sup>80</sup> African-Americans are four times more likely than other Americans to live in poverty.<sup>81</sup> Poverty leaves children vulnerable to abuse and neglect.<sup>82</sup> However, poverty alone does not explain the large number of African-American children in the foster care system.<sup>83</sup> Bias, cultural misunderstandings, and distrust between child welfare decision makers and families also

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<sup>75</sup> See Gloria J. Browne-Marshall, *To Be Female, Black, Incarcerated and Infected with HIV/AIDS: A Socio-legal Analysis*, 41 No. 1 CRIM. L. BULL. art 3 (2005) (discussing the relationship between the rise in HIV+ infections in Black women and the rise in the incarceration rate of Black women).

<sup>76</sup> The Office of Minority Health, *HHS Fact Sheet: Minority Health Disparities at a Glance*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Dec. 7, 2007), <http://www.omhrc.gov/templates/content.aspx?ID=2139> (reporting on the high rate of disease and illness experienced by African-Americans in comparison to other races as of December 2007).

<sup>77</sup> See PRISONERS IN 2007, *supra* note 9, at 4 (showing the incarceration rates of individuals based on gender and race); see also Western & Wildeman, *supra* note 8, at 233 (detailing how mass incarceration not only affects men, but also the women and children left behind to cope with incarcerated partners and parents).

<sup>78</sup> See Roberts, *supra* note 7, at 1282 (detailing how incarceration damages social networks and has other effects upon the community).

<sup>79</sup> GAO REPORT, *supra* note 74, at 7 (indicating the percentages of African-American children in foster care).

<sup>80</sup> *Id.* at 9 (showing the number of states that reported a correlation between high poverty rates and the disproportionate number of Black children entering foster care).

<sup>81</sup> *Id.* at 4 (discussing the correlation that exists between minorities and families living below the poverty level).

<sup>82</sup> See Robert Wexler, *Take the Child and Run: Tales from the Age of AFSA*, 36 NEW ENG. L. REV. 129, 132 (2001). Wexler argues that poverty should not be confused with neglect. *Id.* He contends that there are financial incentives for states to remove children from parents. The National Commission on Children found that children often are removed from their families "prematurely or unnecessarily" because federal aid formulas give states "a strong financial incentive" to do so rather than provide services to keep families together. *Id.* Indeed, state laws make the confusion of poverty with neglect almost inevitable, by "defining in" almost every poor family. *Id.*

<sup>83</sup> See Antoinette Greenaway, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT'L BLACK L.J. 247, 254 (2004) (discussing the many challenges that face African-American parents in America today).

contribute to the removal of children.<sup>84</sup> Additionally, once children are removed from their homes, African-American children are likely stay in foster care longer than white or Latino children.<sup>85</sup>

Child welfare agencies have problems providing services such as substance abuse treatment and subsidized housing, contributing to longer stays for children and delaying or denying the ultimate goal of family reunification.<sup>86</sup> Once children are removed from their homes, it becomes harder for them to be reunified due to the passage of the Adoption and Safe Families Act (ASFA) of 1997.<sup>87</sup> ASFA requires expedited timelines to place children in permanent homes whether through reunification or adoption or guardianship and termination of parental rights.<sup>88</sup> Prior to the passage of ASFA, parents had up to 18 months for reunification with their children.<sup>89</sup> However, ASFA lowered this threshold to 12 months to keep children from lingering in foster care.<sup>90</sup> If children are in foster care for 15 of the most recent 22 months, a petition to terminate parental rights must be filed.<sup>91</sup>

African-American children are the largest population of children with incarcerated parents. Of the 1.7 million children who have parents in custody, 767,400 are African-American.<sup>92</sup> Incarceration threatens the parental rights of these African-American women. The average sentence female offenders serve exceeds the timelines set by ASFA. Women serve an average sentence of 44 months for drug offenses and 54 months for property offenses.<sup>93</sup> Incarcerated women, therefore, face the continual threat of termination of their parental rights unless the children are placed with a spouse or relative.

Nakima Levy-Pounds noted how the vicious cycle of poverty, addiction, and incarceration leads formerly incarcerated mothers to permanently lose their children.<sup>94</sup> Once African-American mothers are sentenced to prison, the clock begins to run for the purposes of ASFA guidelines.<sup>95</sup> ASFA has failed in preventing children of color from languishing in the

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<sup>84</sup> *See id.* at 258 (noting that racial discrimination and unfair biases against African-American women by governmental agencies affect their rights as parents).

<sup>85</sup> *See id.* at 254-55 (explaining the hurdles that African-American mothers face when trying to be reunited with their children).

<sup>86</sup> *See id.* at 258 (stating the deficiencies that exist in the administration of ASFA).

<sup>87</sup> *See generally* Adoption and Safe Families Act, 42 U.S.C. § 675 (2006).

<sup>88</sup> *See* GAO REPORT, *supra* note 74, at 10 (noting the effects the enactment of ASFA had on adoption, guardianship and parental rights).

<sup>89</sup> *Id.* at 11 (stating the requirements of ASFA).

<sup>90</sup> *Id.* (examining the requirements of ASFA that require a permanency hearing no later than 12 months after the child enters foster care).

<sup>91</sup> *Id.* (showing the requirement that states must file a petition to terminate parental rights for children who have been in foster care for 15 of the most recent 22 months).

<sup>92</sup> PARENTS IN PRISON, *supra* note 67, at 2 (examining the number of African-American parents in prison in 2007).

<sup>93</sup> WOMEN IN PRISON, *supra* note 40, at 4 (charting the median sentence length in months for state female prison inmates).

<sup>94</sup> *See* Levy-Pounds, *supra* note 47, at 488-89.

<sup>95</sup> States are as aggressive as the ASFA in seeking to terminate the rights of incarcerated parents. *See* TEX. FAM. CODE ANN. § 161.001(1)(Q) (West 2009) (stating that the court may order termination of parent-child relationship if the court finds by clear and convincing evidence that the parent has knowingly engaged in criminal conduct resulting in a conviction, has been incarcerated for more than two years, and it is deemed to be in the child's best interest); *see also* Erica D. Benites, *In Defense of the Family: An Argument for Maintaining Parental Rights of*

foster care system or losing their families. ASFA timelines have permanently severed ties of tenuous families when the mother fails reunification requirements and parental rights are severed.<sup>96</sup> Children removed from their parents by ASFA become permanent wards of the state.<sup>97</sup> Children of color who become long-term foster placements suffer what is termed “foster care drift.”<sup>98</sup>

## 2. Health and Incarcerated African-American Women

Women who are incarcerated and released have greater need for social service intervention. African-American and Latino women are the predominant incarcerated population, while white women are the predominant probationary population.<sup>99</sup> Incarcerated women may require a variety of forms of assistance. They admit to histories of sexual and physical abuse at levels that exceed societal averages. Over half the women in state prisons admit to having been physically or sexually abused.<sup>100</sup> Sixty percent of women in state prisons admit to having abused drugs before being arrested.<sup>101</sup> Over 30% admit committing the criminal offense that led to their imprisonment to support their drug habit.<sup>102</sup> In prison, treatment for their drug addiction is not readily available. Federal funding earmarked for treatment in state prisons has not reached the offenders. Only 10% of inmates surveyed (male and female) reported participating in professional substance abuse treatment since admission.<sup>103</sup> Research shows that in-prison drug

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*Incarcerated Women in Texas*, 3 SCHOLAR 193, 196 (2001) (explaining the two year incarceration rule in the Texas Family Code regarding parental rights).

<sup>96</sup> See Wexler, *supra* note 82, at 129-30 (arguing that overzealous child welfare agencies remove children for reasons of poverty instead of neglect, that the foster care system is unsafe, and that ASFA has hurt other formally effective programs that were attempting to keep families together).

<sup>97</sup> *Id.* at 135.

<sup>98</sup> See Robert Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 639 (1999). Gordon explores the original intent of ASFA and how it failed to meet the basic needs of children languishing in foster care. *Id.*

Although ASFA's general principles make sense for children, its specific provisions fail to protect children's interests. In some instances, Congress appears to have been unable to see important distinctions among children. In other cases, Congress may have seen children's interests but preferred, notwithstanding its rhetoric, to favor certain parental needs or cultural ideologies. Whatever the causes of these failures, their effect on children is negative.

*Id.* at 657; see also Robert E. Lee & Michael T. Lynch, *Combating Foster Care Drift: An Ecosystemic Model for Neglect Cases*, 20 CONTEMP. FAM. THERAPY 351, 353 (1998) (stating that when biological parents fail to engage in actions necessary to get their children back from foster care, all parties involved suffer from foster care drift).

<sup>99</sup> See WOMEN IN PRISON, *supra* note 40, at 2 (noting that a woman in state prisons in 1991 was most likely to be black, as blacks comprised 46% of state female prison inmates).

<sup>100</sup> *Id.* at 5 (stating that more than four in every ten women reported that they had been abused before entering prison).

<sup>101</sup> *Id.* at 7 (charting that 65.3% of state female prison inmates reported that they used drugs regularly).

<sup>102</sup> *Id.* (noting that 23.9% of state female prison inmates reported that they committed their offense to get money to buy drugs).

<sup>103</sup> See Travis & Petersilia, *supra* note 41, at 302 (stating that 10% of state inmates reported participating in substance abuse treatment since their admission into prison, down from 25% in 1991).

treatment coupled with treatment in the post-release period significantly reduces both drug use and recidivism.<sup>104</sup>

Beth Ritchie conducted in-depth interviews with incarcerated women of color from low-income communities about their needs upon reentry.<sup>105</sup> Ritchie found that substance abuse treatment was one of the most significant needs for women returning to their communities from prison.<sup>106</sup> Not only was the treatment needed but gender-specific treatment was a particular concern. Community based substance abuse treatments are most effective when they entail childcare and protection from sexual harassment as components of their program to assist formerly incarcerated women and prevent recidivism and relapse.<sup>107</sup>

### 3. HIV+ Status

The Department of Justice estimates that 2.4% of the incarcerated women in state and federal prisons are either HIV+ or have AIDS.<sup>108</sup> The Department of Justice does not break down these statistics by race. African-American women therefore become invisible in the race and gender categorization although as a population they suffer the greatest impact of an HIV+ diagnosis. The Centers for Disease Control and Prevention report that 64% of the nearly 127,000 women diagnosed with HIV/AIDS were African-American women.<sup>109</sup> Overrepresentation of HIV+ African-American women is magnified in the prison setting. Texas is a salient example of the disproportionate rate of HIV status among African-American women in state prisons. Of the HIV+ women in Texas prison, 22.8% were white, 72.4% were black, and 4.8% were Hispanic. It is a challenge for correctional facilities to provide healthcare for gender specific medical issues when they must also address the complex psychosocial issues such as depression, substance abuse, and prior physical and sexual abuse that impact the population.<sup>110</sup> If correctional facilities fail to address the complicated issues facing HIV+ women, treatment after reentry becomes all the more critical.

The stigma of HIV+ status and incarceration makes reentry and reintegration a tenuous objective for this particular group of African-American women. The immediate post-release period has been identified as involving a very high risk for mortality and few services are currently in place to ensure continuity of medical care on release.<sup>111</sup>

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<sup>104</sup> *Id.* at 303 (discussing that a significant body of literature supports the notion that in-prison drug treatment can, in conjunction with post-release treatment, significantly reduce further drug use).

<sup>105</sup> See Beth E. Ritchie, *Challenges Incarcerated Face as They Return to Their Communities: Findings from Life History Interviews*, 47 CRIME & DELINQ. 368, 371 (2001) (explaining how 42 interviews were conducted to assess the needs of the incarcerated women when they return to their low-income communities).

<sup>106</sup> *Id.* at 372.

<sup>107</sup> *Id.*

<sup>108</sup> LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, HIV IN PRISONS, 2006 – STATISTICAL TABLES tbl.2 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/html/hivp/2006/tables/hivp06t02.cfm>.

<sup>109</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., HIV/AIDS AMONG WOMEN 1 (Aug. 2008), available at <http://www.cdc.gov/hiv/topics/women/resources/factsheets/pdf/women.pdf>.

<sup>110</sup> Michelle Onorato, *HIV Infection Amongst Incarcerated Women*, 4 HEPP NEWS 1, 1 (2001), available at <http://www.aegis.org/files/hepp/hepp2001-05.pdf>.

<sup>111</sup> Nina Harawa & Adaora Adimora, *Incarceration, African-Americans and HIV: Advancing a Research Agenda*, 100 J. NAT'L MED. ASS'N 57, 60 (2008), available at <http://www.nmanet.org/images/uploads/Publications/OC5708.pdf>.

### C. Laws Frustrating Reentry

The War on Drugs created a tidal wave of legislation meant to socially and legally ostracize drug offenders. Enhanced, determinate prison sentences did not satisfy the rabid desire to demean drug users and offenders. Terminating avenues to public funding for welfare subsidies, education, and housing for persons with drug convictions became a mantra for Congress.<sup>112</sup> This type of legislation operated as a collateral attack on African-American women gaining freedom from prison by barring them from services critical to achieving successful social and legal reintegration.

African-Americans have the highest poverty rates of any racial or ethnic group at 24%.<sup>113</sup> The average income for African-American households is \$33,916, or 62% of the white median household income.<sup>114</sup> Poverty permeates nearly a quarter of the African-American population; the same population suffers from poor education, high unemployment and, high incarceration rates.<sup>115</sup> Drug offender status laws further stigmatize a population seeking to participate in society, and often leave little to no legitimate means for reintegration.

#### 1. Public Assistance

Landmark welfare reform legislation passed by the Clinton administration had severe consequences on public assistance eligibility for drug offenders. Under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), drug offenders are denied eligibility for public assistance for life.<sup>116</sup> PRWORA reduces benefits if a drug offender is part

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<sup>112</sup> See Lisa A. Crooms, *The Mythical, Magical Underclass: Constructing Poverty in Race and Gender, Making the Public Private and the Private Public*, 5 J. GENDER RACE & JUST. 87 (2001); Daniela Kraiem & Jennifer Reich, *Writing the Wrongs in Welfare: Why Legislating Morality Will Not Solve the Crisis of Poverty*, 2 U.C. DAVIS J. JUV. L. & POL'Y 6 (1997).

<sup>113</sup> CARMEN DENAVAS-WALT, ET AL., ECON. & STATISTICS ADMIN., U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 13 tbl.3 (Aug. 2008), <http://www.census.gov/prod/2008pubs/p60-235.pdf>.

<sup>114</sup> *Id.* at 6

<sup>115</sup> See Western & Wildeman, *supra* note 8, at 223-26.

<sup>116</sup> “Denial of assistance and benefits for certain drug-related convictions

- (a) In general. An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))) shall not be eligible for--
  - (1) assistance under any State program funded under part A of title IV of the Social Security Act [42 U.S.C.A. § 601 et seq.], or
  - (2) benefits under the food stamp program (as defined in section 3(1) of the Food Stamp Act of 1977) or any State program carried out under the Food Stamp Act of 1977 [7 U.S.C.A. § 2011 et seq.]”

21 U.S.C. § 862(a) (2006).

of a family that receives public assistance.<sup>117</sup> No other criminal class has legislation geared towards the denial of public benefits like drug offenders. PRWORA has a disproportionate impact on African-Americans, especially African-American women, and children in particular. States can choose between three types of sanctions. Fifteen states utilize the lifetime ban.<sup>118</sup> Eleven states have a partial ban or term limits on benefits.<sup>119</sup> Twelve states make benefits dependent on drug treatment.<sup>120</sup> The public assistance ban prevented 35,000 African-American women from receiving benefits.<sup>121</sup> Predominantly African-American and Latino women are banned for life in seven states.<sup>122</sup> Reintegration becomes a Herculean effort when women are denied public benefits, such as food stamps, on which many formerly incarcerated women rely. Mothers are not able to provide for the fundamental needs of their children, potentially creating a crisis for families and child welfare agencies.

## 2. Education

The demonization of drug offenders, led Congress to systematically excise drug offenders from being able to participate in public benefit programs, including those providing access to education. The Higher Education Act substantially limits the ability of drug offenders to access financial aid.<sup>123</sup> Drug offenders are ineligible for federal financial aid for prescribed time

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<sup>117</sup> *Id.* § 862(b)(1); *see also id.* § 862(d)(1)

(d) Limitations-

(1) State Elections-

(A) Opt out- A State may, by specific reference in a law enacted after [the date of the enactment of this Act], exempt any or all individuals domiciled in the State from the application of subsection (a) of this section.

(B) Limit period of prohibition- A State may, by law enacted after [the date of the enactment of this Act], limit the period for which subsection (a) of this section shall apply to any or all individuals domiciled in the State.

<sup>118</sup> PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 3 (Feb. 2002), *available at*

[http://www.sentencingproject.org/doc/publications/women\\_lifesentences.pdf](http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf) (monitoring the implementation of a lifetime welfare ban in all fifty states); PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 2 (Supp. 2006), *available at*

<http://www.sentencingproject.org/doc/publications/9088smy.pdf> [hereinafter LIFE SENTENCES SUPPLEMENT].

<sup>119</sup> LIFE SENTENCES SUPPLEMENT, *supra* note 118.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1.

<sup>122</sup> *Id.*

<sup>123</sup> 20 U.S.C. § 1091(r) (2006).

Suspension of eligibility for drug offenses.

(1) A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance under this title shall not be eligible to receive any grant, loan, or work assistance under this title from the date of that conviction for the period of time specified in the following table:

If convicted of an offense involving:

The possession of a controlled substance:	Ineligibility period is:
First offense	1 year

periods<sup>124</sup> and subsequent offenses can lead to a lifetime ban.<sup>125</sup> Additionally, some states have passed laws that bar offenders from obtaining professional licenses.<sup>126</sup> States have also created two eligibility criteria that negatively impact offenders and keep them from obtaining professional licenses – good moral character and lack of a prior criminal conviction.<sup>127</sup> The offender’s criminal record in some jurisdictions imputes bad moral character.<sup>128</sup> The denial of a professional license keeps African-American women out of various avenues of employment dominated by women, such as nursing.<sup>129</sup> The federal government uses the War on Drugs and related legislation as a guise to continue to punish offenders who have already served their sentences. Denying the right to seek an education is tantamount to a life sentence of poverty and unemployment.

### 3. Housing

Ex-offenders also suffer discrimination in the area of housing, justified by the federal government under the guise of protecting the community.<sup>130</sup> Drug offenders are at the mercy of public housing agencies that are granted access to criminal records of housing applicants.<sup>131</sup> The presence of an occupant with a drug offense can jeopardize a housing grant. Additionally, if an offender’s family lives in publicly subsidized housing, the entire family risks eviction.<sup>132</sup> An

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Second offense	2 years
Third offense	Indefinite.
The sale of a controlled substance:	Ineligibility period is:
First offense	2 years
Second offense	Indefinite.

*Id.*

<sup>124</sup> *Id.*

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

<sup>126</sup> Geneva Brown, *White Man’s Justice, Black Man’s Grief: Voting Disenfranchisement and the Failure of the Social Contract*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 287, 301-02 (2008) (noting the difficulties associated with obtaining training and education after re-entry).

<sup>127</sup> See Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to Ex-Felon’s Employment Opportunities*, 71 N.D. L. REV. 187, 195 (1995) (discussing classification of state occupational licensing laws and how “criminal convictions” and “good moral character” statutes pose the greatest obstacle to the ex-felon’s attempt to obtain a license).

<sup>128</sup> *Id.* at 196 (providing an example of how, in Ohio, a criminal conviction automatically barred an applicant from obtaining a dance hall license when a court determined evidence of good moral character was not relevant because the applicant had two felony convictions and the licensing authority was simply following a rule that all felons are denied licenses).

<sup>129</sup> See Bureau of Labor Statistics, *Quick Facts on Registered Nurses*, U.S. DEP’T OF LABOR, <http://www.dol.gov/wb/factsheets/qf-nursing.htm> (noting that “[w]omen comprised 92.1 percent of RNs in 2003.”).

<sup>130</sup> See generally Public Health and Welfare Act, 42 U.S.C. § 1437d(q) (2006).

<sup>131</sup> *Id.* § 1437d(q)(1)(A) (providing in relevant part that: “the National Crime Information Center, police departments, and other law enforcement agencies shall, upon request, provide information to public housing agencies regarding the criminal conviction records of adult applicants for, or tenants or, covered housing assistance for purposes of applicant screening, lease enforcement, and eviction.”).

<sup>132</sup> *Id.* § 1437d(q)(1)(B). The statute provides, in relevant part:

A public housing agency may make a request under subparagraph (A) for information regarding applicants for, or tenants of, housing that is provided project-based assistance under section 1437f of this title only if the housing is located within the jurisdiction of the agency and the owner of

offender who chooses not to place their family at risk faces homeless shelters as the only available housing option.<sup>133</sup> African-American women who are drug offenders are placed in the precarious position of needing to secure safe, affordable housing, but having no access to public housing. Many drug offenders seeking reentry to their communities are mothers seeking to reestablish ties to their children. The presence of the returning mother could destabilize her child's life if housing becomes an issue.

### III. Legislative Trends and Recommendations

#### A. Legislative Trends

A philosophical shift has begun to occur in the federal government in its perceptions of drug offender sanctions. Congress passed and President Obama signed into law the Fair Sentencing Act of 2010,<sup>134</sup> which reduced the 100-to-1 sentencing disparity for crack versus powder cocaine to 18-to-1. The Act also reduced mandatory minimum sentence for possession of ten grams from ten years to five years and removed the mandatory minimum sentence for simple possession of crack cocaine. The Act reduces the potential for multi-generational mass incarceration. It does not assist ex-offenders already tainted by the criminal justice system.

Federal and state governments are beginning to address growing concerns about mass incarceration. Senator Jim Webb has sponsored legislation that would create a National Criminal Justice Commission,<sup>135</sup> which would review criminal justice administration and policies. The Commission would review mass incarceration and racial disparities along with other problematic areas of the federal and state criminal justice system and make recommendations to alleviate such problems. The bill is currently on the Senate legislative calendar.

Recent legislative action has had mixed results. In 2007, the Second Chance Act (SCA) passed,<sup>136</sup> addressing reentry as a growing public policy concern. SCA encourages the expansion of evidence-based programs that assist the successful reintegration of ex-offenders into the community and addresses the alarming rate of recidivism. Following the passage of SCA, the Department of Justice's Office of the Inspector General authored a report on DOJ reentry programs.<sup>137</sup> SCA grants were newly disbursed and the Inspector General could not

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such housing has requested that the agency obtain such information on behalf of the owner. Upon such a request by the owner, the agency shall make a request under subparagraph (A) for the information. The agency may not make such information available to the owner but shall perform determinations for the owner regarding screening, lease enforcement, and eviction based on criteria supplied by the owner.

<sup>133</sup> See JEREMY TRAVIS ET AL., URB. INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISON REENTRY 1, 35-36 (2001), available at [http://www.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://www.urban.org/UploadedPDF/from_prison_to_home.pdf). The authors found that "[i]n California, the Department of Corrections reports that at any given time 10% of the state's parolees are homeless. This rate is significantly higher in major urban areas such as San Francisco and Los Angeles, where as many as 30% to 50% of parolees are estimated to be homeless." *Id.* at 36.

<sup>134</sup> S. 1789, 111th Cong. (2010).

<sup>135</sup> S. 714, 111th Cong. (2010).

<sup>136</sup> Second Chance Act of 2007, Pub L. No. 110-199, 122 Stat. 657.

<sup>137</sup> AUDIT DIV., OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT 10-34, OFFICE OF JUSTICE PROGRAMS' MANAGEMENT OF ITS OFFENDER REENTRY INITIATIVES (July 2010), available at <http://www.justice.gov/oig/reports/OJP/a1034.pdf>.

evaluate the effectiveness of the programs.<sup>138</sup> However, the Inspector General warned that SCA programs lacked effective performance measurement tools to assess any program's progress.<sup>139</sup> The Justice Department must define performance goals and have definable outcomes in order to realize SCA's goal of assisting ex-offenders with reentry.<sup>140</sup>

## B. Recommendations

African-American women offenders face collateral attacks on their motherhood, on their ability to secure housing and employment, and on their ability to reintegrate. Reentry programs must have a race and gender focus that confronts the intersectionality of race and sex that pervades the lives of African-American women offenders. Programs must also be targeted to attempt to preserve families and provide community care. Incarcerated mothers face the trauma of being separated from their children. African-American mothers more often face the greater trauma of being the sole support for their children. Additionally, incarceration takes an emotional and financial toll on the family. Reentry plans that incorporate parental roles for incarcerated mothers and that assist mothers in community transition benefit the child, the parent, and society.

African-American women face greater obstacles in obtaining housing, employment, and healthcare. Treatment needs that are not addressed in the correctional setting will need to be addressed in the community. Reentry should tackle more than the social and economic needs of offenders. Treatment is a fundamental reentry component and should address the issues of drug addiction, as well as the physical and sexual abuse history of many offenders.

## IV. Conclusion

African-American women offenders face seemingly insurmountable problems in attempting to reintegrate into their communities. They face the intersectionality of race, gender, poverty, and incarceration. The general social expectation is that offenders, upon release from prison, are to adjust to the demands of mainstream society and not recidivate. Race, gender, poverty, and the War on Drugs make these mainstream demands difficult to meet. Reentry programs do not provide sufficient assistance to expect consistent, successful reintegration. African-American women, facing unique health, education, family, and background challenges, are particularly hard-hit. Their children in foster care became unintended victims of inadequate services. Family reunification deadlines become a ticking time bomb for formerly incarcerated mothers hoping not to have their parental rights terminated. Draconian laws sanctioning drug offenders after imprisonment also make reentry for African-American women arduous. African-American women face significant challenges that are insufficiently addressed by the current reentry framework when they attempt to reintegrate back into their communities. Federal and state legislatures have addressed certain facets of the reentry infrastructure, but more aggressive legislation is needed to repeal or amend laws that frustrate successful reentry of African-American women.

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<sup>138</sup> *Id.* at 21.

<sup>139</sup> *Id.* at 22.

<sup>140</sup> *Id.*