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GENDER AND JUSTICE:
WOMEN, DRUGS, AND SENTENCING POLICY

By

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Introduction: A Portrait of Women in Prison

Since 1980 the number of women in prison has increased at nearly double the rate for men. Nationally, there are now nearly seven times as many women in state and federal prisons as in 1980, an increase from 12,300 in 1980 to 82,800 by 1997, or a rise of 573%. This compares to an increase of 294% in the male prison population during this period. As a result the female proportion of the national prison population increased from 4.1% in 1980 to 6.4% in 1997. In addition, 63,000 women are incarcerated in local jails either awaiting trial or serving short sentences, yielding a total of 146,600 female inmates.¹

As is true of men in prison, women inmates are disproportionately low-income, with low levels of educational attainment and high rates of substance abuse and mental illness. In a 1997 survey of state and federal prison inmates, three quarters (74%) of the women reported that they had used drugs regularly and three fifths (62%) had used drugs in the month prior to their offense.² Nearly a quarter (24%) of women in state prisons are identified as mentally ill.³ Women inmates are also 50% more likely than men to be HIV positive (3.4% of female inmates compared to 2.2% of male inmates).⁴

Women in the criminal justice system have experienced dramatically high levels of physical and sexual abuse. More than half (57%) of the female state prison population has been abused, including 47% being physically abused and 39% sexually abused (with many being victims of both types of abuse). A third (33%) of the women had been raped prior to their admission to prison. Of the women incarcerated in state prisons, those who had been abused were considerably more likely to be incarcerated for a violent offense than those who had not been abused (34% as compared to 21%).⁵

The dramatic rise in the women's prison population has called attention to the consequences of imprisoning ever-larger numbers of women. The social impact of higher rates of women's imprisonment is different from men in several regards. The most significant of these relates to women's roles as mothers and caregivers. While many incarcerated women previously had parenting difficulties due to their involvement in drugs or crime, imprisonment often exacerbates problems with their children.

¹ Data calculated from annual reports on prison and jail populations of the Bureau of Justice Statistics. The number of jail inmates for 1980 is estimated based on population figures for 1978 and 1993 and assuming an average rate of growth. The total inmate population includes a slight overcount since some inmates under state or federal jurisdiction are housed in local jails due to overcrowding.

² Christopher J. Mumola, *Substance Abuse and Treatment, State and Federal Prisoners, 1997*, Bureau of Justice Statistics, 1999, p. 7.

³ Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers*, Bureau of Justice Statistics, 1999, p. 3.

⁴ Laura M. Maruschak, *HIV in Prisons 1997*, Bureau of Justice Statistics, November 1999, p. 1.

⁵ Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers*, Bureau of Justice Statistics, 1999, pp. 2-3.

Two-thirds of the women in prison are mothers to children under the age of 18 and were often heading a single parent household prior to their incarceration. A 1991 survey of state prison inmates found that 10% of the women reported that their children were living in a foster home or children's agency, and that half of women inmates had never had a visit with their children while imprisoned.⁶ Thus, women's incarceration results in a disruption of children's living situation as well as creating emotional stress for both women and their children. As a result of recent federal legislation that places limits on the length of time that children can be in foster care before a parental termination petition is filed (the "Adoption and Safe Families Act of 1997") it also has become increasingly likely that women will lose their parental rights entirely as a consequence of serving long prison terms. These issues do not diminish the seriousness of women's criminal activity, but suggest that the societal response to that needs to take into consideration a variety of consequences.

Other consequences of incarceration affect women even more so than men. Programming is often inadequate or inappropriate, leaving women ill prepared to reenter the community with enhanced work or life skills. Recent policy changes further raise the prospect of the denial of welfare and education benefits that can result as a consequence of a felony conviction.

Report Highlights

A key factor in the rise of the women's prison population in recent years has been the impact of the "war on drugs." As will be seen, the set of law enforcement and sentencing policies and practices that have been enshrined under this approach have had a dramatic and disproportionate impact on women. This has been due to a variety of factors relating both to the circumstances in which women use and abuse drugs, and the impact, whether intended or not, of criminal justice policies.

This report examines the confluence of these various factors in recent years – how the criminal justice system has responded to drug abuse and crime by women. We begin with a national overview of the issue and then focus on trends in three states – New York, California, and Minnesota. The state analysis was conducted because national data often mask significant variation among the states in how they respond to social and criminal problems. This may involve law enforcement priorities, sentencing policy, the use of discretion within the criminal justice system, and responses that lie outside the criminal justice system.

The key findings of this report are the following:

Drug Offenses and Women's Incarceration

- Drug offenses accounted for half (49%) of the rise in the number of women incarcerated in state prisons from 1986 to 1996, compared to one-third (32%) of the increase for men.
- The number of women incarcerated in state prisons for a drug offense rose by 888% from 1986 to 1996, in contrast of a rise of 129% for non-drug offenses.

⁶ Tracy Snell, *Women in Prison*, Bureau of Justice Statistics, 1994, pp. 6-7. Available data do not provide detail regarding whether foster care placement occurred prior to or as a result of incarceration.

- Drug offenses account for a dramatic proportion of the rise in the number of women sentenced to prison from 1986 to 1995:
 - 91% of the increase in New York
 - 55% of the increase in California
 - 26% of the increase in Minnesota
- Women drug offenders in 1995 were more likely to be sentenced to prison than in 1986. In contrast to a rise in drug convictions of 256% and 177% in New York and Minnesota respectively, the increase in prison sentences for drug offenses was considerably higher, 487% in New York and 400% in Minnesota.

State Variations

- National data obscure substantial variations among the states in the degree to which drug offenses have affected women's involvement in the criminal justice system. Whereas drug offenses accounted for 63% of the increase in women's arrests in New York from 1986 to 1995, they represented just 10% of the rise in Minnesota.
- The impact of the criminal justice system on Hispanics is likewise greatly variable by state. In New York, Hispanic women constituted 44% of women sentenced to prison for drug offenses in 1995, compared to their 14% of the state's population, while in California, Hispanic women represented 25% of the drug prison sentences compared to their 31% share of the total population.

Minority Women and Drug Offenses

- Minority women (black and Hispanic⁷) represent a disproportionate share of the women sentenced to prison for a drug offense:
 - New York: 91% of prison sentences for drugs compared to 32% of state population
 - California: 54% of prison sentences for drugs compared to 38% of state population
 - Minnesota: 27% of prison sentences for drugs compared to 5% of state population
- 82% of the Hispanic women sentenced to prison in New York in 1995 were convicted of a drug offense, as were 65% of black women and 40% of white women.

⁷ We use the terms black and Hispanic throughout this report since state data are reported in this manner.

Women in Prison – Dramatic Growth in Recent Years

Women historically have been underrepresented in prison and jail populations in comparison to their share of the national population. This is primarily a result of lower rates of offending by women, particularly for the more serious crimes that were traditionally more likely to result in a sentence of incarceration. FBI data for 1997, for example, show that women constituted 25% of arrests for serious (“Index”) crimes and 16% for crimes of violence.⁸ During the 1980s, when the surge of women’s imprisonment began, women’s proportion of arrests for Index crimes rose only modestly, from 20.5% in 1979 to 22.1% in 1988.⁹

Women are considerably more likely than men to be incarcerated for a non-violent offense. Two-thirds of female state prison inmates in 1991 were imprisoned for a non-violent drug or property offense, compared to half of male prisoners. To the extent that women are incarcerated for a violent offense, they are twice as likely as men to have committed their offense against someone close to them.¹⁰

Research on comparative sentencing practices for men and women has yielded conflicting results, with some studies finding little difference in sentencing patterns and others a more lenient or harsh impact for women. Criminologist Kathleen Daly contends that this conflict may reflect measurements of offenses that are overly broad. Daly has documented that sentencing case studies that explore the individual circumstances of the offender and offense often demonstrate significant differences within similar categories of offenses.¹¹

Although the number of incarcerated women has been increasing for all offenses, this has been particularly true for drug offenses. The inception of the war on drugs in the 1980s has had a proportionally greater effect on women in terms of increased arrests and incarcerations. Among state prison inmates, drug offenses accounted for one of every eight (12%) women prisoners in 1986, but rose to more than one in three (37%) by 1996. This compared to a rise from one in twelve (8%) for men to one in five (22%) during the same period.¹²

During this period, drug offenses constituted half (49%) of the total increase in the women’s state prison population, as compared to a third (32%) of the men’s inmate growth, as seen in Table 1 below. The increase in women drug offenders has been most pronounced among minority women. An earlier study conducted by The Sentencing Project found that from 1986 to 1991, the number of black female drug offenders in state prison rose by 828%, Hispanic women by 328%, and white non-Hispanic women by 241%.¹³

⁸ Uniform Crime Reports, *Crime in the United States, 1997*, FBI, 1998, pp. 230-231.

⁹ Meda Chesney-Lind, *Patriarchy, Prisons, and Jails: A Critical Look at Trends in Women’s Incarceration*, *The Prison Journal*, Vol. 71, No. 1, p. 55.

¹⁰ *Women in Prison*, p. 3.

¹¹ Kathleen Daly, *Gender, Crime, and Punishment*, Yale University Press, 1994.

¹² *Women in Prison*, p. 3.

¹³ Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later*, The Sentencing Project, 1995, p. 20.

Table 1
INCREASE IN STATE PRISON POPULATIONS
BY SEX AND OFFENSE
1986-1996¹⁴

	Number of Inmates		% Increase	Offense % of Total Increase
	1986	1996		
<u>Men</u>				
<u>Offense</u>				
Drugs	34,400	213,900	522%	32%
Total Non-Drugs	391,400	767,500	96%	68%
Violent	236,600	477,900	102%	43%
Property	133,300	222,600	67%	16%
Public Order	21,500	67,000	212%	8%
<u>Women</u>				
<u>Offense</u>				
Drugs	2,400	23,700	888%	49%
Total Non-Drugs	17,200	39,400	129%	51%
Violent	8,100	17,500	116%	22%
Property	8,100	17,500	116%	22%
Public Order	1,000	4,400	340%	8%

¹⁴ Data calculated from *Prisoners in 1997* and *Survey of State Prison Inmates, 1991*. Columns may not always add to 100% due to rounding.

A Tale of Three States

While national data are revealing in discerning trends, they can obscure what may be considerable variation among individual cities and states. Crime and the response to crime are local phenomena in many respects and communities and policymakers in different parts of the country may adopt different approaches to these issues. For these reasons, we have selected three states – New York, California, and Minnesota – to compare and contrast the outcome of different state policies.

The three states have been selected for a variety of reasons. They are geographically diverse and so provide some sense of the variation in approach to these issues nationally. They also have adopted distinctive legislative approaches to sentencing, which may affect the issues being examined here. In New York, the “Rockefeller Drug Laws,” enacted in 1973, have long been regarded as among the nation’s harshest. They eliminate most judicial discretion in sentencing by requiring lengthy mandatory minimum sentences for many first-time offenders, and are augmented by other provisions that call for enhanced mandatory minimum sentences for second- and persistent offenders. For example, sale of two ounces or possession of four ounces of a narcotic drug are felonies subject to a mandatory minimum sentence of fifteen years. This penalty applies regardless of an offender’s role in the drug trade or any other extenuating circumstances.

Under California’s determinate sentencing format, adopted in 1976, judges have limited discretion. The legislature has set three fixed-term sentence-length options for each offense. The presumptive sentence is the mid-length term, but judges may impose either the higher or lower option upon finding aggravating or mitigating circumstances. In 1994, California adopted a “three strikes and you’re out” law which is the broadest and harshest such policy in the nation. Under its provisions, conviction on any felony following two prior serious felony convictions can result in a sentence of 25 years to life. The law also requires that conviction of a second felony results in a doubling of the prison term. The U.S. Supreme Court recently declined to review a California three strikes case of an offender serving 25 years to life for the theft of a \$20 bottle of vitamins from a grocery store.¹⁵ Although most of the data analyzed in this report reflect cases brought prior to the adoption of the three strikes law, the law is now having a substantial impact on sentencing patterns and inmate populations.¹⁶

In 1980 Minnesota established a sentencing guidelines system under which sentences are determined through a sentencing “grid” based upon the severity of the offense and the offender’s prior record. Designed to enable the state to control the growth of the prison system, the guidelines system restricts judicial discretion but does not eliminate it. Judges may depart from the presumptive sentence for an offender if they can document the aggravating or mitigating factors giving rise to the departure.

¹⁵ Linda Greenhouse, *‘Three Strikes’ Challenge Fails, but Others Are Invited*, New York Times, January 20, 1999.

¹⁶ As of September 1999, nearly 50,000 offenders had been sentenced under the California law. See *The “Three Strikes and You’re Out” Law’s Impact on State Prisons: An Update*, California Legislative Analyst’s Office, October 1999.

Methodology

The analysis presented in this report covers ten years of data for the period 1986-1995. This time frame was selected because it coincides with the escalation of the “war on drugs” nationally and permits us to examine its impact on the criminal justice system overall and particularly on women. By 1986, arrests for drug offenses had increased by 42% to 824,100 over the total of 580,900 for 1980. Arrests continued to rise through much of the next decade, reaching 1,476,100 in 1995 (and continuing to rise to nearly 1.6 million by 1997).¹⁷

For each of the three states, we analyzed arrest, sentencing and incarceration data obtained from state agencies.¹⁸ In general, we attempted to analyze the following issues:

- Impact of drug arrests on women;
- Impact of drug sentences on female offenders;
- Racial and ethnic¹⁹ impact of drug law sentencing;
- Impact of drug policies on women’s prison populations.

As will be seen, the impact of the criminal justice system on women drug offenders was quite substantial during this time period. It is unclear to what extent our findings reflect changes in behavior and criminality or changes in official responses to those behaviors. On a national level the rate at which women used drugs actually *declined* substantially during this period. The rate of 9.5% of women using drugs on a monthly basis in 1985 fell by half to 4.5% by 1995.²⁰ These data are not broken down by state, so one cannot say for certain whether the national trends were also reflected in the three states under examination.

In regard to *selling* drugs, self-report data are generally not available or reliable. Official reports rely on arrests for drug offenses and are limited in what they communicate. A rising number of drug arrests in a given city might indicate increasing drug use or sales, but could also reflect the impact of a mayor’s decision to “crack down on drugs” by ordering police to enforce drug laws more stringently. Thus, the analysis of arrest data in the three states requires further inquiry.

In the state overview, two areas of analysis could not be conducted due to the unavailability of data: 1) in California state officials report that data on convictions are not reliable in all jurisdictions; and, 2) in Minnesota, arrest data combine both misdemeanors and felonies (in contrast to felonies only in the other two states) and the arrest data are maintained by gender and race but not combined.

¹⁷ Department of Justice figures at www.ojp.usdoj.gov/bjs

¹⁸ Data were obtained from the following sources: New York – Department of Correctional Services and Division of Criminal Justice Services; California – Department of Justice and Department of Corrections; Minnesota – Sentencing Guidelines Commission, Department of Corrections and Bureau of Criminal Apprehension. National data were obtained from various reports of the Bureau of Justice Statistics. Convictions and prison sentences for 1986 and 1987 in some cases reflect arrests made prior to the beginning of the 1986 study period. It is unlikely that this introduces any significant distortion to the ten-year analysis.

¹⁹ Race and ethnicity are based either on self-report data or criminal justice officials’ perceptions of racial and ethnic identity.

²⁰ Substance Abuse and Mental Health Services Administration, *Preliminary Results from the 1997 National Household Survey on Drug Abuse*, Department of Health and Human Services, 1998, p. 73.

New York – A Drug-Driven Criminal Justice System

Of the three states examined in this study, and quite likely of all states, New York presents the most stark picture of a criminal justice system driven by drug policies for the period 1986-1995. The ten-year period is marked by dramatic changes in women's rates of arrest, conviction, and incarceration, the vast majority of it fueled by drug arrests and sentences. Further, the female drug offenders entering the criminal justice system are virtually *all* members of racial and ethnic minorities.

As can be seen in Table 2, below, and the detailed text following, by the close of the ten-year period twice as many women were being arrested for drug offenses. Those women arrested for drug offenses were substantially more likely to be convicted and of those convicted, the odds of receiving a prison term rose dramatically. *In 1986, one of every twenty women arrested for a drug offense was sentenced to prison. By 1995, that ratio had increased to one in seven.*

Table 2

WOMEN AND DRUG OFFENSES NEW YORK, 1986-1995

	1986	1995	Increase
Arrests	4,263	8,432	98%
Convictions	873	3,108	256%
Prison Sentences	209	1226	487%

- Arrests

Increase in total felony arrests

During the study period, nearly two million people were arrested for a felony offense in New York, of whom 13% (245,000) were women and 87% (1.7 million) men. Women's arrests rose at more than double the rate for men from 1986 to 1995, 31% versus 13%. *The impact of drug offenses can be seen in the fact that while total arrests increased by 15% from 1986 to 1995, drug arrests rose by 61% during this period.*

Female drug arrest increase 1986-1995

While drug arrests rose for all demographic groups the rate for women increased at nearly double the rate for men. The number of women arrested for a felony drug charge grew by 98% from 4,263 in 1986 to 8,432 in 1995, while the rate for men increased by 55%, from 29,964 in 1986 to 46,429 in 1995. *Overall, drugs constituted nearly two-thirds (63%) of the increase in female arrests from 1986-95.*

Drug arrests and minority women

Among the women arrested for drug offenses, the vast majority – 86% -- were racial and ethnic minorities. Black women constituted 52% of drug arrests and Hispanic women 34%. Among minority women, drug offenses represented the most substantial category of arrests: half (49%) of all Hispanic women's arrests were for drugs and a third (31%) of black women's arrests, compared to 17% of white women's arrests.

- Convictions

Increase in drug convictions 1986-1995

While one would expect the number of women's drug convictions to have risen along with the increase in arrests over this ten-year period, in fact women's drug convictions rose at a substantially faster rate. The number of women convicted of drug offenses rose by 256%, from 873 to 3,108, compared to the 98% rise in arrests (and an increase in male drug convictions of 148%). Of the total increase in women's convictions from 1986 to 1995, drug offenses accounted for 82%.

Drug convictions and minority women

For the period as a whole, black and Hispanic women accounted for nine of out ten (89%) female drug convictions, 47% and 42% respectively. The dramatic impact of the drug convictions on Hispanic women can be seen in the fact that drug offenses accounted for 77% of all felony convictions of Hispanic women during this period.

- Prison Sentences

Increase in prison sentences 1986-1995

In parallel with the rise in the number of women in earlier stages of the justice system, the number of women sentenced to prison in New York increased dramatically as well during the ten-year period. By 1995, 156% more women received prison sentences than in 1986, compared to a 49% increase for men during this time. For the entire ten-year period, black and Hispanic women represented 87% of all female commitments.

Perhaps most dramatic is the role of drug offenses in the rising women's prison population, with drug offenses constituting 91% of the 1,114 additional prison commitments in 1995 over 1986. While the men's prison sentence increase also resulted almost exclusively from drug offenses, the scale of the increase for women was more than double that of men – a 487% rise in female drug commitments over ten years compared to a 203% increase for men. Overall, drug offenses as a proportion of all female commitments rose from just over one in four (29%) in 1986 to two in three (67%) by 1995. The corresponding increase for men was from one in five (21%) to two in five (44%).

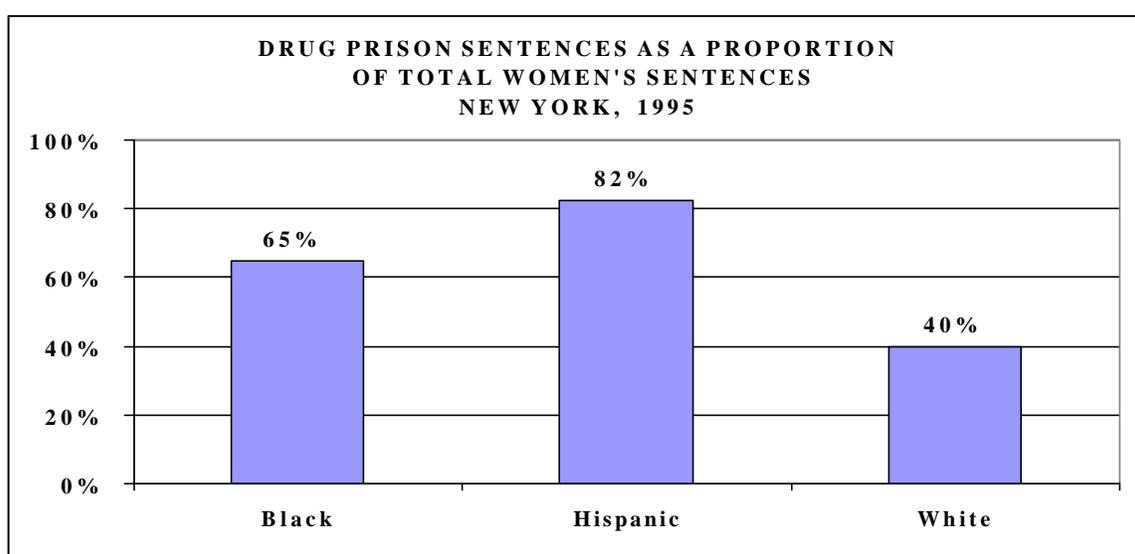
We can note here also the combined effects of mandatory sentencing policies and limited treatment options, with *the 487% rise in prison sentences for drugs nearly doubling the 256% increase in drug convictions.* The increased likelihood of prison sentences may reflect in part the presence of more women who are repeat drug offenders. Women drug users convicted of a first

drug offense who fail to receive adequate drug treatment may return to the criminal justice system and then be sentenced more harshly as repeat offenders.

Drug prison sentences and minority women

The racial and ethnic impact of drug policies in New York can be seen most dramatically in sentencing patterns for women drug offenders. *Four out of five (82%) Hispanic women sentenced to prison in 1995 were convicted of drug charges, as were two out of three (65%) black women.* Drug offenses accounted for a substantial portion of commitments for white women as well – 40% -- but not on the scale as for minorities. Overall, black women accounted for 47% of female drug sentences and Hispanic women for 44%.

Figure 1



- Prison Inmates

Drug offenders and prison population

As a result of the cumulative impact of law enforcement and sentencing policies, New York's prison population grew substantially in the study period and reflected the increasing emphasis on prosecuting drug offenders. By January 1, 1997, there were 69,646 inmates in the state prison system, of whom 5.4% (3,735) were women. *One in three (32%) male prisoners were serving drug sentences, but six of every ten (61%) women in New York state prisons were serving sentences for drug convictions. Overall 77% of Hispanic women inmates were incarcerated for a drug crime, 59% of black women, and 34% of white women.*

The impact of New York's mandatory sentencing policies can be seen as well in the inmate profile, with more than half (55%) of all prisoners sentenced as second felony offenders, cases in which judges were required to impose a prison term. Drug offenders were far more likely to be sentenced under these provisions, with 70% of all drug inmates incarcerated under these terms.

- Impact of sentencing policies

The combination of New York's Rockefeller drug laws and repeat felony offender laws have had a dramatic impact on women. Since women offenders in New York are more likely than men to have been convicted and imprisoned for a drug offense, they are more likely to be subject to the state's harsh mandatory sentencing laws. Further, minority women are disproportionately affected since, as we have seen, the overwhelming majority of women sentenced to prison for drug offenses are black and Hispanic.

An analysis conducted by Human Rights Watch demonstrated that many of the offenders sentenced to prison under these mandatory terms are low-level offenders with minor criminal histories. Of persons in prison in New York in 1996 for drug possession, 44% had never been incarcerated before and 17% had never been arrested. Of the three-quarters of drug felons in prison sentenced as repeat offenders, 72% had no prior violent felony convictions.²¹

The combined impact of the Rockefeller drug laws and repeat felony offender laws is more complex than is sometimes understood. Reviewing the data in Table 2 we can see that the majority of drug convictions do *not* result in a prison sentence, despite the mandatory laws. According to the analysis conducted by Human Rights Watch, the mandatory sentencing laws are widely used to induce plea agreements, often to a lesser charge so as to avoid the mandatory minimum. For example, most first offenders who plead guilty to a Class C, D, or E felony are sentenced to time served plus probation or a few months in jail. But since many of these offenders are not provided any substance abuse treatment or other positive interventions, they often are rearrested and subsequently charged as second felony offenders and subject to harsh prison terms.²²

²¹ Jamie Fellner, *Cruel and Unusual: Disproportionate Sentences for New York Drug Offenders*, Human Rights Watch, 1997, p. 13.

²² *Ibid.*, p. 16.

California – An Expanding System

The period of 1986-1995 was a significant one for criminal justice policy in California. Building on an increasingly “tough on crime” political environment that began in the early 1980s, the state engaged in a massive expansion of its prison system that resulted in a 532% increase in its inmate population from 25,000 in 1980 to 158,000 in 1997, nearly double the national increase of 278%. The influence of drug offenses, though significant, was not nearly as overwhelming as in New York, although the growth of women offenders in the system far outpaced that of men, and drug offenses disproportionately contributed to that rise.

The pattern for minority women diverges significantly from that seen in New York: black women experienced a substantial rise in the criminal justice system during this time period but Hispanic women far less so. And, in some regards, the growth in the number of white women entering the criminal justice system for drug offenses is most divergent from trends in other states.

The combined impact of drug offenses on women in the California criminal justice system can be seen in Table 3, below.

Table 3

**WOMEN AND DRUG OFFENSES
CALIFORNIA, 1986-1995**

	1986	1995	Increase
Arrests	20,694	27,191	31%
Convictions	n/a	n/a	
Prison Sentences	625	2597	316%

- Arrests

Increase in total felony arrests

Women accounted for 15% of the California’s total of 5.5 million arrests during the ten-year period. Women’s arrests rose at nearly three times the rate of men’s over the ten-year period, by 40% compared to 14%. *While the total number of arrests in California increased at approximately the same rate as in New York (17% compared to 15%) from 1986 to 1995, the increase in California was not primarily fueled by drug offenses, which rose by only 7%.*

Female drug arrest increase 1986-1995

A gender breakdown again reveals the disproportionate impact that the drug war has had on women. *While drug arrests overall increased by 7% in the ten-year period, the rate of increase for women was ten times that for men – a 31% rise for women compared to 3% for men. Drug offenses accounted for 24% of the increase in women’s arrests over this period, compared to 6% for men. Further, drug offenses constituted 31% of women’s total arrests for this period, compared to 26% for men.*

Drug arrests and minority women

A racial/ethnic breakdown of women's drug arrests reveals patterns significantly different from those found in New York. While minorities represent half of female drug arrests for the ten-year period, this is not nearly as pronounced as in New York. Further, while arrests of black women are clearly disproportionately high – 7% of the female population but 27% of drug arrests – the figures for Hispanic women show that they are arrested at lower rates (20%) than their 30% share of the female population. *The most substantial growth in female drug arrests over the period is for white women, who experienced a 48% increase, compared to 20% for Hispanic women and 6% for black women.*

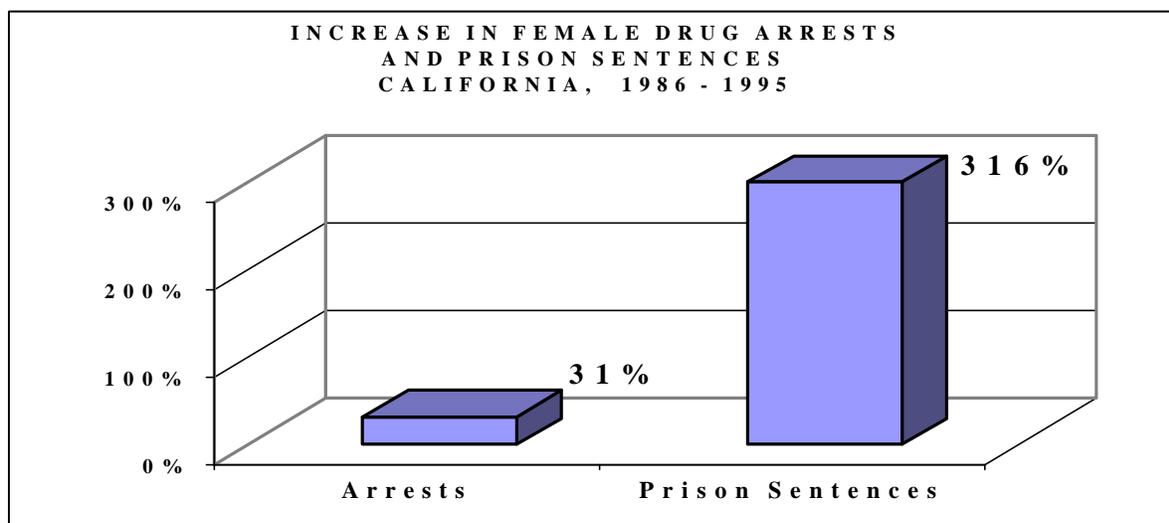
- Prison Sentences

Increase in prison sentences 1986-1995

Over the course of the ten-year period, the number of offenders sentenced to prison each year more than doubled, from 31,265 to 65,939. *The increase for women far outpaced that for men, 149% compared to 108%.* For the entire study period, minority women represented nearly two-thirds (63%) of all female prison sentences.

The impact of drug sentences on these trends is quite significant as well. *While the total number of women sentenced to prison between 1986 and 1995 increased by 149%, the number sentenced for a drug offense increased by 316%.* This compared to an increase of 223% for men. *Given that drug arrests rose by only 31% over these ten years, we see a remarkably increased propensity to incarcerate women for drug offenses, rising fully ten times faster than the increase in arrests.*

Figure 2



Overall, drug offenses accounted for half (55%) of the increase in the number of prison terms for women, compared to 46% for men, and represented 40% of all female prison commitments for the study period. By 1995, drug offenses constituted 43% of women's prison sentences compared to 34% for men.

Drug prison sentences and minority women

The rate of increase in prison terms for drug offenses was very dramatic for black and white women – 635% and 408% respectively, but considerably less so for Hispanic women (157%). For the ten-year period as a whole, black and Hispanic women comprised 60% of all prison commitments for drug offenses. By 1995, more than two out of five (43%) women sentenced to prison had been convicted of a drug offense – 46% of white women, 39% of black women, and 47% of Hispanic women.

- Prison Inmates

On December 31, 1997, women represented 7% (10,281) of the total of 152,225 inmates in the California prison system. About 70% of all inmates were minorities. *Women were significantly more likely than men to be serving a prison term for a drug offense, with 42% of women and 26% of men incarcerated for a drug offense. Of the women imprisoned for drug offenses, 58% were black or Hispanic.*

Impact of sentencing policies

One of the most striking aspects of the changes in the criminal justice system in California as it applies to women in the decade under review is the dramatic 316% increase in the number of women sentenced to prison for drug offenses, ten times the rate of increase for women arrested for these offenses. Thus, increases in offending do not explain the change that we observe, but rather a greatly increased likelihood that arrests and convictions will lead to a prison term.

The adoption of determinate sentencing in California has been a key factor in contributing to increased imprisonment rates for women. Criminologist Meda Chesney-Lind describes how in establishing norms for sentencing in such a system, data rely on the overwhelming number of men in the court system and then apply these standards to women, without any consideration that there may be justifiable reasons for different punishments imposed on men and women.²³ An analysis of this shift noted that the determinate sentencing law “used the averaging approach, one consequence of which was to markedly increase the sentences of women – especially for violent offenses.”²⁴

Within the determinate sentencing structure there are three sentencing options for judges – low, middle, and high terms for each offense. Judges are expected to sentence at the middle level unless they find aggravating or mitigating circumstances in the case.

An analysis of sentencing practices in drug cases for the ten-year period reveals that minority women were more likely than white women to be sentenced at the lowest permissible level for

²³ Chesney-Lind, p. 58.

²⁴ Ibid.

drug offenses, 64% compared to 56%. This was true for men as well, although men were somewhat less likely to be sentenced at the lower level – 59% for minority men and 48% for white men.

The lesser sentences imposed on minority women could be evidence of greater leniency in the courts, but could also be a consequence of other factors. As criminologist Michael Tonry has documented, “Urban black Americans ... have been arrested, prosecuted, convicted, and imprisoned at increasing rates since the 1980s, and grossly out of proportion to their numbers in the general population or among drug users.”²⁵ If more blacks are arrested for drug offenses it is likely that on average they will represent increasingly less serious offenses. This is because the number of drug “kingpins” is relatively modest, while there are far more lower level users and sellers who may become targets of law enforcement. If this is the case, then at the time of sentencing minority women’s convictions for possessing or selling drugs may on average involve smaller quantities of drugs than for whites and so result in lower level sentences. Similar dynamics could be at work in the contrast between male and female drug sentences. A host of factors relating to the severity of the offense, prior record, and individual circumstances would need to be evaluated to make a full assessment of this issue.

²⁵ Michael Tonry, *Malign Neglect – Race, Crime, and Punishment in America*, Oxford University Press, 1995, p. 105.

Minnesota – Limited Drug Emphasis

For quite some time Minnesota's criminal justice policies have been characterized by a degree of moderation that is not found in most other states. The sentencing guidelines adopted by Minnesota in 1980 represent a policy-driven approach to prison growth that has attempted to reconcile sentencing practices with available prison space. While the prison population in the state has increased in recent years, the state's rate of incarceration remains well below the national average.

Overall, there are two findings of note in regard to drug offenses and women offenders in Minnesota. *First, drug offenses comprise a much smaller portion of the court and prison population in the state than in the two other states in this study. Second, the racial disparities in this area are quite extreme in Minnesota, although the small number of cases suggests that a degree of caution is necessary in interpreting these results.*

The combined impact of drug offenses on women in the Minnesota criminal justice system can be seen in Table 4 below.

Table 4

**WOMEN AND DRUG OFFENSES
MINNESOTA, 1986-1995**

	1986	1995	Increase
Arrests	438	1661	279%
Convictions	95	263	177%
Prison Sentences	6	30	400%

- Arrests

Increase in total felony arrests

Of the 1.4 million arrests (misdemeanor and felony combined) during the study period, women accounted for 20% of the total. Arrests for both men and women increased most rapidly of the three states, although again, more so for women, 60% compared to 37% for men. *Arrests for drug offenses increased at a much more rapid pace from 1986 to 1995, rising 174%, compared to an overall arrest increase of 41%.*

Female drug arrest increase 1986-1995

While the number of women arrested for drug offenses is relatively small, they experienced a 279% increase in the ten-year period from 438 to 1,661, considerably greater than the 162% increase for men during this time. Since women's arrests for all offenses increased at a faster rate than for men, drug offenses accounted for 10% of the rise in women's arrests, compared to 18% for men.

Drug arrests and minority women

Unfortunately, the available data for Minnesota do not permit a breakdown in arrests by both race and gender combined. Looking at rates of arrest by race for both men and women, we find that *the black proportion of drug arrests increased from 10% in 1986 to 26% in 1995. This compares to the 3% black share of the state's population.* (Separate data are not maintained for Hispanics in Minnesota.)

- Convictions

Increase in drug convictions 1986-1995

As the number of drug arrests rose in the state, so did the number of drug convictions for both women and men during this period, by 177% and 162% respectively. Drug offenses accounted for 24% of the increased number of convictions for women and 34% for men. Black women accounted for one-quarter (26%) of the total drug convictions for the ten-year period. *While the overall figures are small, the scale of the increase for black women is quite dramatic – an 878% increase from 9 convictions in 1986 to 88 in 1995; the increase for white women was 84%.*

It should be noted that the data presented here for convictions represents felony convictions, in contrast to the combined data for misdemeanors and felonies for arrests. Therefore, comparisons between these two parts of the justice system should be made with caution.

- Prison Sentences

Increase in prison sentences 1986-1995

Minnesota sends fewer offenders to prison than most other states, but nonetheless experienced a significant increase in the number of women receiving a prison sentence from 1986 to 1995. The number of women sentenced to prison rose by 139% from 66 to 158, compared to a 75% rise for men from 1132 to 1978. The proportional increase in the number of drug offenders receiving a prison term was quite substantial for both women and men (400% and 610% respectively), but the overall numbers are still very modest – a women's rise from 6 to 30 and a men's rise from 41 to 291. *Overall, drug offenses accounted for 26% of the increased number of prison terms for women and 30% for men. By 1995, 19% of women's prison sentences were for drug offenses, and 15% of men's.*

Drug prison sentences and minority women

While the number of women being sentenced to prison for drug offenses in Minnesota is quite small, black women are considerably overrepresented. For the ten-year period as a whole, black women constituted 36% of all women's drug sentences to prison. In 1995, 18% of white women sentenced to prison had been convicted of drug offenses and 15% of black women.

- Prison Inmates

Of Minnesota's 5,327 prisoners in 1998, 4.7% (253) were women. Overall, just over ten percent of inmates were serving drug sentences. While blacks represented 2.7% of the state's population, they constituted 36.6% of the state's inmates.

- Impact of sentencing structure

Minnesota's sentencing guidelines system was established to generally place greater emphasis on the use of prison space for violent offenders and to seek non-prison sanctions for many non-violent offenders. Although legislators have made alterations to this structure over the years, the overall impact of law enforcement and sentencing policies continues to result in considerably fewer imprisoned drug offenders than in the other states.

Under the guidelines system judges have sentencing discretion within a specified range to determine if aggravating or mitigating circumstances warrant a departure from the presumptive sentence. "Dispositional departures" result in an otherwise prison-bound offender being sentenced to a non-incarcerative sentence, or vice versa, and "durational departures" serve to increase or decrease the presumptive sentence length.

While mitigation may be employed for a range of circumstances, research on the use of departures under conditions of prison overcrowding has revealed that there are negative consequences for women. Criminologists Lisa Stolzenberg and Stewart D'Alessio examined sentencing practices in Minnesota for the years 1980-1992 and concluded that in times of high prison crowding men were considerably more likely than women to receive mitigating departures at sentencing, even though the state women's prison was considerably more crowded than the men's system.²⁶ The researchers theorize that during periods of overcrowding judges seek to bring the system within its mandated capacity by sentencing more offenders to non-prison terms. Since there are considerably more male inmates in the system, reducing the number of men sentenced to prison will have a greater overall impact on the population.

²⁶ Lisa Stolzenberg and Stewart J. D'Alessio, *The Impact of Prison Crowding on Male and Female Imprisonment Rates in Minnesota: A Research Note*, Justice Quarterly, Vol. 14, No. 4, December 1997.

Analysis

Assessing the trends in women's involvement in the criminal justice system over the ten-year period of 1986-95 demonstrates both the substantial impact that criminal justice policies have had on women's involvement in the system as well as the complex ways in which this manifests itself. Because much of the legislative and policy changes during this period focused on drugs, women have been affected more than men since they are more likely to come into the criminal justice system on a drug offense. While the national data portray a compelling picture of the impact of drug and sentencing policies on women offenders, the state-level analysis illustrates the range of how these trends may be affected by decisions made by state and local policymakers.

The national increase in the number of women in prison results from a confluence of circumstances that emerged in the 1980s. The introduction of crack cocaine in urban areas in the mid-1980s resulted in a cheap source of addiction, new drug markets, and associated violence. For low-income women in particular, this coincided with limited or declining economic opportunities. Women who became addicted to crack or other drugs often became involved in prostitution, leading to increased risk of HIV infection and increased exposure to violence and abuse.²⁷ By 1997, one of every five women inmates in New York state prisons was HIV positive.²⁸ For those women who sought help for their addictions, treatment programs were all too often in short supply. A 1990 study, for example, found that while women constituted 33% of the addicted population, only 20.6% of treatment resources were used for women.²⁹

Rather than addressing the sources of these problems, the policymaker response in many respects exacerbated an already developing crisis. Throughout the course of the 1980s legislators at the state and federal level passed a series of harsh mandatory sentencing laws as part of a sustained effort initiated under the rubric of the "war on drugs." The 1986 and 1988 laws passed by Congress in relation to crack cocaine provided for punishment of a mandatory five-year term for possession or sale of as little as five grams of the drug.

In some instances, the new sentencing policies merely carried on a movement that had been established in the 1970s. As noted, the Rockefeller drug laws in New York had provided for harsh mandatory sentences since their establishment in 1973. In other cases, the new laws vastly expanded the reach and severity of their impact.

As we have seen, the national trends are generally replicated in each of the states under examination but also mask a substantial variation among the states in regard to how women have been affected by sentencing for drug offenses. Overall, the three states mirror national findings in significant areas but differ in other ways:

²⁷ See, for example, Mindy T. Fullilove et al., "Crack Ho's and Skeezers: Traumatic Experiences of Women Crack Users," *Journal of Sex Research*, Vol. 29, No. 2, May 1992.

²⁸ Maruschak, p. 5.

²⁹ "Women, Babies, and Drugs: Family-Centered Treatment Options," in *Network Briefs*, National Conference of State Legislatures Women's Network, July 1990.

Rising Incarceration of Women Offenders

- The rate of arrest and imposition of prison terms for women in New York, California, and Minnesota has increased at a significantly faster rate than for men during the period 1986-95, as seen below.

Table 5

INCREASE IN TOTAL ARRESTS AND PRISON SENTENCES, 1986-1995

	<u>Arrests</u>			<u>Prison Sentences</u>		
	1986	1995	Increase	1986	1995	Increase
<u>New York</u>						
Women	21,302	27,948	31%	716	1,830	156%
Men	151,362	170,777	13%	14,136	20,864	48%
<u>California</u>						
Women	66,682	93,350	40%	2,409	5,992	149%
Men	403,300	457,614	14%	28,856	59,947	108%
<u>Minnesota</u>						
Women	21,056	33,675	60%	66	158	139%
Men	94,133	129,162	37%	1,132	1,978	75%

Disproportionate Impact of Drug Offenses

- Women sentenced to prison in New York and California in 1995 were considerably more likely than men to have been convicted of a drug offense, a phenomenon not found in Minnesota.

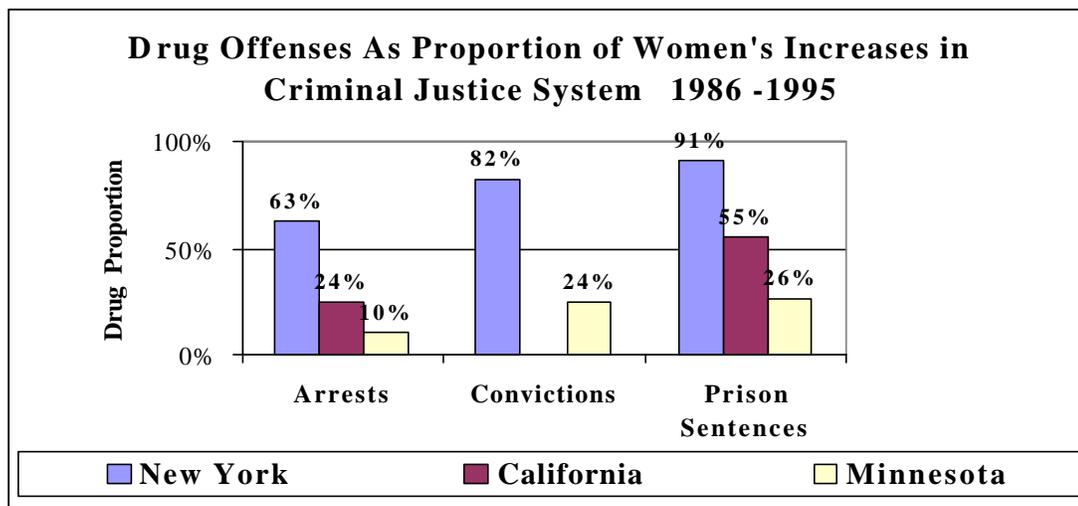
Table 6

PRISON SENTENCES FOR DRUG OFFENSES, 1995

	WOMEN			MEN		
	Drug Sentences	Total Sentences	Drug Proportion	Drug Sentences	Total Sentences	Drug Proportion
New York	1,226	1,830	67%	9,110	20,864	44%
California	2,597	5,992	43%	20,475	59,947	34%
Minnesota	30	158	19%	291	1,978	15%

- Drug offenses account for a substantial portion of the rise in women’s criminal justice populations from 1986 to 1995, as seen in Figure 3 below.

Figure 3



Note: Data for convictions in California are not complete.

Varying Impact of Drug Offenses at the State Level

- In New York, virtually the entire increase in the women’s prison population over the ten-year period was driven by drug arrests and prosecutions. Further, virtually all (91%) of the women incarcerated for these offenses were black or Hispanic. The increases in women’s drug offenses in California and Minnesota are substantial as well, but not nearly as overwhelming as in New York.

Increasingly Harsher Punishments for Women

- While arrests and convictions of women for drug offenses increased considerably in each of these states, the increase in prison sentences far outpaces these trends. In New York, the rate of increase for prison sentences was nearly double that of the convictions increase, in California the differential was ten times, and in Minnesota, one and a half times (though, again, with modest numbers). These changes may reflect a greater punitive climate in regard to law enforcement or criminal justice policy as well as limited treatment options that result in reoffending.

Impact of Mandatory Sentences

- When women in New York are sentenced to prison for drug offenses under mandatory sentencing laws judges are not permitted to consider the range of facts that would ordinarily be considered relevant at sentencing – role in the offense, culpability, impact of a prison term on a woman’s children, etc. Despite strict mandatory sentencing laws in New York, the majority of women's drug convictions in fact do *not* lead to a prison term. This finding illustrates the complexity of these laws but does not diminish their significance in the system.

Women not sentenced to prison on a drug conviction generally avoid this through plea agreements with prosecutors to charges that do not carry mandatory terms. Prosecutors may use their discretion to avoid mandatory sentences for a variety of reasons – the need to move cases through the system, the evidence in the case may be weak, or because imprisonment is not necessary in a particular case. The problem with this from a public policy perspective is that individual prosecutors, rather than judges, are essentially empowered to decide what is in the best interest of justice in a particular case. While many prosecutors no doubt take this responsibility seriously, they exercise this discretion behind closed doors where it is essentially immune from public review. If prosecutors elect to charge an offender with an offense carrying a mandatory penalty, a conviction then renders a judge essentially powerless to alter the presumptive sentence in any way.

Minority Women Disproportionately Affected by Drug Sentences

- Minority women represent a disproportionate share of female offenders sentenced to prison for a drug offense, as can be seen in Table 7 below. Minority women are nearly one and a half times as likely to be sentenced as their share of the population in California, three times as likely in New York, and more than five times as likely in Minnesota.

Table 7

MINORITY WOMEN SENTENCED TO PRISON FOR DRUG OFFENSES, 1995

	% of Female Prison Sentences for Drugs			% of State Population		
	Black	Hispanic	Total	Black	Hispanic	Total
New York	47%	44%	91%	18%	14%	32%
California	29%	25%	54%	7%	31%	38%
Minnesota*	27%	n/a	27%	3%	2%	5%

* The Minnesota data understate the proportion of minority sentences since separate sentencing data are not maintained for Hispanics. “Others,” including Hispanics, comprise 20% of female sentences for drugs.

Hispanic Women Differentially Affected in Each State

- The contrasting data on Hispanic women in New York and California illustrates the complexity of racial and ethnic dynamics in the criminal justice system. In New York, Hispanic women are overwhelmingly represented among drug offenders and in the criminal justice system generally, while in California, they are represented in proportions lower than in the general population. A variety of factors might explain these differences, including the relative use of drugs, the priority placed by police on drug enforcement in different communities, the relative availability of treatment programs, and economic opportunities.

Minnesota Sentencing Guidelines Moderate Impact of Drug Offenses

- Although drug offenses have played an increasing role in the arrest and incarceration of women in Minnesota, the scale of the change in imprisonment is considerably less than in the other two states examined here. As of 1995, 19% of the women sentenced to prison had been convicted of a drug offense, as compared to 67% in New York. While patterns of drug use and sales may affect state variations in this regard, it is also clear that the relative increase of prison sentences in proportion to arrests in Minnesota is less than in the other states. While the state has increasingly adopted mandatory sentencing policies in recent years, its sentencing guidelines system that attempts to both control the growth of the prison population and prioritize the use of prison space for violent offenders is likely to have been a factor in this moderating influence.

Public Policy Recommendations

The analysis conducted here illustrates the toll that the “war on drugs” has taken on women offenders in recent years. These findings suggest several areas of inquiry and policy change that should be undertaken:

- *Repeal Mandatory Sentencing.* While all states have some form of mandatory sentencing, the degree to which these laws affect offenders varies significantly, depending on how the policies are drafted and implemented. New York’s Rockefeller drug laws have substantially contributed to the statistics documented in this report, as increasing numbers of non-violent drug offenders have filled the state’s prisons in recent years. The social and economic impact of these laws have been well documented and they clearly affect not only women currently in the criminal justice system but the next generation of children as well.
- *Expand Treatment Options.* Many state and national officials have expressed concern in recent years about the need to increase the use of treatment for drug-addicted offenders both within and outside the criminal justice system. Despite increases in funding for treatment programs, two significant problems remain: 1) federal anti-drug funding for law enforcement and incarceration still receives about two-thirds of all funds, with just one-third devoted to prevention and treatment; and, 2) the proportion of substance abusers in prison who are receiving treatment has actually declined in recent years, having fallen from one in four (24.5%) in 1991 to one in ten (9.7%) in 1997.³⁰ Clearly, a reversal of these trends is critical if the underlying problem of drug abuse is to be addressed in an effective manner.
- *Focus Resources on Women and Children.* Nearly two million children have a parent or close relative who is incarcerated.³¹ These children have a greater likelihood of being incarcerated themselves later in life. Since imprisoned women have often been the primary caretakers of minor children, their incarceration often results in severe disruption of their children’s lives. In some instances, of course, these mothers may be abusing drugs and experiencing other problems that affect their parenting skills. From a public policy perspective, interventions should be developed that can break the cycle of drug abuse and imprisonment while also improving parenting skills where necessary in order to have a positive impact on the next generation of children. New York State’s Bedford Hills women’s prison offers a good model of programming in this regard, where children’s visitation is encouraged, parenting classes are offered, and women with babies can even have their children live with them in prison for a period of time.
- *Repeal Denial of Welfare and Education Benefits to Ex-Offenders.* The federal welfare legislation of 1996 included a *lifetime* ban on the receipt of welfare or food stamp benefits for any person convicted of a drug felony. States can opt out of this ban, but only eight have done so to date (Connecticut, Hawaii, New Hampshire, New York, Oklahoma, Oregon, Utah, and Vermont), while ten others have modified the provisions, such as exempting persons

³⁰ Christopher J. Mumola, *Substance Abuse and Treatment, State and Federal Prisoners, 1997*, Bureau of Justice Statistics, 1999, p. 10.

³¹ Fox Butterfield, *As Inmate Population Rises, So Does Focus on Children*, New York Times, April 7, 1999.

convicted only of drug possession.³² The Congressional adoption of the Higher Education Act of 1998 delays or denies federal financial aid to any student with a drug conviction. Thus, under these provisions a murderer or rapist could receive federal benefits after leaving prison, but a woman drug “mule” is barred from doing so for life. These provisions are particularly harmful to women since they are more likely to be the primary caretaker of children and more likely than male offenders to be convicted of drug offenses.

- *Investigate the Relationship between Drug Use/Sales and Arrest.* The substantial difference in the number of women arrested for drug offenses among these three states may be due to various factors. These could include levels of drug use and sales, law enforcement emphasis on drug offenses, politically inspired policies, and other factors. Given the variations that we have observed policymakers in these states and elsewhere would be well served by an analysis that documents the relative contribution played by each of these dynamics. Such a state-level analysis would aid in defining public policy approaches to respond to these problems pro-actively and equitably.
- *Maintain Uniform Criminal Justice Data.* Comparing trends in criminal justice policies and practices is made more difficult by the lack of uniformity across states in how data are maintained. In the three states under examination in this study, differences emerged in the categorization of arrest data, ethnicity, and other factors. Similar problems exist within other states’ recordkeeping systems as well. Policymakers should encourage the development of greater uniformity in the collection of criminal justice data so as to permit more cross-state comparisons.

³² National Governors Association, Center for Best Practices, *Summary of Selected Elements of State Plans for Temporary Assistance for Needy Families*, 1997.

Conclusion

The dramatic growth of women in the criminal justice system reflects a series of social and economic problems as well as a change in criminal justice policies. Most significantly, the impact of the war on drugs has played a disproportionate role in this area, though one that, as we have seen, varies substantially among the states. Given the large number of women inmates who are single parents with children under the age of 18, the rising rates of incarceration clearly have an impact that goes well beyond the individual offender.

As we have seen in the comparison of trends in three states national data may obscure substantial variation in criminal justice trends. This may be a result of differences in crime rates, drug usage, criminal justice policy, or other factors. State policymakers and practitioners should analyze trends in this area to assess whether changes in policy or resource allocation could contribute to a reduction in the growth of women's incarceration without any undue negative impact on public safety.

The racial disparities that we have observed are in large part reflective of national drug policy. These disparities result from a variety of decisions made both within and outside the criminal justice system – the allocation of prevention and treatment resources, law enforcement practices and priorities, sentencing policies, and the availability of sentencing options within the court system. Only a multifaceted approach to these issues, and one that takes place at both a national and local level, is likely to be successful in reducing both the increased use of imprisonment for women as well as the dramatic racial disparities that have resulted.