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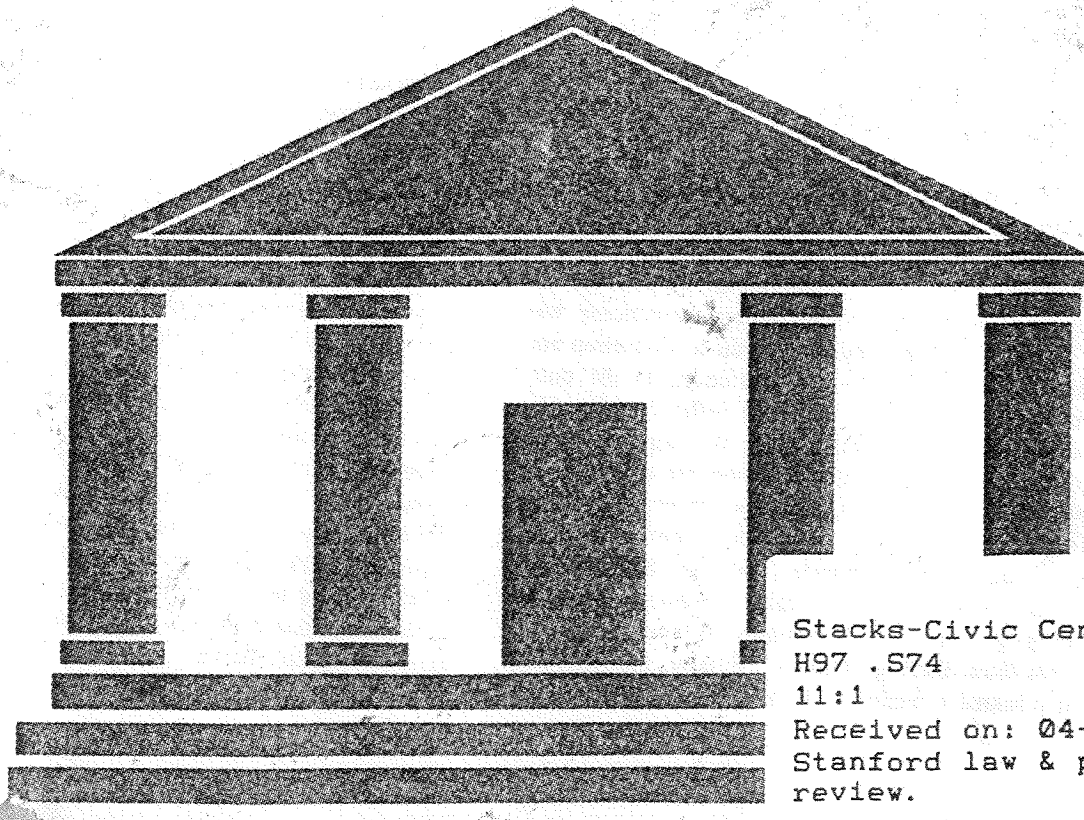
FIGHTING CRIME WITH MORE TIME: AN EVALUATION OF "GET TOUGH" SENTENCING LAWS

Featuring

Leslie Acoca & Myrna S. Raeder ♦ Douglas A. Berman ♦ Nora V. Demleitner
California Secretary of State Bill Jones ♦ Mike Males & Dan Macallair
Samara Marion ♦ Marc Maurer ♦ Kent Scheidegger & Michael Rushford
Susan Turner, Peter W. Greenwood, Elsa Chen & Terry Fain

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most leniently. Drawing upon this empirical evidence, the authors conclude that Three Strikes has not contributed to the recent decline in California's crime rates.

THE IMPACT OF TRUTH-IN-SENTENCING AND THREE STRIKES LEGISLATION: PRISON POPULATIONS, STATE BUDGETS, AND CRIME RATES

SUSAN TURNER, PETER W. GREENWOOD, ELSA CHEN & TERRY FAIN

Susan Turner, Peter W. Greenwood, Terry Fain, and Elsa Chen discuss how, in recent years, many states have enacted "get tough" legislation in response to public outcry that offenders are not adequately punished for their offenses, or deterred from repeating them. This article examines the relationships of Truth-in-Sentencing and Three Strikes legislation with increases in prison populations, state spending in corrections, and crime rates for all 50 states and United States territories. Drawing on their analysis of data from the National Corrections Reporting Program, U.S. Census, and Uniform Crime Reports, the authors find that these two major forms of "get tough" legislation have not caused reduced levels of reported violent crime in their early years of their implementation. The authors also note, however, that it is too early to make a definitive conclusion about their overall effect.

A COMMON LAW FOR THIS AGE OF FEDERAL SENTENCING: THE OPPORTUNITY AND NEED FOR JUDICIAL LAWMAKING

DOUGLAS A. BERMAN

Douglas Berman surveys the recent history of the federal sentencing system, concluding that the federal judiciary is drastically under-involved in the development of sentencing guidelines. Prior to the passage of the Sentencing Reform Act (SRA), federal sentencing was characterized by a high degree of judicial discretion and even inconsistency. Sentencing restrictions in the post-SRA era, by contrast, are far more inflexible than the SRA drafters ever intended. Three developments bear primary responsibility for the unreasonable constrictions of the post-SRA era. First, Congress, motivated by the punitive impulse of the electorate, enthusiastically endorsed mandatory sentence statutes. Second, the Sentencing Commission created highly complex sentencing guidelines and strongly discouraged most departures from these guidelines. Finally, the judiciary has not initiated a meaningful common law dialogue on

sentencing policy. The author argues that the federal judiciary must assert its rightful role as an active partner in the development of sentencing guidelines by taking advantage of its opportunity to write thoughtful, dynamic sentencing opinions that will contribute to further refinement and increased flexibility within the SRA framework. Both as empirical observer and as moral compass, the judiciary must work to bring new balance to the federal sentencing system.

SEVERING FAMILY TIES: THE PLIGHT OF NONVIOLENT FEMALE OFFENDERS AND THEIR CHILDREN

LESLIE ACOCA & MYRNA S. RAEDER

Leslie Acoca and Myrna Raeder argue that sentencing reform, particularly mandatory and determinant sentencing practices resulting from the "war on drugs," has significantly increased the number of female offenders in the United States criminal justice system since the 1970s. The shift to an incarcerative model has occurred without any indication that female offenders have become significantly more dangerous. Moreover, no attention has been paid to the effect of incarceration on their children. The authors discuss the intergenerational impact of incarcerating pregnant and parenting women on future generations. Drawing on original research conducted by National Council on Crime and Delinquency, the authors discuss women's unique pathways into the justice system and suggest alternative sentencing options in lieu of incarceration for women offenders and their children.

PREVENTING INTERNAL EXILE: THE NEED FOR RESTRICTIONS ON COLLATERAL SENTENCING CONSEQUENCES

NORA V. DEMLEITNER

Nora Demleitner writes that the expanding range of collateral sentencing consequences applied to criminals even after they have served their time in prison, including the loss of voting rights, job licensing access, and welfare benefits, exclude ex-offenders from major aspects of society and frequently lack penological justification. Moreover, exclusions from the political, economic and social spheres of life undermine the notion that offenders can ever be successfully rehabilitated. Because of the serious impact these sentencing consequences have on the individual and their potential violation of human rights norms, the author questions the rationale upon which such consequences are based. Collateral consequences for ex-offenders as second class citizens and out-

Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children

by

Leslie Acocha & Myrna S. Raeder

In the rush to make America safe by incarcerating ever-growing numbers of the population, little attention has been focused on the plight of nonviolent female offenders and their children. Their invisibility is due in part to the public's fixation on criminals who are dangerous male predators. Few women commit the types of crime that grab the headlines and cry out for the most severe penalties.

Yet the past two decades have witnessed an explosion in the female inmate population. Twenty-five years ago, the presence of women was an aberration in the criminal justice system, creating not even a blip on the sentencing charts. Approximately two-thirds of all women sentenced in federal court were given probation, and women comprised less than five percent of all prisoners.¹ That was before the war on drugs, viewed by some as a war on minorities² and women living in poverty.³ It was also before the advent of "just deserts," which dictates the

[T]he imprisonment of so many women who are single mothers with primary care responsibilities for their children has the real potential of destroying innocent young lives.

equalization of penalties for all people committing the same crime by focusing on the offense rather than the offender. The Victim's Rights Movement and doubts about the efficacy of rehabilitation also contributed to the public cry to lock up criminals. Once legislators decided that being tough on crime was a nonpartisan issue that benefited both political parties, corrections became a growth industry. Mandatory minimums, statutory enhancements for repeat offenders (commonly referred to as Two and Three Strikes laws), and Truth-in-Sentencing laws have vastly increased prison populations.⁴

In the process of responding to pressures to reform federal and state sentencing and incarceration policies, legitimate considerations about the circumstances affecting female criminality and the role of women offenders as primary caretakers of dependent children have been set aside. So-called gender-neutral policies are based on the stereotype of violent males and major drug dealers, not on nonviolent women who act as mules or facilitate the criminal activity of their male intimates. The public appears to have forgotten the societal costs that such incarceration imposes, costs borne most heavily by the dependent children of nonviolent women offenders.

This article will view incarceration in an historic context, discussing the nature of female criminality, pathways to crime followed by young girls and women, and the effect of changed patterns of sentencing on the

Leslie Acocha is the Director of the Women and Girls Institute at the National Council on Crime and Delinquency. In her section of this article, she draws upon three recent national and California state studies for which she served as principal investigator. Myrna S. Raeder is a Professor at the Western University School of Law. Her portion of this article reviews, updates, and summarizes two of her earlier

children of female offenders. In addition, it will address changes to welfare and adoption policy that impact the ability of incarcerated females to reunite their families, and the paucity of community correctional facilities and services designed to keep families together. Finally, a variety of legislative and programmatic approaches will be suggested that will better serve women offenders, their children, and the public at large.

I. HISTORICAL CHANGES

Since the mid 1970s, women offenders have become the fastest growing segment of the United States criminal justice system,⁵ and this trend shows no signs of slowing.⁶ By 1995, roughly one out of every 130 adult women, or nearly 800,000 women nationally, were in prison, jail, or on probation or parole.⁷ By 1998, the number of women under correctional supervision had swelled to one out of every 109 adult women, or an estimated 950,000 women.⁸ At the same time, the number of women in jails and prisons nearly tripled between 1985 and 1997 to 138,000.⁹ Professor Meda Chesney-Lind, a noted criminologist, has refuted the assumption that spiraling arrests are the primary cause of growing female incarceration. She contrasted the total arrests of women with the historical data concerning female incarceration and concluded that the growth in women's imprisonment cannot be explained by increases in women's crime, as measured by arrests.¹⁰ Instead, Professor Chesney-Lind posits that the war on drugs and shifts in both law enforcement practices and judicial decision-making, rather than any change in the nature of female criminality, are responsible for increasing female incarceration.¹¹ She suggests that mandatory minimums, sentencing reforms that use guidelines developed for male criminals, and "get tough" attitudes toward crime are the primary causes of the increase. "Simply put, it appears that the criminal justice system now seems more willing to incarcerate women."¹² Indeed, this view is supported by a comparative analysis, which reveals that despite a similarly sized population, the United States incarcerates approximately ten times more women than those imprisoned in all of Western Europe.¹³

The current pro-prison emphasis on sentencing has resulted in a massive influx of women being charged, sentenced, and incarcerated by federal and state courts.¹⁴ Since 1990, the annual rate of growth of the female inmate population has been higher than the average increase in the number of male inmates.¹⁵ By the end of 1997, women were 15 percent of those being sentenced in federal court,¹⁶ and at the end of 1998 were 7.5 percent of federal inmates.¹⁷ The severe impact of federal mandatory minimum and guideline sentencing is evident when these numbers are compared with state statistics,

which indicate that while women are being incarcerated in ever increasing numbers, they comprise 6.4 percent of all prisoners.¹⁸

Even when not affected by federal or state mandatory minimums, state Truth-in-Sentencing provisions and federal guideline sentences result in more time being served due to restrictions on good time credit and, in some cases, the complete elimination of indeterminate sentences. Since women are not typically violent or flight risks,¹⁹ they previously received shorter sentences, which meant that they were eligible for non-incarcerative sentencing alternatives and, if imprisoned, were prime candidates for good time credits and early parole. Hence, these changes make women more likely to be imprisoned and to serve more time than their conduct warrants.

Because it was not previously considered necessary to incarcerate women in order to punish them, any increase in the severity of sentence hits them harder. Simply adding women to the mix ensures unequal rather than equal treatment. For example, every state and the federal system using guidelines blends the statistics for men and women offenders. This approach clearly disadvantages women, whose sentences dramatically increase because their sentencing information is drowned in the sea of male statistics.²⁰ Such equalization in the federal arena has been one factor in reducing the percentage of women on probation, from two-thirds of all female offenders to one-third.²¹

In federal court, mandatory minimums and strict guidelines in drug cases contributed to a striking result: in 1991, 62 percent of females sentenced to federal prison had no previous sentence, compared to 28 percent of female state prisoners.²² Similarly, in 1991, women in federal prison were twice as likely as those in state facilities to be imprisoned for a drug offense,²³ in part because so few women's crimes are within the jurisdiction of federal court. Continuing this trend, the most recent statistics indicate that drugs are responsible for the incarceration of 34 percent of state prisoners who are female and 72 percent of federal female prisoners.²⁴ It is clear, however, that states are catching up; during 1996, both the number of females under the jurisdiction of state or federal prison authorities²⁵ and the percent change in the number of female state inmates incarcerated for drug crimes grew at nearly double the rate of males.²⁶ Similarly, first-time female jail inmates who were drug offenders were almost double the percentage of first-time drug offending male jail inmates.²⁷ Not unexpectedly, the percentage of females incarcerated for drug offenses outpaces that of males,²⁸ since the early 1990s' incarceration model of female sentencing

decimated by "get tough" policies aimed at male offenders.

A. CRIMES OF WOMEN OFFENDERS

Despite the gender-blind federal sentencing scheme, some claim that women get a break under the guidelines. However, when differences in factors such as offense role and prior record are included in the analysis, any result appearing to favor women dramatically declines.²⁹ The recent work of criminologist Kathleen Daly suggests it is too simplistic to read sentencing statistics and conclude that there is no justification for any seeming leniency in the length of women's sentences.³⁰ Instead, her empirical study found that direct comparison of similar sounding crimes often reveals that the woman is less blameworthy than her male counterpart. Daly evaluates the "gestalt of the harm," which encompasses such factors as the relationship between victim and offender, the manner in which the crime was committed, as well as the mix of offense and offender biography. Even in an equality-based mode of sentencing, lighter sentences for females may be justified, although a statistical analysis would not reveal the nuances or textured reasoning which explain away any sentencing differential. Similarly, simply controlling for easily compared factors such as prior record may not reveal appropriate reasons for differences in sentences that favor females.³¹ Thus, the seemingly principled imposition of across-the-board gender equality in sentencing may result in an unwarranted harshness, even before children are entered into the equation.

In general, the vast majority of women offenders prosecuted in federal or state court are nonviolent and commit property crimes or relatively low-level drug offenses.³² Many sentenced women, particularly in drug conspiracies, are the wives or girlfriends of male defendants,³³ and may find themselves involved in criminal activity because of social and cultural pressures or occasionally as a result of more obvious means of coercion, such as battery. Before the war on drugs, which was initiated during the 1980s, many of these women either would not have been arrested or would have received relatively light sentences. The current policy of lengthy sentences for drug offenders is questionable for men, in light of the national statistics indicating that 1998 marked the sixth consecutive year of decreasing rates of violent and property crimes,³⁴ but it is tragic for women because such a large percentage of female inmates are incarcerated solely for drug crimes.³⁵

B. WOMEN OFFENDERS AS PRIMARY CARETAKERS OF DEPENDENT CHILDREN

Women have always been perceived as getting longer sentences than men. The natural inclination is to

assume that leniency is due to some combination of paternalism and chivalry. However, to the extent that any break really exists, there are valid reasons why women offenders are good risks for community supervision. As previously indicated, they generally commit nonviolent crimes,³⁶ and they often participate in drug conspiracies by providing low-level assistance to their male intimates or acting as mules. As a group, women appear to be better candidates for rehabilitation than men.³⁷ They are more easily "scared straight" and more easily controlled in the community because of their family ties.³⁸ Moreover, most female offenders have children.³⁹ Approximately 1.3 million minor children have mothers under supervision by justice system agencies.⁴⁰ Over 250,000 of these minors have mothers who are serving time in prison or jail.⁴¹ Needless incarceration of single mothers or primary caretakers punish the children as much as, if not more than, their mothers.⁴²

Yet sentencing options for female offenders are particularly bleak in federal court because section 5H1.10 of the Sentencing Guidelines explicitly decrees that sex is not relevant in the determination of a sentence.⁴³ Similarly, policy statement 5H1.6 states that, "family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."⁴⁴ Ironically, the guidelines' attempt to legislate gender equality in sentencing has backfired against the very women who are the best candidates for alternative sentencing. In other words, female offenders who bear sole responsibility for the care of their children fare no better than individuals who have openly scorned any responsibility for acknowledging their children, caring for them, or financially contributing to their support.

The problem with such purportedly gender neutral policies is that they are not neutral, but male centered. Since more women have sole or primary childcare responsibility than their equivalent male offenders, why assume that any perceived leniency is an affront to equality which should be stamped out, rather than a concern about the welfare of children whose caretakers are typically their mothers? If more men provided childcare, they too would benefit from this factor. The break would be given not for being female, but for being a caregiver. In sentencing, the deletion of gender assumes a world in which men and women have equal custody of children and where the non-custodial parents are willing and able to take responsibility for the care of their children. In reality, 88 percent of single parents are mothers.⁴⁵

Not surprisingly, most of the single parenting departure cases involve females.⁴⁶ When fathers are incarcerated, their wives or former wives overwhelmingly

care for their children.⁴⁷ In contrast, when mothers are incarcerated, surveys find that fathers seldom have custody of the children. For example, a 1991 federal inmate survey found that 92 percent of men and only 26 percent of women reported that their minor children lived with the child's other parent.⁴⁸ Grandparents and other relatives or friends were more likely to live with a female inmate's child than the father. Moreover, foster homes and agencies were responsible for nearly five percent of the children of female offenders, compared with not quite one percent of children of male inmates.⁴⁹ Other problems include separation of siblings and instability of caretaking arrangements. Some commentators believe that policies and practices governing corrections and human services enforce a "family separation paradigm" that encourages adoption and the placement of children with nonfamily members and discourages visits and meaningful contact.⁵⁰

As Judge Jack B. Weinstein has recognized, "[r]emoving the mother in such a matriarchal setting destroys the children's main source of stability and guidance and enhances the possibility of their engaging in destructive behavior."⁵¹ The negative effects of parental separation, which can include delinquency and criminal behavior by children, have long been recognized.⁵² The practical consequence of ignoring children at sentencing is not only that the children become victims of their parent's crimes, but that they are also more likely to become victimizers of others.⁵³ Moreover, from a sentencing policy perspective, there is considerable evidence that family relationships also affect the mother's rehabilitation.⁵⁴ Ms. Radhika Coomaraswamy, the United Nations Special Rapporteur on Violence Against Women, has recognized that "[f]or many inmates, children are a life-sustaining force. To break that bond is punishment of the worst kind."⁵⁵

Significantly, family considerations appear to be a legitimate influence in determining where to place a sentence within the guidelines range. In those state courts, where primary caretaking is not prohibited by law from being a sentencing consideration, it should be no surprise that women with children may appear to receive lighter sentences than men. However, that is no solace for the children whose mothers receive artificially long sentences because of mandatory minimums, Truth-in-Sentencing laws, or habitual offender statutes applied to theft crimes.

Are there any existing remedies? The overcrowding of federal prisons with low-level drug offenders caused enough of an uproar that even Congress felt compelled to enact a safety valve that lets a judge depart below a mandatory minimum in certain circumstances, even if the prosecutor does not initiate the request or agree to it.⁵⁶

The profile of the perfect candidate for this statutory gift appears ideal for many women because it is intended for first-time, nonviolent drug offenders who played a minor role in the offense and have made a good faith effort to cooperate with the government, despite the lack of usefulness of their information.⁵⁷ However, the defense must initiate the contact with law enforcement and must be willing to supply whatever information the offender possesses.⁵⁸ Therefore, half-truths or refusals to identify others because of fear or loyalty render the safety valve inoperative. Given the importance of relationships to women, it is not surprising that some women offenders are not willing to jeopardize others in order to benefit themselves. In addition, denying culpability at trial has resulted in its inapplicability in some circuits,⁵⁹ confining its use to cases in which the defendant pleads guilty.

The safety valve was challenged as unconstitutional on the grounds that it constitutes cruel and unusual punishment and involuntary servitude in a case where the defendant claimed she did not identify other co-conspirators because to do so would subject her and her family to violent retaliation.⁶⁰ The challenge was not successful.⁶¹ The defendant's additional protests that such cooperation would result in her being forced to work as a government informer were equally unavailing. Even if an offender is willing to cooperate, the safety valve may be inapplicable if the supplied information reveals that the woman's role was not minor. In fact, such information can be used to increase the sentence. Thus, cost-benefit analysis may indicate that if the guideline sentence is not significantly less than the mandatory sentence, there is more downside risk than upside reward in talking to the prosecutor.

In summary, current sentencing practices, even those designed to offer respite to nonviolent offenders, are failing to deliver fair and effective sanctions for women offenders. This failure extends into the correctional system, where gender-responsive practices and programs remain inadequate. It now even affects the civil arena, where women offenders and their children may be further disadvantaged by recent federal welfare and adoption reforms.⁶² Underlying this pervasive lack of responsiveness is the persistent invisibility of the characteristics and life circumstances of women offenders and of the children from whom they are severed.

To counter this invisibility, the next section will profile women offenders and explore both the dearth of existing programs to meet their needs and the impact upon them of the growing interface between the criminal and civil courts. To complete the picture, it will also provide a developmental perspective, profiling a generation of young women who may, with the right intervention, become the adult offenders.

mothers of the twenty-first century. The section will conclude with a suggested continuum of legislative and programmatic solutions designed to halt the intergenerational cycle of women and girls offending.

II. CHARACTERISTICS OF WOMEN AND GIRL OFFENDERS AND PATHWAYS TO THEIR OFFENDING

Clearly, it is necessary to examine the characteristics of women offenders and the pathways they follow into the criminal justice system⁶³ in order to develop effective preventative strategies and rehabilitative programs. Moreover, because a high percentage of adult women offenders report histories of involvement with the juvenile justice system, it is also important to describe the characteristics of girl offenders.⁶⁴

Mirroring the rapidly expanding numbers of adult women entering the United States criminal justice system, girls now comprise the fastest growing segment, proportionately, of the juvenile justice population. Between 1993 and 1997, increases in arrests were greater (or decreases were smaller) for girls than for boys in almost every offense category,⁶⁵ and increases in the number of delinquency cases involving young women outstripped those pertaining to young men over the last decade.⁶⁶ Any exploration of the impact of shifts in criminal justice policies and practices affecting women offenders must at least touch upon their younger, even less visible, counterparts, many of whom are already mothers themselves.

A. CHARACTERISTICS

Three recent studies of the characteristics of women state prisoners reveal a strikingly similar portrait.⁶⁷ Nearly two-thirds nationally are women of color, primarily African American and Hispanic,⁶⁸ and many are low-income.⁶⁹ Many have experienced school failure⁷⁰ and have very limited vocational skills and work experience.⁷¹ The vast majority are mothers in their thirties who were single caretakers of minor children at the time of their most recent arrest, and some women inmates are also pregnant.⁷² Due, in part, to the geographical isolation of women's prisons, few of the children of women inmates are able to visit their mothers regularly, if at all.⁷³

Among the most commonly noted characteristics of women prisoners are histories of profound physical and sexual abuse, entrenched histories of drug and alcohol dependence, and serious physical and mental health disorders.⁷⁴ A significant proportion report that their first arrest, most often for a status or non-serious offense, occurred before they were eighteen years old.⁷⁵ A high percentage of state prisoners surveyed are serving their

first prison sentence,⁷⁶ and a majority are imprisoned for nonviolent drug and property offenses.⁷⁷ All of these characteristics and life circumstances must be viewed within an historical and societal context that undervalues women's labor, making it difficult for single mothers to financially support themselves and their children, and limits their access to quality health, educational, and other services.⁷⁸

Leading academics who have examined the constellation of life circumstances typically shared by women and girl offenders have posited that they follow a unique route into the justice system. These scholars have consistently identified physical, sexual, and emotional victimization as the first step along females' pathways into the juvenile and adult correctional systems and as a primary determinant of the types and patterns of offenses typically committed by women and girls. Indeed, in keeping with similar findings from other studies,⁷⁹ a core finding of the National Council on Crime and Delinquency (NCCD) 1995 study of 151 adult women incarcerated in California, Florida, and Connecticut state prisons was that over 92 percent had experienced one or multiple forms of abuse, and that "a history of violent abuse is one of the most universally shared characteristics of women in prison."⁸⁰

Key findings of a 1998 NCCD study of girls in the California juvenile justice system almost exactly matched the above 1995 adult survey. Ninety-two percent of the nearly 200 girl offenders interviewed reported that they had suffered some form of emotional, physical, and/or sexual abuse.⁸¹ However, despite their younger age, a *higher* number (81 percent, versus 72 percent of adult women surveyed by NCCD in 1995) reported that they had been physically abused, including an astonishing 25 percent who reported that they had been shot or stabbed one or more times.⁸² Of critical importance in terms of the pathway approach to understanding girls' and women's offending is the early ages at which young women are victimized, and the correlation between these traumatic experiences and their entry into the juvenile justice system.

Adolescent girls reported that they were most likely to be physically or sexually victimized at 13 or 14 years old.⁸³ Not surprisingly, a high proportion of girls (and their adult counterparts) first enter the juvenile justice system as runaways (often to escape abuse at home).⁸⁴ Additionally, young women, like adult women offenders, report a high degree of alcohol and/or other drug use and abuse, which typically begins at roughly fourteen years old.⁸⁵ Many academics and practitioners agree, and NCCD data reveal, that clear correlations exist between girls' and women's victimization and specific high-risk behaviors such as serious polydrug abuse.⁸⁶ A

fundamental reason for this close connection is the capacity of mood-altering chemicals to temporarily dull the psychological devastation wrought by experiences of physical and sexual violation. Tragically, substance abuse often catalyzes myriad other risky behaviors, including truancy, unsafe sexual activity, and delinquency.⁸⁷

Like older women offenders, girl offenders also report histories of serious health and psychological problems, nearly universal school failure, and family histories of arrest and incarceration. Over one-half (54 percent) of girls interviewed by NCCD reported that their families had been fragmented by the incarceration of the girls' mothers.⁸⁸

Extending the theme of family fragmentation into the next generation, an alarming 83 percent of the young mothers interviewed reported that they had been separated from their infants within the first three months of the infants' lives, a pivotal developmental stage.⁸⁹ Further, 54 percent of mothers eighteen years old and younger had not received a single visit from their child or children while in detention or placement.⁹⁰

A majority of girls arrested are nonviolent offenders charged with relatively minor status, property, drug, and other offenses.⁹¹ Even one of the fastest growing segments of young women offenders, those charged with assault, may be inappropriately labeled as violent.⁹² The question of whether or not girls are actually committing more violent offenses, including assault, or whether normal adolescent behaviors are being "re-labeled" as violent is currently rife with controversy. However, in-depth exploration of the actual circumstances of girls offending by NCCD revealed that many girls had been arrested for non-serious confrontations with family members and peers rather than dangerous assaults.⁹³ This raises the question as to why families and law enforcement seem more willing to intervene upon behaviors that a decade ago would have been dealt with informally.

B. PAUCITY OF SERVICES FOR WOMEN AND GIRL OFFENDERS

The extreme paucity of habilitative services for women and girl offenders and their children is deepening the negative impact caused by the sentencing reforms described above. Most scholars agree that although effective programs for both male and female offenders are limited, those that specifically address the characteristics and needs of women are even more limited or are non-existent.⁹⁴ Further, recent federal welfare and adoption legislation is reducing access to essential public benefits for women offenders while simultaneously reducing the amount of time incarcerated mothers have to

reunite with their children before losing custody.⁹⁵ This growing (and as yet under-evaluated) interface between the criminal and civil court systems may create the equivalent of a legal pincer movement, catching and separating successive generations of women and children in its midst.⁹⁶

The traditional argument that it is not cost effective to provide a full range of services to the relatively small numbers of women in the criminal justice system no longer holds today. According to the Bureau of Justice Statistics, there were over 146,000 women incarcerated in federal and state prisons and local jails by mid-year 1998.⁹⁷ Despite the burgeoning numbers of female inmates, Morash and Byrnum found in a 1995 nationwide survey of prison-based services for women that there were few programs that addressed women's unique characteristics and needs.⁹⁸ Especially lacking were family-oriented services and those targeting pregnant and parenting women.⁹⁹ Substance abuse treatment programs that also addressed women's histories of physical and sexual victimization (considered by practitioner and scholar Stephanie Covington and others to be a key element of effective treatment for this population)¹⁰⁰ were also rare in prison settings.¹⁰¹ Morash and Byrnum further noted that women prisoners had limited access to physical and mental health services, and most services lacked the essential component of cultural responsiveness.¹⁰² This deficit is particularly egregious given that the vast majority of incarcerated women are minorities.¹⁰³ Beyond formal treatment, these authors observed that inadequate educational and vocational options for incarcerated women fail to give them the practical tools they will need to survive crime-free once they are released.¹⁰⁴

In its 1999 five-state study of the barriers to the provision of effective substance abuse and parenting services to women in prisons and jails, NCCD preliminarily has identified several core unmet needs.¹⁰⁵ A fundamental problem reported by women in the study focus groups is the lack of access to general and specialized medical care.¹⁰⁶ Women felt that diagnostic and treatment services for serious chronic and degenerative diseases, such as cancer and heart disease, and infectious and communicable diseases, such as HIV, were dangerously limited.¹⁰⁷ Female inmates also expressed concern that intensive substance abuse treatment did not exist in their facilities, that it was inaccessible due to long waiting lists, or that it was ineffective due to inappropriate design or inadequately trained staff. Programs for women with co-occurring substance abuse and psychiatric disorders were the lacking of all.¹⁰⁸

The women inmates in the NCCD study were particularly concerned that, due to the lack of onsite obstetrical facilities, women in labor must be transported outside correctional facilities to community hospitals to deliver their infants. Reportedly, postpartum women are also returned to prison too soon after delivery without being fully recovered and then denied adequate medical supervision thereafter.¹⁰⁹ Women also reported that in most cases their newborns were removed from their care within hours, or at most days, of delivery.¹¹⁰ Their infants were then immediately returned to the mothers' often geographically distant home county or place of commitment, making regular visitation difficult if not impossible.¹¹¹ This early severance of the mother-child relationship is primarily due to the fact that there are few alternative sentencing options in lieu of prison for pregnant and parenting women offenders, even those who are nonviolent and pose little risk to their communities.¹¹² At the time of the study, there were only four fully implemented nurseries for incarcerated women and their infants nationally.¹¹³

Although the three state and local nursery programs NCCD visited appeared to offer mother-infant pairs an invaluable opportunity to interact and bond, these visits also revealed multiple barriers to the implementation and replication of nursery programs in other correctional settings. For example, such programs require significant changes in facility architecture and custody arrangements, as well as, in the case of New York, separate legislation mandating such services in women's prisons and jails.¹¹⁴ Furthermore, although other scholars and practitioners have long held that separating incarcerated women from their infants and children can cause long-term damage to the children's developmental potential, housing young children in correctional settings may also exact its own developmental toll.¹¹⁵ Catan notes, as does NCCD in its 1999 study, that compared to quality community-based child care services, prison mother-baby units usually do not offer infants a full range of opportunities to practice critical developmental skills and often lack staff who are knowledgeable about structuring and enriching the child's physical environment.¹¹⁶ The reality is that child development is not the central focus or task of prisons and jails. Thus a key question for policy makers in the twenty-first century will be whether or not to replicate the existing mother-baby program model in women's correctional facilities across the nation or to provide higher quality, lower-cost, community-based alternatives.

The above-mentioned program deficits may be further exacerbated by the increasing privatization of correctional facilities and by the placement of juveniles in jails and prisons. The privatization of women's correctional facilities may decrease access to

intensive psychological, psychiatric, and other key services.¹¹⁷ Reportedly, some private institutions impose entry criteria that exclude women with serious psychiatric disorders and those taking psychotropic drugs, as well as women classified as posing a higher security risk.¹¹⁸ These exclusionary practices may cause serious long-term problems as private facilities proliferate, providing fewer physical and mental health services and "skimming" inmates classified as lower-risk from the overall inmate population. This practice could leave public institutions exclusively to bear the cost of addressing the growing population of women with more serious health, psychiatric, and other needs.

The second emerging challenge is the increasing population of adolescent girls incarcerated in adult facilities.¹¹⁹ While accurate and current data on the numbers and characteristics of incarcerated adolescent girls are limited, the Bureau of Justice Statistics reported in 1990 that nearly 8,700 girls were admitted to United States jails in 1989.¹²⁰ Not surprisingly, data reveal that youth held in adult jails are at significantly higher risk of committing suicide than those detained in juvenile facilities. The suicide rate for youth incarcerated in adult jail facilities is "4.6 times higher than the suicide rate for youths in the general population, and remarkably, it is 7.7 times the rate for youths in juvenile detention centers."¹²¹

There is an even greater dearth of current data and information on the numbers and characteristics of girls in adult women's prisons than there is regarding girls in adult jails. Unfortunately, this issue will only grow in importance as increasing numbers of states pass legislation lowering the age at which juveniles can be transferred into the adult criminal justice system and placing the discretion for such action in the hands of prosecutors rather than judges. During the course of its 1999 study, NCCD researchers interviewed several adolescent girls who were housed within a maximum security women's prison in a geographically isolated region of a southern state. Fully integrated into the general adult population, these very young women were receiving no special services or protections that they could identify. Due to their young age and developmental stage, they were also completely unable to benefit from the adult-focused services offered within the prison.¹²²

The absence of adequate services for women offenders is not limited to incarcerative settings, but affects women at every point in their involvement with the criminal justice system. Pre-trial diversion and release services, court-sentenced alternatives and re-entry programs for women offenders are limited in number, size, and effectiveness. A 1992 NCCD survey¹²³ of promising community-based programs providing

supervision and habilitative services for women offenders¹²⁴ revealed the extent of the problem. A broad national survey of effective women-specific community corrections programs revealed that only 111 qualified as meeting study criteria for having community programs for female offenders.¹²⁵ These programs were characteristically small (able to serve 20-30 women) and generally lacked the organizational capacity to collect and manage client-related data. Unfortunately, not one of the programs had undergone a formal evaluation at the time of the survey.¹²⁶ This obviously limited the programs' capacity to demonstrate positive treatment outcomes and cost-effectiveness or to identify and remedy program deficits.

C. THE IMPACT OF FEDERAL WELFARE AND ADOPTION LEGISLATION ON WOMEN OFFENDERS AND THEIR CHILDREN

In addition to experiencing harsh criminal sanctions and inadequate services, women offenders are at increasing risk of losing care and custody of their children. This is due in part to recent legislation that has created a growing interface between federal and state criminal justice, welfare, and adoption systems. Echoing the "get tough" stance underlying recent sentencing reforms, in 1996, the United States Congress enacted the Personal Responsibility and Work Reconciliation Act (PRWRA), known to the public as "welfare reform." At a time when poverty rates among young children are climbing,¹²⁷ this federal legislation effectively ends the entitlement of all poor children to ongoing needs-based public support by placing strict limits on the length of time such children may receive benefits.¹²⁸ It also requires that their parents, overwhelmingly single mothers, seek employment without necessarily guaranteeing that appropriate jobs exist, that they pay a living wage, or that quality home child care is available.¹²⁹ This legislation may ultimately increase the overall numbers of children living in poverty. As Professor Michael Wald of Stanford Law School states, "Opponents argue that the legislation risks leaving more than a million children without any support as a result of time limits."¹³⁰ Further, given that women offenders are almost uniformly poor and unskilled and that those with felony convictions will have greater difficulty securing remunerative jobs, it can be expected that their children will face an even greater risk of poverty.¹³¹

More rarely discussed by scholars and policy makers is a key provision within the bill that explicitly excludes individuals convicted of drug related felonies from receiving welfare benefits on a lifetime basis.¹³² Since women offenders, as mentioned earlier, are more likely than their male counterparts to be sentenced for drug

related crimes, this provision disproportionately penalizes them and their children. Today, when a woman drug offender is released from prison with a few dollars and a bus ticket, she will have even fewer resources to re-establish a home for herself and her children. She will also have a shorter time frame to legally reunite with her children.

While the Adoption and Safe Families Act, enacted by Congress in 1997, has the laudable goal of protecting the "safety and health of the child," its implementation may further fragment the families of thousands of women offenders.¹³³ The Act imposes tighter timelines on family court processes and on the provision of support services necessary to preserve families.¹³⁴ Under the Act, parents whose children are in foster care have approximately one year to demonstrate their ability to parent (which would include recovery from substance abuse).¹³⁵ Within those twelve months, the family court judge must reach a final decision about whether dependent children are to be reunified with their families or placed in an adoptive or other permanent placement.¹³⁶ The judge does not have to offer reunification services to families whose children suffered "aggravated circumstances," such as abandonment or the involuntary termination of parental rights to a sibling.¹³⁷ With very few exceptions, a petition to terminate parental rights must be filed for any child who has been in foster care for 15 of the most recent 22 months.¹³⁸ Further, the Adoption and Safe Families Act specifies that services such as treatment for substance abuse and childcare will not be provided beyond a fifteen-month limit.¹³⁹ The Act makes clear that adoption is considered the best option for children who cannot be reunified with their parents.¹⁴⁰ Enhancing its pro-adoption stance, the Act offers child welfare agencies significant financial incentives to secure adoptive homes.¹⁴¹

The long-term impact of this act on women offenders, especially incarcerated women, cannot yet be measured because full implementation only began in 1999. However, the 1996 NCCD study revealed that 54 percent of women prisoners interviewed were serving a sentence longer than one year¹⁴² and 15 percent reported that one or more children had become a ward of the court.¹⁴³ Since incarcerated parenting women are not exempted from the provisions of the Adoption and Safe Families Act, and since those with children in foster care generally will be unable to meet family court requirements within 12 months, it appears more likely that their parental rights will be terminated. Thousands more children may be placed at the discretion of the court and may be in need of adoptive families. Fundamental issues such as the long-term fiscal cost of offering federal subsidies for adoption and the reality

those children for whom adoptive homes cannot be found (perhaps a new orphan class) have yet to be considered.

D. HOW DO WE GET OUT OF THIS MORASS?

Reversing recent trends underlying women and girls' accelerating entry into the juvenile and adult justice systems will require an organized, comprehensive, and innovative approach. This initiative must include changes in current sentencing practices, women- and girl-specific legislation at federal and state levels, and innovative programs and services with strong evaluation components.¹⁴⁴ It also must develop judicial and public constituencies committed to making these reforms a reality. Given the growing public recognition of the astronomical fiscal costs of incarceration and the emerging consensus among key public agencies such as the National Institute of Corrections (NIC) and the Department of Justice (DOJ) that their policies and funding initiatives must increasingly target female offenders, now is the time to design and launch such a plan.

In federal court, a change in the sentencing guidelines to permit family ties to be considered should be considered as a first step. The recent interest by the courts in balanced and restorative justice, incorporating community and victims' interests, also appears especially appropriate for women and girl offenders whose crimes are often nonviolent and thus amenable to this approach. A comprehensive reevaluation of drug policy and specific legislation is also long overdue. Even the Sentencing Commission and the Federal Judicial Conference have decried mandatory minimums.¹⁴⁵ Recently created criminal drug courts in a number of jurisdictions have proven astoundingly successful at changing behavior and lowering recidivism.¹⁴⁶ The key to the success of criminal drug courts are the combination of regular and close judicial supervision with readily available and effective substance abuse treatment services.¹⁴⁷ Given that women offenders are prime candidates for drug treatment and community support programs, it is time to use these programs and the even newer option of the Family Drug Court to end the intergenerational cycle of crime.

1. *Family Drug Court*

Family Drug Courts represent a new attempt to adopt selected principles and practices from the criminal drug courts into family court settings. However, as attorney Judith Larsen points out, "there cannot be a neat overlay of criminal drug court techniques onto civil family court, because the laws and court systems are too different."¹⁴⁸ The most fundamental difference is the drug court's emphasis on punishing and rehabilitating the individual offender versus the family court's focus on

protecting the safety of the child by rehabilitating the entire family.¹⁴⁹ The Family Drug Court must also function under the shorter and stricter time cap required by the Adoption and Safe Families Act.¹⁵⁰ However, model courts in three jurisdictions (the Family Treatment Court in Manhattan, New York City; the Family Drug Court in Kansas City, Missouri; and the Dependency Drug Court Project in Miami, Florida) offer some hope of success in helping families, including parenting women offenders, into recovery. The Family Drug Court in Kansas City appears to be particularly effective in providing high quality drug treatment for women who would otherwise face criminal conviction for substance use during pregnancy.¹⁵¹

Although there is no common protocol for Family Drug Courts across jurisdictions, effective elements include intensive judicial monitoring and involvement, access to substance abuse treatment facilitated by an integrated team of legal, social service, and treatment professionals, and specific rewards and sanctions.¹⁵² Ultimately, the effectiveness of these courts will depend on many factors, including the availability of quality drug treatment that specifically meets the needs of women and their families, the resolution of due process and sanctioning issues for parents, and the ability of families and the courts to function within a strict one-year timeline.

2. *Model Alternative Sentencing Legislation and Programs for Pregnant and Parenting Women*

The state of California operates the largest state correctional system in the nation and houses the largest and one of the fastest growing populations of women prisoners.¹⁵³ According to the California Department of Corrections (CDC), California incarcerated roughly 1,000 women in 1980 and over 11,000 in 1998.¹⁵⁴ In the early 1990s, the CDC recognized that any estimate of the fiscal and social costs of incarcerating mothers must include the cost of placing their children in foster or kinship care. In 1994, the CDC supported the passage by California legislators of Senate Bill 519, the "Pregnant and Parenting Women's Alternative Sentencing Program Act."¹⁵⁵ This bill requires that the CDC design and fully implement intensive substance abuse and parenting programs in lieu of state prison commitments for pregnant and parenting women offenders with children under six years old. The bill also appropriated \$15 million of prison construction funds for the design and construction of three residential mother-child treatment facilities that ultimately will serve up to a total of 120 women offenders and their children.¹⁵⁶ After five years of planning and development the CDC Family Foundation (formed to implement the legislation)

opened its first program in Santa Fe Springs (Southern California) in 1999.

As designed, this program will represent two critically important advances. First, since it will function as a true alternative sentencing program, women offenders, with the agreement of the sentencing judge, district attorney, and probation department, will go directly into residential treatment with their children rather than to prison.¹⁵⁷ This is significantly different from the existing California Community Prison Mother Program (CPMP), which functions as a pre-release residential program for inmate mothers and their children.¹⁵⁸ CPMP requires that women serve a substantial part of their time in prison before being reunited with their children.

A second key advance of the California Alternative Sentencing Program is that it has adopted research-based practices from the maternal and child health treatment fields into its program design.¹⁵⁹ The goal of the program is thus not only to treat the mother's drug dependence, but to maximize her child's developmental potential by enhancing the mother-child relationship. This emphasis on intensively treating the mother-child pair is rare in correctional settings yet essential for interrupting the intergenerational cycle of family fragmentation and criminal activity.

3. *Model Community-Based Programs that Serve Women Offenders and Their Families*

a. *Child Haven, Inc. (Fairfield, California)*

It is essential that policy makers, correctional professionals, and service providers search outside the boundaries of traditional correctional practice for the most effective (and fully evaluated) community-based program models. One promising model is Child Haven, Inc. Child Haven has the capacity to serve women and girl offenders outside the correctional settings and to provide preventative supports for families at risk of losing custody of their children due to abuse and/or neglect.¹⁶⁰ Child Haven's service model has served as the blueprint for the above-mentioned Alternative Sentencing Program, and will also offer training to the professionals who will staff new programs.

Child Haven, Inc., is a nonprofit, community-based program that accepts low income, multiple-risk, pregnant, postpartum, and parenting women and their children three years old or younger, as well as older siblings.¹⁶¹ The primary focus of the program is to reduce the incidence of child abuse and neglect within families by addressing the underlying distortions and attachment problems in parent-infant and parent-child relationships. The goals of the program are: (1) to prevent damage to the infant due to

substance exposure in utero and other stressors; (2) to prevent incidents of child abuse and neglect; (3) to maximize the health and developmental potential of the child; and (4) to promote the health and recovery of the mother.¹⁶² To accomplish these goals, the program offers a number of services, including in-home counseling services, infant-parent group therapy, basic medical services, and tangible supports such as food, infant supplies, and clothing.¹⁶³ This program model has been rigorously evaluated in the United States and Australia, specifically in terms of its capacity to prevent child abuse and neglect.¹⁶⁴

b. *Operation Par (St. Petersburg, Florida)*

Operation Par was founded 25 years ago primarily to serve heroin-dependent men and women.¹⁶⁵ It now offers a broad range of residential, day, and other treatment services including programs that specifically address the needs of substance dependent women and their children.¹⁶⁶ For example, Par Village is a long-term residential program that serves women in the criminal justice and child protective systems and their children 11 years old and younger. This program includes therapeutic day care for the children, intensive substance abuse treatment for the women, and parenting interventions in which mothers and children participate together, as well as vocational and sober living skills training.¹⁶⁷

A unique and important element of this program is its interface with the Florida court system. Par advocates attend court with prospective women clients and educate judges, prosecutors, and defense attorneys about the unique circumstances and needs of women offenders and their children.¹⁶⁸

4. *Options for Girls In and At Risk of Entering the Juvenile Justice System*

Given their age, their developmental potential, and the generally low safety risk they pose to their communities, intervention programs for girls offer the best hope of interrupting the intergenerational cycle of family fragmentation and criminal offending. Additionally, as the boundary between the juvenile and adult justice systems becomes more permeable, it becomes increasingly impossible to ignore their presence as both current and future occupants of the criminal justice system.

Stemming the rising tide of girl offenders will require a multi-level approach, including federal and state efforts. For example, the Office of Juvenile Justice and Delinquency Prevention could require that states and local jurisdictions receiving its assistance in implementing its strategies to prevent violent juvenile crime¹⁶⁹ explicitly include girls. Without such a requirement, gender

responsive juvenile programs will continue to be an afterthought. At the state level, the California Legislature in 1998 passed SB 1657, legislation allocating funds to reduce juvenile crime committed by female offenders.¹⁷⁰ Although the governor of California failed to sign the bill, it could be resubmitted in California and used as a model for the development of similar legislation in other states. Other strategies include changes in the processing of girls through the juvenile justice system and the implementation and evaluation of programs targeting young women.

The process of disproportionately penalizing and detaining girls for status offenses and subsequent violations of valid court orders must be halted. Instead, effective diversion and intervention options that specifically address girls' needs and engage their families and caretakers should be developed at the community level. Family focused programs that intervene upon family violence, including domestic combat between rebellious girls and their caretakers, should also be implemented at the community level. Further, training that provides accurate and current information on the characteristics and needs of girl offenders and their families and on dispositional alternatives for this population should be immediately delivered to law enforcement, probation officers, juvenile and family court judges, and child welfare professionals.

As indicated earlier, one of the most central challenges girls face is that they are not obtaining sufficient help in developing academic, vocational, and social skill competencies. These skills are essential in preparing young women offenders to hold living wage jobs, support their children, and avoid criminal offending. Nationally, there are few programs for young women offenders and even fewer that have been evaluated and proven effective.

By the most rigorous standards in the field, the PACE Center for Girls (Practical, Academic, and Cultural Education), based in Jacksonville, Florida, has emerged as a model program for girls in or at risk of entering the juvenile justice system.¹⁷¹ PACE is a non-residential, gender-specific program that provides comprehensive education and therapeutic intervention services to adolescent girls in or on the periphery of the juvenile justice system. The organization serves approximately 2,500 girls between the ages of 12 and 18, in 15 PACE centers statewide. It is noteworthy that reviewers of both Florida state and federal juvenile justice programs have indicated that PACE is the most consistently successful program funded by the Florida Department of Juvenile Justice and provides a model strategy for serving girls nationwide.¹⁷²

5. *Preserving Family Ties*

Ultimately, if one of the goals of the United States criminal justice system is to preserve and promote public safety, the preservation of positive family ties between incarcerated women and their children must be supported. Recognizing this fact, in 1994 Congress enacted the Family Unity Demonstration Project,¹⁷³ but has since failed to allocate funds to implement its recommended family strengthening programs. This lack of follow-up flies in the face of the heartfelt purpose of this legislation, which is to help "alleviate the harm to children and primary caretaker parents caused by separation due to the incarceration of the parents" and to "reduce recidivism rates of prisoners by encouraging strong and supportive family relationships."¹⁷⁴ This critical oversight could be at least partially remedied through the implementation of at least one major demonstration project that could be rigorously evaluated for program and cost effectiveness and then replicated across the nation. The Criminal Justice Section of the American Bar Association (ABA) recently passed a resolution urging the reauthorization and funding of the Family Unity Demonstration Project, which will be considered by the House of Delegates of the ABA in February 2000.¹⁷⁵

III. CONCLUSION

As a group, women offenders don't grab headlines, they don't riot, and they don't fit the profile of dangerous criminals who must be incarcerated for lengthy terms in order to protect the public. Yet, the plight of the nonviolent female offender should concern all of us. While the disastrous consequences of lives needlessly lost to prison is a tragedy that extends to all nonviolent offenders, the imprisonment of so many women who are single mothers with primary care responsibilities for their children has the real potential of destroying innocent young lives. As a result of current correctional policy, we ignore the children of female offenders, who in an earlier era would have remained with their mothers in the community. Our insensitivity to their plight, bordering on a lack of humanity, may return to haunt us if they grow up to be the millennium's newest category of criminals, children of incarcerated mothers. This article suggests a variety of approaches designed to halt the intergenerational cycle of crime and assist female offenders to become productive members of the community while maintaining their family ties.

This August, the ABA enacted a policy calling for a National Commission to consider a broad range of sentencing and correctional issues.¹⁷⁶ Professor Raeder, one of the authors of this article, previously has called for a task force to specifically study the gender issues that affect the sentencing and imprisonment of women, a

suggestion that was embraced in Amnesty International's Report on Women in Custody.¹⁷⁷ Even conservative policy makers have begun to question the folly of lengthy mandatory minimums for nonviolent drug offenders.¹⁷⁸ The time is ripe to rethink correctional policy before we condemn yet another generation of children to the fate of their mothers.

NOTES

* The studies upon which Leslie Acoca was principal investigator, and upon which she draws in her section of this article, are: Leslie Acoca and James Austin, *The Hidden Crisis: Women in Prison*, The National Council on Crime and Delinquency (Feb. 1996); Leslie Acoca and Kelly Dedel, *No Place to Hide: Understanding and Meeting the Needs of Girls in the California Juvenile Justice System*, The National Council on Crime and Delinquency (July 1998); and the upcoming *Barriers to the Adoption of Harm-Reducing Gender Specific Substance Abuse and Parenting Programs For Incarcerated Women* to be published by The National Council on Crime and Delinquency and the Robert Wood Johnson Foundation (forthcoming 2000).

** Myrna Raeder's previous works, which she expands, updates, and summarizes in her section of this article, are: *The Forgotten Offender: Effects of Federal Sentencing Policy on Women and Their Children*, 8 FED. SENTENCING REP. 157 (Dec. 1995) and *Gender and Sentencing: Single Moms, Battered Women and Other Sex-Based Anomalies in the Gender Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993).

¹ Elizabeth F. Moulds, *Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System*, in WOMEN IN THE CRIMINAL JUSTICE SYSTEM 277, 286-87 (Susan Datesman & Frank Scarpitti eds., 1980).

² Minority women are particularly hard hit. For example, the number of Hispanic females inmates increased 71 percent from 1990 to 1996. See BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, PRISONERS IN 1997, at tbl.12 (Darrell Gillard & Allen Beck eds., Aug. 1998) [hereinafter PRISONERS IN 1997]. The report also notes that "[a]s a consequence of the dramatic growth in the number of drug offenders, an increasing percentage of federal prisoners are black or Hispanic." *Id.* at 13. Compared with their numbers in the general population, black and Hispanic women are disproportionately represented in the segment of women who are incarcerated. See "Not Part of My Sentence": *Violations of the Human Rights of Women in Custody*, AMNESTY INT'L REP. (Amnesty Int'l, New York, N.Y.), March 1999, at 19 [hereinafter AMNESTY INT'L REP.]; see also Dorothy Roberts, *Unshackling Black Motherhood*, 95

MICH. L. REV. 938 (1997) (arguing that the imprisoning of black women for drug use during pregnancy is part of a pattern of subordination of black women).

³ See, e.g., AMNESTY INT'L REP., *supra* note 2, at 25-32; Maia Szalavitz, *US: War on Drugs, War On Women*, ON THE ISSUES MAGAZINE (Winter 1998) <<http://www.mapinc.org/drugnews/v99.n001.a06.html>>.

⁴ See, e.g., BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT. BULL.: PRISON AND JAIL INMATES AT MIDYEAR 1998, at 2 tbl.1 (Darrell Gillard ed., 1998) [hereinafter MIDYEAR 1998] (showing a total of approximately 745,000 people held in state or federal prisons or local jails in 1985, compared with 1,800,000 people incarcerated as of June 30, 1998).

⁵ AMNESTY INT'L REP., *supra* note 2, at 15.

⁶ See PRISONERS IN 1997, *supra* note 2, at 10 (comparing female and male incarceration rates from 1990 through 1996).

⁷ See LESLIE ACOCA & JAMES AUSTIN, NAT'L COUNCIL ON CRIME AND DELINQ., REPORT, THE HIDDEN CRISIS: WOMEN IN PRISON I (1996).

⁸ BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, NCJ 175688, WOMEN OFFENDERS I (Lawrence A. Greenfield & Tracy L. Snell eds., 1999) [hereinafter WOMEN OFFENDERS].

⁹ See BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT. BULL.: PRISON AND JAIL INMATES AT MIDYEAR 1997, at 4, 7 (D. Gillard & A. Beck eds., 1997).

¹⁰ See Meda Chesney-Lind, *Patriarchy, Prisons, and Jails: A Critical Look at Trends in Women's Incarceration*, PRISON J., Spring-Summer 1991, at 51, 55 [hereinafter *Patriarchy, Prisons, and Jails*]; see also MEDA CHESNEY-LIND, THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME 149 (1997) (concluding that "factors other than a shift in the nature of women's crime are involved in the dramatic increase in women's imprisonment") [hereinafter THE FEMALE OFFENDER].

¹¹ See *Patriarchy, Prisons, and Jails*, *supra* note 10, at 57-58.

¹² See *id.* at 57.

¹³ See AMNESTY INT'L REP., *supra* note 2, at 15.

¹⁴ For example, there were less than 10,000 female prisoners from 1925 to approximately 1975. These figures increased dramatically to nearly 75,000 prisoners by the end of 1997. BUREAU OF JUSTICE STAT., U.S. DEP'T. OF

SOURCEBOOK OF CRIMINAL JUSTICE STAT. 1998, at 488 fig.6.2 [hereinafter 1998 SOURCEBOOK].

¹⁵ PRISONERS IN 1997, *supra* note 2, at 5.

¹⁶ U.S. SENTENCING COMM'N, 1997 ANNUAL REPORT 35 (1997).

¹⁷ *Federal Bureau of Prisons Quick Facts* (updated Dec. 31, 1998) <<http://www.bop.gov>>.

¹⁸ See MIDYEAR 1998, *supra* note 4, at 4; see also PRISONERS IN 1997, *supra* note 2, at 5.

¹⁹ See, e.g., 1998 SOURCEBOOK, *supra* note 14, at 504 tbl.6.51 (indicating that over two-thirds of female federal prisoners are housed in minimum or low security facilities).

²⁰ For example, averaging markedly increased the sentences of women when it was used in California's Uniform Determinate Sentencing Law. 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 114, 213, & 214 tbls.4-7 (Alfred Blumstein et al. eds., 1983).

²¹ See Myrna Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 927 (1993).

²² See BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, COMPARING FEDERAL AND STATE PRISON INMATES 1991, at 7 (Caroline Wolf Harlow ed., 1994) [hereinafter COMPARING INMATES 1991].

²³ *Id.* at 18 (66 percent of female prisoners in federal prison versus 33 percent of state female prisoners).

²⁴ See WOMEN OFFENDERS, *supra* note 8, at 6.

²⁵ See PRISONERS IN 1997, *supra* note 2, at 5.

²⁶ *Id.* at 12 (101 percent for females, 55 percent for males); see also MARC MAUER ET AL., THE SENTENCING PROJECT, GENDER AND JUSTICE: WOMEN, DRUGS, AND SENTENCING POLICY 5 (1999) (comparing ten year increase in state prison population from 1986-1996; 888 percent increase for females, 522 percent increase for males).

²⁷ BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES 1996, at 7 (Caroline Wolf Harlow ed., 1998) (reporting 5.9 percent for male first time offenders, 13.1 percent for their female counterparts).

²⁸ PRISONERS IN 1997, *supra* note 2, at 12.

²⁹ U. S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 76 (1991) [hereinafter MANDATORY MINIMUM PENALTIES].

³⁰ KATHLEEN DALY, GENDER, CRIME, AND PUNISHMENT 227 (1995).

³¹ See Kathleen Daly & Rebecca L. Bordt, *Sex Effects and Sentencing: An Analysis of the Statistical Literature*, 12 JUST. Q. 141, 162-64 (1995).

³² See, e.g., 1998 SOURCEBOOK, *supra* note 14, at 505 tbl.6.51 (indicating that over two-thirds of female federal prisoners in 1998 were committed for a drug offense and only about two percent of these women were imprisoned for violent crimes); AMNESTY INT'L REP., *supra* note 2, at 18 (indicating that in the 1996-1997 year 67 percent of female federal and state prison inmates were incarcerated for drug or property offenses while only 25 percent were incarcerated for violent offenses); BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 6 (Paula M. Ditton & Doris James Wilson eds., 1999) (profiling new court commitments to state prison in 1996 indicating that women were most likely to be admitted to prison for a drug (39 percent) or property offense (36 percent)).

³³ See, e.g., Raeder, *supra* note 21, at 977-78; Szalavitz, *supra* note 3.

³⁴ CRIMINAL JUSTICE SECTION, A.B.A., THE STATE OF CRIMINAL JUSTICE I (1998).

³⁵ See, e.g., 1998 SOURCEBOOK, *supra* note 14, at 505, tbl.6.51 (indicating that approximately 69 percent of female federal prisoners in 1998 were committed for a drug offense).

³⁶ There may be biological as well as sociological reasons for this gender difference. See Deborah W. Denno, *Gender Differences in Biological and Sociological Predictors of Crime*, 22 VT. L. REV. 305, 307 (1997).

³⁷ RUSS IMMARIJEON & MEDA CHESNEY-LIND, NAT'L COUNCIL ON CRIME AND DELINQ., WOMEN'S PRISONS, OVERCROWDED AND OVERUSED 9, 12 (1992) (citing several state empirical surveys).

³⁸ See generally Candace Kruttschnitt, *Social Status and Sentences of Female Offenders*, 15 LAW & SOC'Y REV. 247, 262 (1981) (discussing a study on the effects of social characteristics on women offenders' sentences and concluding that "an accurate analysis of the relationship between sexual status and legal control may hinge on a consideration of the social statuses

particularly relevant to each gender"); Candace Kruttschnitt, *Women, Crime, and Dependency*, 19 *CRIMINOLOGY* 495 (1982) (findings based on a multiple regression analysis provide some support for the notion that the more economically dependent on another a woman is, the less severe her criminal disposition).

³⁹ See, e.g., AMNESTY INT'L REP., *supra* note 2, at 15 (noting that more than 80,000 women in prisons are mothers of children under 18 years of age); AMERICAN CORRECTIONAL ASS'N, *THE FEMALE OFFENDER: WHAT DOES THE FUTURE HOLD?* 6-7, 50-51 (1990) (providing nationwide survey of female offenders).

⁴⁰ See *WOMEN OFFENDERS*, *supra* note 8, at 1.

⁴¹ *Id.* at 8.

⁴² See generally BARBARA BLOOM & DAVID STEINHART, NAT'L COUNCIL ON CRIME AND DELINQ., *WHY PUNISH THE CHILDREN?* (1993) (reviewing survey data on the characteristics of incarcerated mothers and their children); see also *CHILDREN OF INCARCERATED PARENTS* (Katherine Gabel & Denise Johnston eds., 1995).

⁴³ U.S. SENTENCING COMM'N, *GUIDELINES MANUAL* § 5H1.10 (1998) [hereinafter U.S.S.G.].

⁴⁴ *Id.* at § 5H1.6.

⁴⁵ BUREAU OF THE CENSUS, *MARITAL STATUS AND LIVING ARRANGEMENTS* 11 (1992).

⁴⁶ See Alan Ellis & Samuel A. Shummon, *Let Judges Be Judges! Post-Koon Downward Departures, Part 7: Family Ties and Responsibilities*, *CRIM. JUST.*, Summer 1999, at 48, 49 (noting that most cases in which sentencing guidelines departures based on family ties have been granted have involved female defendants who are the "sole providers" for their children).

⁴⁷ BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, *SPECIAL REPORT, WOMEN IN PRISON* 7 (Lawrence A. Greenfield & Stephanie Minor-Harper eds., 1991).

⁴⁸ See *COMPARING INMATES 1991*, *supra* note 22, at 17.

⁴⁹ *Id.*

⁵⁰ See Paula Dressel et al., *Mothers Behind Bars*, *CORRECTIONS TODAY*, Dec. 1998, at 90, 91-92.

⁵¹ *United States v. Concepcion*, 795 F. Supp. 1262, 1282 (E.D.N.Y. 1992).

⁵² See, e.g., ANN M. STANTON, *WHEN MOTHERS GO TO JAIL* 93-94 (1980); Phyllis Jo Baunach, *You Can't Be a Mother and Be in Prison . . . Can You? Impacts of the Mother-Child Separation, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN* 155 (Barbara Raffel Price & Natalie J. Sokoloff eds., 1982).

⁵³ Barbara Bloom, *Imprisoned Mothers, in CHILDREN OF INCARCERATED PARENTS* 28 (Katherine Gabel & Denise Johnston eds., 1995).

⁵⁴ See *id.* at 27-28 (discussing the impact of incarceration on imprisoned women and their families).

⁵⁵ *Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons, Report of U.N. Economic and Social Council, Comm'n on Human Rights, 55th Sess., Provisional Agenda Item 12(a)*, at 18, U.N. Doc. E/CN.4/1999/Add.2 (Jan. 4, 1999).

⁵⁶ 18 U.S.C. § 3553(f) (1999), also included in U.S.S.G. § 5C1.2, allows a sentencing court to disregard the statutory minimum for first-time nonviolent drug offenders who played a minor role in the offense and who have made a good faith effort to cooperate with the government, despite the lack of usefulness of their information.

⁵⁷ See U.S. SENTENCING COMM'N, *1997 ANNUAL REPORT* 38 n.63 (1997).

⁵⁸ See, e.g., *United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997), *cert. denied*, 520 U.S. 1270 (1997) (requiring disclosure of defendant's own actions and of those participating in the activity with defendant); *United States v. Ajugwo*, 82 F.3d 925, 927 (9th Cir. 1996) (finding defendant failed to meet her burden of proving by a preponderance of the evidence that she had provided the government with complete, truthful information, where government claimed she was less than forthcoming and she made only a "bare assertion" that she provided all relevant information); *United States v. Flanagan*, 80 F.3d 143, 146 (5th Cir. 1996) (placing burden on defendant to provide the government with all information regarding the offense, without any request).

⁵⁹ *United States v. Withers*, 100 F.3d 1142 (4th Cir. 1996) (noting split in circuits and holding that in the Fourth Circuit, defendants must acknowledge responsibility for their actions before qualifying for application of safety valve).

⁶⁰ *United States v. Stewart*, 93 F.3d 189, 195-96 (5th Cir. 1996).

⁶¹ *Id.*