Women in Prison

Should they be treated differently from men?

The number of women in state and federal prisons has surged since 1978 by nearly 800 percent — twice the growth rate for men. Mandatory sentences for drug offenses enacted during the 1980s and 1990s have hit women particularly hard, many experts say. But some prosecutors and Republicans dispute the claim that the so-called war on drugs has disproportionately hurt women. They say mandatory sentencing has reduced crime, helped break up drug rings and ended sentencing disparities. Reformers hope states’ recent efforts to reduce prison populations and spend more on drug treatment will help women. But they say women still remain an afterthought in the penal system. For example, reformers say courts and prisons rarely recognize women’s responsibility as mothers or the factors underlying their participation in crime, such as domestic abuse. The justice system, women’s advocates say, needs to think creatively about how to help female prisoners. Meanwhile, in the juvenile system, girls often receive harsher punishments than boys who commit similar offenses.
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Women in Prison

THE ISSUES

In 2015, Ramona Brant had served almost 21 years of a life sentence for conspiracy to distribute crack cocaine, even though she said she was merely a bystander in the dealings of an abusive boyfriend.  

Brant said her boyfriend, who authorities alleged had been running a multimillion-dollar interstate drug operation, had beaten Brant so severely that she had landed in the emergency room numerous times. When Brant tried to leave him, she said, he beat up her brother and threatened to kill her mother.

Brant denied dealing drugs. She thought she had a defense: the hospital records and police reports documenting the abuse that forced her to accompany her boyfriend during drug-dealing trips. However, her public defender never presented those records at the trial.

Under mandatory federal sentencing guidelines in force at the time, the judge sent her to prison for life, citing the amount of drugs her boyfriend’s drug ring had sold. In December 2015, President Barack Obama granted clemency to Brant, and she was released from prison on Feb. 2, 2016.

“There are a lot of Ramonas” still serving lengthy sentences, says Amy Povah, who served more than nine years of a 24-year sentence in federal prison in connection with the ecstasy-drug-selling activities of her husband before receiving clemency in 2000.

Povah is founder of CAN-DO, a nonprofit in Malibu, Calif., that seeks clemency for prisoners serving long sentences for nonviolent drug offenses. “A lot of [women] are like me,” she says. “We didn’t wake up one day and say, ‘I want to sell drugs.’ We were in love with a man or we participated in some minor way, but it was the man driving it, and we were held equally culpable for their actions.”

Since 1978, the female population in state and federal prisons has surged by almost 800 percent, about twice the growth rate for men, although women are only 7 percent of the nation’s prison population.

Brant’s case exemplifies many of the forces that experts say have helped drive this rise:

- Rampedaanti-drug enforcement starting in the mid-1980s;
- State and federal laws imposing lengthy mandatory sentences that don’t take into account the personal circumstances of women;
- Increasingly aggressive prosecution, and
- Lack of treatment for the root causes of crime, such as addiction.

The majority of women in prison, according to researchers, have suffered some kind of trauma, such as domestic or sexual violence; many are addicts; and many suffer from serious mental illness. “Prison is a place where those things generally will get worse — for mothers and their children,” says Georgia Lerner, executive director of the Women’s Prison Association in New York City, which helps women involved in the criminal justice system.

About half of the nation’s 222,000 women behind bars are being held in local jails, where the female population has exploded in recent years, jumping fourteenfold since 1970. During that same period, the male jail population increased only fivefold, according to a recent report by the Vera Institute of Justice, a research organization in New York City, and the John D. and Catherine T. MacArthur Foundation in Chicago. Jails detain people who are awaiting trial — or for low-level crimes carrying a sentence of a year or less.

Women are the poster child for “what’s wrong with America’s use and misuse of jails,” especially when faced with women’s cumulative vulnerabilities, according to Laurie Garduque, director of justice reform for MacArthur. As low-income, single heads of households, they often end up in jail because they can’t afford bail or fines. Then, for many
women, jails become gateways to long-term incarceration in state prisons. 7

Experts are still trying to tease out the causes for the dramatic rise in women being incarcerated.

“Even after doing this research we don’t have a complete answer to this question,” says Elizabeth Swavola, lead author of the Vera report and senior program associate with Vera’s Center on Sentencing and Corrections. She cites one factor in particular: an increased focus on arresting people for low-level, quality-of-life offenses, such as public intoxication, disorderly conduct and vagrancy. That approach, plus the escalation in the nation’s so-called war on drugs in the 1980s and ’90s, targeted low-level activities such as drug possession, in which women are more likely to be involved, according to the Vera Institute. 8

Nearly 60 percent — 58.6 percent — of the women in federal prisons were convicted of drug offenses. Most women in local jails were arrested for nonviolent offenses, such as drug possession or property offenses like shoplifting, and they were less likely than men to have an extensive criminal history. 9

It’s a different story at the state level, however, where only 25 percent of the women are in state prisons for drug-related crimes. And prosecutors note that more than a third (36 percent) of the 93,536 women in state prisons at the end of 2014 were convicted of violent crimes, including murder. That was up from 28 percent in 1998, according to the Bureau of Justice Statistics. 10

But Lauren-Brooke Eisen, senior counsel at New York University’s Brennan Center for Justice, says more than 40 percent of women in state or federal prison are unnecessarily incarcerated if society’s prime concern is whether they pose a threat to public safety. “We need to think more creatively [about] how we punish; prison isn’t the only sanction,” she says, suggesting alternatives such as court-ordered drug treatment, electronic monitoring and community service. 11

Women also are especially vulnerable to arrest for technical violations of probation, such as not showing up for a court-ordered appointment or missing a drug test, according to Vera. Nearly 80 percent of women in jail are mothers with mostly younger children, and they often have trouble finding childcare. 12

“Treating women equally is not necessarily just,” says Swavola. “Women are different.”

Some researchers also note that jails and prisons are not meeting the special medical and psychological needs of female inmates. Incarcerated women “have significant health problems,” said Sylvia Mignon, professor of human services at the University of Massachusetts, Boston. “The reproductive issues of women make the provision of health care more complicated for women than for men and are an additional challenge to health care services within prison walls.” 13

Small, mainly rural counties in the South have some of the nation’s highest rates of incarceration, spurring much of the huge growth of the nation’s female jail population, according to Christian Henrichson, research director of Vera’s Center on Sentencing and Corrections. 14

The trend is puzzling, experts say, because small counties are not crime centers. “No one’s saying this rise is because there’s a crime wave among women” either nationally or in rural areas, says Henrichson. However, rural counties have been hit especially hard by a nationwide opioid crisis, he says, and jail is “the landing place where
women go if addicted and there’s not a treatment or a care facility in that county.”  

Since peaking in 2008, the female prison population has remained at a stubbornly high level, largely because of the surging imprisonment rate among white women, even as the rate among black women has fallen. Experts suggest white women may have been affected to a greater extent by the methamphetamine and prescription opioid crises.

Growing attention to the condition of women behind bars has raised many of the same questions as the debate surrounding mandatory minimum sentences: Do lengthy mandatory sentences curb crime? Would drug treatment be more effective in preventing crime?

Since 2000, dozens of states, burdened with the cost of overcrowded prisons, have rolled back some of the harshest mandatory minimums and drug penalties enacted over the last 30 years. More than two dozen states — including conservative Southern states such as Mississippi and Alabama — have participated in a Justice Department-funded program since 2007 to reduce prison populations by, among other things, shortening sentences. Participating states use the money saved from lower prison costs for drug treatment and prisoner rehabilitation.

Despite President Trump’s tough-on-crime campaign rhetoric, the momentum for this kind of state sentencing reform “is certainly continuing,” says Marc Levin, policy director of Right on Crime, an initiative begun by the conservative Texas Public Policy Foundation in Austin that aims to reduce spending on prisons and invest in more treatment for drug offenders.

The outlook for reforming federal mandatory minimum sentencing laws is uncertain, however. A bill to reduce some federal mandatory sentences, sponsored by Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, won bipartisan majority support in committee last year. But Republican lawmakers were deeply divided on the issue during an election year, and the GOP leadership did not bring the measure to the Senate floor.

As prisoners, their advocates, judicial reform proponents and lawmakers discuss the problems of women in prisons, here are some of the questions being debated:

**Are harsh drug laws responsible for the high number of women in prison?**

During the crack cocaine epidemic in the 1980s and early ‘90s, the nation’s intensified effort to stop the sale and distribution of illegal drugs hit women particularly hard, experts say. As state and federal mandatory minimum sentencing laws were adopted, they say, women increasingly got caught in the criminal justice system’s expanding net.

“The war on drugs has been a war on women, particularly women of color,” Emily Salisbury, who teaches criminal justice at the University of Nevada, Las Vegas, told a justice conference recently. What has been driving the spike in women’s imprisonment, she said, “is not women becoming more violent or becoming more problematic, but the fact that our sentencing laws have changed.” Between 1980 and 2009, the arrest rate among women for drug possession or use tripled, while it doubled for men.

That trend is reflected in the nation’s state and federal prisons: The 25 percent of women in state prisons for drug-related offenses is double the 12 percent rate in 1986, at the start of the drug-war era. By comparison only 15 percent of the men currently in state prisons are there for drug offenses, and less than half of the men in federal prisons (compared to the nearly 60 percent of women).  

The high percentage of women compared with men — serving time for drug offenses shows how the war on drugs disproportionately affected women, said Marc Mauer, executive director of the Washington, D.C.-based Sentencing Project, which advocates reforms in sentencing. “Since women have
always represented a small share of persons committing violent crimes, their numbers in prison would not have grown as dramatically had it not been for changes in drug enforcement policies and practices,” he wrote in an analysis of trends starting in the 1980s. 22

However, Fordham University law professor John Pfaff contends that reformers have overemphasized the role of the drug crackdown and mandatory sentencing on the prison population increase. In a new book, Pfaff attributed the rise to increasingly aggressive prosecutors.

The national criminal justice system “is working exactly as Congress carefully intended and designed it to work.” The association also denies that sentences are overly punitive. Sentencing reform, the association said in a November 2016 letter to candidate Trump, “would seriously undermine our ability to disrupt and dismantle violent gangs and domestic and international drug trafficking organizations.” 24

Surprisingly, the current female prison population “is being maintained by surging imprisonment among women of a particular race: whites,” said Keith Humphreys, a professor of psychiatry and behavioral sciences at Stanford University. Both white and black women had been entering prison in rising numbers since the 1980s, but in 2000 the number and rate of black women being incarcerated began to fall, while white women continued a 30-year rise, possibly because of the seomahphetamine and prescription-opioid crises. 25

The falling incarceration rates among African-American women may be due to the waning of the crack epidemic in urban neighborhoods and a shift in big cities’ policing away from arrests for possession of small amounts of drugs such as marijuana. 26 Black women are still imprisoned at twice the rate of white women, but that is down dramatically from the early 1990s, when they were imprisoned at six times the rate of whites. 27

The long-term rise in women prisoners has masked some dramatic decreases in big cities. New York City’s prison population — for both men and women — has shrunk by more than 50 percent since the mid-90s, according to Michael Jacobson, a former New York City correction commissioner who is now executive director of the Institute for State and Local Governance at the City University of New York.

The biggest reason is “huge changes” in police enforcement practices, as police officers cracked down on minor law-breaking, a strategy that coincided with a drop in major crime, says Jacobson. “The admission stream to jail in New York City completely flipped, from overwhelmingly felonies to misdemeanors,” he says. The jail population fell sharply “because that mix changed.”

However, in rural county jails, the increasing focus on low-level infractions seems to have had the opposite effect — it has sent women to jail for offenses they never got arrested for before, according to the Vera Institute’s Henrichson. In 1970, 70 percent of the nation’s counties did not have a single woman in jail; now some of those rural counties have the highest rates of jailed women in the country. “It’s not as if women were not using drugs or as if no crime was committed by women in the 1970s,” he says. “What has changed in America since 1970?”

What’s changed, some experts hypothesize, is the “over-criminalization” of small infractions like driving with a broken taillight or the “crime of poverty” — arresting someone for failing to pay fines or keeping them in jail.
because of their inability to afford bail. Many localities have begun using the court system as a way to generate revenue by writing more tickets and jailing more people and charging them for their room and board, experts say. When judges do set bail, women are less able to afford it, according to Vera’s report on jails. 28

In places where low-level crimes are pursued with greater vigor, more cash-strapped women may find themselves behind bars, Henrichson says.

**Have mandatory sentences unfairly punished women?**

In December 2003, Mandy Martinson, a dental hygienist in rural Mason City, Iowa, started dating a man who sold methamphetamine. He moved in with her and she let him store drugs in her house. Five weeks later, police raided her house and found two pounds of methamphetamine, 10 pounds of marijuana and a gun in a bag containing Martinson’s purse.

Martinson said she never sold drugs or carried a gun, but she traveled with her boyfriend when he picked up drugs from his supplier and helped him bundle the cash from his drug profits. 29

At her trial, the judge said he was forced against his judgment to sentence Martinson to the 15 years mandated by Congress: 10 years for conspiracy to sell 500 grams or more of methamphetamine and marijuana and five additional years for possession of a gun during a trafficking crime. 30

Noting Martinson’s tangential role, the judge expressed dismay that she was getting a longer sentence than her boyfriend’s 12 years. As is often the case in women’s drug convictions, their trafficking boyfriends can get reduced sentences by giving the prosecutors information on drug rings. Martinson said she couldn’t provide information valuable enough to get a similar plea deal.

The mandatory sentence in Martinson’s case stems from the Anti-Drug Abuse Act passed by Congress in 1986 at the height of the crack cocaine era. To punish drug-trafficking “kingpins,” Congress tied mandatory minimum sentences to the quantity of drugs captured from the entire ring, rather than to the role of an individual in an operation.

Congress also added federal drug conspiracy provisions to the law in 1988, creating an “unjust” system that ends up with women often receiving longer sentences than the men, says Jesselyn McCurdy, deputy director of the American Civil Liberties Union (ACLU) Washington legislative office.

“It doesn’t take much to be considered part of a drug conspiracy in the federal system, and that’s often how women get caught,” she says. “We call it the ‘girlfriend problem.’ Either the husband or boyfriend is involved in drug dealing and the women take the money to the bank or take a phone call and are considered part of the conspiracy.”

Similar “complicity” provisions in state laws recognize no difference between major and minor accomplices, according to the Vera Institute. Women can face the same sentence as ring-leaders by taking a phone message or letting a partner keep drugs or firearms at their home. 31

However, Steve Cook, an assistant U.S. attorney in the Eastern District of Tennessee and the president of the National Association of Assistant U.S. Attorneys, says, “I don’t see any statistical support for any conclusion that females are disproportionately impacted by mandatory minimums.” For example, female offenders were convicted under federal mandatory minimum sentencing laws at a lower rate (24 percent) than male offenders (27 percent), according to the U.S. Sentencing Commission. 32

Cook also doubts that a girlfriend typically has little knowledge of her boyfriend’s drug ring: “The truth is more often than not they’re very close to the offender and they know who their associates are and what role they play.” Fear is more of a barrier than ignorance in his experience. “In the vast majority of cases one of the first things they say is, ‘He’s going to hurt me or my family,’” according to Cook.

Defenders of mandatory sentences say the laws have been responsible for the dramatic drop in the nation’s crime rates. Violent crime has fallen by about half since 1991. 33

“The mandatory minimums are a critical part of our ability to disrupt drug-trafficking organizations,” says Cook. “Regardless of [someone’s] role in the organization, the ability to use those mandatory minimums, with the threat of a long sentence to encourage cooperation, ‘is a cornerstone to our ability to fight those crime problems.’

Cook and others also credit the 1984 Sentencing Reform Act for bringing consistency to federal sentencing by creating mandatory sentencing guidelines for each crime, including drug trafficking.

“If you give too much discretion to sentencing judges, you get different results depending on which judge a defendant draws, versus what he deserves; that concern remains valid today,” says Kent Scheidegger, legal director of the conservative Criminal Justice Legal Foundation, a public interest law firm in Sacramento, Calif. “People who want to go all the way back to before the 1984 Sentencing Reform Act are saying we’re going back to the problem we tried to get rid of.”

Yet Douglas A. Berman, a law professor at Ohio State University and a long-standing critic of mandatory sentences, says both the sentencing guidelines and the congressionally set mandatory minimums put women at a distinct disadvantage. Historically, he says, judges had exhibited “a soft paternalism” in sentencing women and were allowed to consider their individual circumstances, such as the impact of a long sentence on their children.

In an effort to prevent racial bias, however, the 1984 sentencing guidelines specified that judges could no longer consider factors like gender or race.
Incarceration of Women Highest in Rural States

Largely rural states such as Oklahoma, Kentucky and Idaho had the highest rates of incarcerated women in 2015. Oklahoma’s rate was more than 13 times that of Rhode Island, which had the lowest rate.

Imprisonment Rate of Sentenced Female Prisoners by State, 2015
(Per 100,000 women in the adult population)


By taking away judges’ discretion, “we formally limited the opportunities . . . that historically benefited female offenders,” says Berman, “so over the range of cases women get more time and serve more time.”

Cook notes, however, that judges have more discretion today after the Supreme Court in 2005 held that the sentencing guidelines were “advisory” and thus not binding on judges. As a result, some of the harshest sentences mandated by the guidelines, such as Brant’s life sentence, would not occur today if the judge considered it inappropriate.

Should women offenders be treated differently from men?

After she got into a street altercation with her partner, Tamika was facing two to four years in prison for first-degree assault and the loss of her two daughters.

Then she learned about a New York City program, JusticeHome, which would allow her to stay at home with her two daughters rather than serve her sentence behind bars. She was able to complete the program in nine months, and today she lives at home and is in school.  

For some time, experts have said most aspects of the criminal justice system — from prison uniforms to rehabilitation programs — have been designed for men, who make up about 93 percent of the nation’s prison population.  

Cities and counties have been experimenting with diverting criminal offenders into programs that tackle the root causes of their crimes, such as addiction. “But virtually all of these alternative responses stem from research on men in jail,” according to a recent report from the Vera Institute of Justice.

Recently, several programs around the country have started to focus on female offenders. Recognizing that women who run afoul of the law are more likely than men to be the primary caretakers of small children and suffer from higher rates of addiction, mental illness and past sexual or physical abuse, these programs aim to help women outside of the prison setting.

For instance, the court can assign women with drug-related offenses in Tulsa, Okla., to the 14- to 18-month Women in Recovery program, which houses the women in apartments while they receive treatment for addiction and mental health. It also helps them find housing and employment and to reunify with their children. The program was begun in 2009 with money from the George Kaiser Family Foundation after it realized Oklahoma had the nation’s highest female incarceration rate.

“It’s very easy in Oklahoma to get a felony conviction because we have a lot of mandatory minimums and no well-funded mental health or substance abuse agency,” says Amy Santee, senior program officer at Kaiser.

Since its inception, the program has graduated 301 women. In the past three years it has had a recidivism rate of 3.5 percent compared with the state’s 13 percent rate for imprisoned women, according to program Director Mimi Tarrasch.

Elizabeth Swavola, co-author of a 2016 Vera Institute of Justice report, says that vocational programs in jail, such as heavy construction, often are inappropriate for women. In addition, the report said, pretrial risk assessment tools used by a growing number of courts to decide if a defendant is a high risk for fleeing or committing another crime often assess women as riskier than they are. That’s because many of these tools are based on research about men and don’t take into account women’s stronger ties to their families and communities. As a result, women who should be released are kept behind bars, said the report’s authors.

JusticeHome is based on research that found women are less likely to reoffend when allowed to stay with their children. “There’s a spike in women arrested within a couple of months after children are removed; children are the last thing helping women hold everything together,” according to Lerner of the Women’s Prison Association, which runs the program.

During a six-to-nine-month stay in the program, women receive guidance
on parenting, treatment for substance abuse or mental health problems and help with basic needs like housing and employment. Since JusticeHome began in 2013, 36 women with charges ranging from drug possession to robbery have successfully completed the program, and only five have been rearrested, according to Eric Grossman, JusticeHome’s director.

But some prosecutors and judges have been reluctant to refer women to the program if they’ve committed serious crimes, says Lerner. “There is this idea that it’s not hard or we’re not punishing people enough,” she says. Yet even a short prison stay would defeat the purpose, she says, because the idea is to eliminate some of the “collateral consequences” of imprisonment — losing housing or jobs — that lead to reoffending.

Cook of the National Association of Assistant U.S. Attorneys questions whether it’s fair or constitutional to offer such a program for women — and not men — if it could result in a sentencing disparity between the sexes. “We can’t not punish prisoners for very serious criminal behavior because it has some collateral consequence,” such as an impact on their children, he says.

Diana McHugh, communications director of the Women’s Prison Association, responds, “There are plenty of well-funded diversion programs available for men... The Women’s Prison Association simply specializes in women as other programs specialize in youth or those with mental illness. Our intervention is designed for women based on women-specific risks.”

Former federal Judge Nancy Gertner, who teaches law at Harvard University, has argued, “[W]omen’s crime is different than men’s crime.” Family ties play a more important role “in the likelihood that they will recidivate, and in their chances of rehabilitation,” she wrote. And because women are more likely to be caretakers, she said, “their imprisonment has a disproportionate impact on the children in their care.”

Many participants in Tulsa’s Women in Recovery have children. Research has shown that once their mothers are imprisoned, children are “more likely to be abused, engage in criminal behavior, experiment with drugs and end up in prison themselves,” said a recent press release from the program. Reunifying women with their children once they graduate from the program “helps to break the cycle of incarceration.”

**BACKGROUND**

**Prison Reform**

Since the early 19th century, reformers have debated whether women prisoners should be treated differently from men.

The earliest Pennsylvania penitentiaries originated as a form of penal reform promoted by the Quakers, who prescribed solitary confinement for both men and women as a way to rebuild the individual through penitence and reflection.

“The idea is that women in theory could be treated the same as men — which is progressive for that time,” says Erica Rhodes Hayden, a historian at Trevecca Nazarene University in Nashville, Tenn., and co-editor of the 2017 history, *Incarcerated Women.* The reality, she says, was that women were “outside their cell doing washing and cooking for prison officials” and were often sexually exploited by male guards.

Racial disparities were another problem. Before the Civil War, few black women were imprisoned in the South because owners were responsible for disciplining their slaves. That changed after slavery ended. Under the so-called black codes enacted in the Reconstructionist South, blacks — but not whites — were penalized for minor infractions such as being out after a certain hour. From 1831 to 1859, only three of Tennessee’s women prisoners were black; after the Civil War 100 percent were.

Things were not much better in the North, says Hayden. Before the Civil War, black women were arrested and convicted at high rates in nonslave states, she says, as were Irish and German immigrants.

In 1839, the first facility for women opened its doors — as an annex on the grounds of the male Sing Sing penitentiary in Ossining, N.Y. But women continued to experience high levels of corporal punishment and abuse by male guards.

As the 19th century ended, middle-class female reformers argued that women prisoners should be treated differently than men. They should have their own facilities and the focus should be on rehabilitation over punishment, the reformers said. The Indiana Reformatory Institution for Women and Girls, which opened in 1873, was the first all-female prison of this type. By 1940, nearly two dozen states had similar facilities.

But, although these reformatories at first resembled campus-like settings with quaint cottages where women learned domestic skills, the facilities eventually came to resemble prisons where women who committed felonies were warehoused.

The rehabilitation philosophy was doubled-edged: Women who had “fallen” into immoral ways were seen as both more criminal than men but also more capable of reform if they were kept long enough in a reformatory.

During the Progressive era (1890s-1920s), concern about promiscuous women, “white slavery” and prostitution channeled many women from the streets into reformatories. During World War I reformatories from Connecticut to Arkansas began receiving women suspected of having venereal disease.
laws, and women were often sent to reformatories for longer terms than men were, even for the same offenses. 44 The law was not invalidated as discriminatory until 1968, freeing many women held under its provisions. 45

Return to Punishment

In the early 20th century, U.S. prisons generally focused on rehabilitation, providing job training, education or psychological treatment for prisoners.

That began to change in the 1970s. In his State of the Union address, President Richard M. Nixon announced a “war against the criminal elements” in society and proposed doubling federal law enforcement spending. In 1971, with large numbers of veterans returning from the Vietnam War addicted to heroin, Nixon declared drug abuse “public enemy No. 1.”

Although Nixon’s declaration became known as the start of the “war on drugs,” he had actually favored “public health responses over punitive ones,” wrote Pfaff in Locked In. For example, Nixon pushed for passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which emphasized treatment and rehabilitation and abolished federal mandatory minimum sentences enacted in the early 1950s for drug crimes. When Nixon left the White House in 1974, drug offenders still made up less than 7 percent of prisoners. 47

But during the 1970s crime experts began to question the effectiveness of rehabilitation for criminals. An influential 1974 article titled “What Works?” by City University of New York sociologist Robert Martinson, who reviewed more than 200 studies, concluded essentially that “nothing works.” 48

The growing endorsement of “incapacitation” — locking up criminals for many years as the only way to stop crime — influenced state legislatures, starting in New York. Its drug laws came to be known as the Rockefeller drug laws because of enthusiastic support from Republican Gov. Nelson Rockefeller (1959-1973). The laws — which for years remained the nation’s toughest — imposed a minimum sentence of 15 years to life for selling 2 ounces of marijuana, among other drugs, and 25 years to life for larger amounts. 49

Crack Epidemic

The war on drugs — and the fallout from the so-called crack epidemic of the 1980s and early ’90s — has been described as “a war on women” by several criminal justice experts. 50 In the 1980s, predominantly black neighborhoods in the inner cities faced a new drug — crack cocaine, which was cheap and could be smoked for a quick high. With its appearance came a surge in crack-related crime.

On Oct. 14, 1982, President Ronald Reagan declared his own “war on drugs,” saying the use of illegal narcotics was a threat to national security. He later created the Office of National Drug Control Policy to coordinate drug-
**19th Century**

Reformers stress rehabilitation for women in separate reformatories.

1873
First all-female reformatory opens in Indiana.

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**1960s-1970s**

Rehabilitation philosophy governs until drug-related crime wave leads to harsher laws.

1968
President Richard M. Nixon elected on law-and-order plank, soon declares war on drugs.

1973
New York’s Rockefeller drug laws mandate long sentences for drugs.

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**1980s**

Crack-related crime spurs Congress, states to pass lengthy mandatory penalties for drug traffickers, leading to rise in women prisoners.

1984
Sentencing Reform Act abolishes parole and creates commission to set mandatory sentencing guidelines.

1986
Congress mandates minimum sentences for drug traffickers, which unfairly impacts women, civil liberties advocates say.

1988
Congress mandates minimum sentence for conspiracy to distribute drugs, blamed for rising convictions of women with minimal roles.

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**1990s**

Number of female inmates rises, as more states pass harsh drug sentences.

1991
Violent crime reaches all-time high.

1994

1999
Over half of states have three-strikes laws; 34 percent of women in state prison are there for drug offenses, 72 percent in federal prison.

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**2000s**

Female prison population peaks; number of black women prisoners falls.

2002
Michigan eliminates mandatory sentences for most drug offenses.

2007
Gov. Rick Perry, R-Texas, urges legislative shift to rehabilitation to avoid billions in prison costs.

2008
Women’s prison population peaks at 106,358 — up 9-fold from 1978.

2009
Rhode Island repeals mandatory sentences for drug offenses; New York also repeals some.

2010
Fair Sentencing Act cuts sentences for crack cocaine vs. powder cocaine. . . Conservatives launch Right on Crime sentencing reform campaign; South Carolina eliminates some mandatory minimums.

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**2012**

Violent crime falls to half its 1991 peak; state prison populations decline for third year in row as federal inmate population rises. . . California relaxes three-strikes law.

**2014**

More than 30 states have rolled back mandatory minimums. . . U.S. Sentencing Commission retroactively reduces drug trafficking penalties under federal guidelines.

**2015**

Bipartisan bill to reduce some drug mandatory minimums dies in Senate.

**2016**

Republicans blame murder spikes in some cities on early federal prisoner releases under new guidelines. . . Donald Trump wins presidential election with tough-on-crime rhetoric; some reform prosecutors elected, displacing hardline district attorneys. . . Oklahoma, with nation’s highest rate of female incarceration, reduces some drug sentences and invests in treatment. . . FBI announces more than 10 percent increase in murder in 2015. . . Female prison population declines 1 percent in 2015 but remains more than eightfold the 1980 level; women in jail increase fourteenfold since 1970, the Vera Institute of Justice reports.

**2017**

Obama grants clemency to record number of prisoners, but only 6 percent are women; Sen. Chuck Grassley, R-Iowa, expected to reintroduce bill reducing some mandatory minimums. . . Missouri considers legislation to repeal some mandatory minimums. . . Trump announces task force to reduce violent crime (February). . . Sentence-reform opponent Sen. Jeff Sessions, R-Ala., is sworn in as attorney general, saying America has “a crime problem.”
Advocates Want Courts to Consider Abuse Evidence

Many women prisoners were victims of domestic violence.

On the night of Dec. 17, 1991, 25-year-old Kim Dadou was happy to see her boyfriend drive up to her mother’s house in Rochester, N.Y., despite their four-year, on-and-off relationship that she said included beatings from him. She joined him in the car out front and they started kissing. Dadou recalled, but 250-pound Darnell Sanders got angry when she refused his further advances and began to choke her. She said she reached for the gun Sanders kept under the seat and fired. She fled the car, and he drove away, according to Dadou.1

The next day, police found Sanders’ body in a snow bank. Dadou was convicted of first-degree manslaughter and sentenced to eight to 25 years in prison. She was released in 2008.

At the trial, the judge refused to admit into evidence police reports about Sanders’ five arrests for assault, the hospital records of Dadou’s treatment for beatings, battered-women shelter records or witness statements attesting to the abuse.2

Because judges have broad discretion in determining what evidence is relevant and admissible, “it is not uncommon for judges to exclude evidence of domestic violence,” according to Gail T. Smith, director of the Women in Prison Project at the Correctional Association of New York, a nonprofit that advocates for prisoners.

Studies have shown that a large proportion of women in prison have been victims of domestic violence. In New York state, a study by the prison system found that 67 percent of women incarcerated for killing someone close to them in 2005 had been abused by that person.3 But until the early 1990s, most states did not officially recognize battering as admissible evidence in cases involving murder charges. In 1992, California was among the first to permit evidence of “battered woman syndrome” to be introduced at trial. (Current law now refers to it as “intimate partner battering,” the term victims’ advocates prefer.)4

A coalition of domestic violence victims’ groups supports a bill in the New York Legislature that would allow judges to consider evidence of abuse when sentencing a female or male defendant whose crime was directly related to the abuse — either through self-defense or if the defendant’s abuser coerced her into committing a crime.

The bill would allow judges to set shorter sentences than the mandatory minimum required under existing law or to order an alternative to incarceration. It would also allow prisoners whose crime was related to domestic violence to apply to the court for a rehearing on their sentence.

The Correctional Association estimates that at least 357 people in New York state prisons would be eligible under the bill, as would another 483 per year in the court system.5

The Assembly passed the bill last session, but it did not advance to a floor vote in the Senate. It has since been reintroduced. The main opposition comes from the District Attorneys Association of the State of New York. The bill “ignores the harm caused to the actual crime victim,” the association said in a 2012 letter, “and creates a strong incentive for every violent offender to claim that he or she was subjected to some form of domestic abuse in order to receive a more lenient sentence.”6

California enacted a series of laws between 1992 and 2012 permitting prisoners whose abuse received only a limited hearing at trial to petition for a rehearing on their conviction or sentence. The laws also require the parole board to consider evidence of abuse when making parole decisions.

However, the changes haven’t worked as well as advocates had hoped, according to Colby Lenz, legal advocate with the related legislative, diplomatic, research and health policy throughout the government. The media dubbed the agency’s directors “drug czars.”51

Growing inner-city crime and shootings became a regular feature of nightly news as competing drug gangs fought over turf. Congress passed the Anti-Drug Abuse Act of 1986, establishing mandatory minimum sentences triggered by specific quantities of crack and powder cocaine. Congress singled out crack cocaine for special treatment, penalizing it 100 times more severely than powder cocaine measured by the quantity seized.52

Between the late 1970s and early ’80s, states began to establish similar “determinate” sentences — a precise sentence length or narrow range with less liberal policies on early release on the grounds that judges had too much discretion to set sentences. Both liberals and conservatives had criticized judicial discretion for leading to racially biased and widely varying sentences for the same crime. During this period, 19 states passed guidelines to reduce disparity in sentencing among judges.53

For similar reasons, Congress in 1984 passed the Sentencing Reform Act, replacing the parole system with a system of mandatory sentencing guidelines for drug offenses and other crimes, to be set by a presidentially appointed U.S. Sentencing Commission. Yet this supposedly neutral system, prescribing a range of sentences starting at a mandatory minimum for each crime, put women defendants in a worse position than the old system, critics said.

And in 1988, Congress added conspiracy to commit a drug offense to the list of crimes subject to a mandatory minimum, a step the ACLU has said pulled many girlfriends and wives of drug dealers into the justice system. Under the law, every participant in a conspiracy can be held liable for the crime of every other participant.54
San Francisco-based advocacy group California Coalition for Women Prisoners. About 60 prisoners have been released since 2002, more than half through the parole process, but “so many more are eligible” — potentially hundreds, she says.

Many women filed their petitions over a decade ago and are still awaiting court action, according to Lenz.

The legislation applies only to prisoners convicted before 1996, when the state Supreme Court upheld California’s battered-defense law. 7 But Lenz says that cut-off date disqualifies thousands of inmates who should be allowed a rehearing. Even into the late 1990s, she says, women often “weren’t allowed to bring evidence or bring expert witnesses or were given expert witnesses who didn’t know anything about domestic violence.”

In Illinois, a similar law that went into effect in January 2016 adds a history of domestic violence to the list of mitigating factors judges can consider during sentencing. It also creates a process for courts to review petitions for resentencing for certain offenses committed by a victim of domestic violence who was unable to present evidence of domestic violence at trial. 8

Chicago lawyer Margaret Byrne, co-director of the Illinois Clemency Project for Battered Women, says the law is so narrowly drawn that a woman can’t avail herself of it if any evidence of abuse was presented at her court proceeding: “I would say of the hundreds of battered women I’ve represented in 35 years, probably none of them would have been able to use this law because some evidence comes out at trial, sentencing or plea negotiations.”

Nevertheless, Byrne says prisoners’ advocates are making progress. Compared to 20 years ago, “it’s standard practice for a judge to take a history of abuse when sentencing,” she says. “On the other hand, there’s a persistent myth of the ‘perfect battered woman.’ Judges still feel, ‘I know a battered woman when I see one, and this one isn’t, because she is an alcoholic or has previous convictions.’”

— Sarah Glaser 9

By the early 1990s, most states had passed a variety of laws mandating long sentences for drug offenses, violent offenses and career criminals. The trend accelerated after 1994, when Congress passed the Violent Crime Act endorsed by Democratic President Bill Clinton. It provided $30 billion for states in prison-building grants if they passed truth-in-sentencing laws requiring that 85 percent of a prisoner’s sentence be served.

The law also mandated life sentences for some offenders convicted of a third offense — a “three strikes and you’re out” habitual offender law Clinton had endorsed in his State of the Union address earlier that year. 55 More than half the states enacted similar three strikes laws in the 1990s, mandating minimum sentences of 25 years or longer. 56

Ironically, crime rates had peaked in 1991 — three years before the federal law was passed. Between 1991 and 2000, homicide rates fell 30 percent, robbery 44 percent and rape 41 percent, the largest drop in crime of the 20th century. 57

Yet many criminologists say the federal prison-building funds provided during the Clinton administration helped to trigger the largest jump in the federal and state prison population of any administration in U.S. history. Between 1975 and 2005, the nation’s prison population exploded by 700 percent and reached a peak of 1.6 million in 2009. 58

The female state and federal prison population saw an even more dramatic surge, rising from less than 12,000 inmates in the late 1970s to a peak of 106,358 in 2008. 59 By 1999, drug offenses accounted for 72 percent of the female population in federal prison, 34 percent in state prison and 24 percent in local jails. 60

Sentencing Reform

Over the last 15 years, state and federal governments have been rolling
Double Standard Seen for Girls in Juvenile System

Girls are arrested more often than boys for minor offenses.

When it comes to teens in trouble, not all things are equal, experts say. “National data shows that girls receive harsher punishment than boys for less serious offenses and are often detained to protect their safety rather than to protect the public,” according to the Vera Institute of Justice, a research organization in New York City. ¹

For years, experts on adolescence and juvenile justice have been complaining that the juvenile-justice system treats girls differently. That’s a particular concern because involvement in the system can easily become a pathway to adult prison. ²

“Once a child is in the juvenile-justice system, their likelihood of ending up in the adult system is significantly higher,” says Mary Marx, CEO of the PACE Center for Girls, a public-private partnership in Jacksonville, Fla., that runs education, counseling and advocacy programs for troubled girls. “For us, it’s about shutting the door before they enter the system in the first place.”

Girls of color are also more likely than others to be charged. In 2013, black girls were 20 percent more likely to be detained in the juvenile system than white girls. American Indian/Alaska native girls were 50 percent more likely to be detained. ³

“Black girls are being criminalized in and by the very places that should help them thrive,” wrote Monique W. Morris, co-founder of the National Black Women’s Justice Institute, a Berkeley, Calif., advocacy group. Teachers viewed black girls as “loud, defiant and precocious,” in one study she cites. ⁴

In response to gang violence and school shootings in the 1990s, many public schools adopted “zero-tolerance” discipline policies, stationing police officers in hallways to keep order. That trend became the primary driver of school-based arrests, Morris writes. ⁵

Girls tend to be arrested more often than boys for “status offenses,” such as being truant, running away or drinking alcohol, that would not be crimes if committed by adults, according to a report from the National Crittenton Foundation, a group in Portland, Ore., that aims to help girls thrive. ⁶ Boys’ arrest rates for violent crimes are four times that of girls. ⁷

Although the number of juveniles in custody has fallen to half its early-2000s peak, the decline among girls hasn’t been as steep as among boys. What’s more, the number of girls in custody as a proportion of all juveniles arrested is rising in some regions. Nationally, girls’ share of arrests grew from 20 percent in 1992 to 29 percent in 2012, and their share of detentions rose in that period from 15 percent to 21 percent. ⁸

Girls are more likely than boys to be locked up for the same behavior. In 2013, 39 percent of girls who faced delinquency charges were detained for status offenses or technical violations, compared with 21 percent of boys. ⁹

Arrests of girls for simple assault are frequently connected to their experience with violence and abuse in their homes, according to the Crittenton report. But the arrests can also be a response from desperate parents. Girls who are arrested “often have intense conflicts with their mother or father” in a chaotic family, says Lindsay Rosenthal, senior program associate at the Vera Institute of Justice. “Often it’s parents who are at their wits’ end and don’t want the girls in the house anymore and call police.”

Judges’ tendency to try to protect girls can also land them in juvenile detention, Rosenthal says. “Often judges will openly admit they detain girls when they run away because they fear back some of their harshest sentencing policies, in part because of the high cost of incarceration and a swing back toward rehabilitation and drug treatment.

Critics of the nation’s drug laws also have long complained that they disproportionately damage black communities, particularly laws targeting crack, which is more popular among blacks, and favor the drug of choice among the white population — powder cocaine. Under the federal drug law passed in 1986, a person convicted of possessing 10 grams of crack would receive a 10-year-mandatory sentence; for powder cocaine, a person had to possess 100 times as much, or 1,000 grams, to be sentenced to 10 years — a 100:1 disparity. These harsh federal penalties, similar state mandatory sentences and intensified police enforcement in black neighborhoods contributed to a much higher rate of imprisonment for black women than white women — six times higher by 2000, according to the Sentencing Project. ⁶¹

In 2010, President Obama signed the Fair Sentencing Act, which reduced the federal penalties for crack and eliminated the mandatory minimum sentence for simple possession of crack. While the original bill would have eliminated the disparity between crack and powder entirely, a compromise with Senate Republicans legislated an 18:1 ratio. ⁶²

In 2014, the U.S. Sentencing Commission announced it would reduce penalties for most drug-trafficking offenses, effective in late 2015. Those changes also applied retroactively, to inmates convicted under the guidelines in place before 2005, when they were still mandatory. However, the change has no impact on mandatory minimums set by congressional statute.

Nevertheless, some of sentencing commission’s guideline ranges had previously gone far above the congressionally mandated minimums, and the changes in 2014 sought to bring the guidelines closer to congressional statutes. The commission also said the quantity of drugs no longer needed to play as large a role in determining the sentence.

Prisoners convicted under the previous guidelines could petition a court for early release. The commission es-
they will be raped or trafficked on the street, but wouldn’t incarcerate a boy for the same reason,” she says.

That tendency was one reason Florida began a program in 1985 aimed at preventing at-risk middle- and high-school girls from getting in trouble with the law. Girls referred by schools and judges receive intensive academic help and treatment for sexual abuse and other past trauma over 12 to 24 months at 19 centers around the state, run by the PACE Center. The recidivism rate for PACE graduates is 8 to 9 percent, compared with 45 percent for Florida’s juvenile justice system, according to Marx.

New Florida laws that prohibit the arrest of juveniles for misdemeanors and authorize police officers to issue a civil citation instead have helped cut the number of girls’ arrests in half over the past six years. The Legislature also directed schools to limit the disciplinary issues they refer to the justice system. 10

New York City, partnering with the Vera Institute, established a task force in February that will study such approaches as part of an effort to end the detention of girls over the next three years. 11

“We think there’s an opportunity to get to zero girls [in detention] nationally,” Rosenthal says. “The idea is by working in New York City and showing it can be done, it can spread around the country.”

— Sarah Glazer


5 Ibid.

6 Sherman and Balck, op. cit., pp. 4-5.


12 condom. Of the 46,000 prisoners sentenced between 1991 and 2014 would be eligible for reduced sentences. 63 So far, 67 percent of the motions filed have been granted, and 29,872 prisoners — of whom 7 percent were women — have been released. 64

Since 2000, at least 30 states have passed legislation to move away from the severe mandatory minimums passed during the past 30 years. States’ reconsideration has generally not extended to repeal, according to a recent summary of state trends in 2014 and 2015 from the Vera Institute of Justice. Instead, states have created “safety valves,” giving judges the option to ignore a statutory mandatory sentence if certain factual criteria are met or a shorter sentence is otherwise deemed appropriate. Some states have set a high bar for departing from mandatory sentences, while others have given judges more discretion. 65

Alabama, Mississippi, Nebraska and Utah have joined the more than two dozen states that have reformed their criminal justice systems under the Justice Reinvestment Initiative. Funded by the Justice Department, the initiative enables states to use savings from reductions in prison populations to invest in drug treatment and other programs. 66

However, women’s experts have long criticized treatment and rehab programs for being mostly tailored to men — although data are scarce on how they affect women versus men. For example, says Vera’s Swavola, drug treatment programs often “do not address women’s distinct needs, including high rates of trauma and co-occurring illness,” and fail to account for women’s child care responsibilities.

A high proportion of women on parole or probation do not successfully complete this supervision — often because they are struggling with child care responsibilities or having difficulties meeting financial obligations, securing jobs or finding safe housing. In a national study of post-prison recidivism, about 60 percent of women released were arrested again, and nearly 30 percent returned to prison within three years of release. 67

A bipartisan movement evolved around sentencing reform in the previous
Congress, with support from Obama, but no legislation was passed. A bill introduced by Senate Judiciary Committee Chairman Grassley sought to reduce some drug and gun mandatory minimum sentences. Known as the Sentencing Reform and Corrections Act, year, the GOP leadership did not bring the measure up for a floor vote.

The advocacy group Families Against Mandatory Minimums (FAMM) preferred another bill introduced by Sens. Rand Paul, R-Ky., and Patrick Leahy, D-Vt., that would have given Obama in January called the president’s clemency power an “important and underutilized tool for advancing reform.” In addition, he said, the “vast majority” of his commutation recipients “had already served far more time than the sentence they would receive today.”

However, Povah, whose organization CAN-DO helped women prisoners file clemency petitions, expressed dismay at the small number of women — 106 — who got clemency, just 6 percent of the total granted by Obama.

“The men who drove the drug war are the ones getting clemency, even if they are four-time offenders. How is it that they get it and first-offender women are being denied?” she asked.

**CURRENT SITUATION**

**Federal Actions**

Despite bipartisan support in the last Congress for federal sentencing reform — which some experts say could dramatically help women — such legislation has uncertain prospects with Trump in the White House.

Sen. Grassley has said he plans to reintroduce his bill, substantially unchanged, to reduce some federal mandatory minimum sentences for drug and gun crimes. But it is unclear whether the bill will encounter the same kind of opposition it met in the last Congress.

Attorney General Jeff Sessions likely will oppose any such legislation, based on his opposition to Grassley’s bill last

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Should mandatory minimum sentences be repealed?

**KEVIN RING**  
**PRESIDENT, FAMILIES AGAINST MANDATORY MINIMUMS**  
**WRITTEN FOR CQ RESEARCHER, MARCH 2017**

Journalist H.L. Mencken might as well have been discussing crime and mandatory minimum sentencing laws when he wrote in 1917, “For every complex problem, there is an answer that is clear, simple and wrong.” Mandatory sentencing laws have an intuitive, superficial appeal: Isn’t it fair to give everyone who commits the same crime the same sentence? Think for just a moment longer, however, and you quickly realize that no two people — and no two crimes — are exactly the same.

Consider 55-year-old Iowa widow Shirley Schmitt. In 2013, she was convicted of conspiracy to distribute methamphetamine and sentenced to 10 years in prison. Her decade-long sentence was based on her part in manufacturing more than 50 grams of methamphetamine, a weight equal to about 20 pennies. Despite the small quantity involved, the law required the 10-year sentence — a prison term Congress thought would target kingpins and major suppliers.

But Schmitt was no kingpin or major dealer. The federal judge who was forced to sentence her to 10 years said, “All matters of methamphetamine manufacturing are serious. The Court’s well aware of that. But this case, the evidence was pretty clear, that there wasn’t anybody really selling any methamphetamine. There wasn’t — nobody had any big cars or stacks of 20s in their pocket or anything like that. It involved a group of addicts who were satisfying their own addiction.”

To be cost-efficient, our criminal justice system must operate with precision. Dangerous offenders should be held accountable and spend time in prison. It’s obvious that releasing a dangerous offender too early can jeopardize public safety.

But so, too, can holding less-dangerous offenders too long: Prisoners who spend longer in prison than necessary are more likely to reoffend. Additionally, when we spend millions keeping people like Shirley Schmitt behind bars, we divert resources away from better anti-crime uses, like apprehending murderers and rapists.

Over the past few decades, numerous states have repealed or reformed their mandatory sentencing laws and watched their crime rates fall. New York state, for example, dramatically scaled back its infamous Rockefeller drug laws in 2009. Violent and property crime rates tumbled across the state and in New York City.

Treating all offenders and all crimes the same was an approach that proved clear, simple and wrong. To get tough on crime, we must eliminate mandatory minimums.

**STEVE COOK**  
**PRESIDENT, NATIONAL ASSOCIATION OF ASSISTANT U.S. ATTORNEYS**  
**WRITTEN FOR CQ RESEARCHER, MARCH 2017**

Federal mandatory minimum penalties are perhaps the single most important tool available to law enforcement and to federal prosecutors to infiltrate, disrupt and dismantle violent gangs, international drug cartels and other drug-trafficking organizations. Congress should reject any call to weaken or repeal these laws.

In the mid-1980s, we faced a staggering crime wave. Violent crime had more than tripled. Congress responded by enacting mandatory minimum penalties for high-level drug-trafficking and serious firearm offenses. Using those tools, law enforcement targeted the worst of the worst and sent them to federal prison.

By 1991, we began to experience a dramatic reduction in violent crime, including homicides, rapes, robberies and assaults. By 2014, violent crime rates had been cut in half.

Those promoting weakening the federal criminal justice system describe drug traffickers as “nonviolent drug offenders.” This is a ridiculously false description. The drug-trafficking business is inherently violent from top to bottom. Street-level dealers have a clientele desperate to get their product. Traffickers up the distribution chain routinely possess tens of thousands of dollars’ worth of drugs or cash proceeds. Disputes among drug traffickers are not resolved in court; they are resolved on the streets through violence.

Moreover, even beyond the violence, drug trafficking exacts a high toll in our communities. In 2015 alone, there were over 52,000 overdose deaths in the United States. Sadly, these deaths are only the tip of a pyramid of harm. The pain of addiction, the crime generated, families torn apart, lost productivity and the costs to our health care system are immeasurable.

Changes weakening the federal criminal justice system have already been implemented, including the early release of tens of thousands of drug traffickers from federal prisons, a 27 percent reduction in federal prosecutions and an 11 percent reduction in the federal prison population.

Predictably, violent crime rates are now surging upward. In 2015 homicides increased a staggering 10.8 percent, rapes 6.3 percent and aggravated assaults 4.6 percent. While the official 2016 statistics will not be released for some time, preliminary figures look just as ominous.

In short, we are in the middle of a drug epidemic of historic proportion and face a wave of violent crime. We simply cannot further dismantle the federal criminal justice system by weakening the very laws to bring violent drug traffickers to justice.
President Trump could reverse a 2013 order from Obama’s attorney general, Eric Holder, who directed federal prosecutors not to charge certain low-level nonviolent drug offenders with the maximum sentence available under law.

To address violent crime. At his February swearing-in, Sessions said the United States “has a crime problem,” prompting experts to point out that violent crime and murder rates are still about half the level they were at their peak in the 1990s. But Sessions said the recent rise in the number of murders by more than 10 percent was not a “blip.” 74

Although the number of murders rose 10.8 percent nationally between 2014 and 2015, experts noted that rise was driven by large increases in seven cities: Baltimore, Chicago, Houston, Kansas City, Mo., Milwaukee, Philadelphia and Washington. However, in late 2016, when the figures were announced, that trend was already shifting, with murders dropping in Baltimore and Washington. In general, the murder rate has been declining since the crack epidemic of the 1990s, except for a few upticks. 75

The number of women prisoners, meanwhile, has held steady in the past six years: About 105,000 women were sentenced to state or federal prisons in 2015, about the same number as in 2010, according to Bureau of Justice figures. 76

The administration’s power over sentencing is limited, because the vast majority of criminal prosecutions take place at the state level. Nonetheless, Trump could reverse a 2013 order from Obama’s attorney general, Eric Holder, who directed federal prosecutors not to charge certain low-level nonviolent drug offenders with the maximum sentence available under law. 77

“I’m sure that’s one of the things the incoming administration will want to revisit pretty quickly,” says Cook, of the National Association of Assistant U.S. Attorneys, which along with Sessions has criticized the Holder policy for reducing the number of prosecutions and for contributing to rising crime.

Although Sessions supported the Fair Sentencing Act that reduced the disproportionate sentencing for crack cocaine compared to the powder form, he opposed making those reforms retroactive for prisoners convicted under the old rules, as Grassley’s bill would do.

Sessions “has a lot of sway with Trump,” says Kevin Ring, president of PAMM, which seeks repeal of mandatory minimums. Sessions was “an early supporter, and he has experience; Trump seems to like to delegate, so it seems like Sessions will have a strong influence” in opposing legislation to reduce mandatory minimums.

Marc Levin, who heads the conservative Right on Crime initiative, which supports reducing drug penalties, is a little more optimistic, noting that some of the rural areas hit hardest by the opioid crisis went overwhelmingly for Trump in the presidential election. “I don’t think Trump ever said, ‘We need to put more people in prison who are drug addicts,’” says Levin. “That’s an open opportunity as to what his position will be.”

However, federal prosecutors represented by the National Association of Assistant U.S. Attorneys strongly oppose any legislation to weaken mandatory minimums. “Letting dealers out of prison early has an impact; there’s a reason they’re in prison” the association’s Cook says. He cites the case of Wendell Callahan, a drug dealer charged with killing his ex-girlfriend and her two daughters last year after he was released early. 78 “We think this notion that drug crime is not a violent crime is crazy talk,” says Cook.

The ACLU’s McGurdy argues there is “no correlation,” between prisoner releases and crime, noting that Washington, D.C.’s crime spike, which occurred before the prisoner release, dropped after the release. Nationwide, the violent crime rate remains at about half its level in the 1990s, despite a 4 percent jump in the number of violent crimes in 2015 from the previous year. Property crimes dropped 2.6 percent in 2015, declining for the thirteenth consecutive year. 79

Congress also might consider new mandatory minimums in select cases, according to both opponents and advocates. As part of last year’s compromise, Grassley’s bill added new minimums for domestic violence and terrorism. There also has been some discussion of raising penalties for prescription opioids that have been contributing to the recent wave of overdoses, Ring and Cook note.

Continued from p. 208

year when he was a Republican senator from Alabama and was serving on Grassley’s committee. Releasing “thousands of violent criminals is a risky and possibly devastating social experiment in criminal leniency,” he said. “The Senate bill would drastically reduce mandatory minimum sentences for all drug traffickers, even those who are armed and traffic in dangerous drugs like heroin, and provide for the early release of dangerous drug felons currently incarcerated in federal prison.” 73
State Actions

New York state is considering a bill to permit women prisoners to petition a court for early release if their convictions were tied to domestic violence. The measure would allow judges to sentence people for shorter periods than the mandatory sentence if domestic abuse was an important factor in commission of a crime. Similar legislation has passed in California and Illinois. (See sidebar, p. 204.)

Given the change of administrations in Washington, reform activists view state legislatures as a more fruitful forum than Congress for rolling back what they see as harsh sentencing policies.

“A lot of us are shifting our assets to the states,” says FAMM’s Ring. For instance, he says, Missouri is considering legislation proposed by a former sheriff’s deputy, Republican state Rep. Galen Higdon, to repeal mandatory minimums for nonviolent or minor crimes. 80

Despite tough-on-crime talk and the fact that 25 states are now in the hands of both a Republican governor and legislature, the momentum to soften drug sentences “is certainly continuing,” says Right on Crime’s Levin, as cash-strapped states try to reduce prison populations.

Alaska, Maryland and Oklahoma have undertaken such reforms, he says. Oklahoma, which overwhelmingly voted for Trump, also passed a ballot initiative to reduce some drug possession offenses from a felony to a misdemeanor and to reinvest the savings in drug treatment, Levin points out. 81

“We always like to say saving money is the appetizer, but the main course is public safety and redeeming people’s lives,” Levin says, explaining why conservatives are attracted to this movement. “As conservatives, we should be locking up people whom we’re afraid of, not people we’re mad at. And that means taking a different approach to people with addiction and mental health issues.”

Levin’s coalition also supports bail reform, which would benefit women prisoners, who are disproportionately impacted by current bail procedures. The ACLU’s goal is to eliminate the “money bail system” at the state and local level, says McCurdy. 82

In January, New Jersey Republican Gov. Chris Christie signed a bipartisan bill containing funds to implement a new law that removes the state’s cash bail requirement for pretrial release, allowing defendants to be freed based on whether they pose a risk to the community. New Jersey is one of three states to enact bail reform in the past two years. 83 Texas is considering similar legislation, according to Levin.

OUTLOOK

Crackdown Feared

Researchers and policymakers increasingly are focusing on the high number of women entering prisons and jails — once largely overlooked. And even though women make up less than 10 percent of the nation’s prison population, their fates are tied to the sentencing reform trends sweeping the nation.

Some worry the nation might be becoming increasingly punitive, judging from recent polls and Trump’s vows to crack down on crime. Last April, a Gallup Poll found that Americans’ concern about crime had reached a 15-year high, even though violent crime levels nationwide remained at 20-year lows. 84

A more punitive approach may be reflected in the rural counties where the jail rate for women is rising fastest. The criminalization of poverty and the tendency of towns like Ferguson, Mo., to use the justice system as a cash register are two trends that could continue to send women to jail for minor offenses or for failing to pay bail, fines and fees, experts say. 85

However, sentencing reform advocates on both the left and the right cite a contrary trend sweeping the states toward reducing severe sentences for drug offenses, and instead investing more in drug treatment, mental health and re-entry programs.

Another encouraging sign for reformers is the unusual number of tough-on-crime prosecutors who lost to reformers in district attorney races in Colorado, Florida and Texas in November. A month after taking office in Chicago, the new Cook County state’s attorney, Democrat Kim Foxx, ordered her prosecutors to stop charging low-level shoplifting as a felony. 86

While most of the action in the next few years is expected to be in the states, some reformers are optimistic about change at the federal level, too. In a recent editorial, former New York Times executive editor Bill Keller, now editor-in-chief of the nonprofit journalism site The Marshall Project, argued that “prospects of federal reform are actually better in 2017” than in the last Congress in part because it is not an election year. 87

Sen. Grassley has said his sentencing reform bill could have garnered a veto-proof majority if it had made it to the Senate floor, and Keller said reform continues to have a broad base of support, from libertarians to conservative Christians and fiscal conservatives. 88

In the waning days of his presidency, Obama wrote an article for the Harvard Law Review calling the need for criminal justice reform “urgent.”

“How we treat those who have made mistakes speaks to who we are as a society and is a statement about our values,” he wrote. 89

It remains to be seen how the nation will respond to that challenge.

Notes


7 Ibid., p. 6.

8 Ibid., p. 23.


12 Swavola et al., op. cit.


20 Swavola et al., op. cit., p. 23.

21 “Prisoners in 2015,” op. cit., Table 9, p. 14, and Table 10, p. 15.


26 Mauer, op. cit., Table 4. Between 2000 and 2009, black women’s incarceration rate dropped 30.7 percent; while white women experienced a 47 percent rise and Hispanic women a 23 percent rise.

27 Humphreys, op. cit.


30 Ibid. Also see Mandy Martinson, FAMM, http://tinyurl.com/jip4cdj. Mandy Martinson was granted clemency by President Obama in 2016.

31 Swavola et al., op. cit.


34 Email from Diana McHugh, director of communications, Women’s Prison Association. Tamika’s last name has been withheld for privacy reasons.


36 Swavola et al., op. cit., “From the Director.”

37 Swavola et al., op. cit.


44 Mallicoat, op. cit., p. 380.


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About the Author

Sarah Glazer is a London-based freelancer who contributes regularly to CQ Researcher. Her articles on health, education and social-policy issues also have appeared in The New York Times and The Washington Post. Her recent CQ Researcher reports include “Privacy and the Internet” and “Decriminalizing Prostitution” She graduated from the University of Chicago with a B.A. in American history.
FOR MORE INFORMATION

American Civil Liberties Union, 125 Broad St., 18th Floor, New York, NY 10004; 212-549-2500; www.aclu.org. National organization that seeks to protect individual civil rights and advocate for sentencing reform.


Sentencing Project, 1705 DeSales St., N.W., Eighth Floor, Washington, DC 20036; 202-628-0871; www.sentencingproject.org. Research and advocacy organization working to change sentencing policy and find alternatives to incarceration.


Vera Institute of Justice, 233 Broadway, 12th Floor, New York, NY 10279; 212-334-1300; www.vera.org. Research organization that works to build and improve justice systems that ensure fairness.

47 Pfaff, op. cit., p. 27.
49 Glazer, op. cit., p. 34.
50 Woodworth, op. cit.
51 Pfaff, op. cit., p. 22.
53 Glazer, op. cit.
54 ACLU, op. cit., p. 35.
55 Glazer, op. cit., p. 34.
57 Glazer, op. cit., p. 36.
58 Ibid., p. 34.
59 “Prisoners in 2015,” Table 3, p. 6., op. cit.
60 “Caught in the Net,” op. cit.
61 Mauer, 2013, op. cit.
62 Glazer, op. cit., p. 38.
65 Silber, op. cit., p. 27.
66 Ibid., p. 34.
70 “Obama used clemency power more often than any president since Truman,” Pew Research Center, Jan. 20, 2017, http://tinyurl.com/2dzxegwv. However, only 5 percent of petitions were granted — a much lower proportion than Truman’s 41 percent. One reason was Obama’s Clemency Initiative in 2014, which encouraged qualified federal inmates to apply — resulting in a flood of more than 36,000 petitions.
71 Obama, op. cit.
76 “Prisoners in 2015,” op. cit., Table 3, p. 6.
77 Glazer, op. cit., p. 28.
85 Obama, op. cit.
88 Ibid.
89 Obama, op. cit.
The latest FBI statistics show murders rose nearly 11 percent in 2015, but seven cities were responsible for the increase.


The editor-in-chief of the journalism site The Marshall Project explains why the chances for sentencing reform in Congress in 2017 may be improving.


The former president cites the case of Ramona Brant, sentenced to life for her involvement in her boyfriend’s drug trafficking ring, as “ emblematic” of the problems with “overly harsh” mandatory sentences.


President Trump’s plan to crack down on crime and appoint a new task force comes as crime levels remain at historic lows despite upticks in some cities.

Reports and Studies


The government’s most recent incarceration statistics show a 1 percent decline in the female prison population from 2014.


This much-discussed New York University research center report concludes that 39 percent of the nation’s prisoners are incarcerated for nonviolent offenses. Forty-two percent of women are unnecessarily incarcerated, the authors calculated for CQ Researcher.


A report summarizes recent state trends in sentencing reform, mandatory minimums, reducing prison sizes and bail reform.


The number of women in jail has risen 14-fold since 1970, with small rural counties the main engine of the growth, concludes this report by a New York research organization.
Domestic Violence


A Florida woman who spent almost six years in prison for firing a “warning shot” after she said her husband abused her says she will fight for domestic abuse victims.


The attorney for an Ohio woman charged with murdering her husband said she was “in fear for her life.”


A woman, who spent 17 years in prison for killing her abusive boyfriend, is now advocating for legislation that would help protect survivors of domestic violence charged with a crime related to the abuse.

Drug Crimes


A task force created by the governor of Oklahoma, where the female incarceration rate is the highest in the country, recommends the state reduce sentences for nonviolent drug offenders.


Police arrested a visitor after she tried to smuggle drugs into a Las Vegas jail with her three children present.


More than 500 pregnant women in Alabama have been charged with felony chemical endangerment of a child since 2006, when the state adopted its “meth lab law.”

Legal Reforms


Alabama lawmakers are considering an $800 million plan that would build three prisons, including one for women.


A bipartisan sentencing law reform bill, led by Sen. Chuck Grassley, R-Iowa, would loosen some mandatory minimum sentences for nonviolent crimes and seek to reduce recidivism rates.


New Massachusetts legislation would give prisoners a greater chance for early release, even those who received mandatory minimum sentences.

Mental Illness


The Illinois Department of Corrections is looking to spend about $80 million to improve conditions for 11,000 mentally ill prisoners, including women.


Prisoners who suffer from a mental illness or addiction issues make up a large portion of Massachusetts’ criminal justice system, many suffering from substance use disorders.


Despite large numbers of mentally ill inmates, Rhode Island’s prison system only has 11 social workers for 3,000 prisoners.

Citing CQ Researcher

Sample formats for citing these reports in a bibliography include the ones listed below. Preferred styles and formats vary, so please check with your instructor or professor.

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