

A TEST FOR U.S. CRIMINAL JUSTICE REFORM: FEWER WOMEN IN PRISON

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Abstract

Women comprise only 7% of the offenders in the prisons and jails of the United States. A small fraction of a very large incarcerated population, they number over 200,000. But the rate of growth of female imprisonment has exceeded that of men by 50% during the three or four decades of the mass incarceration era. The number of incarcerated women has grown by more than 700% in 35 years. The political leadership of the United States recognizes that the four or fivefold increase in the incarcerated population must be brought down. There is bipartisan agreement on the measures to be taken to achieve reduction: Keep more low-level nonviolent offenders out of prison. This agenda is too timid and tepid to accomplish more than modest reductions in the incarcerated population. However, statistically women offenders ARE "low-level nonviolent" offenders. A good measure of the success of the current reform agenda therefore is bringing down the number of women behind bars from their current historically unprecedented heights.

1. Introduction

Women comprise just 7 percent of the 2.2 million people incarcerated in the prisons and jails of the United States.¹ It is not surprising therefore that relatively little attention is paid to the distaff side of the incarceration boom even as reducing the numbers of the imprisoned has risen to a prominent place on the American political agenda of both U.S. political parties. Criminal justice reform is a rare area where liberals and conservatives are in agreement about the need for and the substance of reform. There are at least three good reasons to focus more attention on incarcerated women.

¹ Carson, E.A., *Prisoners in 2014*, Bureau of Justice Statistics, Washington, D.C. (2015). [Herein after BJS *Prisoners in 2014*]; Minton, T.D. and Zeng, Z., *Jail Inmates at Midyear, 2014*, Bureau of Justice Statistics, Washington, D.C. (2015).

First, the number of incarcerated women has increased sharply during the mass incarceration era. From 1980 to 2014 the number of women behind bars increased by more than 700 percent.² There are more than women 215,000 behind bars.³ Thirty percent of the world's incarcerated women are in U.S. prisons and jails.⁴ The rate of growth of U.S. female incarceration has exceeded the rate for males by more than 50 percent during this 35 year period.⁵

Second, the bipartisan policy prescriptions advocated by leaders of both U.S. political parties are far too anemic to reduce imprisonment in the United States to anything approaching pre-boom levels. These leaders are overselling and misleading the public about the impact of reforms undertaken and proposed. However, if effectively carried out, these reform policies would bring a dramatic reduction of women behind bars. The mantra of the bipartisan reformers is: keep more low-level nonviolent offenders out of prison; reduce the time served and recidivism rates of low-level nonviolent prisoners. Statistically, women offenders ARE low-level nonviolent offenders to a greater extent than incarcerated men.

Third, the bipartisan consensus extends to the recognition that the prison boom has fallen so heavily on blacks as to be indefensible morally and socially. One in three black men will go to prison in his lifetime if current rates of incarceration persist.⁶ The outsized impact of mass incarceration on black men has legitimately captured the attention of reformers. Reformers recognize that mass incarceration has been egregiously harmful not only to those incarcerated but also to the families and communities that so many black men have left for prison. However, the racial

² *Incarcerated Women and Girls*, Sentencing Project. Washington, D.C. (2015).

³ BJS *Prisoners in 2014*. [Hereinafter *Incarcerated Women and Girls*].

⁴ Kajstura, A. and Immarigeon, *State of Women's Incarceration: The Global Context*, Prison Policy Initiative (2015).

⁵ *Incarcerated Women and Girls*.

⁶ Bonczar, T., *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, Bureau of Justice Statistics, Washington, D.C. (2003).

skew has also affected black women. The imprisonment rate of black women is more than twice that of white women.⁷

Reduction in the incarceration of women would have an outsized impact on female black offenders and through them black families and communities. Women of all races in prison are more likely than male prisoners to be parents, and more likely than male parents to be the breadwinners and caretakers of children prior to incarceration.⁸ Reform programs targeted to reduce the numbers of low-level nonviolent offenders locked up and to help them avoid reoffending, if effective, would have a significant ameliorative impact on black communities. The rate of black female incarceration exposes their families and communities to greater risk of deprivation of adults in the responsible roles they could fill. The same multiplier effect applies to incarcerated women of every race and ethnicity.

It is too soon to determine whether the reform agenda will be expanded to exceed the “low-level nonviolent” formula. But the political class at the state and federal level embrace this mantra at the present time. If these modest policies were amply implemented they would reduce the flow of women to prison and jail and the number of incarcerated women. A good measure of the success of such programs therefore is the extent to which it reduces female incarceration.

2. Mass Incarceration in the United States

The United States has the world’s highest rate of imprisonment and largest prison population.⁹ More importantly, from the point of view of domestic politics, U.S. incarceration rates are four or five times higher than they were before the

⁷ *BJS Prisoners in 2014*.

⁸ Glaze, L. and Maruschak, M., *Parents in Prison and Their Minor Children*, Bureau of Justice Statistics, Washington, D.C. (2008) Revised 3/30/10. [Hereinafter *Children*]

⁹ Travis, T., Western, B., and Redburn, S., *The Growth of Incarceration in the United States: Exploring the Causes and Consequences*, National Research Council of the National Academy of Sciences(2014) at 34. [Hereinafter, *Growth of Incarceration*]

prison boom began four decades ago.¹⁰ Mass incarceration can therefore now be seen as a historical epoch rather than an essential feature of the American way of criminal justice. The political class has reached substantial consensus that it is time to reduce the use of incarceration. Just as the prison boom enjoyed bipartisan support, so the reform movement now enjoys the support of liberals and conservative office holders and their allied policy establishments. The steep rise in crime rates that began in the 60's and 70s fed the prison boom. Liberals supported or were unable to resist the hallmark policies of the mass incarceration era. Mass incarceration has meant a harsh penal response to narcotics use and trafficking (the war on drugs) and more severe and mandatory penalties for serious and violent crime (harsh recidivism penalties and the more extensive imposition of long terms of years and life sentences). The sustained, precipitous drop in crime rates that began in the late 80's of the last century did not slow or reverse the growth of incarceration, which peaked in 2010.¹¹ The political class became a prisoner of its own "tough on crime" political rhetoric as the momentum of the prison boom increased its fiscal burden while crime rates fell.¹²

By the second decade of the 21st century liberals and conservatives plucked up sufficient courage to make a modest demurral from the fiscal and social costs of America's crowded prisons. Democrats and some of the most conservative Republicans argued that mass incarceration policies were an expensive failure. A previously vigorous policy debate as to the relative size of the role of high incarceration policies in bringing down the crime rate largely evaporated. It has become accepted that public safety is compatible with bringing down the numbers, and indeed that policies aimed at reducing incarceration would also reduce crime and recidivism.

¹⁰ *Growth of Incarceration*, at 33.

¹¹ *Growth of Incarceration*, at 34.

¹² For an overview of the history summarized in this paragraph, see Tonry, M., ed., *Crime and Justice in America 1975-2025* (University of Chicago Press, 2013).

One of the most surprising aspects of the new consensus is the bipartisan recognition that the steeply increased rate of black male imprisonment is pernicious. One in 3 prime age black males are in prison or under the supervision of the criminal justice system. The social and economic impact on them, their families, and communities has become a concern across the political spectrum. Jurisdictions at every level of government have adopted policies to reduce the police/black youth interactions that breed arrests and criminal records, to curb arrests and prosecutions for illicit drug use, and to lessen the use of carceral sanctions for low-level nonviolent crime. These policies aim to prevent another generation of black men being lost, never to effectively assume productive adult social roles. The rhetoric of reform is often augmented to include the men and boys of other minority racial and ethnic minorities. The numbers certainly justify the emphasis on black men, whose incarceration rates exceed those of all other men.¹³ Calls for reform emanate from President Obama in his second and final term in office, from the federal Department of Justice, conservatives contending for the presidential nomination of the Republican Party, and from the most conservative senators.¹⁴ In this respect conservative leaders are in accord with the Black Lives Matter protest movement. States as varied in their political culture as New York and Texas are leaders in bringing down their prison populations.¹⁵

Largely missing from the bipartisan reform narrative are the consequences of the prison boom for women, and for the poor of every description. Women's imprisonment rates have exceeded that of men as the prison boom progressed and continue to lead men in the nascent reform era. As with men, black women have

¹³ *BJS Prisoners in 2014*.

¹⁴ For example, see Attorney General Holder's historic speech to the American Bar Association, August 12, 2013, Department of Justice, or the bipartisan senate criminal sentencing reform bill, which has as yet has not been introduced on the Senate floor. Martinez, J., *Senators Announce Bipartisan Criminal Justice Reform Legislation*, Newsweek, 10/1/2015.

¹⁵ *BJS Prisoner in 2014*.

borne the brunt although not quite as dramatically as with men; the imprisonment rate for black women is more than twice that for white women.¹⁶ The full picture of mass incarceration era includes not only shocking increase in the imprisonment of women and blacks but steep rises in imprisonment for whites and Hispanics as well.¹⁷ The prison boom has seen steep rises in imprisonment across all ethnic and racial categories for those who lack a high school education.¹⁸ Lack of a high school diploma has become a marker of poverty as high school graduation has become more the norm than the exception. Black men and women are the most vulnerable among the poor population to the risk of incarceration. But the poor of every race are experiencing unprecedented levels of incarceration. A comprehensive account of mass incarceration must include its class, race and gender composition.¹⁹ The emphasis on black and other minority men both acknowledges and masks the toll of the incarceration crisis.

Implicitly or explicitly, reformers reject at least some of the excessive reliance on incarceration as a means of social control that is a hallmark of the mass incarceration era. Reformers promise, and may exaggerate, the expected fiscal relief from the costs of the incarceration boom. They seek to inoculate reform against political blowback from a public long accustomed to tough on crime politics by emphasizing the maintenance of public safety. Reform prescriptions rest upon a less punitive approach to illicit drug use: Treatment rather than incarceration, decriminalizing the use of marijuana, shortening sentences for possession of illegal drugs. There is importantly a long overdue recognition of the need to find alternatives to using police and incarceration as a de facto mental health system. The poor and often homeless mentally ill, a drug and alcohol abusing population, figure prominently among recidivists who cycle through jails and prisons. The

¹⁶ *Incarcerated Women and Girls*.

¹⁷ *Growth of Incarceration* at 65.

¹⁸ *Growth of Incarceration* at 65.

¹⁹ See *Growth of Incarceration*, Chapter 2, for the most recent and comprehensive research on the race, class and gender composition of the incarcerated during the mass incarceration era.

overarching goal of reform is to prevent low-level non-violent offenders from embarking upon and sustaining careers of repeat offending. In addition to shortening sentences for drug possession and decriminalization of marijuana, the means of achieving this goal is the non-carceral diversion of low-level nonviolent offenders into addiction and mental health treatment programs. For those to be released from prison, the program calls for drug counseling and assistance with housing, employment and family re-integration. Whether or not the public is persuaded that treatment works, the appeal to the public lies in fiscal savings and the innocuousness of the target population of nonviolent offenders.

Women offenders exceed men in all indicia of suitability for treatment, diversion or early release. They are more likely than men to be nonviolent offenders (54 vs. 37%)²⁰, more likely to be drug addicted (40 vs. 32%)²¹ and mentally ill (73 vs. 55%)²². They are also more likely to be parents living with dependent children prior to incarceration.²³ As yet national statistics show no diminution of mass incarceration's appetite for imprisoning and jailing women.

3. The Limited Scope of the Reform Program

The reform agenda has had modest success to date;²⁴ its potential to curb rates of incarceration has yet to be fully played out. However, "low-level nonviolent"

²⁰ BJS *Prisoners in 2014*.

²¹ Greenfield, L and Snell, T., *Women Offenders*, Bureau of Justice Statistics, Washington, DC (1999).

²² Ditton, P., *Mental Health and Treatment of Inmates and Probationers*, Bureau of Justice Statistics, Washington D.C. (1999).

²³ The majority of state and federal inmates reported having minor children; 62% of women and 51% of men in state prison reported having at least one minor child. *Children*.

²⁴ There have been very modest declines in the prison population since 2010. See *BJS Prisoners in 2014*. The decline was less than 1% 2012-13 and 2013-14. The federal system for the first time achieved modest declines in 2013 and 2014. Some few states have achieved significant deductions. New York State, for example, has more than 17% fewer prison inmates in 2015 than in its peak year of 2007. New

prison reform cannot move the numbers down to any where near pre-prison boom levels or bring the United States significantly closer to its peers among the world's developed democracies. An analysis of the composition of America's prisons reveals the limited reach of the reform agenda. It is only in the federal prison system, accounting for approximately 13 percent of the prison population, that narcotics offenders comprise half the prison population.²⁵ In state prisons, fewer than 16 percent are serving time for drug offenses.²⁶ Of these state prisoners only 3.6 percent are serving time for possessing rather than trafficking drugs.²⁷ 53 percent of state prisoners are violent offenders.²⁸ Many traffickers also have records that include violence. Although there are certainly instances of hapless petty offenders serving exceptionally long sentences, it is difficult to paint the majority of narcotics offenders as casualties of the system in this sense. Although there are coerced or peripherally involved little brothers and girlfriends of drug traffickers serving long sentences, the typical man in prison for narcotics trafficking persistently pursued this illegal trade. At this time, there is a vigorous debate about marijuana legalization. The legalization of no other street drug or prescription-only medicinal drug is within the realm of practical politics.

Offenders convicted of serious crimes of all stripes, including narcotics traffickers, are serving sentences draconian by comparison to sentences in the mid-twentieth century sentencing regime. At least one in ten prisoners are serving life sentences and more than a quarter of these are serving life without the possibility of parole.²⁹ In addition to the growth of life sentences and long terms of years, the elimination of parole in the federal system and 16 states raises formidable barriers

York Commission of Corrections, *Inmate Statistics*, 9/29/15. There is considerable variation between the incarceration rates of the 50 U.S. states.

²⁵ *BJS Prisoners in 2014*.

²⁶ *BJS Prisoners in 2014*.

²⁷ *BJS Prisoners in 2014*.

²⁸ *BJS Prisoners in 2014*.

²⁹ Fellner, J. *Old Behind Bars, The Aging Prison Population in the United States*, Human Rights Watch (2012) at 24.[Hereinafter *Old Behind Bars*].

to reducing the size of the U.S. prison population.³⁰ As a result American prisons have a rapidly growing geriatric population. Thus far neither cost nor compassion nor the burden of elder care on prison systems has overcome fierce resistance to the use of compassionate release or medical parole for the prison elderly.³¹

The limited reforms that the political establishment regards as politically feasible are certainly welcome in a country that has become so extreme in its reliance on carceral penalties. Innovations are welcome that decrease the number of minority youth, of the addicted and of the mentally ill caught in the coils of the criminal justice system, and suffering the collateral economic and social consequences of imprisonment and a prison record. The Low-level nonviolent agenda cannot unless augmented with more ambitious reforms return the U.S. to the status of the moderately high rate of incarceration nation it was through most of the 20th century. Nor will we return a generation of black men to their communities..

However, the modest low-level nonviolent agenda can and should yield significant gains in keeping women offenders out of jails and prisons. Fewer women are in prison for violent offenses, 37 percent as compared to 54 percent of men. Almost 25% of women but only 16 percent of men are serving state prison sentences for drug offenses.³² Women moreover comprise 14 percent of the jail population, nearly tripling their proportion of the jail population over the length of the incarceration boom.³³ U.S. jails held almost three quarters of a million persons in 2014, a third of those behind bars in the United States.³⁴ These city and county

³⁰ An additional 4 states have abolished parole for certain serious offenses. *Re-entry Trends in the U.S.*, Bureau of Justice Statistics, Washington,D.C.

³¹ *See Old Behind Bars* generally on the aging of the prison population, its fiscal implications, and the efforts or lack thereof to address this geriatric population's needs.

³² *BJS Prisoners in 2014*.

³³ Subramanian, R., Henrichson, C., Kang-Brown, J., *In Our Own Backyard: Confronting the Growth and Disparities in American Jails*, Vera Institute of Justice (2015). [Hereinafter *Jails*].

³⁴ *Jails*

facilities serve multiple purposes, one of which is to confine people serving sentences of less than one year for minor offenses. Women offenders provide rich opportunities for reformers to experiment with alternatives to incarceration. Women's addiction and mental health statistics render them suitable targets for treatment alternatives. They present low risk of violent anti-social behavior. The many who are care-taking parents provide an additional incentive to reformers of urgent social need.

4. Conclusion

The United States cannot come any where close to its mid-twentieth century levels of incarceration without a bolder political leadership pursuing a more comprehensive reform agenda. The premises for comprehensive reform would include recognition of a root of runaway incarceration rates in the structural unemployment of the undereducated in the United States. While we await such courage and vision, reformers attention should be called to one of the implications of the current reform agenda. Its success can be measured by the extent to which it reverses the build up in women in confinement.

References

- [1] BONCSAR, T., *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, Bureau of Justice Statistics, Washington, D.C. (2003).
<http://www.bjs.gov/content/pub/pdf/piusp01.pdf>
- [2] CARSON, E.A., *Prisoners in 2014*, Bureau of Justice Statistics, Washington, D.C. 2015). <http://www.bjs.gov/content/pub/pdf/p14.pdf>
- [3] DITTON, P., *Mental Health and Treatment of Inmates and Probationers*, Bureau of Justice Statistics, Washington D.C. (1999).
<http://www.bjs.gov/content/pub/pdf/mhtip.pdf>

[4] FELLNER, J. , *Old Behind Bars: The Aging Prison Population in the United States*, Human Rights Watch
(2002) https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf.

[5] GLAZE, L. and MARUSCHAK, M., *Parents in Prison and Their Minor Children*, Bureau of Justice Statistics, Washington, D.C. (2008) Revised 3/30/10.
<http://www.bjs.gov/content/pub/pdf/pptmc.pdf>

[6] HUGHES, A. and JAMES WILSON, D., *Re-entry Trends in the United States*, Bureau of Justice Statistics, Washington, D.C.
(2002) <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1138>.

[7] GREENFIELD, L and SNELL, T., <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>
Holder, E, Speech to the ABA, August 12, 2013,
<http://www.bjs.gov/content/pub/pdf/wo.pdf>

[8] HOLDER, E., Speech to the American Bar Association, August 2013
<http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

[9] KAJSTURA, A. and IMMARIGEON, R., *State of Women's Incarceration: The Global Context*, Prison Policy Initiative (2015).
<http://www.prisonpolicy.org/global/women/>

[10] MARTINEZ, J., *Senators Announce Bipartisan Criminal Justice Reform Legislation*, Newsweek, 10/1/2015. <http://www.newsweek.com/criminal-justice-bill-six-senators-bipartisan-378643>.

[11] MINTON, T.D. and ZENG, Z., *Jail Inmates at Midyear, 2014*, Bureau of Justice Statistics, Washington, D.C. (2015).
<http://www.bjs.gov/content/pub/pdf/jim14.pdf>

[12] New York Commission of Corrections, *Inmate Statistics*, 9/29/15.
<http://www.scoc.ny.gov/pop.htm>

[13] SENTENCING PROJECT, *Incarcerated Women and Girls*. Washington, D.C. (2015).

<http://www.sentencingproject.org/doc/publications/Incarcerated-Women-and-Girls.pdf>

[14] SUBRAMANIAN, R., HENRICHSON, C., KANG-BROWN, J., *In Our Own Backyard: Confronting the Growth and Disparities in American Jails*, Vera Institute of Justice (2015).

<http://www.vera.org/sites/default/files/resources/downloads/incarceration-trends-in-our-own-backyard.pdf>

[15] TONRY, M., ed., *Crime and Justice in America 1975-2025* (University of Chicago Press, 2013).

[16] TRAVIS, T., WESTERN, B., and REDBURN, S., *The Growth of Incarceration in the United States: Exploring the Causes and Consequences*, National Research Council of the National Academy of Sciences(2014). <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>