

A 21st Century Analysis of the Adoption and Safe Families Act of 1997 and its Impact on Incarcerated Black Women

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NREI Issue Area: Criminal Justice

Introduction

Between 1980 and 2019, there was a more than 700% increase in the U.S. women's prison population.¹ Forty years ago, there were approximately 26,000 women in prison,² but today there are more than 1.2 million women under correctional supervision.³

While the increase in incarceration has impacted women of all backgrounds, Black women have disproportionately shouldered the burden of this trend. For example, in the five years between 1986 and 1991, there was an 828% increase in the number of Black women incarcerated for a drug offense.⁴ Today, despite making up 13% of the U.S. women's population, Black women represent 30% of all women incarcerated in the United States.⁵

This disparity between Black women and other women in the incarcerated population has had an overwhelming impact on young people under the age of 18. According to the Bureau of Justice Statistics, 60% of women who are incarcerated in state prisons have a minor child.⁶ While 2% of all U.S. children have an incarcerated parent, 7% of Black children have a parent in prison.⁷ Here we see that like their parents, the children of incarcerated Black women are also bearing the brunt of this upward trend in women's incarceration.

During their time in prison, many Black women leave their children at home or in the care of a loved one. However, for Black women who are single parents, the primary breadwinners in their families, and/or disconnected from familial support, this is not always an option, and their children often end up in the foster care system.

The Women in Prison Project of the Correctional Association of New York says that "social, emotional, and economic harm to families and communities is a defining legacy of female imprisonment."⁸ This analysis, however, contends that for incarcerated Black women with

¹ Sawyer, W. (2018) "The Gender Divide: Tracking Women's State Prison Growth". Prison Policy Initiative. Retrieved from https://www.prisonpolicy.org/reports/women_overtime.html

² Id.

³ The term correctional supervision includes those on probation or parole or currently being held in jails or prisons.

⁴ Bush-Baskette 1998 in Gross, K.N. (2015) African American Women, Mass Incarceration, and the Politics of Protection. *The Journal of American History*, 102(1), 25-33. Retrieved from <https://academic.oup.com/jah/article/102/1/25/686630?login=true>

⁵ American Civil Liberties Union. (n.d.). Facts About the Over-Incarceration of Women in the United States. Retrieved from <https://www.aclu.org/other/facts-about-over-incarceration-women-united-states>.

⁶ Glaze, L.E., and Maruschak, L.M. (2009). Parents in Prison and Their Minor Children. Bureau of Justice Statistics. Retrieved from <https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf>

⁷ Id.

⁸ Margolies, J.K. and Kraft-Stolar, T. (2006). When Free Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State. Women in Prison Project of the Correctional Association of New York. Retrieved from https://repositories.lib.utexas.edu/bitstream/handle/2152/15159/When_Free_Rpt_Feb_2006.pdf?sequence=2

children in foster care, the defining legacy of imprisonment is to suffer two degrees of punishment:

- 1. The loss of many of their basic, civil, and constitutional rights; and**
- 2. The loss of the opportunity and agency to mother their children as they see fit.**

Over the last two and a half decades, this double-punishment of incarcerated Black women has been facilitated by Public Law 105-89, the Adoption and Safe Families Act of 1997 (“ASFA”).⁹ While many of its provisions sit at the intersection of the child welfare and criminal justice systems, the provisions that most directly impact incarcerated Black women and their families are ones that set arbitrary timelines for family preservation, dictate who can care for their children in their absence, and use language that leave them vulnerable to racist biases and differences in state attitudes towards their parenting practices.

In the years following the implementation of the Adoption and Safe Families Act, the federal government, academic institutions, and child welfare policy stakeholders dedicated their resources to answering the following questions:

- How many children live in families that the criminal justice system has intervened in?¹⁰
- What happens to foster-involved children as their parents move through various phases of the criminal justice process (ex. arrest, sentencing, incarceration, release)?¹¹
- How, if at all, are incarcerated parents able to participate in child welfare court proceedings?
- What are the needs and issues confronting children of arrested/incarcerated parents and how do they differ from those of other children who are involved in the child welfare system?¹²

While investigating these queries has given us a better understanding of what happens to families caught at the intersection of the child welfare and criminal justice systems, this inflection point in women’s incarceration demands a recommitment to scholarship, legislation, and cross-systems collaboration to mitigate the negative impact the Adoption and Safe Families Act continues to have on incarcerated Black women and their children.

Through a thorough analysis of the provisions outlined in the Adoption and Safe Families Act, extant legislation aimed at protecting the rights of incarcerated parents, and best practices for engaging with families involved in both the child welfare and criminal justice systems, this study presents a 21st century take on the harm incarcerated Black women experience as a result of the Adoption and Safe Families Act and updated recommendations for how to honor the dignity of Black mothers serving time in prison.

⁹ Adoption and Safe Families Act of 1997. Pub. L 105-89, 111 Stat. 2115 (1997).

<https://www.congress.gov/105/plaws/publ89/PLAW-105publ89.pdf>

¹⁰ Phillips, S.D. and Gleeson, J.P. (2007). Children, Families, and the Criminal Justice System. University of Illinois at Chicago. Retrieved from

<https://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=04520DD02B790B800F87D386D3A9914C?doi=10.1.1.523.6538&rep=rep1&type=pdf>

¹¹ Id.

¹² Id.

Intersectionality and Black Women's Entrance into the Criminal Justice System

In her 1989 article “Demarginalizing the Intersection of Race and Sex,” professor Kimberlé Crenshaw introduced her theory of intersectionality to describe the ways in which race and gender interact to shape Black women’s employment experiences.¹³ More than thirty years later, the perspective of intersectionality has been applied by feminists, prison reform advocates, and criminologists to understand how the intersections of multiple oppressions impact Black women’s decisions to engage in crime.¹⁴

Studies show that 1 in 18 Black women can expect to go to prison at some point in their lifetime, while only 1 in 111 white women can expect the same.¹⁵ Scholars contend that this disparity exists because “structural and systemic impediments to protection have placed Black women at a greater risk for violence and abuse conditions related to increased instances of incarceration.”¹⁶ For example, in 1999, 57% of female state prisoners were victims of abuse prior to their confinement, 46.5% had been physically abused, and 39% had been sexually assaulted.¹⁷ In 2011, 85 to 90% of incarcerated and justice-involved women reported a history of domestic and sexual violence, as opposed to 22.3% of women nationally.¹⁸

Whether they are subjected to “dual arrests”¹⁹ for defending themselves against intimate partner violence; pushed out of school and criminalized for offenses that constitute normal teenage behavior; or arrested and ushered into the sexual abuse-to-prison pipeline for supporting themselves through sex work,²⁰ these histories with gender- and race-based oppression make it such that before a Black woman has ever been convicted of a crime, she carries vulnerabilities that make her less likely to have her needs met within the context of the criminal justice system than women who are racially privileged.²¹ This is because, as Crenshaw so eloquently put it in

¹³ Crenshaw, K. (1989). Demarginalizing the Intersection of Race and Sex. University of Chicago Legal Forum 1(8). Retrieved from <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf>

¹⁴ Brown 2010; Burgess-Proctor 2006 in Gueta, K. (2020). Exploring the promise of intersectionality for promoting justice-involved women’s health research and policy. Health and Justice 8(19). Retrieved from <https://healthandjusticejournal.biomedcentral.com/track/pdf/10.1186/s40352-020-00120-8.pdf>

¹⁵ Goodwin, M. (2020). The New Jane Crow: Women’s Mass Incarceration. Just Security. Retrieved from <https://www.justsecurity.org/71509/the-new-jane-crow-womens-mass-incarceration/>

¹⁶ Gross, K.N. (2015). African American Women, Mass Incarceration, and the Politics of Protection. The Journal of American History 102(1). Retrieved from https://www.jstor.org/stable/pdf/44286133.pdf?refreqid=excelsior%3A2cf7c4e543ad8373d5e788b8519e221f&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=

¹⁷ See note 15 in Gross 2015

¹⁸ Id.

¹⁹ “Dual arrest” is a practice where police responding to a domestic violence call cannot determine which person is the “primary aggressor”, so they arrest both the victim and the perpetrator. This practice has been associated with an increase in the number of Black women arrested during domestic violence calls; Shinde, R. (2021). Black Women, Police Brutality, and The Violence Against Women Act: How Pro-Arrest Policies Facilitate Racialized and Gendered Police Violence. Georgetown Journal of Gender and the Law. 22(2). Retrieved from <https://www.law.georgetown.edu/gender-journal/black-women-police-brutality-and-the-violence-against-women-act-how-pro-arrest-policies-facilitate-racialized-and-gendered-police-violence/>

²⁰ Supra note 1

²¹ This includes non-Hispanic white women, women who are perceived as white, and other women who benefit from white privilege.

her 1990 article “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”: “...[I]ntersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.”²² In other words, by virtue of being Black, identifying as women, and experiencing other forms of social inequality, incarcerated Black women are primed to experience the absolute worst elements of parenting behind bars.

The Adoption and Safe Families Act

The Adoption and Safe Families Act [P.L. 105-89], commonly referred to as “ASFA”, was signed into law on November 19, 1997. At the time, it was celebrated as the most comprehensive overhaul of federal child welfare law since the Adoption Assistance and Child Welfare Act of 1980 [P.L. 96-272]. The decade leading up to its passage was marked by an increase in out-of-home/foster care placements, but little to no increase in the number of children who were being adopted out of care. In 1985, 276,000 children were in the foster care system.²³ By 1999, this number had more than doubled to 568,000 children.²⁴ There are many hypotheses surrounding the increase in foster care caseloads between 1985 and the implementation of ASFA, but the most widely cited causes are the crack cocaine and HIV/AIDS epidemics of the 1980s and 90s.

ASFA’s 1980 predecessor encouraged states to replace the costly²⁵ and disruptive out-of-home placements that dominated child welfare practice at the time, with preventive services²⁶ and family reunification programs.²⁷ However, its critics argued that this approach to addressing

²² Crenshaw, K. (1990). Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color. *Stanford Law Review*, 43, 1241.

²³ Figure 1 in Swann, C.A. and Sylvester, M.S. (2006). *The Foster Care Crisis: What Caused Caseloads to Grow*. Demography 43(2). Duke University Press. Retrieved from https://www.jstor.org/stable/pdf/4137200.pdf?refreqid=excelsior%3A22e02de325f4d419b5ecf07d4e7eded1&ab_segments=&origin=&acceptTC=1

²⁴ Id.

²⁵ At the time, the federal government reimbursed state and local governments for foster care expenses for children whose families received payments or were eligible for payments from cash welfare programs such as Aid to Families with Dependent Children (AFDC) under Title IV-E of the Social Security Act. For children who did not qualify for Title IV-E payments, the responsibility for paying for their care fell on state and local governments. See note 7 in Swann and Sylvester 2006.

²⁶ Preventive services are programs and activities that are designed to give families in crisis the support they need to parent their children, improve family functioning, and keep young people in their care safe from child abuse and neglect. Examples of preventive services include, but are not exclusive to parent support groups, anger management, substance abuse treatment and rehabilitation, and home visiting programs for parents of newborns and young babies; Children’s Bureau. (2019). What Prevention/preservation services are available for children and families in crisis?. Office of the Administration for Children & Families. Retrieved from <https://www.acf.hhs.gov/cb/faq/cw1>; For additional information, visit <https://www.childwelfare.gov/topics/preventing/prevention-programs/>

²⁷ Family reunification programs are rooted in the understanding that separating children from their families and communities due to child welfare involvement can be traumatic and lead to long-term emotional and relational damage. As such, family reunification programs provide child-welfare involved families with services that help them improve their parenting and family functioning while keeping the children in their care safe. Usually, a caseworker helps the family identify strengths, needs, and areas of concern and provides them with a case plan for

instances of child abuse and neglect exacerbated the rising numbers of children in foster care, encouraged the return of many children to blatantly abusive homes²⁸ and robbed even more of the opportunity to grow up in safe and loving adoptive families. These critiques of the Adoption Assistance and Child Welfare Act of 1980 and other federal family preservation policies were heavily biased and not entirely true. However, under the Adoption and Safe Families Act, the 1980 child welfare law was amended, and states were directed to make the health and safety of children in foster care their main priority, with a goal of doubling the number of children adopted annually by 2002.²⁹

The most salient provisions aimed at facilitating these adoption goals are outlined below.

Provision # 1: The Adoption and Safe Families Act of 1997 established exceptions to the requirement that states make “reasonable efforts” to avoid placing children in foster care and to reunite them with their families if they are removed.³⁰

Under the Adoption Assistance and Child Welfare Act of 1980, states were required to make “reasonable efforts” to provide child welfare-involved families with the services they need to either prevent their children from entering foster care or have them returned to the home if they spent time in placement.³¹ Under the 1997 child welfare law, states are no longer required to make efforts to preserve or reunify a family if a parent has:

1. Killed another of his or her children,
2. Committed felony assault against the child or a sibling, or
3. Had his or her parental rights to another child terminated.³²

Additionally, ASFA allows states to bypass the reasonable efforts requirement if the court finds that a parent has subjected their child to “aggravated circumstances” that are only vaguely defined in the federal legislation.³³

addressing their goals; Children’s Bureau. (n.d.) Introduction to Family Support and Preservation. Retrieved from <https://www.childwelfare.gov/topics/supporting/introduction/>

²⁸ See note 116 in Bean, K.S. (2009). Aggravated Circumstances, Reasonable Efforts, and ASFA. Boston College Third World Law Journal 29(2). Retrieved from

<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1037&context=twlj>

²⁹ Congressional Research Service. (2004). Child Welfare: Implementation of the Adoption and Safe Families Act (P.L.105-89). Retrieved from

https://www.everycrsreport.com/files/20041108_RL30759_96784ee8d3d99882a9c887e9da08de67ee99e872.pdf

³⁰ Id.

³¹ Id.

³² Id.

³³ The term “aggravated circumstance” is written, but not explicitly defined in the Adoption and Safe Families Act of 1997. The legislation provides examples of aggravated circumstances such as abandonment, torture, chronic abuse, and sexual abuse. However, state legislatures are given the freedom to decide which additional child welfare cases do not require the state to expend resources to reunite a child with their parents. Some states have chosen to define “aggravated circumstances” using the model provided in the federal policy. Others have chosen to define “aggravated circumstances” using very specific and niche terms. For example, in Utah law, parental rights can be terminated without reunification efforts if “the parent permitted the child to reside... at a location where the parent knew or should have known that a clandestine laboratory operation was located.”; See notes 36-42 in Bean 2006.

Provision # 2: The Adoption and Safe Families Act requires states to conduct criminal background checks for all prospective foster or adoptive parents.

If any prospective foster or adoptive parents are convicted of felony child abuse or neglect, spousal abuse, a crime against children, or a violent crime such as rape, sexual assault, or homicide, states are required to deny their approval to care for child welfare-involved children. Under this provision, states are also required to deny approval to anyone with a felony conviction for physical assault, battery, or a drug-related offense, if it occurred within the past five years.³⁴

Provision # 3: The Adoption and Safe Families Act requires states to initiate termination of parental rights (TPR) proceedings for foster-involved youth who have been in care for 15 of the most recent 22 months (about 2 years).

Commonly referred to as “the 15 of 22 provision” or “the 15/22 rule,” this provision requires federally funded child welfare agencies to initiate termination of parental rights (TPR) proceedings for foster-involved youth who have been in care for 15 of the most recent 22 months. Written in response to concerns about the number of children who were remaining in foster care for extended periods of time and who were unlikely to be reunified with their families,³⁵ this provision outlines the timeline and conditions for initiating a termination of parental rights. Children in foster care cannot be placed for adoption if their parents maintain their parental rights, so at the bare minimum ASFA requires these proceedings to be initiated in cases where the court finds that a parent has:

1. Lost parental rights to that child’s sibling.
2. Killed another of their children;
3. Committed felony assault against the child or a sibling;
4. Subjected the child to aggravated circumstances; or
5. Were recognized under state law as having abandoned their infant.

What makes this provision especially significant is the fact that prior to the Adoption and Safe Families Act of 1997, no similar process for terminating a parent’s rights to his or her children existed in federal law.³⁶

Provision # 4: The Adoption and Safe Families Act requires that permanency hearings occur within 12 months of the date that a child entered foster care.

Under previous federal family preservation policies, child welfare agencies were required to provide foster-involved youth with a “dispositional” hearing, within 18 months of their placement in care to determine next steps regarding their care.³⁷ This ASFA provision “fast tracked” or expedited this permanency planning and required that foster parents, pre-adoptive parents, and relative caregivers are informed and provided the opportunity to be heard at case reviews and permanency hearings.³⁸

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

Provision # 5: The Adoption and Safe Families Act established a program of incentive payments to states to increase the number of young people who are in foster care or living with special needs who are adopted.

Under this provision, payments equal to \$4000 were given to states for each foster-involved young person whose adoption was finalized over a certain base level and payments of up to \$6000 were given for each adoption of a child living with a special need above the base level.³⁹ The intent behind this provision was to increase state accountability for the performance of their child welfare programs.

The Adoption and Safe Families Act and Incarcerated Black Women

While the intent behind the Adoption and Safe Families Act of 1997 was to prevent children who could not be reunified with their families from lingering in foster care, this policy has produced a federal child welfare landscape wherein incarceration and the loss of parental rights are concordant experiences for Black women whose children enter foster care due to their incarceration.

In 2018, The Marshall Project conducted an analysis of approximately 3 million child-welfare cases nationally. In this study, they found that for incarcerated parents who have a child placed in foster care, but who do not have a history of child abuse, neglect, endangerment, or substance abuse, the likelihood of having their parental rights terminated is greater than it is for parents who physically or sexually assault their children.⁴⁰ According to an analysis of records maintained by the U.S. Department of Health and Human Services between 2006 and 2016, they also found that in approximately 12.5% of child welfare cases, incarcerated parents lose their parental rights regardless of the seriousness of their offense.⁴¹

Grounded in Kimberlé Crenshaw's theories of intersectionality and intersectional insubordination, this section examines how the main provisions of the Adoption and Safe Families Act are a mismatch for the specialized needs and unique burdens that incarcerated Black women carry.

When the oppression that Black women face at the intersection of race and gender is compounded with byproducts of the flaws of capitalism, it becomes impossible for them to maintain their parental rights within the 12-to-15-month time frame mandated by the Adoption and Safe Families Act.

The Adoption and Safe Families Act of 1997 requires federal child welfare agencies to begin permanency hearings within 12 months of the date that a child enters foster care.⁴² The underlying belief behind this 12-month grace period is that a year gives child welfare-involved families with more than enough time to strengthen their parenting, address presenting issues, and render their homes safe enough for their children's return.

³⁹ Id.

⁴⁰ Hager, E. and Flagg, A. (2018). How Incarcerated Parents are Losing Their Children Forever. The Marshall Project. Retrieved from <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever>

⁴¹ Id.

⁴² Supra note 8

While the law allows parents to engage in family reunification services during this period, incarcerated Black women, many of whom suffer from substance abuse disorders, homelessness, mental health conditions, and other byproducts of the flaws of capitalism,⁴³ are primed to not be able to meet these requirements. For example, in informational materials given to the families of individuals considering substance abuse treatment, the Substance Abuse and Mental Health Services Administration reinforces the idea that because substance use disorders affect every part of a person's life, treatment needs to impact every part of a person's life for it to be successful. Stopping the use of drugs and alcohol is merely the beginning of a recovery process that can take weeks, months, and even years to complete even when it's done in conjunction with support groups, detoxification programs, mental health counseling, and other proven therapeutic approaches.⁴⁴

In their 2014 study titled, "Risk Profile and Treatment Needs of Women in Jail with Co-Occurring Serious Mental Illness and Substance use Disorders", researchers found that 1 in 5 of the women in their multi-site jail study met the DSM-criteria for having both a current serious mental illness and a current substance use disorder. Only 29% of these women had received treatment for both a serious mental illness and a substance use disorder, while another one-third had received no treatment from a doctor or health professional in the past year.⁴⁵

This example of incarcerated women who are suffering from mental illness and substance use disorder shows us that the issues that many incarcerated women enter prison with are complex and can take years to remedy. Commencing a permanency hearing and making decisions that impact an incarcerated Black woman and her children, 12 months into a recovery process, is premature and incongruent with what addiction specialists, mental health professionals, and other types of counselors have told us about this process.

When Black women spend a long time in prison due to unjust sentencing practices, reuniting with their children within 15 months of their entrance into foster care becomes an unattainable vision.

People who have committed federal crimes typically serve sentences that are longer than one year. Data shows that women convicted of a statute carrying a mandatory minimum penalty⁴⁶ receive an average sentence length of 60 months and those who are not convicted of a statute

⁴³ Central to the liberal paradigm is the belief that social problems do not sit squarely on the shoulders of individuals, their families, or their communities of origin. It accepts the fact that economic markets fail, and these failures have made it difficult for the contemporary family to meet needs that families might have been able to meet in the past. These imperfections of the capitalist market cause social problems for some people (ex. Domestic violence, substance abuse & addiction, propensity for abusing their children and others in their care etc.); George & Wilding 1976 in Dupre, M. & Mullaly, R.P. (2018). *The New Structural Social Work: Ideology, Theory, and Practice*.

⁴⁴ Substance Abuse and Mental Health Services Administration. (2014). *What is Substance Abuse Treatment? A Booklet for Families*. United States Department of Health and Human Services. Retrieved from <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4126.pdf>

⁴⁵ Nowotny, K. M., Belknap, J., Lynch, S., & DeHart, D. (2014). Risk profile and treatment needs of women in jail with co-occurring serious mental illness and substance use disorders. *Women & health, 54*(8), 781-795.

⁴⁶ "The term 'mandatory minimum penalty' refers to a federal criminal statute requiring, upon conviction of a federal criminal offense and the satisfaction of criteria set forth in that statute, the imposition of a specified minimum term of imprisonment"; Note 20 in United States Sentencing Commission. (2017). *Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System*. Retrieved

carrying a mandatory minimum penalty receive an average sentence length of 17 months.⁴⁷ Women of color are commonly tied to the heavy sanctions associated with drug trafficking, fraud, embezzlement, and immigration offenses. However mandatory minimum sentencing limits judicial discretion in considering their prior criminal history and family responsibilities.⁴⁸

For example, in determining the sentence for a drug offense, judges assign mandatory minimum penalties based on the quantity of drugs and the size of the conspiracy, versus the offender's role in the conspiracy.⁴⁹ This means that if a young woman of color with no prior criminal history is arrested for delivering 6.854 grams of cocaine base, mandatory minimum sentencing would subject that woman to a minimum term of five years versus the 51-63 month imprisonment range outlined in the Sentencing Guidelines.⁵⁰ This is because mandatory minimum sentencing requires the judge to use the weight of the drugs as the basis for calculating the sentence.⁵¹

Additionally, many Black women associate with men who commit federal crimes, such as drug trafficking because they are involved in intimate or familial relationships and gain economic support from the crime. However, receiving a mandatory sentence for trusting or being economically dependent on these men is not proportionate to the crime that was committed.⁵² Nonetheless, these women who might otherwise receive a more modest sentence or even probation are left to serve lengthy sentences for their minimal involvement in trafficking drugs. The Honorable J. Spencer Letts, U.S. District Judge for the Central District of California states: "Statutory mandatory minimum sentences create injustice because the sentence is determined without looking at the particular defendant...It can make no difference whether he is a lifetime criminal or a first-time offender."⁵³

To avoid a permanency hearing and/or prevent her parental rights from being terminated, an incarcerated Black mother with a mandatory minimum sentence for drug trafficking would need to:

- 1) Have her sentence reduced,
- 2) Acknowledge her own history of victimization and how it might be impacting the way she nurtures, raises, and provides for her children,⁵⁴
- 3) Put an end to her involvement in intimate or familial relationships with men who commit federal crimes, to prevent herself from returning to prison, and

from https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf

⁴⁷ United States Sentencing Commission. (2014). Quick Facts: Women in the Federal Offender Population. Retrieved from https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Female_Offenders.pdf.

⁴⁸ Gaskins, S. (2004). "Women of Circumstance"- The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes. The American Criminal Law Review. Retrieved from <https://www.proquest.com/docview/230349984/fulltextPDF/E40149BE6DE94585PQ/1?accountid=35803>

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Davis 1990 in Katz, P.C. (1998). Supporting Families and Children of Mothers in Jail: An Integrated Child Welfare and Criminal Justice Strategy. Child Welfare 77(5). Retrieved from <https://www.proquest.com/docview/213810098?fromopenview=true&pq-origsite=gscholar>

- 4) Acquire a means of establishing and/or sustaining her economic independence.

Mandatory minimum sentences bar judges from showing mercy and considering an individual's criminal history and family responsibilities. This places the idea of getting a reduced sentence outside of the realm of possibility for many incarcerated Black women serving a mandatory minimum sentence. Additionally, recovery from economic stability can require numerous steps such as finding housing, entering substance abuse treatment, mental health counseling, employment, medical care, and family support systems, the likelihood of women in this position having an environment that eliminates the risk of child welfare involvement is also very slim.⁵⁵

For incarcerated Black women with children in foster care, the impact of serving a mandatory minimum sentence in the years following the enactment of the 1997 Adoption and Safe Families Act is as follows: Because the Adoption and Safe Families Act does not outline any exceptions to the mandate for TPR proceedings to begin 15 months after a child has entered foster care, this group of women can only make futile attempts to act within the federal window within which they are allowed to defend their parental rights. This causes their relationship with their children to be further fragmented amidst this tension between policy and reality.

Allowing states to determine which “aggravated circumstances” exempt them from making a reasonable effort to reunify a child welfare-involved family, exposes incarcerated Black women to differences in outcomes depending on their state of jurisdiction.

Under the Adoption and Safe Families Act, child welfare agencies that receive federal funding must begin termination of parental rights (TPR) proceedings for all children who have been in care for 15 of the most recent 22 months. Although the statutory frameworks for terminating parental rights are highly varied and oftentimes more extensive than federal laws,⁵⁶ ASFA does not standardize the types of behaviors that allow child welfare agencies to bypass the 15-month grace period and move directly to termination.

In his 2011 study “State Law and the Termination of Parental Rights”, University of Washington School of Social Work Professor William Vesneski, conducted a content analysis of state laws authorizing the termination of parental rights. In it, he compares the termination criteria adopted across the country to the termination criteria and examples of “aggravated circumstances” outlined in the Adoption and Safe Families Act of 1997. Professor Vesneski's study illuminates the following about state interpretations of the 1997 law:

- Most states allow termination for circumstances listed in the Adoption and Safe Families Act such as abandonment (51 states), murder (51 states), serious bodily injuries (51 states), and sexual abuse.⁵⁷
- However, many states also allow termination for vaguely defined conditions and behaviors that are not listed in the Adoption and Safe Families Act such as neglect (35 states), emotional/mental abuse (20 states), parents' failure to assume responsibility for

⁵⁵ Bussey et al. 1995 in Katz, P.C. (1998). Supporting Families and Children of Mothers in Jail: An Integrated Child Welfare and Criminal Justice Strategy. *Child Welfare* 77(5). Retrieved from <https://www.proquest.com/docview/213810098?fromopenview=true&pq-origsite=gscholar>

⁵⁶ Id.

⁵⁷ Vesneski, W. (2011). State law and the termination of parental rights. *Family Court Review*, 49(2), 364-378.

their children (31 states), the failure to respond to reasonable efforts (28 states), and the failure to provide financial support (23 states).⁵⁸

Additionally, some of the qualifying aggravated circumstances defined in state legislatures are defined by parental conduct, while others are defined by judgements of the effect of the parental behavior on the child.⁵⁹ In even more state legislatures, reasonable effort exemptions consider both parental conduct and the effect of those actions on the child.⁶⁰ For example, in Missouri no reasonable efforts to reunify are required if the parent “has subjected the child to a severe act or recurrent acts of physical, emotional, or sexual abuse toward the child.”⁶¹ However, in Nevada, no reasonable efforts are required only when the parent “caused the abuse or neglect of the child... which resulted in substantial bodily harm to the abused or neglected child.”⁶² Here we see that the difference between two state’s decisions to apply resources to preserving a child’s relationship with his or her family depends on state attitudes surrounding the purpose of child welfare interventions: Some states are concerned with punishing parents for causing harm to their children, while others are concerned with the impact abuse and neglect has on the child or children in question.

Giving states the authority to deny reasonable efforts to reunify a family in instances where family preservation is neither safe nor viable was a meaningful attempt to keep children who are at risk for abuse and neglect safe from harm. However, the ambiguity of the “aggravated circumstances” provision, scholars argue, leaves these same children and their families susceptible to life-altering decisions that could be arbitrary, discriminatory, and/or made in poor judgement.

When coupled with a constitutional framework that allows states to create, implement, and regulate their own laws, the vague discussion of “aggravated circumstances” outlined in the Adoption and Safe Families Act leaves incarcerated Black women vulnerable to the race- and gender-based bias that exists in their state of jurisdiction.

From slavery to the present, controlling images and identities such as the “Jezebel” and the “Mammy”, have been used to portray Black women as subhuman beings, with uncontrollable sexual desires, who are fully content with being relegated to subservient and dependent positions within the American framework.⁶³ With issues of welfare, the culture of poverty, and crack cocaine taking center stage in political debate, during the 1980s and 90s (the decade leading up

⁵⁸ Id.

⁵⁹ See note 45 in Bean, K.S. (2009). Aggravated Circumstances, Reasonable Efforts, and ASFA. Boston College Third World Law Journal 29(2). Retrieved from <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1037&context=twlj>

⁶⁰ Id.

⁶¹ See note 46 in Bean, K.S. (2009). Aggravated Circumstances, Reasonable Efforts, and ASFA. Boston College Third World Law Journal 29(2). Retrieved from <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1037&context=twlj>

⁶² See note 50 in Bean, K.S. (2009). Aggravated Circumstances, Reasonable Efforts, and ASFA. Boston College Third World Law Journal 29(2). Retrieved from <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1037&context=twlj>

⁶³ Windsor, L.C., Dunlap, E., & Golub, A. (2011). Challenging Controlling Images, Oppression, Poverty, and Other Structural Constraints: Survival Strategies Among African-American Women in Distressed Households. Journal of African American Studies 15(3). Retrieved from <https://link.springer.com/article/10.1007/s12111-010-9151-0>

to the passage of the Adoption and Safe Families Act of 1997), images of the “welfare queen” and the “crack whore” were added to the anthology of narratives employed to proliferate misguided characterizations of Black women and justify their persecution via federal injunctions.⁶⁴ Like stereotypes, these controlling images had and continue to have the power to sustain harmful and incorrect beliefs about this group and their fitness for motherhood.

The “Jezebel” image promotes the belief that Black women are promiscuous, have insatiable sexual desires, and cannot be survivors of sexual abuse and assault because they enjoy sex under any circumstance.⁶⁵ As it pertains to motherhood, this image portrays Black women as a class of people that is incapable of making responsible decisions regarding their reproduction, and morally incapable of caring for the children they produce.

The “Mammy” image promotes the belief that Black women are lazy, stupid, and incapable of performing well in “respectable” employment positions.⁶⁶ As such, they are portrayed as content with paternalistic systems “taking care” of them and are happy to remain submissive⁶⁷ in situations where the government and local law enforcement/regulation agencies infringe upon their rights to parent their children as they see fit.

The “welfare queen” reinforces the idea that Black women are innately cunning and seeking to take advantage of the state’s “goodwill”.⁶⁸ And lastly, “the crack whore” image contends that Black women who suffer from addiction and other consequences of social inequality, will do anything to satiate their addictions, including engaging in greater degrees of sexual promiscuity, abusing their own children, and raising a class of offspring that is poised to do the same.⁶⁹

While these stereotypes might have been created a long time ago, they continue to be reinforced through media, entertainment, and journalism. Contemporary films that portray Black women using these tropes include, but are not exclusive to *Raising Isaiah*, *The Help*, *Precious*, and *Girls Trip*. By failing to provide more concrete definitions of the types of behavior that warrant the termination of parental rights, the Adoption and Safe Families Act leaves it to judges in states with varying degrees of exposure to racial and ethnic difference, to lay their conscious and unconscious personal biases to the side and not allow these images to influence how they

⁶⁴ Id.

⁶⁵ Collins 2000 in ⁶⁰ Windsor, L.C., Dunlap, E., & Golub, A. (2011). Challenging Controlling Images, Oppression, Poverty, and Other Structural Constraints: Survival Strategies Among African-American Women in Distressed Households. *Journal of African American Studies* 15(3). Retrieved from <https://link.springer.com/article/10.1007/s12111-010-9151-0>

⁶⁶ Windsor, L.C., Dunlap, E., & Golub, A. (2011). Challenging Controlling Images, Oppression, Poverty, and Other Structural Constraints: Survival Strategies Among African-American Women in Distressed Households. *Journal of African American Studies* 15(3). Retrieved from <https://link.springer.com/article/10.1007/s12111-010-9151-0>

⁶⁷ Collins 2000; West 1995 in Windsor, L.C., Dunlap, E., & Golub, A. (2011). Challenging Controlling Images, Oppression, Poverty, and Other Structural Constraints: Survival Strategies Among African-American Women in Distressed Households. *Journal of African American Studies* 15(3). Retrieved from <https://link.springer.com/article/10.1007/s12111-010-9151-0>

⁶⁸ Hays 2003; Limbert & Bullock 2005; Quadagno 1996; Roberts 2002 in Windsor, L.C., Dunlap, E., & Golub, A. (2011). Challenging Controlling Images, Oppression, Poverty, and Other Structural Constraints: Survival Strategies Among African-American Women in Distressed Households. *Journal of African American Studies* 15(3). Retrieved from <https://link.springer.com/article/10.1007/s12111-010-9151-0>

⁶⁹ Dunlap & Johnson 1992; Reinerman & Levine 1997 in Windsor, L.C., Dunlap, E., & Golub, A. (2011). Challenging Controlling Images, Oppression, Poverty, and Other Structural Constraints: Survival Strategies Among African-American Women in Distressed Households. *Journal of African American Studies* 15(3). Retrieved from <https://link.springer.com/article/10.1007/s12111-010-9151-0>

understand Black womanhood. This can prove to be especially challenging given stereotypes of this magnitude do not exist for non-Hispanic white women. This difference automatically positions incarcerated Black women's attempts to maintain their right to parent, in accordance with the provisions outlined in the Adoption and Safe Families Act and their state companions, to be (mis)understood in ways that their white counterparts' are not.

The requirement that states conduct criminal background checks on all prospective foster and adoptive parents, disproportionately disqualifies Black people from serving as foster parents to children in their families and communities.

Under the Adoption and Safe Families Act states are required to conduct criminal background checks on all prospective foster and adoptive parents. While the intent behind the inclusion of this provision was to ensure children entering out-of-home placements were being cared for by people who would not harm them, the reality is that it currently disqualifies many Black people from caring for foster-involved youth in their families and communities.

For example, in 2021 the Legal Aid Society filed a lawsuit in federal court against the New York State Governor, the Commissioner of the New York State Office of Children and Families, and the city of New York because people were applying to serve as foster parents to relatives and were routinely being rejected due to past convictions, and sometimes charges and allegations.⁷⁰ The cocktail of state, federal, and city policies that were used to disqualify these individuals, Legal Aid argues, go against the city's efforts to place more children with family members as opposed to with unfamiliar guardians in out-of-home placements.⁷¹

In their November 2021 article titled "They Wanted to Foster Their Great-Grandson. Why Did New York Say No?", authors at the New York Times tell the stories of New Yorkers who have had strong relationships with child welfare-involved children in their families but were being denied the opportunity and the resources to care for them.

For example, in 2019, a 59-year-old woman, identified in the Legal Aid case as Michelle, applied to foster her 14-year-old granddaughter who had a history of running away and was a survivor of sexual abuse. Michelle has a master's in community health education, was employed at a nonprofit organization that assists New Yorkers who have chronic illnesses, and 30 years of success with sobriety. However, because she had been arrested on loitering and prostitution charges in the 1980s and 1990s during her addiction to crack cocaine, the child welfare agency rejected her application to care for her granddaughter.⁷²

New York City has an official list of almost 300 crimes that automatically disqualify potential foster parents.⁷³ This list⁷⁴ includes but is not exclusive to, crimes outlined in ASFA (felony child abuse or neglect, a crime against children, a violent crime such as rape, sexual assault, or homicide etc.), marijuana charges, and having an adult in the household who has ever been

⁷⁰ Newman, A. (2021). They Wanted to Foster Their Great-Grandson- Why Did New York Say No. The New York Times. Retrieved from <https://www.nytimes.com/2021/11/10/nyregion/foster-care-lawsuit-nyc.html>

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ New York State Office of Children and Family Services. (2022). Criminal History Record ASFA Review Standards. Retrieved from https://ocfs.ny.gov/main/policies/external/OCFS_2016/ADMs/CRIMINAL-HISTORY-RECORD-ASFA-REVIEW-STANDARDS.pdf

charged with a crime or has been the subject of a somewhat credible child maltreatment report.⁷⁵ The city's Administration for children and Families also has a tendency of disqualifying prospective foster parents who had child neglect cases that were closed as "unfounded."⁷⁶

While this section highlights New York as a case study, it speaks to the larger trend of stigmatizing people of color in the United States who have come in contact with the criminal justice and child welfare systems. For incarcerated Black mothers, the implications of these practices are that they limit the number of people in her support system who could prevent her children from feeling the disconnection that comes with entering the foster care system, and perhaps also spare her from the pain associated with having her parental rights terminated.

Incarcerated Black Mothers and the Battle to Maintain their Parental Rights

Although the Adoption and Safe Families Act does not align with the specialized needs of incarcerated Black women and their families, to preserve parent-child relationships and maintain their right to parent, many still try to adhere to the restrictions outlined in the law. In trying to do this they encounter the following challenges:

Limited contact and visitation with their children

In the 12 months before federally-funded child welfare agencies are required to initiate permanency hearings for young people living in foster care, parents are expected to maintain meaningful and frequent contact with their children.⁷⁷ While this is not a difficult requirement for people who are healthy, able-bodied, and/or living as free citizens, this is challenging for incarcerated Black women because their ability to stay in contact with people outside of prison is almost entirely outside of their control.

Visitation depends on the willingness and ability of their children's caretaker(s) to arrange and provide transportation for their children to come spend time with them in prison. It also depends on their readiness to work within the timeframe and restrictions governing prison visitation and endure the atmosphere of prison visiting rooms.⁷⁸ For incarcerated women whose children are in the care of friends and family members, the challenge of adhering with their child welfare case plans and maintaining contact with their children also depends on the health, personal finances, and concerns of their children's caretaker.

For example, the travel expenses associated with visiting incarcerated people can be insurmountable for individuals that are struggling with financial instability and are living in poverty.⁷⁹ And when money isn't the issue, often times the long distances can be extremely taxing on young children and the older relatives that sometimes care for them.⁸⁰ And when distance isn't the issue, sometimes the environment in prison can be so unwelcoming to children and such a hostile ground for personal and intimate interactions that caretakers do not make the

⁷⁵ Supra note 72

⁷⁶ Id.

⁷⁷ Halperin, R., & Harris, J. L. (2004). Parental rights of incarcerated mothers with children in foster care: A policy vacuum. *Feminist Studies*, 339-352.

⁷⁸ Id.

⁷⁹ Supra note 8

⁸⁰ Id.

effort to visit.⁸¹ As a result, more than half of all mothers in prison receive no visits from their children.⁸²

While visitation can be difficult when incarcerated women's children are living with friends and family, the challenges to visitation are even greater when children are living with nonrelative foster families and their visits depend on arrangements made by caseworkers associated with child welfare agencies.⁸³ These individuals often have heavy caseloads, are not provided with adequate information about prison visitation procedures, have difficulty scheduling visits due to the number of children they have to transport, and find themselves uncomfortable with some of the humiliating searches and procedures that they have to be subjected to.⁸⁴ Additionally, many caseworkers have to endure long travel times to visited incarcerated mothers. While all of these experiences make facilitating prison visits challenging, there are real life implications for not supporting incarcerated Black women's efforts to maintain contact with their children: They are made vulnerable to allegations of abandonment and neglect, both of which are offenses that can result in the termination of their parental rights.⁸⁵

Outside of visitation, many incarcerated parents struggle to simply speak with their children because they only have access to collect calls. These calls can be very expensive and as a result, many foster care agencies, foster families, relatives and friends do not and are not able to accept them. In the 2000s, New York state prisons had an exclusive contract with Verizon which charged exorbitant fees for prison calls: Families, caseworkers, and children of incarcerated women had to pay \$3.00 to initiate a call from a parent in prison, and then 16 cents per minute.⁸⁶ At that time, members of the general public were only paying 5 cents per minute for a long-distance call. At this rate, prison calls were 630% more expensive than a similar non-prison call, so when families couldn't accept this rate, many incarcerated Black women lost their lifeline to their children and their opportunity to adhere to this aspect of their reunification plan.

Insufficient Access to Family Reunification/Preservation Services

In addition to having visitations and maintaining contact with their children, incarcerated mothers are also required to participate in family preservation and reunification services as a means of adhering to their child's case plan. Depending on the needs of the family, services include, but are not exclusive to parenting classes, job training, drug and alcohol rehabilitation programs, and other services that help them address the issues that contributed to their children being placed in foster care.⁸⁷ While in an ideal setting, these services would give women the tools they need to better support themselves and their families, these programs are not easily accessible to incarcerated Black women. Almost all state Departments of Correctional Services claim to offer parenting classes in at least one of their women's facilities, but upon further investigation scholars have found that these programs are small and serve fewer women than the

⁸¹ Supra note 79

⁸² Id. at note 10

⁸³ Supra note 79

⁸⁴ Id.

⁸⁵ Supra note 8

⁸⁶ American Civil Liberties Union. (n.d.). Words from Prison: Women's Incarceration and Loss of Parental Rights. Retrieved from <https://www.aclu.org/other/words-prison-womens-incarceration-and-loss-parental-rights>

⁸⁷ Supra note 79

number who wish to participate.⁸⁸ This limits incarcerated mothers' opportunities to fulfill the requirements of their child's case plan.

Inadequate Opportunities to Participate in Case Planning

Many incarcerated Black women with children in foster care struggle to participate in planning meetings with their children's caseworker. This is because sometimes they are not transported to Family Court hearings where they would have the opportunity to meet their children's lawyer, caseworker, and the judge. Additionally, they are given limited access to legal representation. Incarcerated women might be assigned counsel in Family Court proceedings during one phase of their case, but there is no guarantee that they will have the same lawyer during another phase. And for the mothers who do keep their lawyer throughout the 12 months leading up to the permanency hearing, many have little or no time to discuss their case prior to appearing before the judge⁸⁹ for reasons similar to ones that make it difficult for them to keep up with visitation and contact requirements.

Attendance in a hearing is dependent on a mother being notified of the hearing, being given approval from the prison to attend, and receiving transportation arrangements.⁹⁰ Even though these actions are extremely important for incarcerated women who are trying to remain in their children's lives, surveys show that 28% of women in New York state prisons weren't notified of upcoming court hearings, and more than half reported that they would not know how to make the necessary transportation arrangements.⁹¹

Poor cross-systems collaboration between corrections departments, child welfare agencies, and the courts

Despite the duty to support incarcerated Black women and their families, pressures inside of the criminal justice and child welfare systems often make it difficult for either system to effectively serve this population.⁹² Child welfare case workers often describe how frustrating it can be to arrange visits or contact a mother in prison and their criminal justice counterparts often complain about how difficult it is to contact the assigned caseworker and access appropriate child welfare services for the mother and her family.⁹³ As a result, without appropriate cross-systems exchange of information, families receive duplicate or unnecessary interventions, while the interventions they need to adhere to their case plan are not provided.⁹⁴

Discussion and Policy Recommendations

This analysis of the Adoption and Safe Families Act shows that the 1997 decision to shift away from a federal commitment to family preservation and towards adoption as the primary solution to rising child welfare caseloads was severely misaligned with the specialized needs of incarcerated Black women and their children. It codifies policies that do not strike enough of a

⁸⁸ Note 15 in Halperin and Harris 2004

⁸⁹ Supra note 8

⁹⁰ Supra note 79

⁹¹ Id. at note 7

⁹² Katz, P.C. (1998). Supporting Families and Children of Mothers in Jail: An Integrated Child Welfare and Criminal Justice Strategy. *Child Welfare* 77(5). Retrieved

from <https://www.proquest.com/docview/213810098?fromopenview=true&pq-origsite=gscholar>

⁹³ Women's Prison Association 1996a, 1996b supra note 94

⁹⁴ Id.

balance between protecting children’s safety, respecting the integrity of their families, and preserving their parents’ rights to remain in their lives.⁹⁵ The values preserved in this policy opened and continue to widen the door to government interventions in families, the removal of children from parents who, with some additional support, can care for and nurture their children, and the imposition of unnecessary trauma associated with removal on children who are already vulnerable.⁹⁶ Without novel legislation that seeks to rectify the harm that has already been done to incarcerated Black women and their children, and prevent additional trauma at the intersection of the child welfare and criminal justice systems, we run the risk of continuing to facilitate the permanent separation of children from families that might have been preserved with adequate state resources and/or alternative custody arrangements.

This section highlights opportunities for legislation that will help us to better serve and honor the dignity of incarcerated parents.

Empower incarcerated Black women to protect their parental rights

Studies have shown that incarcerated women who are able to participate in making placement decisions for their children, tend to be more satisfied with their living conditions than women who are not.⁹⁷ As such, honoring the dignity of incarcerated Black mothers requires us to create as many opportunities as possible for them to be advocates for their children and active participants in reunification efforts. On the most basic level, this means that representatives from the child welfare system need to make weekly, bimonthly, or monthly visits to detention centers to answer inmates’ questions about their children’s care.⁹⁸ Policy should include a pathway for caseworkers to bypass the regular visiting routine that friends and family members are subjected to, to ensure their clients have access to the individuals who can help them adhere to their case plans.

On a more comprehensive level, this looks like enhancing incarcerated Black women’s capacity to represent themselves legally. Law librarians within prisons and jails should be equipped with resources that mothers can access to work with their legal counsel to protect their parental rights.⁹⁹ Having meaningful access to law and legal resources enables incarcerated Black women to hold their counsel accountable. It would make them more alert to whether the strategies that are being employed in efforts to maintain their parental rights conflict with their child welfare case, their criminal case, or both.¹⁰⁰ It would also make them more aware of the state’s obligations to support their families, positioning them to hold the agency accountable for including them in case planning and rehabilitative services.¹⁰¹

⁹⁵ Golden, O., Macomber, J.E., and Additional Authors (2009). Intentions and Results: A Look Back at the Adoption and Safe Families Act. The Urban Institute. Retrieved from <https://www.urban.org/research/publication/intentions-and-results-look-back-adoption-and-safe-families-act>

⁹⁶ Id.

⁹⁷ Henriques 1982 supra note 94

⁹⁸ Supra note 94

⁹⁹ Laroche, C. (2022). The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration. Columbia Journal of Race and Law, Forthcoming. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4043102

¹⁰⁰ Id.

¹⁰¹ Id.

Establish more holistic defense offices and develop academic programs that would attract law students to pursue careers in holistic defense.

It is important that lawyers charged with serving incarcerated Black women understand the systems of oppression these women encounter at the intersection of the child welfare and criminal justice system. They need to be equipped to provide trauma-informed, anti-racist, and culturally congruent care.¹⁰² This can best be done via multidisciplinary legal teams that have social workers, peer parent advocates, and other professionals with experience in child welfare case management.¹⁰³ With all of these skillsets on the team, some individuals would be responsible for navigating the barriers to communicating with incarcerated clients and others would work on ensuring aspects of the case progress towards the goal of family reunification.¹⁰⁴

Examples of defense offices that have adopted the legal defense model include, but are not exclusive to: the Bronx Defenders, Maryland Office of the Public Defender, Defender Association of Philadelphia, and Still She Rises, which is the first holistic defense office in the country dedicated to representing mothers in the criminal and civil legal systems.¹⁰⁵ As was mentioned earlier in this investigation, there are several controlling images that impact the way our society views Black mothers in the United States. Having a team that has taken the time to learn their clients' history, observe the heart they have towards their children, and listen to their desired outcomes for both the child welfare and criminal justice case, could help bring color to the women's criminal histories and offer a more complete image of their parenting.¹⁰⁶

End Mandatory Sentencing and Continue the Hard Work of Reforming Prison Sentences

As discussed earlier in this investigation, mandatory minimum sentences have a detrimental impact on women and people of color. They eliminate judicial discretion, and they prevent judges from considering an individual's background and the circumstances of their offenses when determining their sentence.¹⁰⁷ This sentencing practice causes people who commit federal crimes to serve sentences that are much longer than what would be recommended under the Sentencing Guidelines; And they have produced lasting harm in communities across the country with doing little to nothing to curb drug use and crime.¹⁰⁸

To honor the dignity of incarcerated Black mothers and put an end to the use of this War on Drugs-derived punishment-based approach, it is important that policymakers sponsor and support legislation that would put an end to mandatory sentencing. Listed below are some of the most comprehensive solutions introduced at the federal level:

¹⁰² Gerber et al. 2019 in Laroche 2022

¹⁰³ Supra note 101

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Finck 2017 supra note 101

¹⁰⁷ McCurdy, J. and Cook, S. (2021). Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform. Statement before the United States House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. Retrieved from <https://civilrights.org/resource/undoing-the-damage-of-the-war-on-drugs-a-renewed-call-for-sentencing-reform-june-17-2021/>

¹⁰⁸ Id.

- The Fair Sentencing Act: Passed in 2010, this bill reduced the disparities between the mandatory penalties for crack and powder cocaine from 100:1 to 18:1.
- Mandatory Minimum Sentence Reform Act of 2017: If passed, this bill would repeal all mandatory minimums for federal drug crimes.
- The First Step Act of 2018: This bill made the Fair Sentencing Act of 2010 retroactive, and it expanded the federal safety valve for allowing a sentencing court to disregard minimum sentences for low-level nonviolent defendants. It reformed and reduced the three-strike mandatory minimum sentence from life to 25 years and eliminated the practice of stacking, which allowed consecutive sentences for gun charges stemming from an incident committed during a drug or violent crime.

For justice-involved Black women, the elimination of mandatory minimum sentences has the potential to reduce their representation in the prison population and reduce the sentences they serve if they are not able to avoid incarceration.

Conclusion

While the Adoption and Safe Families Act of 1997 was designed to address contemporary concerns around the rising numbers of children in foster care and state interpretations of their responsibility to preserve and reunify families, for incarcerated Black women, it has been the mechanism by which they have experienced two degrees of punishment at the intersection of the child welfare and criminal justice systems. Since policies are the culmination of the public perceptions and best practices for addressing a social problem, at a particular point in time, it is possible that Black women who are living at the intersection of these two systems could experience a world where this is no longer the case. Honoring their ability to parent behind bars would require legislation that reforms prison sentencing, produces better processes for cross-systems collaboration, and infuses the value of having a multidisciplinary team legal education. This is not an easy lift, but it is what needs to be done until we can collectively agree that the child welfare and criminal justice systems are not the best way to remedy the social problems that exist in our communities and our families.