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Snapshots: Holistic Images of Female Offenders in the Criminal Justice System

Cover Page Footnote

This Essay would not have been possible without the support of Janet L. Hedgepath, Ph.D. and the "A" from Professor of Law Angela Davis.

SNAPSHOTS: HOLISTIC IMAGES OF FEMALE OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM

Jennifer Ward*

INTRODUCTION

Currently, the number of female offenders continues to increase while the overall crime rate drops.¹ Unfortunately, the most recent report by the Bureau of Justice Statistics does not clarify the reasons underlying this trend.² Yet this trend is not new. Between 1960 and 1974, the number of arrests for women increased by 108 percent, with a corresponding increase of only twenty-three percent for men.³

Since the mid-1970s, the dramatic upswing in the number of female offenders has caused a wide variety of scholars and commentators to attempt to explain these increases.⁴ In comparison to male offenders, relatively few studies have been conducted regarding female offenders. Additionally, the study of the relationship

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1. See Larry Lipman, *Serious Crime Committed By Women Are Rising, Report Shows*, SAN DIEGO UNION-TRIB., Dec. 6, 1999, at A6 [hereinafter *Serious Crime*] (reporting that according to a Justice Department report released in December 1999, the number of women arrested and serving time in prison is at an all-time high, even though the national crime rate declined); see also Larry Lipman, *Crime By Women On The Increase, According To New Report Embargoed For Monday*, COX NEWS SERV., Dec. 5, 1999 (recounting that between 1990 and 1996, convictions of women in state courts increased as follows: forty-two percent for felonies, fifty-five percent for fraud, thirty-seven percent for drug offenses, and thirty percent for violent felonies). More than three-fourths of violent crimes by women are committed against other women; when women attacked men, the victims were either intimate with, or relatives of, the female attacker in more than one-third of all cases. *Id.*

2. See *Serious Crime*, *supra* note 1, at A6 (quoting Tracy L. Snell, a statistician for the Bureau of Justice Statistics who co-authored the report, responding to the question of why the number of female offenders is on the rise with the statement, "[t]hat's the million-dollar question.").

3. Laura Crites, *Women Offenders: Myth v. Reality*, in *THE FEMALE OFFENDER* 33 (Laura Crites ed., 1976).

4. See Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, in 4 *CRIME & JUSTICE* 91 (Michale Tonry & Norval Morris eds., 1983) (reviewing female sentencing literature existing prior to 1983).

between race and criminal justice has produced a solid field of research for African-Americans,⁵ while studies concerning Latina⁶ and Native American women⁷ are less numerous; nevertheless, these studies have been and will continue to be explored. Furthermore, considerations of class within the criminal justice system have also received some study.⁸

A majority of these studies fail to address the reality that female offenders processed through the American criminal justice system are women with a distinct racial and economic status. The impact of race and class must be accounted for in studies on female offenders to make such fractured images whole.⁹ Without an understanding of the correlation between these factors in the justice system, it becomes harder to address the issue of increased female offending in a productive manner.¹⁰ If programs and policies

5. See, e.g., Norma Manatu-Rupert, *Media Images and the Victimization of Black Women: Exploring the Impact of Sexual Stereotyping on Prosecutorial Decision Making*, in *THE SYSTEM IN BLACK AND WHITE: EXPLORING THE CONNECTIONS BETWEEN RACE, CRIME AND JUSTICE* 181 (Michael W. Markowitz & Delores D. Jones-Brown eds., 2000). See generally Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White and Racialized*, 51 WASH. & LEE L. REV. 431 (1994); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African-American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1 (1995).

6. See, e.g., Kristen L. Holmquist, *Cultural Defense or False Stereotype? What Happens When Latina Defendants Collide with the Federal Sentencing Guidelines*, 12 BERKELEY WOMEN'S L.J. 45, 57 (1997) (discussing the pros and cons of cultural defenses for Latina women under the Federal Sentencing Guidelines).

7. See, e.g., DAVID LESTER, *CRIME AND THE NATIVE AMERICAN* 11-12 (1999). See generally Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830-1934*, 21 AM. INDIAN L. REV. 1 (1997); Eileen M. Luna, *Seeking Justice: Critical Perspectives of Native People: Law Enforcement Oversight in the American Indian Community*, 4 GEO. PUB. POL'Y REV. 149 (1999).

8. See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (discussing solutions to alleviate race discrimination in all phases of the criminal trial process); JAMES F. SHORT, JR., *POVERTY, ETHNICITY, AND VIOLENT CRIME* 1 (1997) (using statistics to show the tendency of young, impoverished males to commit violent crimes, especially in a group environment).

9. See Judith Resnik, *Sentencing Women*, 8 FED. SENTENCING REP. 134, 137 (1995).

Women are not a singular set, but differ on many dimensions, including those of race, class, sexual orientation, age, parental status, occupational position, and the like. Women share the ways in which the social order is organized by gender, but that organization is varied and complex; reforms must themselves be predicated on a nuanced appreciation of the diverse situations of women and speak to this range of concern.

Id.

10. See Gabrielle Crist, *Program Designed to Meet Female Offenders' Needs*, FORT WORTH STAR-TELEGRAM, Jan. 2, 1999, at 1 (quoting Linda Albrecht, an expert in programs for young women, as saying: "[f]emale offenders require a different treat-

aimed at decreasing the number of women in the criminal justice system are going to work, they will need to account for the differences among female offenders.¹¹

This Essay attempts to pull together the various threads of thought regarding the relationships between gender, race, and class within the justice system, and suggests possible patterns that could be used to create holistic images of female offenders. Hopefully, a clearer understanding will foster more effective programs or policies to lower the number of women processed through the criminal justice system. Part I provides a brief overview of the various explanations used over time to account for criminal behavior by women. Part II details the ways in which gender can affect the processes of the criminal justice system. Part III discusses the impact that race can have on the female offender's experience in the system. Part IV briefly overviews the types of influences that class status produces. Part V concludes that while some research has been done combining these factors, additional research, using all of these factors, is required in order to achieve a more accurate picture of female offenders in America.

I. OVERVIEW OF FEMALE CRIMINALITY THEORIES

Theories regarding the causes of female offending have varied greatly over time. Yet, even with these temporal differences, the majority of these theories can usually be grouped into one of three categories—biological, psychological, or socioeconomic theories.¹²

ment approach . . . because they commit crimes for different reasons and respond to treatment differently than males.”); see also Dan McGillvray, *State Tries New Treatment for Female Offenders*, KENNEBEC J., July 6, 1999, at A1 (discussing a new method used in Maine to treat teenage female offenders which identifies the differences between the sexes and stresses the need to give female offenders “more opportunities to discuss their feelings, needs and concerns.”).

11. See Carol Kreck, *Girls Filling State Lockups New Facility Planned to Meet Growing Need*, DENV. POST, Feb. 28, 2000, at A-01; Brenda G. McGowan & Karen L. Blumenthal, *Children of Women Prisoners: A Forgotten Minority*, in *THE FEMALE OFFENDER*, *supra* note 3, at 121 (noting the issues that arise when females are incarcerated, such as disenfranchisement, responsibility for the minor children of women in jail, and the correlation between an increase in female juvenile offending and a continuing increase in adult female offenders); Christopher Uggen & Candace Kruttschnitt, *Crime in the Breaking: Gender Differences in Desistance*, 32 *LAW & SOC'Y REV.* 339, 339 (1998) (noting the gender-based difference in the patterns of individuals desisting in their criminal behavior).

12. See R. BARRI FLOWERS, *FEMALE CRIME, CRIMINALS, AND CELLMATES: AN EXPLORATION OF FEMALE CRIMINALITY AND DELINQUENCY* 65-71 (1995) (enumerating these three groups of theories in addition to two others, sociological and women's liberation movement). The latter two theories were excluded because the sociological theory can be grouped into one of the other three categories. Furthermore, Laura

Nonetheless, far from being distinctly separate categories, these three theories often overlap.

Attempts to explain criminal behavior by women began as early as the turn of twentieth century.¹³ The first scientific study of female offenders came in 1894, with the publication of *The Female Offender*.¹⁴ In this study, the authors, Caesar Lombroso and William Ferrero, examined both the skeletal remains of female offenders and the bodies of living female prisoners.¹⁵ Lombroso and Ferrero concluded that the number and types of physical abnormalities in female offenders indicated the extent to which women were predisposed to criminal acts; the authors even attempted to determine which particular criminal acts women were more likely to commit.¹⁶ Due to its methodological deficiencies,¹⁷ however, this study was quickly rejected.¹⁸ Nevertheless, attempts to correlate female criminality with biological factors have continued into the present.¹⁹

Crites has soundly rebutted the women's liberation movement theory. See Crites, *supra* note 3, at 36-39 (disproving the theory that there is a relation between female criminal behavior and the women's liberation movement).

13. See Joy Pollock, *Early Theories of Female Criminality*, in *WOMEN, CRIME, AND THE CRIMINAL JUSTICE SYSTEM* 25, 26-28 (Lee H. Bowker ed., 1978) (summarizing the various types of literature from the early to late 1800s). Although little of this research was taken seriously, several studies treated the subject of female criminality as a valid area of research. *Id.* at 26. These works included many of the themes later seen in studies of female criminality, such as biological and environmental explanations. *Id.* at 26-28.

14. See generally CAESAR LOMBROSO & WILLIAM FERRERO, *THE FEMALE OFFENDER* (W. Douglas Morrison ed., 1895) (reporting the results and conclusions of a study on the relationship between criminal behavior by women and various biological abnormalities found among female offenders).

15. See *id.* at 3 (listing the subjects used for the study as twenty-six skulls, five skeletons of prostitutes, sixty bodies from a prison in Turin, and seventeen bodies from a prison in Rome).

16. See FLOWERS, *supra* note 12, at 65-66 (noting that Lombroso and Ferrero believed females to be biologically predisposed to criminal acts due to certain physical abnormalities); see also Pollock, *supra* note 13, at 30 (stating that "Lombroso postulated a biological theory of crime. The criminal was a primitive breed recognizable by physical, atavistic qualities. Women were, on the whole, less inclined to criminality because of constitutional and psychological factors.").

17. See Pollock, *supra* note 13, at 31-32 (including in the list of methodological inadequacies the use of only prisoners, small sample size, the inability to take into account ethnicity, and attributing biological causes to such characteristics as tattooing, drinking, and overeating).

18. See FLOWERS, *supra* note 12, at 66 (stating that this study was rejected because of the small control group and the gender-based theory of atavism).

19. See, e.g., R. BARRI FLOWERS, *THE ADOLESCENT CRIMINAL: AN EXAMINATION OF TODAY'S JUVENILE OFFENDER* 78 (1990) (relating obesity to sexual promiscuity and menstruation to delinquent conduct); T.C. Gibbens, *Female Offenders*, 6 *BRIT J. HOSP. MED.* 279, 279-86 (1971) (positing that the existence of high rates of

Psychological theories began appearing soon after early biological theories, and often relied on biological assumptions regarding women. The work of W.I. Thomas was considered a “departure from biological Social-Darwinian theories to complex analyses of the interaction between society and the individual.”²⁰ Yet, at the same time, Thomas used biological differences as the basis for his work.²¹ Additionally, Thomas characterized female criminal behavior as a “normal” response to specific social conditions, and believed that such behavior could be controlled by changing the woman’s attitude towards those specific social conditions or by imposing “beneficial” conditions.²²

Freud’s analysis of female offenders assumed the existence of biological inferiority in women.²³ Freud connected a woman’s lack of male genitalia with her inability to resolve her Oedipal complex.²⁴ He argued that this unresolved conflict led to an inability of women to control their impulses, therefore making women more likely to commit criminal acts.²⁵ Under Freud’s framework, deviant acts, criminal or otherwise, were part of a woman’s frustration with her gender, and an “expression of her longing for a penis.”²⁶ As with Thomas, the solution was to help the woman adjust to her lack of masculinity.²⁷

While Thomas’s and Freud’s theories on the causes of female criminal behavior are no longer in use, some of their conclusions can still be seen in modern psychological theories regarding female offending.²⁸ For example, a study done by Gisela Konopka²⁹ showed four factors associated with female offending: the onset of

anomalies in the sex chromosomes of female offenders has some causal relationship to female criminal behavior).

20. Dorie Klein, *The Etiology of Female Crime: A Review of the Literature*, in *THE FEMALE OFFENDER*, *supra* note 3, at 5, 12.

21. *See id.* at 12-13 (discussing the basic biological difference between female and male as one of energy, with men having the type of energy that is outwardly expressed, while women have inactive energy, and believing women to be further down on the scale of evolution than men).

22. *Id.* at 14-15.

23. *See* Elissa P. Benedek, *Women and Homicide*, in *THE HUMAN SIDE OF HOMICIDE* 154 (Bruce L. Danto et al. eds., 1982) (discussing Freud’s argument that female anatomical deficiencies cause amoral female behavior).

24. *See* FLOWERS, *supra* note 12, at 67.

25. *See id.*

26. Klein, *supra* note 20, at 17-18; *see* JOANNE BELKNAP, *THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE* 3, 24-25 (1996) (giving a quick overview of Freud’s theory, and labeling it “anatomy as destiny.”).

27. *See* Klein, *supra* note 20, at 18.

28. *See, e.g.*, CLYDE VEDDER & DORA SOMERVILLE, *THE DELINQUENT GIRL* 1 (1970) (arguing that female offenders’ behavior is a result of an inability to access or

puberty, the process of identification with the mother, changes in the position of women in society, and an indistinctive authority resulting in low self-esteem and loneliness.³⁰ These findings are a re-statement of earlier theories that blatantly ignore the effects of economic and social factors; these theories also describe female criminal behavior as an emotional response to being deprived of the opportunity to play out a traditional gender role.³¹

The third category of theories are those which can be loosely considered as socioeconomic theories. One of the first studies of female offenders that can be considered an example of socioeconomic theory was conducted by Eleanor and Sheldon Glueck, who followed five hundred female offenders from childhood to life after parole.³² The Gluecks studied such factors as ethnicity, religion, parental jobs, educational background, offender's employment, substance abuse, and whether the subject exhibited an obviously unstable personality.³³ The Gluecks found that environmental and biological conditions affected a woman's chances of rehabilitating.³⁴ Unlike earlier studies, the Gluecks focused on criticizing the criminal justice system, rather than merely adjusting the female offender to society.³⁵

Later studies in this area focused on the relationship between a woman's delinquent behavior and the "blocked," or lack of, opportunities a woman has during her life.³⁶ Other studies in this area

properly adjust to normal feminine roles). Unfortunately, this study did not take into account influences created by economic or social factors.

29. GISELA KONOPKA, *THE ADOLESCENT GIRL IN CONFLICT* 118-23 (1966).

30. See FLOWERS, *supra* note 12, at 67 (summarizing the conclusions Konopka made in a 1966 study on the causes of female criminal behavior).

31. See Klein, *supra* note 20, at 24-25 (noting that Freud's and Thomas's theories have helped to perpetuate the stereotype of women as passive and emotional, and men as active and analytical, in more recent studies on women's criminal behavior).

32. See generally SHELDON GLUECK & ELANOR TOUROFF GLUECK, *FIVE HUNDRED DELINQUENT WOMEN* (1934).

33. See Pollock, *supra* note 13, at 42-43 (discussing the methodology used by the Gluecks in their mid-1930s study of female offenders).

34. *Id.* at 43.

35. See *id.* (noting the Gluecks suggestions to implement indeterminate sentencing, to move jurisdiction over female offenders to juvenile courts, and to focus on preventative programs run by community service agencies).

36. See, e.g., Susan Datesman et al., *Female Delinquency: An Application of Self and Opportunity Theories*, 12 J. RES. CRIME & DELINQUENCY 107, 116-17 (1975) (noting that the strain of blocked opportunities is more relevant in predicting female, rather than male, behavior). But see Stephen Cernkovich & Peggy Giordano, *A Comparative Analysis of Male and Female Delinquency*, 20 SOC. Q. 131, 131-45 (1979) (finding male and female delinquency rates to be equally related to blocked opportunity); R.L. Simons et al., *Contemporary Theories of Deviance and Female Delin-*

have focused on criminal behavior as a reflection of economic necessity. These studies show that the majority of female offenders are economically disadvantaged, self-supporting, and often have children.³⁷ Such factors have led various researchers to comment that this economic reality may make criminal behavior necessary for women to provide for themselves and their families.³⁸

Other variants of socioeconomic theories that focus on different environmental or external influences include the following: differential association,³⁹ labeling,⁴⁰ social control theories,⁴¹ and even the women's liberation movement.⁴²

quency: An Empirical Test, 17 J. RES. CRIME & DELINQUENCY 42, 49 (1980) (finding that such strain is a better predictor of male delinquent acts).

37. See Flowers, *supra* note 12, at 70; see also *infra* Part II.A (describing the economic and family characteristics of female offenders in both state and federal prisons).

38. See Jennifer James, *Motivations for Entrance into Prostitution*, in THE FEMALE OFFENDER, *supra* note 3, at 177, 202, app. § 9B (finding that 84.85 percent of women surveyed considered money and material goods to be the advantages of prostitution); Klein, *supra* note 20, at 8 (using poor and Third World women as examples that “negate the notions of sexually motivated crime. These women have real economic needs which are not being met, and in many cases engage in illegal activities as a viable economic alternative.”).

39. See EDWIN SUTHERLAND & DONALD CRESSEY, PRINCIPLES OF CRIMINOLOGY 83-98 (7th ed. 1966) (arguing that criminal behavior is learned, and therefore, an individual's group association becomes important in determining the likelihood of that individual engaging in criminal behavior). *But see* BELKNAP, *supra* note 26, at 29-30 (highlighting the flaws in Sutherland and Cressey's claim of producing and using a non-sex-specific theory).

40. See EDWIN M. SCHUR, LABELING WOMEN DEVIANT: GENDER, STIGMA, AND SOCIAL CONTROL 5-9 (1984) (postulating that individuals are labeled as deviant based on such characteristics as race, class, and sex, and that once such labeling occurs, the individual may internalize the label and commit more criminal behavior); see also Richard E. Johnson, *Family Structure and Delinquency: General Patterns and Gender Differences*, 24 CRIMINOLOGY 65, 82-84 (1986) (concluding that girls from single-mother families are more likely to be labeled as delinquent than girls from two-parent families). *But see* BELKNAP, *supra* note 26, at 31 (highlighting the lack of women as subjects of individual study, and noting their presence only in stereotyped interactions with male subjects).

41. See TRAVIS HIRSCHI, CAUSES OF DELINQUENCY 16 (1969) (arguing that an individual's connections to conventional people, institutions, and behavior in areas such as employment, recreation, and the rules of society are related to the likelihood of that individual committing a crime). In 1990, Hirschi again proposed his model of social control theory as a general theory, rather than a sex-specific one, to explain criminal behavior. See MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990); Susan L. Miller & Cynthia Burack, *A Critique of Gottfredson and Hirschi's General Theory of Crime: Selective (In)Attention to Gender and Power Positions*, 4 WOMEN & CRIM. JUST. 115, 115 (criticizing Hirschi's 1990 study for ignoring gender and the power relationships based on gender as a significant factor in the study).

42. See RITA JAMES SIMON, THE CONTEMPORARY WOMAN AND CRIME 48 (“[a]s women's opportunities to commit crimes increase, so will their deviant behavior and

II. CURRENT TRENDS IN THE INCARCERATION PROCESS

A. Female Offenders and Their Criminal Offenses

Female offenders differ from their male counterparts in many respects. Women tend to commit less serious offenses, have a longer history of physical and/or sexual abuse, are more often the parent or guardian of minor children, are more likely to have inferior economic situations, and have a higher rate of substance abuse. A significant majority of female offenders are convicted on non-violent offenses, such as property,⁴³ drug,⁴⁴ and public order offenses.⁴⁵ According to the 1998 statistics compiled by the Bureau of Justice Statistics ("BJS"), about sixty percent of women in state prisons have had a prior history of physical and/or sexual abuse.⁴⁶ In about one-third of the cases in which women reported prior abuse, the abuse started at a young age, and continued into adulthood.⁴⁷ Such abuse often leads to drug use as a coping mechanism to numb and survive both emotional and physical pain.⁴⁸

Those few women incarcerated for violent offenses usually victimized other women,⁴⁹ and often had a prior relationship with the victim.⁵⁰ In cases where women were convicted of murder or man-

the types of crimes they commit will much more closely resemble those committed by men."'). *But see* Crites, *supra* note 3, at 36-39 (arguing against the theory that there is a relationship between female criminal behavior and the women's liberation movement).

43. Property offenses include burglary, fraud, larceny, and motor vehicle theft. *See* LAWRENCE A. GREENFIELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: WOMEN OFFENDERS, 1-5 tbls. 10-11 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf> (last visited Jan. 15, 2003).

44. Drug offenses include trafficking and possession. *See id.*

45. Public order offenses include weapons, driving related incidents, and other various disturbing the public type of offenses, such as public drunkenness. *See id.* (showing that in 1998, women accounted for sixty-three percent of all non-violent offenses, and only seventeen percent of all violent offenses).

46. *See id.* at 1 (reporting that over one-third of imprisoned women had been abused in the past by someone with whom they were intimate, while slightly less than one-quarter of the women had been abused by a family member).

47. *See* Meda Chesney-Lind, *The Forgotten Offender*, 60 CORRECTIONS TODAY 66, 69 (1998) (stating that unlike women, approximately eleven percent of imprisoned men who reported being abused as boys also said "the abuse generally [did] not continue into adulthood."').

48. *See* Mary E. Gilfus, *From Victims to Survivors to Offenders: Women's Routes of Entry and Immersion into Street Crime*, 4 WOMEN & CRIM. JUST. 63 (1992) (outlining the relationship between the incarceration of women and their use of illegal drugs as a reaction to and method of survival of physical and/or sexual abuse).

49. *See* GREENFIELD & SNELL, *supra* note 43, at 3 (stating that three-quarters of violent female offenders victimized other females).

50. *See id.* (estimating that in sixty-two percent of violent offenses perpetrated by women, a prior relationship existed between the offender and the victim).

slaughter, the victim tended to be either a husband or boyfriend, who had “repeatedly and violently” abused the offender.⁵¹ Drug use also plays a significant role in violent crime by women. For example, in a study of women arrested for violent crimes in New York City and Washington, D.C., over fifty percent had been using at least one or more illegal drugs before their arrest.⁵²

In general, drugs play a major role in the incarceration of women.⁵³ In 1998, approximately eighty-two percent of federal cases involving female offenders included at least one drug offense.⁵⁴ Male offenders in federal cases have comparable rates of drug charges.⁵⁵ Yet women offenders in state prisons report significantly higher overall drug usage than their male counterparts.⁵⁶ Forty percent of convicted women in state prison were under the influence of drugs when they committed their offense, and one-third reported that the reason they committed their crime was to obtain the money necessary to support their drug habits.⁵⁷

The majority of incarcerated female offenders are the mothers of minor children.⁵⁸ Prior to their offense, sixty-four percent of state

51. See Chesney-Lind, *supra* note 47, at 70 (noting that for half of the women convicted for homicide, it was their first and only offense).

52. FLOWERS, *supra* note 12, at 120.

53. See *id.* at 121-24 (noting that the possible unreported use and abuse of prescription and/or legal drugs by women is believed to include the abuse of drugs like tranquilizers, sleeping pills, amphetamines, and pain killers). Furthermore:

[b]ecause of the range of drugs, and alcohol—including illicit drugs, prescription drugs, and alcohol—it is impossible to guess just how many women are involved in abusive or illegal drug use. It is generally believed that millions of women in the United States today are abusing drugs and/or are addicted to drugs.

Id. at 115.

54. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 425 tbl. 5.27 (1999) [hereinafter SOURCEBOOK], available at <http://www.albany.edu/sourcebook> (last visited Jan. 15, 2003).

55. See *id.* (reporting that over ninety-four percent of male offenders convicted in 1998 were convicted of at least one drug charge).

56. GREENFELD & SNELL, *supra* note 43, at 8 (stating that “[o]n every measure of drug use (ever used, using regularly, using in month before the offense, and using at the time of offense), women offenders in State prisons reported higher usage . . .”).

57. *Id.* at 8-9 (noting that sixty percent of women in state prison reported that they used drugs in the month prior to their offense, and fifty percent considered themselves daily drug users).

58. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (last visited Jan. 15, 2003) (reporting that sixty-five percent of women in state prison and fifty-nine percent of women in federal prison have a minor child). Approximately forty-five percent of state female inmates have more than one minor child. *Id.* Although statistics regarding the number of federal female inmates with multiple children are unavailable, overall, fifteen percent more federal female prison-

and eighty-four percent of federal female inmates lived with their minor children.⁵⁹ Unlike their male counterparts,⁶⁰ the children of female inmates are more likely to be placed in the care of persons outside the nuclear family group, usually with an immediate family member.⁶¹ These placements can create a variety of problems both for the individuals in the family unit and the general community. The separation of an incarcerated mother from her child strains the mother-child relationship,⁶² and often causes emotional and/or behavioral problems for the children.⁶³ Additionally, the general community suffers when a child's future is jeopardized by a mother's incarceration,⁶⁴ and becomes responsible for directly and indirectly providing a variety of resources towards the basic needs of some of those children.⁶⁵

ers than state female prisoners have multiple children. *Id.*; see GREENFELD & SNELL, *supra* note 43, at 8 (estimating that over a quarter of a million children are the minor children of imprisoned women).

59. MUMOLA, *supra* note 58, at 4 (noting that only forty-four percent of fathers in state prison and fifty-five percent of fathers in federal prison had lived with any of their minor children before their offense).

60. *Id.* (finding that almost all imprisoned fathers, ninety percent in federal and ninety-two percent in state, reported that their minor children were being cared for by each child's mother).

61. *Id.* (noting that fifty-three percent of mothers in state prison reported that their minor child(ren) is (are) in the care of their grandparent(s), and twenty-six percent reported that some other relative cares for their child(ren), while mothers in federal prison reported forty-five and thirty-four percent, respectively).

62. See McGowan & Blumenthal, *supra* note 11, at 127.

[C]hildren are often removed abruptly from their homes, schools, and communities. They may be shuttled from one caretaker to another, teased or shunned by their peers. Often they have no knowledge of what is happening when their mother is first arrested; they are simply left alone in terror and confusion.

Id.; see MUMOLA, *supra* note 58, at 5 (discussing the various forms and frequency of communication between children and their incarcerated mothers, and noting the lack of frequent contact).

63. See Timothy Egan, *War on Crack Retreats, Still Taking Prisoners*, N.Y. TIMES, Feb. 28, 1999, § 1, at 1 (relaying the story of Tonya Drake, a mother of four sentenced to ten years for mailing a package of crack for a friend, who paid her forty-four dollars and did not tell her what the package contained). Ms. Drake's sister stated that "[t]he children are having considerable trouble growing up with their mother in prison Tonya was taken away from the kids at a time when everybody needed her, . . . [n]ow the kids are screwed up. They're angry and bitter that she was forced to leave them." *Id.* at 6.

64. See *id.* (telling the story of a young man forced to give up a college scholarship to get a job, so that he could earn the income lost to the family after the state incarcerated his father for possession of marijuana).

65. See MUMOLA, *supra* note 58, at 4 (finding that ten percent of mothers reported that their minor child(ren) were placed in a foster home, agency, or other government institution). Indirect costs can include later rehabilitative services for disturbed chil-

Female offenders are most likely to be economically inferior⁶⁶ and poorly educated.⁶⁷ Less than half of female inmates in state prisons held a full-time job prior to their arrest.⁶⁸ Additionally, before their arrest, about thirty-seven percent of the women had an income of less than six hundred dollars a month, and thirty percent received government welfare as a primary source of income.⁶⁹ Surprisingly, however, the majority of women in both state and federal prisons, fifty-six and seventy-three percent, respectively, graduated high school.⁷⁰ Of those women who graduated high school, thirty to forty percent attended various kinds of higher or continuing education.⁷¹

Generally, these characteristics support the idea that female offenders' needs require programs that address the issues mentioned above to prevent female offending and recidivism. The prevalence of long-term physical, emotional, and/or sexual abuse, and widespread drug use suggests that the issues surrounding these characteristics must be addressed before a decline in female offending occurs.⁷² Due to the mostly non-violent nature of the crimes committed by women, the possibility of switching the emphasis from traditional incarceration, to programs modeled on outpatient ser-

dren, juvenile incarceration, and other costs associated with dealing with the symptoms of abused, abandoned, and runaway children.

66. Martin Milkman & Sara Tinkler, *Female Criminality: An Economic Perspective*, in *FEMALE CRIMINALITY: THE STATE OF THE ART* 291, 299 (Concetta C. Culliver ed., 1993) (proposing that single female heads of households "have particular incentives to commit crime."). "Low wages and financial obligations of female heads of households often necessitate more than forty hours of work per week. When suitable second jobs are not available, income is often supplemented through criminal activity." *Id.*

67. See Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 *PEPP. L. REV.* 905, 913-15 (1993) (noting that the typical female inmate is likely to be poor).

68. See GREENFELD & SNELL, *supra* note 43, at 8 (comparing this percentage to the sixty percent of male inmates in state prisons who held a full-time job before their arrest).

69. *Id.* (noting that twenty-eight percent of male inmates made less than six hundred dollars a month, while only eight percent received welfare assistance prior to their arrest).

70. *Id.* at 7; see SOURCEBOOK, *supra* note 54, at 25 tbl. 5.27 (breaking down the level of education of female and male offenders, in 1998, according to their primary offense).

71. GREENFELD & SNELL, *supra* note 43, at 7.

72. Because of the correlation between drug use and a history of abuse, addressing only one of these issues is unlikely to break the cycle. The greater the separation between rehabilitation among these two areas, the less likely a significant difference in the rate of female offending and recidivism will be made. See generally Gilfus, *supra* note 48; *supra* text accompanying note 49.

vices is feasible. Programs of this nature may also allow women who have children to remain with, or in relatively greater contact with, their children, thus lowering the harm done by forced separation and isolation.

B. Gender as a Factor in the Incarceration Process

Even though the rate of female incarceration is at an historic high,⁷³ women are still significantly less likely to be imprisoned than men.⁷⁴ Once arrested and placed into the criminal justice system, gender plays a variety of roles in the treatment of individual offenders. The most prevalent argument is that female offenders are granted more leniency than men because of the traditional view of women as the more vulnerable gender, in greater need of protection.⁷⁵ The other two major arguments regarding gender as a factor in the incarceration process are that: 1) the criminal justice system treats female and male offenders equally, and uses the same factors in the decision-making process;⁷⁶ and 2) women are treated more harshly than men who have committed the same crime, because the female offender has broken not only a law, but a code of gender behavior.⁷⁷ Which argument prevails depends on the phase of the process the female offender is dealing with at the time, for example, pretrial decisions or sentencing.

At the arrest or police decision-making stage, these three arguments are equally plausible and are each supported by different

73. See Chesney-Lind, *supra* note 47, at 66-67 (noting that the rate of female imprisonment has increased from six per 100,000 women in 1925, to fifty-four per 100,000 in 1997; also noting that since 1985, the annual rate of growth in female inmates has outpaced the male inmate growth rate).

74. SOURCEBOOK, *supra* note 54, at 427 (showing that in 1999, the United States district courts incarcerated approximately 44,900 men and 8,082 women).

75. This theory is often referred to as the "chivalry theory" or "judicial paternalism." See BELKNAP, *supra* note 26, at 71 (noting that although some scholars try to distinguish between chivalry and paternalism, both terms "imply weakness and a need to protect another person or group, which can have dangerous repercussions when 'protect' becomes 'control'"); Nicolette Parisi, *Are Females Treated Differently? A Review of the Theories and Evidence on Sentencing and Parole Decisions*, in JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES, AND CRIMINAL JUSTICE 205, 207-08 (Nicole Hahn Rafter & Elizabeth Anne Stanko eds., 1982) (reviewing the various explanations for preferential treatment of female offenders in the justice system, including "chivalry" and the role of the woman as a mother and provider for minor children).

76. See Parisi, *supra* note 75, at 209-10 ("the equality model holds that there are no sex-related differences between males and females at sentencing.").

77. See BELKNAP, *supra* note 26, at 70; see also Parisi, *supra* note 75, at 208-09 (arguing that "females are treated punitively because the female criminal is perceived to be unladylike; she does not, in other words, conform to sex-role expectations.").

studies.⁷⁸ The results of these studies are problematic, however, because they fail to take into account certain factors regarding these interactions, such as people who are less willing to report women perpetrators⁷⁹ or the female offenders police chose not to arrest.

At the sentencing stage of the process, women tend to receive treatment equal to that of their male counterparts.⁸⁰ The evidence in some studies lends strength to the argument that before the enactment of the Federal Sentencing Guidelines, federal courts were more likely to give female offenders either probation or lesser sentences than their male counterparts.⁸¹ Additionally, the disparity in sentencing practices between state and federal courts demonstrates the harsh effects of mandatory minimum sentences on female offenders.⁸² Due to the enactment of the Federal Sentencing Guidelines, and comparable state sentencing schemes, however, this leniency towards women seems to have disappeared.

Under Congressional orders to produce sex-neutral sentencing guidelines, the United States Sentencing Commission created guidelines that “explicitly mandate that sex is not relevant in the determination of a sentence.”⁸³ Despite the good intention to eliminate invidious discrimination in sentencing, the Federal Sentencing Guidelines appear to play a significant role in the increase of both the incarceration of, and longer sentences for, female offenders.⁸⁴

78. See Parisi, *supra* note 75, at 208-09 (citing several studies regarding the effect of gender on the decision-making process at the arrest stage; two of those studies found the effect of chivalry/paternalism, two found discrimination against women for inappropriate gender behavior, and one found equal treatment).

79. See Frank H. Julian, *Gender and Crime: Different Sex, Different Treatment?*, in *FEMALE CRIMINALITY: THE STATE OF THE ART*, *supra* note 66, at 343, 346.

80. See Andrea Shapiro, *Unequal Before the Law: Men, Women, and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL’Y & LAW 427, 452 (2000).

81. See Sean B. Berberian, *Protecting Children: Explaining Disparities in the Female Offender’s Pretrial Process, and Policy Issues Surrounding Lenient Treatment of Mothers*, 10 HASTINGS WOMEN’S L.J. 369, 373 n.25 (remarking on studies that show a trend among courts towards lenient treatment of female offenders and directing the reader to a sampling of these studies); Kathleen Daly, *Gender and Sentencing: What We Know and Don’t Know From Empirical Research*, 8 FED. SENTENCING REP. 163, 163 (1995) (reviewing the author’s earlier research regarding pretrial release and sentencing that showed “sex-effects” with controls for severity and type of offense).

82. See Raeder, *supra* note 67, at 925 (noting that in 1990, female prisoners constituted 7.6 percent of all federal prisoners, but only 5.5 percent of state prisoners).

83. *Id.* at 906 nn.1-2.

84. See Meda Chesney-Lind, *Patriarchy, Prisons, and Jails: A Critical Look at Trends in Women’s Incarceration*, 71 PRISON J. 51, 55-58 (1991); see also JOCELYN M. POLLOCK-BYRNE, *WOMEN, PRISON, & CRIME* 31 (1990).

III. RACE AND THE INCARCERATION PROCESS

In addition to gender, a female offender's race or ethnicity can affect her treatment in the incarceration process. For example, the race of a female offender can negate any lenient treatment she might have received at different stages of the process.⁸⁵ Conversely, race may also increase the protective or lenient treatment given a female offender.⁸⁶

A. African-American Women in the Incarceration Process

African-Americans in the United States, both female and male, possess a long documented history of discrimination by the criminal justice system.⁸⁷ Currently, African-American women make up a majority of those incarcerated in both state and federal prisons.⁸⁸ In general, African-American female offenders demonstrate many of the same characteristics as the overall female offender population. The majority of offenses committed by African-American women are nonviolent offenses; these crimes mainly consist of property, drug, and public disorder crimes.⁸⁹ In contrast to the total female offender population, however, African-American female offenders commonly have less formal education,⁹⁰ and are more likely to: 1) come from a single parent family;⁹¹ 2) head a single

85. See Laurence French, *The Incarcerated Black Female: The Case of Social Double Jeopardy*, 8 J. BLACK STUD. 321, 333 (1978) (noting the existence of a larger proportion of African-American women in the pool of incarcerated females in North Carolina than African-American men). "Furthermore, a greater proportion of Black females were institutionalized for victimless crimes, notably drug-related offenses. Given this profile . . . the Black female offender surely suffers from social double jeopardy in North Carolina, a state which is usually overprotective of their 'acceptable' female population." *Id.*

86. See Holmquist, *supra* note 6, at 52 ("[b]ecause Latinas are often stereotyped as passive and obedient, they may be considered ultrafeminine and treated particularly chivalrously by the police officers and prosecutors.").

87. See Johnson, *supra* note 5, at 1-36 (giving a brief review of the history of the interactions between the American criminal justice system and African-American women, beginning with the colonial period).

88. *Id.* at 5-6 (noting that the entire African-American population of the United States is only twenty-nine percent of the total population); see Chesney-Lind, *supra* note 47, at 69 (noting that according to the 1998 Bureau of Justice Statistics study, forty-six percent of the nation's female prisoners are African-American).

89. See Johnson, *supra* note 5, at 42 (citing a study in JAMES AUSTIN & JOHN IRWIN, NAT'L COUNCIL ON CRIME & DELINQUENCY, WHO GOES TO PRISON (1990)).

90. See Laurence French, *A Profile of the Incarcerated Black Female Offender*, 63 PRISON J. 80, 80-87 (1983) (stating that the results of studies from the 1980s show that African-American female offenders tend to be younger and have less formal education than white female offenders).

91. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1994, at 1, 5 (1994) (noting that forty-six percent of

mother household;⁹² 3) have lived with their minor children;⁹³ 4) be on welfare;⁹⁴ and 5) are less likely to have ever held a job.⁹⁵

Among African-American female prisoners and female prisoners of other races, the contrast in education, jobs, and the number of welfare recipients appears to be a reflection of the generally lower economic position of African-Americans in the United States. These contrasts, however, can also be attributed to the focus that government places on drug enforcement in minority communities.⁹⁶ The War on Drugs has not only contributed to the increase of African-American women in prison,⁹⁷ but also has placed a significant number of young African-American men in jail as well.⁹⁸

In the short term, the imprisonment of these men can increase the number of single mother households, the number of children

African-American female offenders had lived in a household headed by a single mother, while approximately twenty-nine percent of white female offenders lived in a household headed by a single mother), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvius94.pdf> (last visited Jan. 15, 2003).

92. L. Bresler & D.K. Lewis, *Black and White Women Prisoners: Differences in Family Ties and Their Programmatic Implications*, 63 *PRISON J.* 116, 116-23 (1983); see Rochelle L. Stanfield, *Black Frustration*, *NAT'L J.*, May 16, 1992, at 1162 (citing to the 1990 census, which shows that forty-four percent of all African-American families consist of a single mother head of household, compared with thirteen percent of white families).

93. BUREAU OF JUSTICE STATISTICS, *supra* note 91, at 5-6.

94. Bresler & Lewis, *supra* note 92, at 118-21. This particular statistic appears to be the result of a convergence of the following trends: 1) the median net worth for African-Americans is usually less than white Americans; 2) the median income for women is less than men; 3) the median income for single mother, African-American households is thirty-eight percent less than a married African-American couple; and 4) a higher percentage of African-American families than white are headed by a single woman. Johnson, *supra* note 5, at 10.

95. Bresler & Lewis, *supra* note 92, at 118-21.

96. See MARVIN D. FREE, JR., *AFRICAN-AMERICANS AND THE CRIMINAL JUSTICE SYSTEM* 184-85 (1996) (noting that between 1986 and 1991, the percentage of white offenders imprisoned for drug-related charges increased by only four percent, while at the same time, the percentage of African-American offenders imprisoned for the same types of charges increased by eighteen percent). "Since law enforcement agencies typically target crack, which is more commonly used by low-income African-Americans and Hispanics than whites, the 'get tough' policies of drug control agencies are likely to result in the disproportionate processing of those minorities." *Id.* at 185.

97. Johnson, *supra* note 5, at 12-14 (discussing the impact of the war on drugs and mandatory sentencing laws on African-American women). Johnson's study focuses on New York's Rockefeller Drug Laws and its impact on African-American women arrested for drug offenses in New York.

98. See *NAT'L CRIMINAL JUSTICE COMM'N, THE REAL WAR ON CRIME* 102-03 (Steven R. Donziger ed., 1996) [hereinafter *REAL WAR*] (stating that while African-American men constitute seven percent of the United States population, they represent approximately half of the prison and jail population).

with an incarcerated parent, the number of women on welfare, and the number of unemployed women.⁹⁹ In the long term, a man's history of incarceration contributes to unemployment rates and low wage jobs.¹⁰⁰ Together, these factors contribute to the low income of African-American families and to the number of children who live below the poverty line.¹⁰¹ Research has consistently demonstrated a connection between a history of youth poverty and crime, whereby a significant number of African-American children living below the poverty line perpetuates the circle of criminal arrests and incarceration.¹⁰²

Programs instituted for rehabilitative purposes, as well as those designed to prevent first-time offending and recidivism, will need to address the fact that the majority of African-American female offenders have slightly different needs than the general pool of female offenders. For African-American women already incarcerated, creating ways in which there can be greater and more consistent contact between parents and children are especially important, given the higher rate of single mother households.¹⁰³ Allowing such a program to place women outside the prison, for example, in a halfway house, poses little threat to the community, as a majority of the women placed in this type of program would be non-violent offenders.¹⁰⁴ These programs could be available in conjunction with opportunities to provide such women with education and/or job skills that would allow access to jobs with higher wages.

Much like gender, the effects of race on an individual's treatment at various stages of the incarceration process vary depending upon the stage.¹⁰⁵ African-American women are likely to encounter racial bias in the criminal justice system even before arrest. The government's policy of focusing enforcement measures—particu-

99. *See id.* at 36.

100. *See id.*

101. *See id.* at 105 (stating that in 1992, forty-six percent of African-American children were born into poverty).

102. *See id.* at 105-06 (connecting youth poverty to criminal behavior and a higher likelihood of incarceration in adulthood). Generally, an inverse relationship between poverty and crime rates exists, so that the more people living in poverty, the higher the crime rates tend to be, and vice versa.

103. *See id.* at 154.

104. *See* Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 445-46 (1993) (discussing those who advocate halfway houses).

105. *See* FREE, *supra* note 96, at 92 (discussing the difference in bail treatment between African-Americans and whites).

larly of drug laws—in minority communities, makes African-American women more likely to be arrested than white women.¹⁰⁶ If the processes subsequent to arrest were free of racial bias, the arrest statistics would roughly parallel that of the prison population.¹⁰⁷

As compared to white Americans, approximately three times as many African-Americans are arrested for non-violent offenses.¹⁰⁸ African-Americans, however, are seven times more likely than white Americans to be imprisoned.¹⁰⁹ Yet, no study appears to point directly to any one stage in the incarceration process as either the sole or even primary cause of this disparity. It appears that the disparity between arrest and incarceration rates is a product of the total process between arrest and incarceration.¹¹⁰ For example, bail decisions,¹¹¹ the decision to incarcerate before trial,¹¹² and plea-bargaining,¹¹³ are all stages that evidence a racial disparity which cannot be explained by the differences between individual crimes and the offenders' histories.

The evidence of discrimination in sentencing is generally inconclusive regarding the effect race has on the outcome.¹¹⁴ At the sentencing stage, however, all the discrimination involved in prior stages, particularly arrest and charging decisions, can easily affect

106. *See id.* at 184-85; *see also* REAL WAR, *supra* note 98, at 109-10 (discussing the effect that race has on police officers' decisions to follow, stop, search, or arrest individuals).

107. *See* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 753-54 (1993).

108. REAL WAR, *supra* note 98, at 107-08. Unfortunately, no comprehensive statistical studies focusing on this particular disparity for African-American women could be located.

109. *Id.* at 108.

110. *See* FREE, *supra* note 96, at 92 (arguing that "differential processing of African-Americans can occur prior to sentencing.").

111. *See id.* at 93 (stating that while it is difficult to distinguish between the effects of race and class on bail decisions, studies that control for this specific variable have found that race still plays a role in these decisions, as "nonwhite suspects were less likely than white suspects to receive low bail."); *see also* REAL WAR, *supra* note 98, at 111 (reviewing a study demonstrating that African-American or Hispanic men pay approximately twice the bail of a white male offender for the same offense).

112. *See* REAL WAR, *supra* note 98, at 111 (summarizing a study in Florida that found evidence of racial bias in decisions to hold or release an offender prior to trial).

113. *See id.* at 107-14 (reviewing studies from various geographic areas that have found racial bias in the plea bargaining stage). "All else being equal, whites did better than African-Americans and Hispanics at getting charges dropped, getting cases dismissed, avoiding harsher punishment, avoiding extra charges, and having their criminal records wiped clean." *Id.* at 112.

114. *See* FREE, *supra* note 96, at 94-103 (using a wide range of sentencing studies from different geographical areas and time periods to demonstrate the variety of outcomes such studies have produced).

sentencing, even in cases where no racial bias exists in the sentencing body. For example, African-Americans are more likely than white Americans to be arrested due to the decision to focus drug enforcement efforts on minority communities. The resulting arrests, whether founded or unfounded, will give most African-Americans longer criminal records than their white counterparts, which is a significant factor in deciding sentences for the offender.¹¹⁵

B. Hispanic Women in the Incarceration Process¹¹⁶

Statistical data on Hispanic women in the criminal justice system is severely lacking.¹¹⁷ In 1997, the total number of Hispanic prisoners being held by state and federal authorities was 198,673.¹¹⁸ Of this total, seventeen percent of prisoners in the state prison system, and twenty-seven percent in the federal system, were female.¹¹⁹ According to the sparse information available, it appears that the trends surrounding Hispanic female offenders do not appear to vary significantly from the trends found in the general female offender population, as a high rate of drug use,¹²⁰ and conditions of poverty,¹²¹ also exist among Hispanic offenders.

Much more statistical information needs to be gathered regarding Hispanic female offenders before any other conclusions are drawn. Without more specific information, making suggestions for programs directed at Hispanic female offenders is problematic. It

115. *See id.* at 95.

116. The term Hispanic is meant to cover all subgroups of persons with ancestry originally from Central and South American countries. It does not distinguish between Latina or Chicana. It also does not differentiate between those persons with Native South and Central American ancestry, and those with primarily European or Asian ancestry who immigrated to South and Central America.

117. Many jurisdictions do not record the racial information of offenders at all. Those jurisdictions that do record racial information often categorize offenders as either African-American or white, and fail to record the number of Hispanic female offenders.

118. SOURCEBOOK, *supra* note 54, at 511 tbl. 6.35.

119. GREENFELD & SNELL, *supra* note 43, at 7 tbl. 16 (citing the percentage of Hispanic women in state prisons as fifteen percent, and in federal prisons as thirty-two percent); SOURCEBOOK, *supra* note 54, at 513 tbl. 6.37 (comparing the 1997 percentages with the 1991 percentages, which are roughly the same).

120. SOURCEBOOK, *supra* note 54, at 381 (listing the percentage of Hispanic female offenders who tested positive for drug use). The highest percentage, eighty-four percent, was in Fort Lauderdale, Florida, while the lowest percentage, nearly twenty-two percent, was in Laredo, Texas. *Id.*

121. REAL WAR, *supra* note 98, at 29 (noting that in 1993, thirty-eight percent of Latino children lived in poverty, as compared to forty-four percent of African-American children, and sixteen percent of white children).

is likely that once comprehensive data has been gathered, a visible pattern will exist specific to the Hispanic female offender population. This assertion is based on the fact that white, African-American, and Native American Indian female offenders have all shown patterns deviating from the picture created by the aggregate female offender pool.¹²²

One of the major intersections between race and gender can be seen in the treatment of Hispanic female offenders. Anecdotal evidence suggests that the stereotype of Hispanic women as “ultra-feminine” can affect the treatment of Hispanic female offenders.¹²³ This stereotype may help some Hispanic female offenders avoid some of the harshness of the Federal Sentencing Guidelines and/or the penalties imposed by the Anti-Drug Abuse Act of 1986, as judges sometimes rely on theories based on cultural stereotypes.¹²⁴ The “uses of gender and culture,” however, “place Latina defendants in a double bind. They can choose to accept the harsh statutorily mandated sentences, or they can embrace stereotype and play to a court’s sympathy by presenting themselves as pawns of their husbands, naive and lacking in self-determination.”¹²⁵ Creating this type of identity conflict is part of the disparate treatment that Hispanic female offenders face.¹²⁶ This particular type of conflict, however, does not appear to be a significant factor for white, African-American, or Native American Indian women. Nonetheless, additional research might reveal that other female offenders, such as Asian or Middle-Eastern women, whom the American justice system perceives as coming from a culture with a similar stereotype, will often face the same decision.¹²⁷

122. See *supra* Part III.A; see also *infra* Part III.C.

123. See Holmquist, *supra* note 6, at 52 nn.47-48.

124. See *id.* at 50-56 (discussing two cases in which the stereotype of Hispanic women as not being full or active partners in the crimes committed is used in the courts’ decision). In one case, the court did not accept this argument, and refused to reduce the female offenders’ sentences; another court, however, allowed a downward adjustment of a female offender’s sentence under the Guidelines, using the stereotype as a partial basis for its finding that her participation in the crime was low. *Id.*

125. *Id.* at 65.

126. *Id.*

127. See *id.* (discussing how stereotypes can force women to choose between using the stereotype to their advantage or facing a harsher sentence).

C. Native American Indian Women in the Incarceration Process

Although Native American Indians¹²⁸ represent a small fraction of all criminals charged in the United States,¹²⁹ they represent a disproportionately large number of those incarcerated in the criminal justice system.¹³⁰ Information regarding Native American Indian female offenders is scarce, but the statistics gathered on Native American Indian offenders of both sexes may provide some insight.

Of those Native American Indian offenders incarcerated,¹³¹ a majority was held in local jails.¹³² As of June 1999, Native American Indian female offenders accounted for sixteen percent of the population in jails of Indian country.¹³³ Generally, Native American Indian offenders are less likely than any other race to have been incarcerated for either a violent offense or drug offense.¹³⁴ Yet, the majority of studies do not indicate that drug use is less prevalent among Native American Indians as opposed to any other racial or ethnic group.¹³⁵ Native American Indian offenders are

128. The term Native American Indian here is meant to include persons with ancestry from any of the tribal groups existing in North America at the time of the European invasion, including Alaskan natives. Unfortunately, statistics regarding Native American Indians living away from the reservation community are almost non-existent, as they are often grouped into other racial categories by jurisdictions which do not consider Native American Indians as a separate, enumerated category.

129. See SOURCEBOOK, *supra* note 54, at 352-54 tbl. 4.10 (calculating that Native American Indians were charged in 1.2 percent of offenses in 1998).

130. LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME iii, viii (1999) (stating that Native American Indians had a thirty-eight percent higher rate of incarceration, on a per capita basis, than the national rate of incarceration). This rate means that four percent of the Native American Indian population is in the correctional system, in comparison to two percent of the white population and ten percent of the African-American population. *Id.* at 26.

131. *Id.* (estimating that of the offenders not incarcerated, fifty-four percent were in the community on either probation or parole).

132. *Id.* (calculating that twenty-five percent of incarcerated American Indians were held in local jails, eighteen percent in state prisons, and three percent in federal prisons). Native American Indians are more likely than the average offender in the correctional population to be held in a local jail and in federal prison. *Id.* at 27.

133. PAULA M. DITTON, U.S. DEP'T OF JUSTICE, JAILS IN INDIAN COUNTRY (1998 AND 1999) 2 tbl. 3 (2000).

134. GREENFELD & SMITH, *supra* note 130, at 28 tbl. 34 (estimating that 26.6 percent of American Indians are jailed for violent offenses and 6.5 percent for drug offenses). These percentages are approximately ten percent and fourteen percent less, respectively, than all other races in 1996. *Id.* In 1996, only sixteen percent of Native American Indian inmates in local jails had been convicted of a drug offense. *Id.* at 29.

135. See LESTER, *supra* note 7, at 15-16 (discussing the different trends in types of drugs used by various tribes, in comparison to drug use trends of white and African-American users).

typically younger than the average incarcerated offender.¹³⁶ Furthermore, as to the living conditions surrounding Native American Indians, many who live on reservations live in near third-world conditions, although these conditions vary depending on the particular reservation.¹³⁷ Additionally, conditions are likely to vary between Native American Indians who live on reservations, and those who do not.¹³⁸

The most significant trends that differentiate Native American Indian offenders from those of other races are the greater percentage of alcohol-related charges and the greater likelihood of a history of childhood abuse among them. Native American Indians have traditionally and consistently had the highest arrest rate of any racial or ethnic group for alcohol-related offenses.¹³⁹ Yet the chances of a Native American Indian being arrested for such offenses may depend on their location, as approximately seventy-five percent of these arrests occurred in cities between 1976-1985.¹⁴⁰ Although no statistics have been collected regarding the percentage of Native American Indian offenders with a history of abuse, it is likely to be a fairly high percentage, because Native American

136. GREENFELD & SMITH, *supra* note 130, at 1 (stating that Native American Indian offenders are, on average, eight years younger than offenders of other races).

137. LESTER, *supra* note 7, at 17 (calculating that forty percent of Native American Indian families on eighteen of thirty-six major reservations live below the poverty line); Ken Peak & Jack Spencer, *Crime in Indian Country: Another "Trail of Tears,"* 15 J. CRIM. JUST. 485, 486 (1987). The article describes the general living conditions for Native American Indians on reservations as follows:

Twice as many Indians die from diabetes, influenza, and pneumonia as do other Americans. Six times as many Indians die from tuberculosis; three times as many Indian babies die during their first year of life. Nearly sixty percent of all Indian housing . . . remains substandard. . . . murder, automobile fatalities, suicide, and other violent deaths occur at three times the national norms.

Id.

138. LESTER, *supra* note 7, at 18 (noting that for most Native American Indian families not living on a reservation, the poverty level is comparable to both African-Americans and Hispanic Americans).

139. Alcohol related offenses include liquor law violations, drunkenness, disorderly conduct, and driving while intoxicated ("DWI"). Peak & Spencer, *supra* note 137, at 489-90 (estimating that for the period from 1976-1985, "Indians had the highest arrest rate for offenses involving alcohol of any racial group—forty-seven percent of all arrests for this type of offense."); see GREENFELD & SMITH, *supra* note 130, at 28-29 (remarking on the higher arrest and conviction rates of Native American Indians for DWIs).

140. Peak & Spencer, *supra* note 137, at 487 (stating that in comparison "17.4 percent were arrested in rural areas and 7.5 percent in suburban areas" during this period).

Indian children are reported as abuse victims at twice the rate of their population.¹⁴¹

Obviously, a considerable amount of statistical research needs to be conducted in this field, especially research that considers gender as a separate category. Whether the offender lives on or off a reservation is another major factor that warrants consideration. If possible, the research should also differentiate between reservations based on each individual reservation's average income level, and its proximity to the closest major city.¹⁴² The current research indicates an even stronger need for providing alcohol treatment programs and addressing the history of abuse in appropriate cases. Due to the unique nature of Native American Indian reservations,¹⁴³ traditional job and educational programs will most likely be inadequate, given the lack of employment opportunities on or near reservations.¹⁴⁴ Economic improvement programs targeted at the reservation community as a whole are needed to help offenders gain skills while incarcerated to ensure that they have employment upon release.

The lack of statistics makes it hard to track the treatment of female Native American Indians through the criminal justice system and uncover the points at which their race and gender affect their treatment. Moreover, unlike all other groups of female offenders, Native American Indian women are subject to the vagaries of multiple jurisdictions because they are caught between federal and/or state law.¹⁴⁵ Native American Indian offenders on reservations can

141. GREENFELD & SMITH, *supra* note 130, at 15 (estimating that Native American Indian children represented only one percent of persons fourteen and under, but were two percent of all victims of child abuse and neglect in 1995). During that same year, out of approximately thirty children, one substantiated report of abuse or neglect existed, in comparison to a rate of one per fifty-eight children of all races. Peak & Spencer, *supra* note 137, at 487.

142. Based on the scant information currently available, it is suggested that arrest and incarceration rates vary depending on income levels, which can vary greatly between reservations. The rates also vary depending on whether a Native American Indian lives in a city, making it possible that reservations located closer to major cities may evidence higher rates of arrest. LESTER, *supra* note 7, at 11-12.

143. The majority of reservations do not have an economic base to support new hires, particularly for any permanent, full-time positions. Some reservations are located close enough to economic centers off the reservation so that the possibilities of job exist after release. For those persons on reservations located in areas where the travel time to economic centers off the reservation is not impractical, however, employment opportunities are severely limited even for offenders who have learned marketable skills. *Id.*

144. *Id.* at 17.

145. See *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (giving Congress the power to enact criminal statutes that regulate Indian behavior); *Buckman v. State*, 366

be subject to tribal court jurisdiction; furthermore, it is possible that several states can also claim jurisdiction over one reservation,¹⁴⁶ depending on where the crime occurred within the reservation and the identity of the victim.¹⁴⁷ For example, on the Navajo Reservation, a Native American Indian offender can be prosecuted for an offense against a non-Native American Indian under Arizona, New Mexico, or Utah law.¹⁴⁸ These states have different required elements and punishments for the same crime, making criminal justice for Indians on the Navajo Reservation a matter of location.¹⁴⁹

The way courts resolve jurisdictional issues often place Native American Indians who commit offenses on a reservation at a greater disadvantage than Native American Indians who commit an offense off the reservation, and non-Native American Indians who commit an offense on the reservation.¹⁵⁰ Congress can amend the Major Crimes Act to include any offense, and can thus determine which traditional state crimes will be ceded to federal jurisdiction when both the offender and victim are Indian and the crime occurs on the reservation. The same crimes committed by non-Indians fall under state jurisdiction, unless Congress has specified it as a federal crime.¹⁵¹ This dichotomy means that Native American Indian offenders are often subjected to the harsher penalties of the Federal Sentencing Guidelines.

P.2d 346, 346 (Mont. 1961) (applying state law to crimes committed by Native American Indians off reservations).

146. See Major Crimes Act, 18 U.S.C. § 1153(b) (1994) (stating that if a crime is not covered by federal law, the offense shall be “punished in accordance with the laws of the state in which such offense was committed . . .”).

147. See *id.* § 1153(a) (enumerating the crimes that fall under federal jurisdiction when committed by an Indian against an Indian on a reservation); *cf. id.* § 1152 (granting federal jurisdiction in cases where a non-Indian commits an offense against an Indian on a reservation, but only when the offense is specified by the United States Code as being a federal crime).

148. Charles T. Dumars, *Indictment Under the “Major Crimes Act”—An Exercise in Unfairness and Unconstitutionality*, 10 ARIZ. L. REV. 691, 700 (1968).

149. *Id.* (discussing the different standards used by Arizona, New Mexico, and Utah to convict a person of rape).

150. See *id.* at 693-98 (discussing several examples of how jurisdiction under the Major Crimes Act has allowed for discrimination against Indian offenders, particularly Indian offenders whose victims were non-Indian).

151. *Id.* at 694-96.

IV. CLASS AS A FACTOR IN THE INCARCERATION PROCESS

Class affects the treatment of female offenders in a variety of ways.¹⁵² One of the most significant aspects of an offender's class within the criminal justice system is that the law offers no equal protection based on income. In other words, a female offender can object to treatment based on gender and race, but not on class status. Without this type of protection, the criminal justice system may operate in a manner that discriminates on the basis of an offender's class. Examples of this type of class bias during the enforcement phase of the incarceration process are the search and seizure of buses,¹⁵³ decisions to target low-income neighborhoods for drug enforcement,¹⁵⁴ laws that have a disproportionate effect on inner city residents,¹⁵⁵ "three strikes" sentencing laws,¹⁵⁶ the standards used in consent to search cases,¹⁵⁷ and *Terry* stops.¹⁵⁸

Once a low-income female offender is in the criminal justice system, class discrimination persists. The most visible and important area in which this can be seen is in both the Supreme Court's interpretation of the right to counsel, and the actual performance of attorneys assigned to low-income offenders. Three areas exist in which the Supreme Court's Sixth Amendment interpretations

152. See *supra* notes 66-71 and accompanying text. This Essay focuses on the connection between class and treatment by the justice system, rather than the relationship between poverty and crime, because many studies of this area in the fields of law, social sciences, and humanities already exist.

153. COLE, *supra* note 8, at 20-22 (stating that police search and seizure techniques are not random, but instead target and discriminate against persons based on their income and social status, especially regarding low-income modes of travel, like buses).

154. See *id.* at 141-46 (discussing the racial discrimination caused by the "crack" cocaine and powder cocaine distinction); see also *supra* notes 96-97 and accompanying text (arguing that the war on drugs has had a disproportionate affect on minority communities because law enforcement bodies have chosen to focus enforcement efforts in urban, low-income neighborhoods).

155. See Tracy A. Bateman, *Validity, Construction, and Application of State Statutes Prohibiting Sale or Possession of Controlled Substances Within Specified Distance of Schools*, 27 A.L.R. 5th 593, § 10 (1995) (reviewing several cases which hold that drug laws prohibiting sale or possession of drugs within a certain distance of schools did not violate the equal protection clause).

156. See COLE, *supra* note 8, at 146-49 (discussing the disproportionate impact these laws have had on African-American offenders).

157. See *id.* at 27-34 (arguing that the Supreme Court's interpretation of "voluntary" is most likely to work against the poor, the uneducated, and minorities).

158. See *id.* at 41-44 (maintaining that the use of the reasonable suspicion standard for stop and searches authorized under *Terry v. Ohio*, 392 U.S. 1 (1968), gives a large amount of discretion to police officers whose preconceptions of race and class make it more likely that people of color and low-income persons will be arrested).

greatly limit the effectiveness of counsel for the poor:¹⁵⁹ 1) the right to counsel prior to indictment;¹⁶⁰ 2) the right to counsel on appeal;¹⁶¹ and 3) the adoption of a low standard for determining effective assistance of counsel.¹⁶²

Despite these limitations on the right to counsel, however, the actual performance of public counsel differs slightly from that of private counsel. In 1998, only a one percent difference existed between the conviction rate for federal offenders with public counsel, and federal offenders with private counsel.¹⁶³ Federal defendants with public counsel, however, were more likely to be incarcerated.¹⁶⁴ In large state courts, conviction rates were approximately the same,¹⁶⁵ but defendants with public counsel were less likely to

159. U.S. CONST. amend. VI (stating that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”). Supreme Court decisions, however, have had little effect on parties who can afford private counsel, since once counsel is obtained, the attorney has the right to be present for all interactions between her client and officers of the state. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 668 (1984); *Ross v. Moffitt*, 417 U.S. 600, 610-12 (1974).

160. *COLE*, *supra* note 8, at 71-73 (describing how the Supreme Court has limited the ability of poor persons to gain access to representation by deciding that the Sixth Amendment does not require the presence of counsel before the offender has been indicted, and before formal adversarial proceedings are initiated); *STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE* 669-70 (5th ed. 1996).

161. *Ross*, 417 U.S. at 610-12 (limiting the defendant’s right to counsel by stating that effective assistance of counsel is only necessary at the trial and for the initial appellate briefs, as all further appeals are based on the record, not new arguments); *COLE*, *supra* note 8, at 73-76 (discussing how this limitation has hurt low-income convicted offenders).

162. *Strickland*, 466 U.S. at 668 (holding that to establish a claim of ineffective assistance of counsel, the defendant is required to show that counsel’s performance is deficient, and that, but for this substandard performance, the outcome would have been different); *COLE*, *supra* note 8, at 76-81 (giving a variety of examples of how the justice system tolerates incompetent counsel for poor persons because of the near impossibility of meeting the standard necessary to prove ineffective assistance of counsel).

163. *CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES* 3 (2000) (estimating that ninety-two percent of defendants with public counsel pled guilty or were found guilty, compared to ninety-one percent of defendants with private counsel).

164. *Id.* (noting that approximately eighty-eight percent of defendants with public counsel who were convicted were incarcerated, compared to seventy-seven percent of defendants with private counsel).

165. *Id.* at 6 (calculating that seventy-five percent of defendants with public counsel and seventy-seven percent of defendants represented by private counsel were found guilty).

gain pretrial release than those with private counsel.¹⁶⁶ As in federal courts, defendants represented by public counsel in state court were more often incarcerated, however, these defendants faced shorter sentences than those represented by private counsel.¹⁶⁷ Consistent with the Supreme Court's decision that the right to counsel only attaches after indictment, incarcerated offenders with public counsel spoke with their attorneys later and less often than offenders with private counsel.¹⁶⁸

CONCLUSION

The research summarized in this Essay reveals that trends exist within the female offender population that should influence the types of programs offered to reduce female offending and recidivism. Regardless of race or class, the connection between a history of physical and/or sexual abuse and subsequent drug use appears to be the most important factor in a woman's incarceration. The predisposition to incarceration by abused women indicates that programs to prevent abuse, particularly abuse that starts in childhood and becomes long term, is essential to reduce the number of female offenders. Additionally, programs designed to provide treatment to sexually and/or physically abused female offenders, as well as female offenders with substance abuse problems, are important in reducing recidivism.

Job training skills and education would ensure the success of these programs. Women with the means to be financially independent are less likely to stay in abusive relationships, less likely to feel the need to turn to crime for money, and in some cases, less likely to turn to drug use as a coping mechanism. In addition, for those low-income, mostly minority female offenders who do use

166. *Id.* at 5 (finding that about half of defendants with public counsel received pretrial release, in comparison to just over three quarters of defendants with private counsel).

167. *Id.* at 6 (finding that over seventy percent of defendants with public counsel and over fifty percent with private counsel were sentenced to a prison or jail term, and noting that “[t]hose with publicly financed attorneys were sentenced to an average of two and a half years of incarceration, and those with private counsel to three years.”).

168. *Id.* at 8 (estimating that thirty-seven percent of state inmates and fifty-four percent of federal inmates spoke with their public counsel within the first week after indictment, while sixty percent of state and seventy-five percent of federal inmates spoke to their private counsel within that same time period). “About 26% of State inmates and 46% of Federal inmates with court-appointed attorneys discussed their cases with counsel at least four times.” *Id.* In contrast, fifty-eight percent of state inmates and sixty-five percent of federal inmates with private attorneys spoke with that attorney four or more times. *Id.*

their new skills to obtain a job that pays a living wage, the possibility of removing themselves from neighborhoods targeted by law enforcement exists.

Beyond these broad suggestions, detailed research is necessary to discover all the facets of female offenders in America. When we have a more fully formed picture of female offenders, it will reveal that the criminal justice system does have flaws, particularly in regards to police and prosecutorial discretion. Based on the scant research currently available, however, this picture will reveal that many of the disparities in our justice system are merely reflections of the disparities, inequalities, and discriminations within our civil society. Reforms within the justice system may provide greater equality for those women already in the system. Nevertheless, to truly address the issue of female offending, we as a society must take responsibility for the consequences of our decisions to allocate resources in places other than where those resources would be most effective in fighting female offending.

