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ARTICLES

THE WIND CRIES MARY—THE INTERSECTIONALITY OF RACE, GENDER, AND REENTRY: CHALLENGES FOR AFRICAN- AMERICAN WOMEN

GENEVA BROWN*

To deliver up bodies destined for profitable punishment, the political economy of prisons relies on racialized assumptions of criminality—such as images of black welfare mothers reproducing criminal children—and on racist practices in arrest, conviction, and sentencing patterns.¹

Angela Davis warned of the impending growth of the prison industrial complex and how it devastates communities.² The rise of the prison industrial complex has led to the phenomena of mass incarceration.³ The

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¹ Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES, Fall 1998, <http://www.colorlines.com/article.php?ID=309> at 1.

² *See id.* (opining on the bases for the growth of the prison industrial complex, and on the havoc that results for the communities involved).

³ *See generally* Alfred Blumstein et al., *Mass Incarceration: Perspectives on U.S. Imprisonment: Incarceration Trends*, 7 U. CHI. L. SCH. ROUNDTABLE 91, 100 (2000) (reasoning that the growth in the criminal justice system is not due to more crime or arrests per crime, but rather an attribute of policy choices, such as “more commitments per arrest and longer time served, counting parole violation time in the time served”).

expansions of prisons are marked by the dramatic rise of African Americans being incarcerated.⁴ African American men are the largest incarcerated population in the United States. Mass incarceration has decimated the African American community.⁵

The nexus of the declaration of the War on Drugs, the actions of state legislatures, and the fact that prisons are becoming for-profit institutions has created the largest incarcerated population in the world.⁶ One-percent of all Americans have been or will be incarcerated.⁷ The unintended consequences of mass incarceration include the effects on the African American family, principally, the rise of African American women in federal and state prisons.

The racialized criminal justice system has risen from the philosophy of law and order regimes;⁸ from the front lines of law enforcement to prison sentences, overrepresentation exists at every level of the criminal justice system.⁹ Local police departments' strategy of policing as an occupying

⁴ See *infra* Part I B (outlining the "intensified criminalization of drugs" as it relates to the growth in prison populations and, in particular, the African American prison population).

⁵ See D. H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 454 (2003) (observing that the annual arrest rate among African Americans is more than two and a half times the white rate); MaryBeth Lipp, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 1022 (2004) ("[O]ne-third of black boys born today likely will spend at least some part of their lives behind bars, . . . nearly one-tenth of black males in their twenties already live in prison, and almost one out of three black males currently remains under criminal justice control."); Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1279 (2004) (commenting that mass imprisonment takes a tremendous toll on black communities); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 343 (2006) (detailing how mass imprisonment has created obstacles to reliable administration of the criminal justice system and created unjustifiable procedures that bar prisoner appeals); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the "Race Question" in the US*, 13 NEW LEFT REV. 41, 53–54 (2002) (arguing that mass imprisonment presents an institutional impediment to progress and equality for African Americans that has historical antecedents in slavery and American racial apartheid laws); MARC MAUER & TUSHAR KANSAL, *THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES I* (2005), <http://www.sentencingproject.org/pdfs/barredforlife.pdf> (describing the practices of states that strip people who have been convicted of felonies of voting rights after imprisonment, as well as the practices of states that permanently bar voting rights unless the person is pardoned).

⁶ See JENIFER WARREN ET AL., PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, 35 tbl.A-7, (Feb. 2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/One in 100.pdf](http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf) (comparing the inmate population of the United States with that of other countries by total inmate population, as well as by inmates per 100,000 residents).

⁷ *Id.* at 7. "One in every 99.1 U.S. Adults are behind bars."; see *id.* at 24–27 (describing the methodology and assumptions taken to make the calculation).

⁸ See Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 223 (2009) (arguing that the law and order themes of political movements were related to the genesis of mass imprisonment).

⁹ See Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses*, 31 LAW & SOC'Y REV. 789, 789 (1997) (revealing a disparity in sentencing for drug related crimes based

force¹⁰ in low-income African American communities leads to discriminatory treatment by police officers.¹¹ The discriminatory treatment pervades the court system, as does the disparate sentencing of crack versus powder cocaine, which sent a generation of African American men and women to prison.¹²

Mass incarceration of African Americans will lead to massive reentry into communities. Communities are expected to absorb ex-offenders without funding or services to assist in the reintegration. Legal reforms have limited the participation of ex-offenders in employment, education and housing.¹³ Gender and race further complicate reintegration.

Kimberle Crenshaw has demonstrated that the legal community overlooks the impact of the intersectionality of race and gender.¹⁴ The criminal justice system suffers from the same dilemma. Law enforcement, the government, and research institutions measure “gender” as “white women” and “race” as “African American men.”¹⁵ African American women are invisible until the policies being pursued have had a devastating impact on their lives. The rates of incarcerated African American women are at historic highs.

African American women face challenges in reentry and reintegration

on ethnicity, gender, educational level and citizenship); Marvin D. Free, Jr., *The Impact of Federal Sentencing Reforms on African Americans*, 28 J. BLACK STUD. 268, 268 (1997) (showing that African Americans are disproportionately incarcerated in Federal penal institutions); TUSHAR KANSAL, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE (Marc Mauer ed., The Sentencing Project 2005), http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/racial_disparity_20050128/disparity.pdf (finding that black and Latino males are subject to particularly harsh sentencing, are disadvantaged in the course of the legal process, and are more likely than whites to receive death sentences); HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONS IN 2007 432, tbl.5.26 (2008), <http://www.ojp.gov/bjs/pub/pdf/p07.pdf> [hereinafter Prisons 2007] (illustrating that in 2002, African-Americans received approximately 25% of sentences issued by U.S. District Courts under the U.S. Sentencing Commission Guidelines).

¹⁰ Hague Convention IV Respecting the Laws of War on Land Section III, art. 42, 36 Stat. 2277. The Hague Convention defines occupied territory as territory that “is actually placed under the authority of the hostile army.” *Id.*

¹¹ KATHERYN K. RUSSELL, *THE COLOR OF CRIME* 36-38 (1998) (proving disproportional and irrational hostile treatment of black men by police departments across the United States).

¹² *Id.* at 132 (showing significantly more severe treatment of possessors of crack cocaine over possessors of powder cocaine).

¹³ See *infra* Part IV.D (discussing the legal obstacles facing former drug offenders seeking to take advantage of governmental programs and services).

¹⁴ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991) (arguing that women of color face conditions and burdens significantly harsher than those faced by white women).

¹⁵ See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER SOC. POL’Y & L. 1, 6 (1995) (stating that there is a dearth of analysis of African American women due to a dualistic approach towards social studies, in which relevant categories are race or gender).

that other populations do not have to face. Incarcerated African American women are mothers, care givers and heads of household before they become offenders.¹⁶ Once they become offenders, their children become displaced and income that is desperately needed by their families is lost.¹⁷ African American children languish in foster care, awaiting their parents release from prison or alternatively become permanently severed from their families.¹⁸ Additionally, African American women suffer health consequences that are largely ignored by mainstream society. The rates of HIV transmission are rampant in low-income African American communities. African American women are now the largest growing HIV Positive population.¹⁹ Incarcerated women are overrepresented in rates of HIV transmission.²⁰ Federal laws frustrate the transition from prison to community with draconian laws. Drug offenders are not able to obtain public benefits, housing, or education.²¹ Reentry without obtaining employment, education or income is a failure. African American women are victimized by these policies that frustrate reentry and maintain poverty.²² They become the true casualties in the War on Drugs.

In this Article, Part I identifies the trends of mass incarceration in the African American community. Part II examines reentry policies and challenges. Part III elucidates intersectionality through the lives of African American women offenders and the complexities of the criminal justice

¹⁶ Forty-nine point three percent of poor black children live with their single mother with no involvement of the father; forty-five percent live in arrangements where there is significant visiting by the biological father. Ronald B. Mincy & Helen Oliver, *Age, Race, & Children's Living Arrangements: Implications For Tanf Reauthorization*, No. B-53 THE URB. INST. 1, 5 (2003), available at http://www.urban.org/UploadedPDF/310670_B-53.pdf.

¹⁷ See Jeremy Travis et al., *Families Left Behind: The Hidden Costs Of Incarceration And Reentry*, THE URB. INST. 1, 1 (2003), available at http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf (addressing the significant impact of incarceration on the children of those incarcerated).

¹⁸ See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 6 (2002) (addressing the significant intervention of child welfare services with black families).

¹⁹ See *infra* Part IV.C (discussing the HIV Positive female prison population and the difficulties those women face during reintegration).

²⁰ See Ann S. De Groot et al., *Women in Prison: The Impact of HIV*, 2 HEPP NEWS 1, 1 (1999), available at <http://www.aegis.com/files/hepp/hepp1999-06.pdf> (providing statistics of and addressing explanations for the high percentage of HIV Positive women in the prison population, and suggesting that gynecological care in prisons could reduce the transmission of HIV and positively impact the health of HIV Positive incarcerated women).

²¹ See Nakima Levy-Pounds, *Beaten by the System and Down for the Count: Why Women of Color and Children Don't Stand a Chance Against U.S. Drug Sentencing Policy*, 3 U. ST. THOMAS L. J. 462, 488-93 (2006) (examining the severe obstacles facing convicted female drug offenders after incarceration).

²² See *id.* at 488. "Once women with drug convictions are released from prison, they face systematic denial of access to public benefits such as cash grants, food stamps, and participation in public housing programs. For single mothers struggling to provide for their children, access to such benefits are critical and could mean the difference between stability and life on the streets for women and their children." *Id.*

system. Part IV assesses the problems that African American women offenders have with reentry. Part V concludes with proposals for gender and race-based treatment considerations for reentry.

I. MASS INCARCERATION AND THE AFRICAN AMERICAN COMMUNITY

A. Social Control and Drug Policy

The law and order message from failed presidential candidate Barry Goldwater resonated with many; not only in the Republican Party, but also with Southern and working class whites.²³ Elevated crime rates and racial politics of the civil rights movement gave Republican state legislatures the impetus needed to reconfigure criminal laws into a social control model.²⁴ Southern legislatures introduced mandatory minimum sentences, repeat offender sentence enhancers, and expanded prison capacity.²⁵ Studies showed that incarceration rates grew fastest under Republican governors and state legislatures.²⁶ Democrats embraced the law and order stance and supported a more punitive criminal justice system. The rise in the prison industrial complex can be ascribed to the Clinton administration's \$9 billion dollar earmark for prison construction projects.²⁷ The advent of the rise of the prison industrial complex coincided historically with the social construction of the War on Drugs.²⁸

The War on Drugs has its roots in Ronald Reagan's coining of the phrase during a weekly radio address in 1982.²⁹ Reagan did more than utilize phraseology during his presidency with regard to drugs. The Reagan

²³ Western and Wildeman, *supra* note 8, at 223 (discussing the political, economic, and historical origins of harsh sentencing policies and a punitive approach to drug control in the 1960s, which led a mass imprisonment of low-income, urban African Americans in the 1990s).

²⁴ *See id.* (highlighting the role Republican politicians played in the prison boom of the 1990s). *See also* Tracy L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 192 (1998) (concluding that the use of high incarceration rates for crime deterrence and reduction in drug use do not create an effective social control model, and suggesting that community-based policies with local control and law enforcement assistance should be favored).

²⁵ *See* Western and Wildeman, *supra* note 8, at 223 (discussing the different law enforcement strategies utilized between the 1960s and 1990s by politicians that drastically increased the prison population).

²⁶ *See id.* "Quantitative analyses show that incarceration rates grew fastest under Republican governors and state legislators." *Id.*

²⁷ *See id.* (recognizing that Democratic politicians supported the punitive approach to crime prevention and control developed largely by the Republicans in the 1960s).

²⁸ *See* Christopher J. Tyson, *At the Intersection of Race and History: the Unique Relationship Between the Davis Intent Requirement and Crack Laws*, 50 HOW.L.J. 345, 375-376; 378-379 (2007).

²⁹ *See* Kenneth Nunn, *Race, Crime and the Pool of Surplus Criminality, or Why 'War on Drugs' Was a 'War on Blacks'*, 6 J. OF GENDER RACE & JUST. 381, 386-87 (2002) (citing Reagan, *In Radio Talk, Vows Drive Against Drugs*, N.Y. TIMES, Oct. 3, 1982, § 1, at 38) (analyzing the impact of War on Drugs on African American communities nationwide).

administration used a concerted public campaign to demonize drugs, drug users, and drug dealers.³⁰ The Bush and Clinton administrations followed with policies that exacerbated the drug war. George H.W. Bush appointed a drug czar and intensified drug law enforcement efforts.³¹ Clinton bolstered “efforts towards drug interdiction and prosecution.”³²

The public support for the War on Drugs gave Congress the political will to pass tough drug enforcement initiatives.³³ The War on Drugs became the favored public policy initiative. Each initiative passed spawned greater rhetoric, and no politician, Democrat or Republican, could afford to be seen as soft on drugs. Kenneth Nunn, a critic of the War on Drugs, found that the rhetoric of war created not only military strategies, but enemies as well.

For the constituency the Reagan Administration was trying to reach, it was easy to construct African Americans, Hispanics, and other people of color as the enemy in the War on Drugs. These are the groups that the majority of white Americans have always viewed as the sources of vice and crime. Reagan’s anti-drug rhetoric was skillfully designed to tap into deeply held cultural attitudes about people of color and their links to drug use and other illicit behavior.³⁴

African Americans and Latinos became the socially constructed enemy in the Reagan Administration’s drug war. The war would imprison an entire generation of African American men and women at alarming rates.

B. Mass Incarceration

The social and political implications of disproportionate incarceration reverberate throughout the African American community. Studies show incarceration is associated with low wages, unemployment, family instability, recidivism and restrictions on political and social rights.³⁵ The

³⁰ *Id.* at 387 (examining how President Reagan’s increase in anti-drug spending and federal drug task forces and use of the media led to a commitment to the War on Drugs by the public and Presidents Bush and Clinton).

³¹ *See id.* (discussing how the War on Drugs was continued after President Reagan left office).

³² *Id.* at 387.

³³ *Id.* at 389.

Congress itself soon became a beehive of activity in support of the War on Drugs. First, the Administration persuaded Congress to enact all of its ‘legislative offensive’ toughening the laws governing bail, sentencing, criminal forfeiture, and the exclusionary rule. Second, Congress was called upon to finance the war, and it responded in the first year of the war with a special appropriation that gave the Administration 100 percent of what it had requested in addition to the regular fiscal 1983 drug enforcement budget.

Id. at 390 n.65 (quoting STEVEN WITSOTSKY, *BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 4* (1990)).

³⁴ *Id.* at 390-91.

³⁵ Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class*

rise in crime in the 1980s and 1990s does not explain the increased numbers of incarceration.³⁶ However, the intensified criminalization of drugs added to the increased prison populations.³⁷ Street sweeps, undercover operations and other aggressive policing tactics targeted poor African American communities; communities where drugs were traded in public and social networks for drug dealing and could easily be penetrated.³⁸ Dorothy Roberts notes that “the government can use incarceration as a tool of station repression”.³⁹ Roberts opines that “massive incarceration inflicts a political injury beyond the physical restraint imposed on so many individuals. It is increasingly clear that the criminalization of Black Americans serves a repressive function”.⁴⁰

The rate of incarceration since the implementation of the War on Drugs defies historic norms. Reviewing federal and state prison populations from 1925 until 1973, the average incarceration rate was 100 per 100,000.⁴¹ Incarceration rates grew dramatically starting in 1974. In 1974, the total number of persons ever imprisoned was 1.8 million including 595,000 African American men and 51,000 African American women.⁴² Since the implementation of the War on Drugs, the population skewed towards African American imprisonment. By 2001, the total number of persons ever imprisoned was 5.6 million, with 1.9 million African American men and 231,000 African American women in that population.⁴³

At the end of 2007, 2.4 million people were in federal, state, or local prisons.⁴⁴ African American males composed the largest incarcerated population with 556,900 (white males numbered 471,400).⁴⁵ African American women numbered 29,300.⁴⁶ United States incarceration rates for

Inequality in U.S. Inequality, 69 AM. SOC. REV. 151, 151 (2004).

³⁶ See Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 *Crime & Delinquency* 419 (1999).

³⁷ See Nunn, *supra* note 29, at 393 (noting that “[s]ince the declaration of the War on Drugs in 1982, prison populations have more than tripled.”).

³⁸ *Id.* at 154.

³⁹ Dorothy Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1007 (2001).

⁴⁰ *Id.* at 1007–08.

⁴¹ Western and Wildeman, *supra* note 8, at 227.

⁴² THOMAS C. BONCZAR, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, 1 (U.S. Dept. of Justice 2003), <http://www.ojp.gov/bjs/pub/pdf/piusp01.pdf>.

⁴³ *Id.*

⁴⁴ PRISONERS 2007, *supra* note 9, at 7.

⁴⁵ *Id.* at 3 (graphing the number of male prisoners under state or federal jurisdiction by categories of White, Black, Hispanic or Latino).

⁴⁶ *Id.* (graphing the number of female prisoners under state or federal jurisdiction by categories of White, Black, Hispanic or Latino).

2007 averaged 506 per 100,000.⁴⁷ The disproportionate nature of African American incarceration rates becomes more pronounced when understanding that African Americans are 12.9 percent of the U.S. population.⁴⁸ African American male prisons numbered 3,138 per 100,000 African American men. African American women numbered 150 per 100,000 African American women.⁴⁹ White male prisoners numbered 481 per 100,000 white males.⁵⁰ White female prisons numbered 50 per 100,000 white females.⁵¹ At particular points in the historic arc of the War on Drugs, African American men and women became the most incarcerated populations in the U.S. The 1991 Department of Justice Report, *Women in Prison*, noted that women who were most likely in prison were black, aged 25 to 34, unemployed at the time of arrest, high school graduates or holders of a GED with some college, and were never married.⁵² As the number of incarcerated African Americans declined from historic highs in the 1990s, the challenge and focus changed to life after prison, and reentry into family and community life.

II. REENTRY POLICY AND CHALLENGES

A. Sentencing Policy

Facets of reentry have changed since the implementation of the War on Drugs. The changes in sentencing philosophy directly influenced thousands of offenders facing reentry. Indeterminate sentencing received heavy criticism from critics of the left and right.⁵³ The left found that too

⁴⁷ BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS SUMMARY FINDINGS 1 (Jun. 30, 2008), <http://www.ojp.gov/bjs/prisons.htm>. “[T]here were an estimated 509 sentenced prisoners per 100,000 U.S. residents—up from 506 at yearend 2007.” *Id.*

⁴⁸ JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION: CENSUS BRIEF 2000, 1 (August 2001), <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>. “Census 2000 showed that the United States population on April 1, 2000 was 281.4 million. Of the total, 36.4 million, or 12.9 percent, reported Black or African American.” *Id.*

⁴⁹ PRISONS 2007, *supra* note 9, at 4.

Black male offenders had the highest imprisonment rate...of all racial groups, male or female. This was 6.5 times the imprisonment rate of white males and 2.5 times that of Hispanic males. Similarly, the black female imprisonment rate...was almost double the imprisonment rates for Hispanic (79 prisoners per 100,000) and 3 times the rate for white females (50 per 100,000).

⁵⁰ *Id.* (listing the prison rate for sentenced prisoners in the years 2000, 2006, and 2007).

⁵¹ *Id.* (charting the imprisonment rates for sentenced prisoners).

⁵² TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, WOMEN IN PRISON: SURVEY OF STATE PRISON INMATES, 1991, 2 (March 1994), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1073>. [hereinafter *WOMEN IN PRISON*].

⁵³ Jeremy Travis & Joan Petersilia, *Reentry Reconsidered: A New Look at an Old Question*, 47 *CRIME AND DELINQ.* 291, 294 (2001) (describing the characteristics of women in prison).

much judicial discretion distorted justice.⁵⁴ Critics from the right believed that indeterminate sentences were too low and wanted proportional punishment.⁵⁵ By 1998, seventeen states created sentencing commissions that designed sentencing grids that significantly restrained judicial discretion.⁵⁶ Mandatory minimum sentences were enacted in all fifty states.⁵⁷ Twenty-four states enacted three-strikes laws.⁵⁸ Forty states enacted truth in sentencing laws, requiring offenders serve a minimum of 50% of their sentence.⁵⁹ Some states required violent offenders to serve 85% of their sentence.⁶⁰

The change in sentencing policy meant that larger populations were sent to prison and serving longer sentences.⁶¹ The change also meant parole boards made fewer release decisions. The adoption of truth in sentencing statutes not only removed discretion from parole boards, but increased caseloads of parole offices.⁶² The nature of parole supervision shifted from a rehabilitation model to that of law enforcement.⁶³ The introduction of surveillance technology, including electronic monitoring, provided enhanced capacity to detect violations and increase parole revocations. In 1985, 70% of parolees successfully completed supervision; by 1997, the completion rate plummeted to 44%.⁶⁴ Prisons discharge thousands of offenders to supervision. Successful reentry and reintegration back into communities is not the norm.

Reentry is a difficult process for ex-offenders. States offer little to no

⁵⁴ *Id.* “Liberals critiqued indeterminate sentencing by judges and discretionary release decisions by parole boards as presenting opportunities for distortions of justice.” *Id.*

⁵⁵ *Id.* “The criticism from the right was equally fierce. The imposition of indeterminate sentences, with low minimum and high maximum prison terms, was criticized as a fraud on the public.”

⁵⁶ *Id.* “As of 1998, 17 states had created sentencing commissions, quasi-independent administrative bodies that have designed sentencing grids that significantly constrain judicial sentencing discretion . . .”

⁵⁷ *Id.* “Legislation creating mandatory minimum sentences has been enacted in all 50 states.” *Id.*

⁵⁸ *Id.* (noting that 24 states have lengthened prison terms for repeat offenders as a result of three-strikes laws).

⁵⁹ *Id.* at 294-95. “Forty states have enacted truth-in-sentencing laws requiring that violent offenders serve at least 50% of their sentences in prison. . . .” *Id.*

⁶⁰ *Id.* at 295 (recognizing that of the 40 states having truth-in-sentencing laws, 27 states and the District of Columbia require violent offenders to serve at least 85% of their sentences in prison).

⁶¹ See Nunn, *supra* note 29, at 399 (discussing how the “cumulative effect” of new sentencing policies from the War on Drugs has been an increase in the proportion of convicted drug dealers sentenced to prison and an increase in the length of their sentences).

⁶² See Travis & Petersilia, *supra* note 53, at 295. The widespread adoption of truth-in-sentencing statutes will make release by parole board decisions “a vestige of a bygone era.” *Id.*

⁶³ *Id.* at 298 (noting that recent surveys of parole officers have shown that the law enforcement function of parole has been prioritized, rather than the rehabilitative functions).

⁶⁴ *Id.* (finding that the rate of parole violations has “increased significantly over recent years.”).

assistance in the transition from prison to community.⁶⁵ Reentry programs generally contain substance abuse counseling, education, job readiness and access to community resources.⁶⁶ Offenders are given a small stipend from \$25 to \$200 dollars.⁶⁷ However, they are mostly left to fend for themselves, and return to the communities that became the initiator of their criminal behavior.

Offenders are released into communities with less treatment, fewer skills, less exposure to the work world, and less planning for transitioning from prison to community.⁶⁸ Offenders returning to neighborhoods are already facing economic disadvantage. A majority of prisoners are released into major metropolitan areas, which makes reintegration difficult.⁶⁹ Research has found that high rates of returning offenders destabilize communities. Todd Clear and Dina Rose indicate that high incarceration rates and return rates may disrupt a community's social network, affecting family formation, reducing informal social control of children and income to families, and lessening ties amongst residents.⁷⁰

B. Reentry and African American Women

Reentry for female offenders can be more difficult because of their particularized needs. Female offenders are a complex population who require gender based services and treatment. Female offenders have suffered from harsher social and economic circumstances than male offenders before being incarcerated. Only about forty percent of women reported that they were working prior to being incarcerated.⁷¹ Almost thirty percent of women offenders reported receiving welfare assistance prior to

⁶⁵ James Austin, *Prisoner Reentry: Current Trends, Practices and Issues*, 47 CRIME & DELINQ. 314, 326 (2001). "[I]n general, most inmates are released directly from the facility in which they are presently housed with no concerted effort to initiate a reentry process." *Id.*

⁶⁶ *Id.* (noting that the content of reentry programs "almost always" includes exposure to education, job readiness, substance abuse counseling, and information on resources available in the community from various agencies).

⁶⁷ *Id.* ("All inmates receive a minimal level of financial support that ranges from \$25 to \$200 plus clothing and bus fare to some location within the state.") *Id.*

⁶⁸ See Travis & Petersilia, *supra* note 53, at 300 (identifying the "inescapable conclusion" that the price society has paid for prison expansion is a decline in preparation for prisoners' return to the community).

⁶⁹ *Id.* (suggesting that release into disadvantaged neighborhoods can alter the social framework).

⁷⁰ *Id.* at 301 (extrapolating Todd Clear & Dina Rose, *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQ. 335 (2001) and stating that this practice can lead to higher crime rates and decrease social control in communities).

⁷¹ LAWRENCE A. GREENFIELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, WOMEN OFFENDERS 8 (1999), <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf> [hereinafter *Women Offenders*] (contrasting with the statistic that almost 60% of male inmates had fulltime employment before being arrested).

being arrested.⁷² Female offenders reported higher usage of drugs and alcohol during the time of their arrest than male offenders. Sixty- percent of female offenders admitted to using drugs prior to their offense, forty percent admitted using on the day of offense.⁷³ Forty-four percent of women offenders report being either physically or sexually abused, and 69% reported the abuse took place before the age of eighteen.⁷⁴

Reentry services for women must focus on elements that male offenders do not encounter. Physical and sexual abuse, along with the prevalence of drug and alcohol abuse make reintegration difficult unless services are available. African American women face greater challenges. African American female offenders are seven times more likely to be incarcerated over their lifetime than white women.⁷⁵ African American children are “seven and a half times more likely than white children” to have an incarcerated parent.⁷⁶ HIV rates for incarcerated African American women are higher than for white or Latino women.⁷⁷ The recidivism rate for women offenders averages forty-five percent.⁷⁸ Only eleven percent of women offenders were successfully discharged from parole.⁷⁹ The intersectionality of race, gender and offender/criminal background compounds reentry, and reintegration issues for African American women.

III. INTERSECTIONALITY AND AFRICAN AMERICAN WOMEN OFFENDERS

Kimberle Crenshaw identifies the unique, and often ignored, political and social stance that African American women endure as being neither white women nor African American men.⁸⁰ White feminist legal theory

⁷² *Id.* (distinguishing from the figure that under 8% of male inmates received welfare before incarceration).

⁷³ *Id.* at 9 (comparing with the statistic that 32% of male inmates reported using drugs during their commission of the crime).

⁷⁴ *Id.* at 8 (announcing that, in addition, 44% of women offenders reported sexual assault during their lives).

⁷⁵ *Id.* at 11. “The estimates further show that about 5 out of 1,000 white women, 36 out of 1,000 black women, and 15 out of 1,000 Hispanic women will be subjected to imprisonment during their lifetime.” *Id.*

⁷⁶ LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2008), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pptmc.pdf> [hereinafter PARENTS IN PRISON].

⁷⁷ WOMEN AND HIV/HEPATITIS FACT SHEET, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSN. OF NEW YORK 2 (2008), http://www.correctionalassociation.org/publications/download/wipp/factsheets/HIV_Hep_C_Fact_Sheet_2009_FINAL.pdf [hereinafter WOMEN AND HIV].

⁷⁸ Women Offenders, *supra* note 71, at 11. “Overall, about 45% of women for whom parole supervision was ended in 1996 were returned to prison or had absconded.” *Id.*

⁷⁹ *Id.* “In 1996, women accounted for about 11% of successful discharges from parole and 8% of unsuccessful parole terminations.” *Id.*

⁸⁰ See Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women and Feminist Legal*

creates women as white and African American women as anecdotal information.⁸¹ Angela Harris creates a more provocative theory that, under Catherine MacKinnon's dominance theory, African American women are white, only more so.⁸² Crenshaw uses intersectionality to aide in the identity of African American women who are neither white nor male. Crenshaw explicates the nexus of race and gender:

[T]he experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.⁸³

The praxis of intersectionality becomes more conflated by viewing the lives of African American women through the prism of incarceration and reentry.

Over 7.3 million persons are serving prison sentences or are under community supervision.⁸⁴ Race and gender do not serve as identifiers in serving offender populations. The current system subsumes thousands of African American women offenders into the prison population without consideration for the inimitable traits that make circumstances for African American women more difficult. The African American community has disproportional representation in particularly troubling areas of society that affect reentry: child welfare systems and HIV transmission rates.

African American children have become the face of the child welfare system. They are more likely than white or Latino children to have a parent who is incarcerated.⁸⁵ They are also more likely to be in foster care and remain in foster care longer than white or Latino children.⁸⁶

Theory, 11 CARDOZO WOMEN'S L.J. 303, 308 (2005). Nash explains the dearth of diversity in prior waves of feminist thought by stating that "[w]e currently inhabit a "post-feminist" or "third wave feminist" cultural moment. A moment that is ostensibly marked by multiculturalism, diversity, and racial and ethnic plurality. Nevertheless, the second-wave feminist critique remains a potent one as there continues to be a dearth of meaningful feminist scholarship that integrates and draws on the voices, narratives, and experiences of women of color. *Id.*

⁸¹ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 595 (1990) (addressing concerns of gender essentialism in the feminist theories of both Catharine MacKinnon and Robin West).

⁸² *Id.* at 593 (describing how MacKinnon recognizes the inherent faults of gender theories regarding race, yet still fails to address the implications of these faults).

⁸³ Crenshaw, *supra* note 14, at 1244.

⁸⁴ LAUREN GLAZE & THOMAS P. BONCZAR, PROBATION AND PAROLE IN THE UNITED STATES, 2007 STATISTICAL TABLES 1 (2008), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf> (detailing the number of incarcerated individuals and the corresponding percentages compared to the total United States population from 2000 to 2007).

⁸⁵ PARENTS IN PRISON, *supra* note 76, at 2 (breaking down the percentages of how likely children of different races have parents in jail).

⁸⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, AFRICAN AMERICAN CHILDREN IN FOSTER CARE:

AIDS has become the number one killer of African American women between the ages of 25 and 34.⁸⁷ Women who are incarcerated are exceptionally vulnerable to becoming HIV Positive due to their poverty and their time in jail.⁸⁸ Compounding the problem is a generation of African American men who are not present in the community to assist in child rearing and provide income for the home.⁸⁹ African American women have this extra burden that white and Latino women do not face. Incarceration effects employment, wages, community attachment, and other factors that bind a family to a community and to each other.⁹⁰

IV. AFRICAN AMERICAN OFFENDERS AND REENTRY ISSUES

A. African Americans and the Child Welfare System

African American children are overrepresented in most states' foster care systems. African American children make up less than fifteen percent of the children in the U.S. but represented twenty-seven percent of the children entering foster care and thirty-four percent of the children remaining in foster care.⁹¹ Thirty-three states cite poverty as the reason for children being placed in foster care.⁹² African Americans are four times more likely than other Americans to live in poverty.⁹³ Poverty leaves children vulnerable to abuse and neglect.⁹⁴ However, poverty alone does

ADDITIONAL HHS NEED TO HELP STATES REDUCE THE PROPORTION IN CARE, H.R. Rep. No. 07-816 (2007) [hereinafter GAO REPORT] (reporting to the Chairman of the Committee on Ways and Means about the affects that poverty has on African American children in foster care and potential strategies aimed at combating this problem).

⁸⁷ THE OFFICE OF MINORITY HEALTH, U.S. DEP'T OF HEALTH, HHS FACT SHEET MINORITY HEALTH DISPARITIES AT A GLANCE 2 (2007), <http://www.omhrc.gov/templates/content.aspx?ID=2139> (reporting on the high rate of disease and illness experienced by African Americans in comparison to other races as of December 2007).

⁸⁸ See Gloria J. Browne-Marshall, *To Be Female, Black, Incarcerated and Infected with HIV/AIDS: A Socio-legal Analysis*, 41 No. 1 CRIM. L. BULL. 3 (2005) (discussing the relationship between the rise in HIV Positive infections in Black women and the rise in the incarceration rate of Black women).

⁸⁹ See PRISONERS 2007, *supra* note 9, at 4 (showing the incarceration rates of individuals based on gender and race); see also Western & Wildeman, *supra* note 8, at 233 (detailing how mass incarceration not only affects men, but also the women and children left behind to cope with incarcerated partners and parents).

⁹⁰ See Roberts, *supra* note 5, at 1282. Roberts details how incarceration damages social networks of families its effects upon the community. *Id.*

⁹¹ GAO REPORT, *supra* note 86, at 7 (indicating the percentages of African American children in foster care).

⁹² *Id.* at 9 (showing the number of states that reported a correlation between high poverty rates and the disproportionate number of Black children entering foster care).

⁹³ *Id.* at 4 (discussing the correlation that exists between minorities and families living below the poverty level).

⁹⁴ See ROBERT WEXLER, *Take the Child and Run: Tales from the Age of AFSA*, 36 NEW ENG. L. REV. 129, 132 (2001). Wexler argues that poverty should not be confused with neglect. *Id.* He contends

not explain the large number of African American children in the foster care system.⁹⁵ Bias, cultural misunderstandings and distrust between child welfare decision makers and families also contribute to the removal of children.⁹⁶ Additionally, once children are removed from their homes, African American children are likely to stay in foster care longer than white or Latino children.⁹⁷

Child welfare agencies have problems assessing services such as substance abuse treatment and subsidized housing; contributing to longer stays for children when the ultimate goal is family reunification.⁹⁸ Once children are removed from their homes, it becomes harder for them to be reunified due to the passage of the Adoption and Safe Families Act (ASFA) of 1997.⁹⁹ The ASFA requires expedited timelines to place children in permanent homes through reunification, adoption or guardianship and terminating parental rights.¹⁰⁰ Prior to the passage of the ASFA, parents had up to eighteen months for reunification with their children.¹⁰¹ However, permanency hearings were reduced to twelve months to keep children from lingering in foster care.¹⁰² If children are in foster care for fifteen of the most recent twenty-two months, a petition to terminate parental rights must be filed.¹⁰³

African American children are the largest population of children with parents who are incarcerated. Of the 1.7 million children who have parents in custody, 767,400 are African American.¹⁰⁴ The average sentence female

that there are financial incentives for states to remove children from parents. The National Commission on Children found that children often are removed from their families "prematurely or unnecessarily" because federal aid formulas give states "a strong financial incentive" to do so rather than provide services to keep families together. *Id.* Indeed, state laws make the confusion of poverty with neglect almost inevitable, by "defining in" almost every poor family. *Id.*

⁹⁵ See ANTOINETTE GREENAWAY, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African American Women*, 17 NAT'L BLACK L. J. 247, 254 (2004) (discussing the many challenges that face African American parents in America today).

⁹⁶ See *id.* at 258 (noting that racial discrimination and unfair biases against African American women by governmental agencies affect their rights as parents).

⁹⁷ See *id.* at 254-55 (explaining the hurdles that African American mothers face when trying to be reunited with their children).

⁹⁸ See *id.* at 258 (stating the deficiencies that exist in the administration of ASFA).

⁹⁹ See generally Adoption and Safe Families Act, 42 U.S.C. § 675.

¹⁰⁰ See GAO REPORT, *supra* note 86, at 10 (noting the effects the enactment of ASFA had on adoption, guardianship and parental rights).

¹⁰¹ *Id.* at 11 (stating the requirements of ASFA).

¹⁰² *Id.* (examining the requirements of ASFA that require a permanency hearing no later than 12 months after the child enters foster care).

¹⁰³ *Id.* (showing the requirement that states must file a petition to terminate parental rights for children who have been in foster care for 15 of the most recent 22 months).

¹⁰⁴ PARENTS IN PRISON, *supra* note 76, at 2 (examining the number of African American parents in prison in 2007).

offenders serve exceeds the timelines for ASFA. Women have served an average sentence of 44 months for drug offenses and 54 months for property offenses.¹⁰⁵ Women who are incarcerated also face the continual threat of termination of their parental rights unless the children are placed with a spouse or relative.

Nakima Levy-Pounds documents how the vicious cycle of poverty, addiction and incarceration can lead formerly incarcerated mothers to permanently losing their children.

[M]isguided federal initiatives meant to facilitate the ‘war on drugs’ ensure that poor women and their children will remain in extreme poverty. These policy initiatives arguably expose lawmakers’ lack of understanding of the cycle of poverty and drug addiction, as lawmakers are often wealthy, highly educated, and insulated from systemic problems facing poor women and children. Once women with drug convictions are released from prison, they face systematic denial of access to public benefits such as cash grants, food stamps, and participation in public housing programs. For single mothers struggling to provide for their children, access to such benefits are critical and could mean the difference between stability and life on the streets for women and their children. As long as women continue to face perpetual punishment after serving time for drug convictions, they will continue to be at risk of becoming recidivists or relapsing into addiction.¹⁰⁶

Once African American mothers are sentenced to prison, the clock begins to run according to the ASFA guidelines.¹⁰⁷ The ASFA has failed in preventing children of color from languishing in the foster care system or losing their families. The ASFA has permanently severed ties of tenuous families when the mother fails reunification requirements and parental rights are severed.¹⁰⁸ The child then becomes a permanent ward of the state. Children of color who become long-term foster placements suffer

¹⁰⁵ WOMEN IN PRISON, *supra* note 52, at 4 (charting the median sentence length in months for state female prison inmates).

¹⁰⁶ Levy-Pounds, *supra* note 21, at 488-89.

¹⁰⁷ States are as aggressive as the ASFA in seeking to terminate the rights of incarcerated parents. See Tex. Fam. Code Ann. § 161.001(1)(Q) (2009) (stating that the court may order termination of parent-child relationship if the court finds by clear and convincing evidence that the parent has knowingly engaged in criminal conduct resulting in a conviction, has been incarcerated for more than two years, and it is deemed to be in the child’s best interest); see also Erica D. Benites, *In Defense of the Family: An Argument for Maintaining Parental Rights of Incarcerated Women in Texas*, 3 SCHOLAR 193, 196 (2001) (explaining the two year incarceration rule in the Texas Family Code regarding parental rights).

¹⁰⁸ See Wexler, *supra* note 94 at 129-30 (arguing that overzealous child welfare agencies remove children for reasons of poverty instead of neglect, that the foster care system is unsafe, and that ASFA has hurt other formally effective programs that were attempting to keep families together).

from what is termed "foster care drift."¹⁰⁹

B. Health and the African American Incarcerated

Women who are incarcerated and released have greater need for social service intervention. African American and Latino women are the predominant incarcerated population, while white women are the predominant probationary population.¹¹⁰ Incarcerated women admit to histories of sexual and physical abuse that trends above societal averages. Over half the women in state prisons admit to having been physically or sexually abused.¹¹¹ Sixty percent of women in state prisons admit to having abused drugs before being arrested.¹¹² Over thirty percent admit committing the criminal offense that led to their imprisonment to support their drug habit.¹¹³ In-prison treatment is not readily available. Federal funding earmarked for treatment in state prisons has not reached the offenders. Only ten percent of inmates surveyed (male and female) reported participating in professional substance abuse treatment since admission.¹¹⁴ Research shows that in-prison drug treatment coupled with treatment in the post-release period significantly reduces both drug use and recidivism.¹¹⁵

Beth Ritchie conducted in-depth interviews with incarcerated women of color from low-income communities about their needs upon reentry.¹¹⁶

¹⁰⁹ See Robert Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 639 (1999). Gordon explores the original intent of ASFA and how it failed to meet the basic needs of children languishing in foster care. *Id.*

Although ASFA's general principles make sense for children, its specific provisions fail to protect children's interests. In some instances, Congress appears to have been unable to see important distinctions among children. In other cases, Congress may have seen children's interests but preferred, notwithstanding its rhetoric, to favor certain parental needs or cultural ideologies. Whatever the causes of these failures, their effect on children is negative.

Id. at 657; see also Robert E. Lee & Michael T. Lynch, *Combating Foster Care Drift: An Ecosystemic Model for Neglect Cases*, 20 CONTEMP. FAM. THERAPY 351, 353 (1998). Lee states that when biological parents fail to engage in actions necessary to get their children back from foster care, all parties involved suffer from foster care drift. *Id.*

¹¹⁰ See WOMEN IN PRISON, *supra* note 52, at 2 (noting that a woman in state prisons in 1991 was most likely to be black, as blacks comprised 46% of state female prison inmates).

¹¹¹ *Id.* at 5 (stating that more than four in every ten women reported that they had been abused before entering prison).

¹¹² *Id.* at 7 (charting that 65.3% of state female prison inmates reported that they used drugs regularly).

¹¹³ *Id.* (noting that 23.9% of state female prison inmates reported that they committed their offense to get money to buy drugs).

¹¹⁴ See Travis & Petersilia, *supra* note 53, at 302 (stating that 10% of state inmates reported participating in substance abuse treatment since their admission into prison, down from 25% in 1991).

¹¹⁵ *Id.* at 303 (discussing that a significant body of literature supports the notion that in-prison drug treatment can, in conjunction with post-release treatment, significantly reduce further drug use).

¹¹⁶ See Beth E. Ritchie, *Challenges Incarcerated Face as They Return to Their Communities:*

Ritchie found that substance abuse treatment was one of the most significant needs for women returning to their communities from prison.¹¹⁷ Not only was the treatment needed but gender-specific treatment was a particular concern. Community based substance abuse treatment should also entail child care and protection from sexual harassment as components of their program to assist formerly incarcerated women and prevent recidivism and relapse.¹¹⁸

C. HIV Positive Status

The Department of Justice estimates that 2.4% of the incarcerated women in state and federal prisons are either HIV Positive or have AIDS.¹¹⁹ Florida has the largest state population of HIV Positive women.¹²⁰ The Department of Justice does not give a statistical analysis of African American women who are HIV Positive. African American women become invisible in the race and gender categorization although as a population they are the ones to suffer the greatest impact of HIV Positive diagnosis. The Center for Disease Control reports that 64 percent of the nearly 127,000 women diagnosed with HIV/AIDS were African American women.¹²¹ Over-representation of HIV Positive African American women is magnified in the prison setting. Texas is a salient example of the disproportionate rate of HIV status among African American women in state prisons. Of the HIV Positive women in prison, 22.8% were white, 72.4% were black, and 4.8% were Hispanic. It is a challenge for correctional facilities to provide healthcare for gender specific medical issues when they must also address the complex psychosocial issues such as depression, substance abuse, and prior physical and sexual abuse that impact the population.¹²² If correctional facilities fail to address the complicated issues of HIV Positive women, treatment after reentry becomes all the more critical.

Findings from Life History Interviews, 47 CRIME & DELINQ. 368, 371 (2001) (explaining how forty-two interviews were conducted to assess the needs of the incarcerated women when they return to their low-income communities).

¹¹⁷ *Id.* at 372.

¹¹⁸ *Id.*

¹¹⁹ LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, HIV IN PRISONS 2006 6 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp06.pdf>.

¹²⁰ *Id.* at 2. "Florida (371) reported the largest number of female HIV-positive inmates, followed by New York (350), and Texas (284)." *Id.*

¹²¹ CTR. OF DISEASE CONTROL, U.S. DEPT. OF HEALTH & HUMAN SERVICES, FACT SHEET: CDC HIV/AIDS FACTS 1 (Aug. 2009), <http://www.cdc.gov/hiv/topics/aa/resources/factsheets/pdf/aa.pdf>.

¹²² Michelle Onorato, M.D., *HIV Infection Amongst Incarcerated Women*, 4 HEPP NEWS 1, 1 (2001), available at <http://www.aegis.org/files/hepp/hepp2001-05.pdf>.

The stigma of HIV Positive status and incarceration makes reentry and reintegration a tenuous objective for this particular group of African American women. The immediate post-release period has been identified as involving a very high risk for mortality and few services are currently in place to ensure continuity of medical care on release.¹²³ The quality of life for HIV Positive African American women is only now being understood. There is a dearth of research on African American women living with HIV/AIDS. The few completed studies detail the notable challenges that HIV Positive African American women face. A substantial disparity exists in the availability of appropriate care, treatment and social support for HIV Positive African American women.¹²⁴ Formerly incarcerated HIV Positive African American women are particularly vulnerable because of their prior history of physical and sexual abuse, drug addiction, and poverty. Researchers Gant and Welch found a correlation between substance abuse, child sexual abuse, income, and medical adherence.¹²⁵ The presence of poverty, substance abuse, and unresolved sexual abuse are barriers preventing high rates of medical adherence needed to keep the virus under control.¹²⁶ Medical adherence, the regimen of consuming medication several times a day, not only prolongs life, but also adds to the quality of life. Reentry for formerly incarcerated HIV Positive women requires a multifaceted approach, combing the skills of the corrections community, health care providers, and social service agencies.

D. Laws Frustrating Reentry

The War on Drugs created a tidal wave of legislation meant to socially and legally ostracize drug offenders. Enhanced, determinate prison sentences did not satisfy the rabid response to demeaning drug users and offenders. Terminating avenues to public funding for welfare subsidies, education, and housing for persons with drug conviction became the mantra for Congress. This type of legislation became a collateral attack on African American women gaining freedom from prison by barring them from social and legal reintegration.

¹²³ Nina Harawa, M.P.H., Ph.D. & Adaora Adimora, M.D., M.P.H., *Incarceration, African Americans and HIV: Advancing the Research Agenda*, 100 J. OF NAT'L MED. ASSOC. 57, 60 (2008), available at <http://www.nmanet.org/images/uploads/Publications/OC5708.pdf>.

¹²⁴ Larry M. Gant & Leseliey A. Welch, *Voices Less Heard: HIV-Positive African American Women, Medication Adherence, Sexual Abuse and Self-Care*, 3 J. OF HIV/AIDS & SOC. SERVS. 67, 70 (2004).

¹²⁵ *Id.* at 81.

¹²⁶ *Id.* at 83.

African Americans have the highest poverty rates of any racial or ethnic group at twenty-four percent.¹²⁷ The average income for African American households is \$33,916, or 62 percent of the white median household income.¹²⁸ Poverty permeates nearly a quarter of the African American population; the same population that suffers from poor education, high unemployment, and high incarceration rates.¹²⁹ The drug offender status laws stigmatize a population seeking to participate in society and leave them little to no legitimate means for reintegration.

a. Public Assistance

Landmark welfare reform passed by the Clinton administration altered public assistance eligibility for drug offenders. Under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), drug offenders are denied eligibility for public assistance for life.¹³⁰ The Act reduces benefits if a drug offender is part of a family that receives public assistance.¹³¹ No other criminal class has legislation geared towards the denial of public benefits like drug offenders. The PRWORA has a disproportionate impact on African Americans, and African American women and children in particular. States can choose between three types of sanctions. Fifteen states utilize the lifetime ban.¹³² Eleven states have a partial ban or term limits on benefits.¹³³ Twelve states make benefits dependent on drug treatment.¹³⁴ The public assistance ban kept 35,000

¹²⁷ CARMEN DENAVAS-WALT ET. AL., ECONOMICS AND STATISTICS BUREAU, U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE U.S.: 2007 13 (Aug. 2008), <http://www.census.gov/prod/2008pubs/p60-235.pdf>.

¹²⁸ *Id.* at 6.

¹²⁹ See Western and Wildeman, *supra* note 8, at 223-26.

¹³⁰ 21 USCS § 862a. Denial of assistance and benefits for certain drug-related convictions. (a) In general. An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))) shall not be eligible for—

(1) assistance under any State program funded under part A of title IV of the Social Security Act [42 U.S.C.A. § 601 et seq.], or

(2) benefits under the food stamp program (as defined in section 3(l) of the Food Stamp Act of 1977) or any State program carried out under the Food Stamp Act of 1977 [7 U.S.C.A. § 2011 et seq.].

21 U.S.C. § 862(a).

¹³¹ *Id.* at (b)(1).

¹³² PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 3 (Feb. 2002), http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf (monitoring the implementation of a lifetime welfare ban in all fifty states); PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES, 2006 SUPPLEMENT 2 (Apr. 2006), <http://www.sentencingproject.org/doc/publications/9088smy.pdf>.

¹³³ *Id.*

¹³⁴ *Id.*

African American women from receiving benefits.¹³⁵ Predominantly, African American and Latino women are banned for life in seven states.¹³⁶ Reintegration becomes a herculean effort by denying public benefits such as food stamps. Mothers are not able to provide for the fundamental needs of their children, potentially creating a crisis for families and child welfare agencies.

b. Education

The War on Drugs demonizes drug offenders and Congress contributes to the demonization by systematically excising drug offenders from being able to participate in public benefit programs. The Higher Education Act bans financial aid for drug offenders.¹³⁷ Drug offenders are ineligible for federal financial aid for proscribed time periods.¹³⁸ Subsequent offenses can lead to a lifetime ban.¹³⁹ States have passed laws that bar offenders from obtaining professional licenses as well.¹⁴⁰ States have also created two criteria that negatively impact offenders and keep them from obtaining professional licenses—good moral character and a prior criminal conviction.¹⁴¹ The offender's criminal record in some jurisdictions imputes

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 20 U.S.C. § 1091(r)

Suspension of eligibility for drug offenses.

(1) A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance under this title shall not be eligible to receive any grant, loan, or work assistance under this title from the date of that conviction for the period of time specified in the following table:

If convicted of an offense involving: TABLE TO BE PUT IN LATER...

The possession of a controlled substance: Ineligibility period is:

First offense 1 year

Second offense 2 years

Third offense Indefinite.

The sale of a controlled substance: Ineligibility period is:

First offense 2 years

Second offense Indefinite.

Id.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Geneva Brown, *White Man's Justice, Black Man's Grief: Voting, Felon Disenfranchisement and the Failure of the Social Contract*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 287, 301-02 (2008) (noting the difficulties associated with obtaining training and education after re-entry).

¹⁴¹ See Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to Ex-Felon's Employment Opportunities*, 71 N.DAK. L. REV. 187, 195 (1995) (discussing classification of state occupational licensing laws and how "criminal convictions" and "good moral character" statutes pose the greatest obstacle to the ex-felon's attempt to obtain a license).

bad moral character.¹⁴² The denial of a professional license keeps African American women out of various avenues of employment, such as cosmetology—a field dominated by African American women. The federal government uses the War on Drugs and subsequent legislation as a guise to continue to punish offenders who have already served their sentences. Denying the right to seek an education is tantamount to a life sentence of poverty and unemployment.

c. Housing

Housing discrimination is sanctioned by the federal government against returning offenders under the guise of protecting the community.¹⁴³ Drug offenders are at the mercy of public housing agencies that are allowed access to criminal records of housing applicants.¹⁴⁴ The presence of a drug offender can jeopardize a housing grant. Additionally, if an offender's family lives in publicly subsidized housing they risk being evicted.¹⁴⁵ An offender who chooses not to place their family at risk faces homeless shelters as the only available housing option.¹⁴⁶ African American women who are drug offenders are placed in the precarious position of needing to secure safe, affordable housing, but have no access to public housing. Many drug offenders seeking reentry into their communities are mothers seeking to reestablish ties to their children. The presence of the returning mother could destabilize her child's life if housing becomes an issue.

¹⁴² *Id.* at 196 (providing an example of how, in Ohio, a criminal conviction automatically barred an applicant from obtaining a dance hall license when a court determined evidence of good moral character was not relevant because the applicant had two felony convictions and the licensing authority was simply following a rule that all felons are denied licenses).

¹⁴³ See generally Public Health and Welfare Act, 42 U.S.C. § 1437d(q).

¹⁴⁴ 42 U.S.C. § 1437d(q)(1)(A) (providing in relevant part that: "...the National Crime Information Center, police departments, and other law enforcement agencies shall, upon request, provide information to public housing agencies regarding the criminal conviction records of adult applicants for, or tenants or, covered housing assistance for purposes of applicant screening, lease enforcement, and eviction.").

¹⁴⁵ § 1437d(q)(1)(B) (providing in relevant part: "A public housing agency may make a request under subparagraph (A) for information regarding applicants for, or tenants of, housing that is provided project-based assistance under section 1437f of this title only if the housing is located within the jurisdiction of the agency and the owner of such housing has requested that the agency obtain such information on behalf of the owner. Upon such a request by the owner, the agency shall make a request under subparagraph (A) for the information. The agency may not make such information available to the owner but shall perform determinations for the owner regarding screening, lease enforcement, and eviction based on criteria supplied by the owner.").

¹⁴⁶ See Jeremy Travis et al., *From Prison to Home: The Dimensions and Consequences of Prison Reentry*, URBAN INSTITUTE 1, 35-36 (June 1, 2001), available at http://www.urban.org/UploadedPDF/from_prison_to_home.pdf. The authors found that "[i]n California, the Department of Corrections reports that at any given time 10 percent of the state's parolees are homeless. This rate is significantly higher in major urban areas such as San Francisco and Los Angeles, where as many as 30 to 50 percent of parolees are estimated to be homeless." *Id.* at 36.

V. PROPOSALS

African American women offenders face collateral attacks on their motherhood, on their ability to secure housing and employment, and on their ability to reintegrate. Programs must have a race and gender focus that confronts the intersectionality of racism and sexism that pervades the lives of African American women offenders.

A. Preserving families

Incarcerated mothers face the trauma of being separated from their children. African American mothers more often face the greater trauma of being the sole support for their children. Additionally, incarceration takes an emotional and financial toll on the family. The ASFA is an ever-present danger that may cause mothers to permanently lose custody of their children. The emotional toll on African American children is just as profound. Attachments, particularly at younger ages, are critical, yet the imprisonment of mothers often means that their children will lose the benefit of the constant, uninterrupted presence of a parent.¹⁴⁷ Reentry plans that incorporate parental roles for incarcerated mothers and that assist mothers in community transition benefits the child, the parent, and society. Parenting classes, treatment regimens for parents, and educational and vocational training should be part of the reentry equation.¹⁴⁸

B. Creating Community Care

Before releasing offenders into communities that may not be receptive to their presence,¹⁴⁹ it is incumbent that correctional facilities assess their needs and services. African American women face greater obstacles in obtaining housing, employment, and healthcare. Treatment needs that are

¹⁴⁷ ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE AND POLITICS* 55 (2008) (discussing how the lack of consistency and continuity in the mother-child relationship, which is essential for the child's normal development during different life stages, can have a lasting impact on the child's ability to bond with others).

¹⁴⁸ *Id.* at 59 (recognizing the substantial obstacles women face when released from prison, including fighting for child custody, ability to provide financial support and housing to children, lack of vocational and educational training, negative effects of welfare laws on ability to access benefits and adoption laws that reduce the amount of time parents have to reunite with their children before permanently losing custody).

¹⁴⁹ *Id.* at 61. Thompson notes that Black women are not as readily accepted back into communities as Black men. The numbers of Black women who are incarcerated are low compared to the overall population. Incarcerated Black women fall outside the norm or mainstream. Anti-social black male lawbreakers function within mainstream gender roles. Incarcerated black women do not have the same acceptance or understanding. *Id.*

not addressed in the correctional setting will need to be addressed in the community. State community corrections offices need programs that address the myriad of needs of subgroups. HIV Positive mothers who need appropriate healthcare and facilities to help transition into the parenting role is only one example of the intricacy of African American reentry needs.¹⁵⁰ Reentry needs to tackle more than the social and economic needs of offenders. Treatment is a fundamental reentry component and should address the issues of drug addiction, as well as the physical and sexual abuse history of many offenders.

C. Overhaul Regressive Legislation

A philosophical shift needs to occur in the federal government in its perceptions of drug offender sanctions. The social construction that drug offenders are “public enemy number one” has created an oppressive environment where ex-drug offenders are expected to rehabilitate and reintegrate. Congress needs to repeal the legislation that singles out drug offenders for extra sanctions. Denying public housing, food stamps, and public benefits and restricting financial aid burdens ex-offenders during the reentry process. Stripping African American women of the opportunity to house themselves, educate themselves, and obtain income becomes a profound deprivation of basic rights of citizenship.¹⁵¹ Drug offenders have life-time sanctions that murderers and rapists do not suffer.

CONCLUSION

African American women offenders face seemingly insurmountable problems in attempting to reintegrate into their communities. They face the intersectionality of race, gender, poverty, and incarceration. The expectations are offenders, upon release from prison, are to adjust to the demands of mainstream society and not recidivate. Race, gender, poverty, and the War on Drugs make mainstream demands difficult to meet. The War on Drugs created collateral consequences that reverberate throughout

¹⁵⁰ See Browne-Marshall, *supra* note 88, at 5. The study details the need for more transitional HIV case-management programs, which have been successfully implemented in a number of facilities, but are still urgently needed. *Id.*

¹⁵¹ I would be remiss if I did not mention the rate of voter disenfranchisement disproportionately affects African American women. See FELONY DISENFRANCHISEMENT RATES FOR WOMEN, SENTENCING PROJECT 1 (2001), http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cfd_bs_women.pdf. The Sentencing project found an estimated 279,800 African American women – 1 in 50 – cannot vote, an increase of nearly 14% since 2000. This rate of disenfranchisement is nearly four times the rate for non-African American women. *Id.*

the African American community. African American children in foster care became one of the unintended targets. Family reunification becomes a ticking time bomb for formerly incarcerated mothers hoping not to have their parental rights terminated. The draconian laws sanctioning drug offenders after imprisonment becomes another factor that makes reentry for African American women arduous.

After all the jacks are in their boxes
And the clowns have all gone to bed
You can hear happiness staggering on down the street
Footprints dressed in red
And the wind whispers Mary

A broom is drearily sweeping
Up the broken pieces of yesterday's life
Somewhere a queen is weeping
Somewhere a king has no wife
And the wind, it cries Mary

The traffic lights they turn up blue tomorrow
And shine their emptiness down on my bed
The tiny island sags downstream
'Cause the life that lived is, is dead
And the wind screams Mary

Will the wind ever remember
The names it has blown in the past
And with his crutch, it's old age, and it's wisdom
It whispers no, this will be the last
And the wind cries Mary¹⁵²

¹⁵² THE JIMI HENDRIX EXPERIENCE, *The Wind Cries Mary*, on ARE YOU EXPERIENCED (Track Records 1967).