

AT THE INTERSECTION OF INJUSTICE: EXPERIENCES OF AFRICAN AMERICAN WOMEN IN CRIME AND SENTENCING

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Part A: What is Past is Prologue	2
I. Introduction	2
II. The Colonial Period	10
III. The Status of African American Women in the Nine- teenth Century	14
A. Antebellum America	14
B. Slave Criminality	16
C. Postbellum America	20
D. Crime as Resistance	22
IV. African American Women's Experiences in Penal Institutions	25
Part B: Images, Ideology, and African American Women's Criminality	31
Part C: Punishment in the Contemporary 20th Century: Mandatory Sentencing, the "Drug War," and African American Women	36
I. Theories of Sentencing	36
A. Indeterminate Sentencing	36

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This paper is dedicated to my nieces, Heiress, Facia, and Kamilah, for the joy and purpose that they bring to my life. This paper is also dedicated to all of the "Angela Thompsons" who desire fairness and freedom in their lives.

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B. Determinate Sentencing 37

II. Impact of Sentencing Reform on Women 41

III. Angela Thompson, the Eighth Amendment, and
Proportionality Analysis 45

 A. Proportionality Analysis by the Supreme Court 46

 B. Proportionality Analysis by the State of New York 53

 1. Gravity of the Offense 53

 2. Character of the Offender 62

 3. Rara Avis: *the "Rare Case" Exception* 68

Part D: Conclusion 71

In the context of the Negro problem neither whites nor blacks, for excellent reasons of their own, have the faintest desire to look back; but I think that the past is all that makes the present coherent, and further, that the past will remain horrible for exactly as long as we refuse to assess it honestly.¹

PART A: WHAT IS PAST IS PROLOGUE

I. INTRODUCTION

*If we know, then we must fight for your life
as though it were our own—which it is—²*

The interrelationship between African American women offenders, the United States criminal justice system, and the conditions of the larger community of African Americans in United States society has rarely been a subject of concern. Twenty-five years ago, however, the nation was riveted by what became one of the most historic political trials in America: the trial of Angela Yvonne Davis for her alleged role in an attempt to gain freedom for "The Soledad Brothers."³ The trial

1. James Baldwin, *Me and My House . . .*, HARPER'S MAGAZINE, Nov. 1955, at 54, *reprinted in Notes of a Native Son*, in THE PRICE OF THE TICKET: COLLECTED NONFICTION, 1948-1985, at 127 (1985).

2. James Baldwin, *An Open Letter to My Sister, Angela Davis*, in IF THEY COME IN THE MORNING: VOICES OF RESISTANCE 13, 18 (Angela Y. Davis ed., 1971).

3. 1 BLACK WOMEN IN AMERICA: AN HISTORICAL ENCYCLOPEDIA 304, 306 (Darlene Clark Hine, Elsa Barkley Brown, Rosalyn Terborg-Penn, eds. 1993).

Angela Davis became active in the cause of the "Soledad Brothers." One of the Brothers, George Jackson, was killed by guards for allegedly trying to escape; all charges against him, however, had been dropped. George's brother, Jonathan, went to the Marin County Courthouse where a San Quentin inmate was being tried for the stabbing of a prisoner. Jonathan took hostages and tried to escape. During the escape, Jackson, two prisoners, and a judge were killed. Jackson took guns from Davis's house to facilitate the rescue attempt. In August 1970, Davis was charged with murder, kidnapping and conspiracy. After a federal warrant was issued for her arrest, Davis, then professor of philosophy at UCLA, went underground. On August 18,

was significant for it provided a rare instance which revealed the experiences of African American women within the criminal justice system.⁴ Describing her circumstances, Davis stated that "as the accused in this case, I find myself at an enormous disadvantage. As a *Black woman*, I must view my own case in the historical framework of the fate which has usually been reserved for my people in America's halls of justice."⁵ Although Angela Davis' case became a *cause celebre*,⁶ many incarcerated African American women preceded her, unknown, unheralded and undefended. In this respect, Angela C. Thompson provides the more typical situation.

In 1988, Angela C. Thompson, an African American woman, was seventeen years old when she was sentenced to a mandatory term of fifteen years to life imprisonment for the sale of "crack" cocaine to an undercover police officer.⁷ Thompson had no other criminal activity on her record at the time of her arrest. The sale took place at her uncle's home, who, according to the dissenting opinion in the New York Court of Appeals,⁸ was "running a major drug-selling operation in Harlem."⁹ Selling the crack cocaine to the police agent qualified as an A-1 felony because it weighed 2.3 grams.¹⁰ If the crack weighed one-tenth of an ounce less,¹¹ the sale would have constitut-

1970, she was placed on the FBI's ten-most-wanted list. Davis was found in New York two months later, extradited to California, and put in jail. After her capture, a "Free Angela" movement developed. On February 23, 1972, Angela was released on \$102,000 bail. She was ultimately acquitted of all charges. The National Alliance against Racism and Political Repression, with Davis as its co-chair, was formed by Davis' defense committee for the purpose of defending political prisoners, the majority being blacks and Hispanics. Presently a tenured professor with the History of Consciousness Department at the University of California-Santa Cruz, Davis has remained politically active through her writings and lectures. Her books include, *ANGELA DAVIS: AN AUTOBIOGRAPHY* (1988), *IF THEY COME IN THE MORNING* (Angela Davis ed., 1971), *WOMEN, CULTURE, AND POLITICS* (1989), and *WOMEN, RACE, AND CLASS* (1981). Kenneth Auchincloss, *The Angela Davis Case*, *NEWSWEEK*, Oct. 26, 1970, at 18; Beverly Beyette, *Angela Davis Now: On a Quiet Street in Oakland, the Former Radical Activist Has Settled in But Not Settled Down*, *L.A. TIMES*, Mar. 8, 1989, § 5 (View), at 1.

4. See generally, Beyette, *supra* note 3, at 1 (describing how Davis compares her struggles as an African American woman in the American criminal justice system to the struggle of Winnie Mandela against apartheid in South Africa).

5. *DAVIS, IF THEY COME IN THE MORNING*, *supra* note 3, at 240 (emphasis added).

6. Auchincloss, *supra* note 3, at 18.

7. *New York v. Thompson*, 633 N.E.2d 1074 (N.Y. 1994), *rev'g* *New York v. Thompson*, 596 N.Y.S.2d 421 (N.Y. App. Div. 1993). See generally, Nat Hentoff, *15 Years for a 17-Year-Old's First Drug Sale*, *WASH. POST*, Sept. 10, 1994, at A23 (discussing the New York legislature's need to keep strict drug sentencing minimums laid out in the Rockefeller drug laws because of an increased fear in the public of drug-related crimes); Gary Spencer, *Rare Case' Exception Before Court of Appeals*, *N. Y. L. J.*, Feb. 7, 1994, at 1 (discussing the impact of two New York trial case decisions where judges refused to impose the harsh minimum sentence required by the Rockefeller drug laws, stating that their decisions were "rare case" exceptions).

8. The New York Court of Appeals is the highest court in New York.

9. *Thompson*, 633 N.E.2d at 1081.

10. *N.Y. PENAL LAW* §220.41, §220.43 (McKinney 1989).

11. *Thompson*, 633 N.E.2d at 1082.

ed an A-2 felony with a mandatory minimum sentence of three years, compared to the fifteen year minimum of an A-1 felony.¹²

The trial judge, Juanita Bing-Newton, ruled that the mandatory minimum sentence was cruel and unusual punishment under both the Eighth Amendment of the United States and the New York State Constitutions.¹³ Accordingly, she sentenced Angela Thompson to eight years to life imprisonment.¹⁴ In determining that "the draconian sentence urged by the State, as applied to this defendant under these circumstances would constitute cruel and inhuman punishment,"¹⁵ the trial court focused on several factors, including Angela Thompson's age, lack of criminal history and the pretrial plea offer of three years to life.¹⁶ The presentence report also revealed that Angela Thompson was the single mother of a young son; that Thompson's mother had died at the age of twenty-seven; and that by the age of thirteen, Thompson had lived with various relatives until moving in with an aunt in Queens, New York.¹⁷

On appeal to the Appellate Division of the New York Supreme Court, a majority of the court upheld the sentence of the trial judge.¹⁸ The Court of Appeals of New York also adopted the trial court's sentence and found that, despite a long-term investigation with numerous "buys" made at the location, Angela Thompson was not a participant in any sales other than the transaction for which she was convicted.¹⁹ That court further adopted the trial court's finding that the drug offense was inconsistent with Thompson's life, stating that "[t]he appellant's participation in the exchange appears to have been made at the behest of her uncle, co-defendant Norman Little She had no prior criminal record whatsoever prior to her involvement in this case."²⁰

The State of New York cross-appealed the lower sentence. The New York Court of Appeals overturned the lower courts' decisions and resented Angela Thompson to the mandatory minimum of fifteen years to life imprisonment. Judge Levine, writing for the 4-2 majority

12. *Id.*

13. *Thompson*, 596 N.Y.S.2d at 422 (invoking the "rare case" exception).

14. *Id.* (citing many factors for a reduced sentence, such as appellant's age, lack of criminal history and a pre-trial offer of three years minimum sentencing).

15. *Id.* (citing U.S. CONST. amend. VIII and N.Y. CONST. art. I, § 5).

16. *Id.* at 423. New York State is one of the few jurisdictions that would even try someone Thompson's age as an adult under these circumstances. In most states and in the federal system, she would be considered a youth.

17. *Id.* at 422.

18. *Thompson*, 596 N.Y.S.2d 421 (N.Y. App. Div. 1993).

19. *Id.* at 422.

20. *Id.*

on the Court of Appeals, reversed the Supreme Court.²¹ Judge Levine held that imposition of the mandatory minimum sentence of fifteen years to life on the defendant, who was seventeen years old at the time of the crime, did not constitute cruel and unusual punishment.²² Angela Thompson now serves a potential lifetime sentence for a minor drug offense, and has become one more casualty in the nation's war on drugs.

Angela Davis observed over twenty years ago that "sufficient attention has not been devoted to women in prison."²³ This need remains urgent and largely unfulfilled, particularly with regard to African American women. Although the American Correctional Association's (ACA) national survey of imprisoned women in the United States found the majority to be young, women of color, and single mothers²⁴ recent studies have produced important research about women in crime and punishment, but have virtually ignored the experiences of African American women.²⁵ Similarly, research in African American criminality has focused almost exclusively on males.²⁶ This is a stark omission considering that African American women have been disproportionately incarcerated relative to their numbers in the overall population. African American women represent over forty percent of the women in United States federal prisons.²⁷ This statistic is alarming given that the *total* African

21. *New York v. Thompson*, 633 N.E.2d 1074 (N.Y. 1994).

22. *Id.* at 1079.

23. DAVIS, IF THEY COME IN THE MORNING, *supra* note 3, at 109.

Former NOW President Aileen Hernandez recalled her January 1971 visit with Angela Davis in the Marin County jail after NOW adopted a statement supporting her right to a fair trial: "We did not talk about her case . . . [S]he talked about the sexist conditions in the jail—the double standard for male and female prisoners. And then the brief visit was over." Aileen C. Hernandez, *Introduction* to MARY TIMOTHY, *JURY WOMAN: BY THE FOREPERSON OF THE ANGELA DAVIS JURY* at ix (1974).

24. AMERICAN CORRECTIONAL ASSOCIATION, *THE FEMALE OFFENDER: WHAT DOES THE FUTURE HOLD?* 47-50 (1990).

25. MICHAEL TONRY, *Preface*, to *MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA* ix (1995). According to Tonry:

The rationale for focusing on men is slightly different. Racial disproportions are about as bad in women's prisons as in men's. Like men, about half of female prisoners are black. However, women make up only six to seven percent of the total number of prisoners. Because one of [his] central arguments is that by removing so many young black men from their families and communities, crime control policies are undermining efforts to ameliorate the conditions of life of the black urban underclass, the focus on black men is necessary. The story of black women as offenders and as prisoners is important, but it is a different story.

Id.

26. *Id.*

27. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991*, at 636 [hereinafter *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS*] (Table 6.97—Type of Commitment Offense Among Federal Prison Inmates by Sex and Race) (Timothy J. Flanagan & Kathleen Maguire, eds., 1992). In 1992, African American women comprised 46%

American population comprises but a mere twelve percent of the entire U.S. population.²⁸

In large measure, the dearth of information and analysis of African American women's criminality is attributable to dualistic approaches to social issues, in which relevant categories have been deemed to be race and/or ethnicity, and gender. This has resulted in the lack of empirical data about women of color, including African American women, in nearly all areas of social and scholarly inquiry.²⁹ With respect to criminology, the data historically has obscured information

of women in local jails. See LAWRENCE A. GREENFELD & STEPHANIE MINOR-HARPER, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON, SPECIAL REPORT, 2 (Table 1—Characteristics of State Prison Inmates, By Sex, 1986 and 1979) (1991) (stating that in 1986, white women comprised 40% of women in state prison and Hispanic women comprised 13% of women in state prison); see also TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN IN JAIL, SPECIAL REPORT 3 (Table 1—Characteristics of Jail Inmates, By Sex, 1989 and 1983) (1992) (stating that in 1989, white women comprised 38% of women in local jails and Hispanic women comprised 16% of women in local jails).

28. Of course, the purpose of this article is not to minimize the magnitude of problems of incarcerated African American men, whose actual numbers are far greater than those of incarcerated African American women. See MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990) [hereinafter THE SENTENCING PROJECT] (stating that throughout the United States, nearly one in four black men (23%), between the ages of 20 and 29, is currently under some form of criminal restraint—prison, jail, probation or parole). Although they constitute only 6% of the national population, African American men comprise 47% of the U.S. prison population. According to the National Center on Institutions and Alternatives, in Washington, DC and Baltimore, MD, 42% to 65% of black males 18-35 years old were under criminal justice system control, respectively. *Id.* "According to a study prepared by the Sentencing Project, the black male rate of incarceration is 3,109 per 10,000, considerably higher than the rate of 729 per 10,000 in South Africa." The New York State Judicial Commission on Minorities, "[t]he 'Williams Commission' found that although people of color comprise only 22% of the state's overall population, the prison population in New York State is 82% black and Hispanic." Diane R. Gatewood, *Number of Imprisoned Black Males is a Concern of Black Women Lawyers*, N. Y. L. J., May 1, 1992, at S-9.

Rather, the point is that while African American women's representation in U.S. prisons and jails has been exceedingly high, minor attention has been given to their ever-increasing concerns. Professor Judy Scales-Trent states the case well:

I have a long-standing interest in legal and policy issues facing African-American women. Are there issues which are invisible because these women are invisible? The burgeoning legal literature about black women shows that the issues are indeed there, but they have been hidden, as the group too has been hidden—too unimportant to see, not worthy of study.

Judy Scales-Trent, *Using Literature in Law School: The Importance of Reading and Telling Stories*, 7 BERKELEY WOMEN'S L.J. 90, 90-91 (1992).

29. See, e.g., Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 10-11 (1989) (discussing the confusion and disagreement regarding African American women's status as "blacks" or as "women" for purposes of the Civil Rights Act protection, and calling for a separate category of "black woman" in order to recognize the unique civil rights concerns of black women); see also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (stating the need to address the experiences of black women separate from black men and white women); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (addressing the need to avoid gender essentialism, the process of classifying all women's experiences as one).

specifically about African American women's experiences. The Uniform Crime Reports, for example, gives information on arrest rates for African Americans and arrest rates for women but does not give information on African American women. Information is available as to the number of black and white females in state prison, but information is lacking as to the offenses committed by these women and any prior sentences served by them as well as information concerning their socioeconomic and employment status.³⁰

In contemporary times, as in the past, poverty is the major correlative in African American women's involvement in criminality.³¹ Relatedly, and particularly characteristic of the modern era, state and federal emphasis on mandatory and guideline sentencing schemes, coupled with the nation's "war on drugs," has resulted in a substantial increase in African American women's incarceration.³² Women are much more likely than men to be serving sentences for drug offenses and other non-violent crimes with economic motives. In 1991, almost sixty-four percent of females in federal institutions were serving sentences for a drug-related offense.³³ Property offenses were the second most common offenses committed by women.³⁴

Moreover, the number of women in state and federal prison more than tripled from 1980 to 1990, from 12,331 to 40,484.³⁵ During the past two decades, the female prison population grew by over 700%,

30. Diane K. Lewis, *Black Women Offenders and Criminal Justice: Some Theoretical Considerations*, in *COMPARING FEMALE AND MALE OFFENDERS 89-90* (Marguerite Q. Warren ed., 1981).

31. TRACY SNELL, *WOMEN IN PRISON 1991 2* (1994) (noting that women in state prisons, in 1991 were more likely to be black (46%), young (50% ages 25 to 34), and unemployed at the time of arrest (53%)). See U.S. BUREAU OF THE CENSUS, *CURRENT POPULATION REPORTS, SERIES, P60-185, POVERTY IN THE UNITED STATES: 1992*, at 1 (Table 1: Number, Poverty Rate, and Standard Errors of Persons, Families, and Unrelated Individuals Below the Poverty Level: 1992 and 1991), 147 (Table 23- Poverty Threshold, By Size of Family and Number of Related Children, 1992) (1993) (stating that in 1992, nearly 40 million people lived under the official poverty level, which is \$9,137 for a family of two, \$11,186 for a family of three and \$14,335 for a family of four. Although two-thirds of the poor are white Americans, the poverty rates in the African American community are the highest in the nation, at thirty-three and one-third percent. By comparison, the national average is about fifteen and one-half percent.). See also Marguerite Q. Warren, *Gender Comparisons in Crime and Delinquency*, in *COMPARING FEMALE AND MALE OFFENDERS 11* (Marguerite Q. Warren ed., 1981).

32. Neil Steinberg, *The Law of Unintended Consequences*, *ROLLING STONE*, May 5, 1994, reprinted in *CRIMINAL SENTENCING 44-45* (Robert Emmet Long ed., 1995) (discussing that the effect of mandatory sentencing, specifically in relation to drug offenses, has been to divide offenders along racial lines, with African American offenders serving much longer sentences than white offenders).

33. Sue Klein, U.S. Dep't of Justice, *A Profile of Female Offenders in the Federal Bureau of Prisons*, *FED. PRISONS J.* Spring 1992, at 33-34.

34. *Id.*

35. *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS*, *supra* note 27, at 636.

while the male prison population grew by less than 400%.³⁶ In New York alone, from 1982 to 1992, the number of women prisoners increased from 772³⁷ to 2501³⁸—a 324% increase.

Angela Thompson's case is paradigmatic of the present situation of many African American women in the United States criminal justice system. Viewed in light of the historic abuses of indeterminate sentencing schemes,³⁹ however, the fundamental issue to be addressed is whether the modern drug laws, in mandating life imprisonment and lifetime parole, operate disparately in communities of color and/or prescribe sentences so disproportionately severe as to constitute cruel and unusual punishment in violation of constitutional limitations.⁴⁰

This article will examine the modern rendering of "just deserts theory"⁴¹ and analyze the Eighth Amendment as a mandate for proportionate punishment, with particular attention to the lives of African American women. Further, this article will examine the complex and often contradictory legal and societal impulses which have sought to diminish African American women's life chances, by denying them access to necessary societal resources and constructing them as unworthy and deserving of enhanced criminal punishment.⁴²

36. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 27, at 636.

37. AMERICAN CORRECTIONAL ASSOCIATION, DIRECTORY OF JUVENILE AND ADULT CORRECTIONAL DEP'TS, INSTITUTIONS, AGENCIES AND PAROLING AUTHORITIES xii (Diana N. Travisono ed., 43d ed. 1983).

38. AMERICAN CORRECTIONAL ASSOCIATION, DIRECTORY OF NATIONAL JAIL AND ADULT DETENTION 270 (6th ed. 1993).

39. ROBERT EMMET LONG, CRIMINAL SENTENCING 40 (Robert Emmet Long ed., 1995) (stating the often cited argument that indeterminate sentences allow criminals to serve minimum prison sentences and then, once released, repeat their crimes).

40. Steinberg, *supra* note 32, at 44-45.

41. "Just deserts theory" is the theory that greater weight should be placed on the severity of the crime rather than on background characteristics of the person accused. Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173 (1995).

42. Professor Dorothy Roberts has provided excellent writings in this area, with particular focus on the criminalization of African American women for drug use during pregnancy and other aspects of devaluation and criminalization of African American motherhood. Professor Roberts' writings have focused primarily on equal protection (Fourteenth Amendment) and privacy (Fourteenth Amendment) analysis regarding the circumstances of African American women whose drug use reinforces white devaluation of them and triggers their disparate treatment within the criminal law. While the issues addressed in this article are amenable to disparate treatment/equal protection analysis, the article's focus on the broader circumstances of African American women's excessive punishment (for all levels of drug involvement) which necessitates constitutional analysis under the Eighth Amendment. In this manner, Eighth Amendment analysis requires examination of the qualitative differences in African American women's punishment that give rise to disparate treatment. See Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945 (1993) (converging two interests of the law: the racial construction of crime and the use of reproduction as an instrument of punishment); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993) (probing the historical relationship between motherhood and crime, and suggesting societal reasons for this relationship); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to*

It also will examine their resistance in opposition to negative cultural images, biased laws and legitimated cruelty.

The article will survey African American women's experiences in crime and punishment during three major periods: (1) the Colonial Period; (2) the Nineteenth Century; and (3) the Present Day. In Part A, the article begins with an analysis of African American women's early involvement in the United States criminal justice system. This section also examines the legal and social construction of enslaved persons' putative criminality and their opposition to subordination. An historical-social perspective is essential for understanding the present response to African American women offenders within the criminal justice system. This section also reveals the means in which prevailing ideologies historically have justified unequal and harsh treatment of African American women within correctional systems. Part B provides an analysis of the origins of negative cultural images of African American women. These images have been responsible for limiting their participation throughout American society and often leading to their increased participation in criminal activity. Part C shifts to an analysis of African American women offenders' present position in the criminal justice system and considers the continuing effects of negative social stereotypes and social disadvantages within the context of sentencing reform and Eighth Amendment principles. The examination of these issues focuses on African American women's experiences under the New York mandatory drug sentencing schemes, which exemplify modern sentencing reform in state and federal government.⁴³

The article argues that the progression toward mandatory sentencing not only perpetuates the historically devalued status of African American women, construing them as undeserving of social benefits and as intrinsically incorrigible, but also metes out disparate and unconstitutionally disproportionate sentences in violation of the Eighth Amendment.⁴⁴ The article will analyze the Angela Thompson

Privacy, 104 HARV. L. REV. 1419 (1991) (arguing that punishing black women for maternal substance abuse is wrong because these women historically have come under the greatest weight of societal disadvantage); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1 (1993) (recognizing the need to look at racism and feminism together in order to see the resulting effect on African American women, which is more than the sum of its parts).

43. The focus on the New York State sentencing scheme is important in light of the *Thompson* case. See *infra*, Part C, III, this text. Moreover, in 1973, Governor Nelson Rockefeller initiated one of the first efforts to remove sentencing discretion from judges and to impose harsh mandatory sentences for drug offenses. The "Rockefeller Drug Laws" are widely regarded as spawning similar sentencing reform efforts in other state and federal jurisdictions. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 411 (1993).

44. U.S. CONST. amend. VIII.

case within the context of historical forces and policies which continue to operate in discriminatory and harsh ways in the lives of African American women. Thus, by focusing on African American women, this article intends to contribute to a greater understanding of African American women's history and experiences in the United States criminal justice system, and more broadly, to provide a useful critique of modern trends in United States sentencing policy.

II. THE COLONIAL PERIOD

African American women's presence in America began when a seized Spanish cargo ship bound for the West Indies landed in Jamestown, Virginia in 1619.⁴⁵ Isabella, Antony, Pedro, and seventeen other Africans aboard the ship were offered by the Dutch seamen in exchange for food.⁴⁶ In the early decades of the seventeenth century, there were few distinctions in the concept between black and white servitude; the terms "slave" and "servant" were used synonymously.⁴⁷ As Professor Orlando Patterson argues, "[g]radually there emerged, however, something new in the conception of the black servant: the view that he did not belong to the same community of Christian, civilized Europeans."⁴⁸

English-speaking European settlers brought their common law legal system when they arrived in the early seventeenth century, on land that is now part of the United States.⁴⁹ Despite variations among the colonies, they developed consistent criminal law traditions which were both patriarchal and hierarchical.⁵⁰ The emergent United States criminal justice system was particularly repressive toward slaves, servants, and women as laws and legal customs in the colonies reflected the values of elites, magistrates, and leaders regarding virtue, justice, and order.⁵¹ The influence of religion was significant in

45. LERONE BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA 1619-1964*, at 30 (rev. ed. 1966).

46. *Id.* See also A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 20-22* (1978) (discussing the debate regarding the status, whether free or slave, of blacks when they were unwillingly brought to Virginia in 1619).

47. As historian Winthrop Jordan observed, in the early years (pre-1640), both servants and slaves were abused and forced to serve their masters for many years. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 45-48 (1968).

48. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 7* (1982).

49. There was a rich legal history on the continent before the white settlers arrived, including Spanish-speaking settlements in present day Florida and Puerto Rico, and, Dutch settlements in present day New York. Also, of course, indigenous peoples had established societies, with norms, laws and systems of punishment. FRIEDMAN, *supra* note 43, at 19.

50. FRIEDMAN, *supra* note 43, at 31.

51. FRIEDMAN, *supra* note 43, at 23.

shaping the criminal codes. As Professor Friedman notes, the criminal justice system, in many ways, was another arm of the religious orthodoxy in framing modes of enforcement, and generally, in creating a distinctive legal culture.⁵² Further, while religion was a powerful influence in both European and American societies, it was thought to be more so in New England than in old England.⁵³

Offenses against morality were punished by the "heavy use of shame and shaming."⁵⁴ Although the purpose was repentance, punishment was often public and brutal, including pillory and stocks, mutilations and whippings.⁵⁵ Whipping was a very common punishment for servants and slaves.⁵⁶ Free whites and white servants received corporal punishment and the death penalty during the colonial period, though much less so than blacks.⁵⁷

Capital punishment was invoked more frequently in the southern colonies, with slaves as the most common victims.⁵⁸ In Virginia,⁵⁹ for example, white authorities reserved the most severe sanctions for slaves. Between 1801 and 1865, Virginia authorities "ordered. . . thousands of slaves [to] be whipped or given other corporal punishments, sent at least 983 slaves into exile between 1801 and 1865, and condemned at least 555 to death between 1706 and 1784 and executed 628 between 1785 and 1865."⁶⁰ "This was a much higher death toll than in any northern state."⁶¹ However, one of the most extreme episodes of capital punishment in the colonial period took place in the North, in New York, in 1741.⁶² It too had a racial element, concerning an alleged plot by blacks, in conspiracy with whites, "to rise up, pillage, and burn."⁶³ Following a major conspiracy trial, more than 150 slaves, along with twenty whites, were tried,⁶⁴

52. FRIEDMAN, *supra* note 43, at 23.

53. FRIEDMAN, *supra* note 43, at 19 (noting, for example, that Massachusetts was occupied by the Puritans while Pennsylvania and, for a while, New Jersey, belonged to the Quakers).

54. FRIEDMAN, *supra* note 43, at 37.

55. Branding, letter-wearing, and mutilation were other forms of bodily punishment. FRIEDMAN, *supra* note 43, at 40-41.

56. FRIEDMAN, *supra* note 43, at 37.

57. PHILIP J. SCHWARTZ, *TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865*, at ix (1988).

58. FRIEDMAN, *supra* note 43, at 44.

59. Virginia was "the largest slave society in North America from 1705 through 1865. . . ." Schwartz, *supra* note 56, at xi.

60. SCHWARTZ, *supra* note 57, at ix.

61. SCHWARTZ, *supra* note 57, at ix; *see also* FRIEDMAN, *supra* note 43, at 44 & n.75 (describing the motive, manner and frequency of the death penalty and pardons in early America). Mr. Friedman also compares and contrasts the severity of early American punishment to the more lenient pre-revolutionary English punishment.

62. FRIEDMAN, *supra* note 43, at 44.

63. FRIEDMAN, *supra* note 43, at 44.

64. FRIEDMAN, *supra* note 43, at 44.

resulting in the execution of over thirty slaves, eighteen of whom were hanged while thirteen were burned alive, and four whites, who were hanged.⁶⁵

Also occurring in the North and what was perhaps the most infamous aspect of colonial criminal justice were the witch-hunts of the late seventeenth century.⁶⁶ Although not all individuals accused of being witches were women, most were.⁶⁷ In Puritan thought, both slaves and women were subordinated as part of the natural order.⁶⁸ The witch symbolized "the very embodiments of evil" and rebellion against order—"of woman against man, and woman against the godly society."⁶⁹ Historians' comparisons of the penalties imposed on women and men reveal further differences. As compared to women, men were tried less often and were less likely to be found guilty; and when they were found guilty, their sentences were much less severe.⁷⁰

The most extensive witch-hunt in New England unfolded in Salem Village, Massachusetts.⁷¹ The investigation of the Salem episode, which began in 1692, is attributed to a slave woman named Tituba. Tituba and her husband, John Indian, were slaves, originally from Barbados.⁷² They were taken to Salem by their owner, Rev. Samuel Parris.⁷³ John was hired out to a tavern keeper and Tituba to a weaver. Tituba cared for Parris' ill wife and his children as well as provided the family with needed woven goods.⁷⁴

65. FRIEDMAN, *supra* note 43, at 44 & n.76.

66. Witchcraft trials were more prevalent in the northern colonies. For example, in 1648, the laws of Massachusetts classified witchcraft as a capital offense. In comparison, Professor Friedman notes that in North Carolina there were only three instances of such trials before 1730. FRIEDMAN, *supra* note 43, at 45.

Even before the Salem trials of 1692, during which almost 200 persons were accused of witchcraft, there were at least 100 persons charged or convicted of witchcraft. Between 1648 and 1663, the colonies of Massachusetts, Connecticut, and New Haven executed 15 persons. During the Salem trials, these colonies executed an additional 19 persons. DAVID D. HALL, *WITCH-HUNTING IN SEVENTEENTH-CENTURY NEW ENGLAND: A DOCUMENTARY HISTORY 1638-92*, at 4 (David D. Hall ed., 1991).

67. Women comprised three-fourths of persons accused of witchcraft in Salem. In fact, 14 of the 20 persons executed were women. Bruce Watson, *Salem's Dark Hour: Did the Devil Make Them Do It?*, SMITHSONIAN, Apr. 1992, at 116, 128. "According to historian John Demos, most New England witches were poor women over forty. Some were healers or midwives who had lost a patient or miraculously saved one. They were considered abrasive or quarrelsome, 'deviant,' in other words." *Id.* (citing JOHN DEMOS, *ENTERTAINING SATAN: WITCHCRAFT AND THE CULTURE OF EARLY NEW ENGLAND* (1982)).

68. FRIEDMAN, *supra* note 43, at 47.

69. FRIEDMAN, *supra* note 43, at 46-47 & n.86.

70. HALL, *supra* note 66, at 6-7.

71. Hine, *supra* note 3, at 1172.

72. Hine, *supra* note 3, at 1172.

73. Hine, *supra* note 3, at 1172.

74. Hine, *supra* note 3, at 1172.

Tituba entertained the children with stories about Barbados, evoking the warmth and beauty of the island, telling stories of animals that could talk and of magic spells, and reading their palms. Gradually the parsonage became a meeting place for bound girls who were eager to hear Tituba's stories of a livelier, more colorful world. . . . Some of the girls listening to Tituba's stories, including Parris' daughter and niece, became hysterical, performing strange antics, crying out, and barking like dogs. Some of the girls accused Tituba; Sarah Good, a vagrant; and Sarah Osborne, a sick old woman, of having bewitched them. In 1692, these three women became the first persons to be accused of practicing witchcraft in Salem Village.⁷⁵

The specially appointed court, fearing the unusual and dangerous character of witchcraft, discarded the traditional rules of evidence and procedure.⁷⁶ Instead, a confession to practicing witchcraft was beaten out of Tituba who, as a result, was imprisoned for thirteen months, despite her insistence that she was not a witch.⁷⁷

"We are either saints or devils," the Reverend Parris preached.⁷⁸ Hence, the inculcation of the oppositional "we-they" distinction emerged from the "fusion of race, religion, and nationality in a generalized conception of *us*—white, English, free—and *them*—black, heathen, slave."⁷⁹ At their zenith, during the witch trials in seventeenth century America, these dichotomies justified cruel treatment of enslaved persons of African descent, rationalized the creation of laws that specifically limited their rights in the dominant legal culture, and further indelibly linked blackness with evil and criminality. As historian Kathryn Preyer observed:

However unequally financial sanctions or corporal punishments may have fallen on the lower classes in colonial society, no matter what the degree of class control penal measures represent within the white population, the greatest discriminatory power of the penal law is to be seen in the case of slaves.⁸⁰

75. Hine, *supra* note 3, at 1172; see also FRIEDMAN, *supra* note 43, at 45 & n.80.

76. FRIEDMAN *supra* note 43, at 46 & n.82.

77. Hine, *supra* note 3, at 1172. According to historian David Hall, as the seventeenth century approached, there were very few accusations of witchcraft, with no executions from 1663 to 1688. This practice, however, drastically changed as a result of the Salem witch-hunt. HALL, *supra* note 66, at 11.

After the Salem trials, until early into the eighteenth century, however, people continued to make accusations of witchcraft. And, the legend of witches continued even after witchcraft was no longer a crime. HALL, *supra* note 66, at 12.

78. Watson, *supra* note 67, at 116.

79. PATTERSON, *supra* note 48, at 7.

80. Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 352 (1982).

Although there is no further record of Tituba, her ordeal before the colonial Puritan court reveals her position at the intersection of legally sanctioned injustice and cruel punishment.

III. THE STATUS OF AFRICAN AMERICAN WOMEN IN THE NINETEENTH CENTURY

A. *Antebellum America*

Americans' perceptions of crime and criminals mirror both colonial and nineteenth century views of poverty and race.⁸¹ As stated by Professor Jane Gibson-Carpenter & Professor James Carpenter, these views "reproduce pejorative stereotypes of minorities and poor people; induce unwarranted fear of increasing crime; promote a siege mentality on the part of the police and poor neighborhoods; and predispose every level of the criminal justice system to find crime where the light shines brightest, among the poor."⁸²

Relative to the nineteenth century one historian has stated that, "[t]o be a black woman in nineteenth century America was to live in the double jeopardy of belonging to the 'inferior' sex of an 'inferior' race."⁸³

The experiences of enslavement were different for African American women and men.⁸⁴ Enslaved African American women

81. Jane W. Gibson-Carpenter and James E. Carpenter, *Race, Poverty, and Justice: Looking Where the Streetlight Shines*, 3 KAN. J.L. & PUB. POL'Y 99, 99 (1994). See also David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 648 (1993) (stressing the need for rehabilitation programs for drug offenders).

82. Gibson-Carpenter and Carpenter, *supra* note 81, at 99.

83. WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY IX (Dorothy Sterling ed., 1984) (presenting an informal history including letters, diaries, and newspaper articles of black women who lived between 1800 and the 1880s).

84. Historian Deborah Gray White notes that "[m]ale and female slavery was different from the very beginning." DEBORAH GRAY WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 63 (1985). Women generally did not travel the middle passage in the holds of slave ships but took the dreaded journey on the quarter deck. According to the 1789 Report of the Committee of the Privy Council, the female passage was further distinguished from that of males in that women and girls were not shackled. *Id.*

"This policy had at least two significant consequences for black women. First, they were more easily accessible to the criminal whims and sexual desires of seamen, and few attempts were made to keep the crew members of slave ships from molesting African women (footnote omitted). As one slaver reported, officers were permitted to indulge their passions at pleasure and were sometimes guilty of such brutal excesses as disgrace human nature." *Id.* (footnote omitted) (quoting GEORGE FRANCIS DOW, SLAVE SHIPS AND SLAVING 145 (1927)).

"Conversely, African women were occasionally able to incite and/or assist slave insurrections that occurred at sea. For instance, in 1721 the crew on board the *Robert* was stunned when they were attacked by a woman and two men intent on gaining their freedom. Before they were subdued by the captain and other crew members, the slaves, including the woman, had killed several sailors and wounded many others. In his investigation into the mutiny, Captain Harding reflected on the near success of the slaves and found that they had been assisted by the woman

were exploited for their physical labor and reproductive capacities; “[thei]r job was to work and to produce workers.”⁸⁵ Their reproductive function was crucial to the economic interests of the slaveholders, especially after 1801, when Congress outlawed the importation of slaves from Africa into the United States.⁸⁶ The exploitation of African American women’s sexuality was also a means of terrorizing the entire slave community.⁸⁷ Former slave Harriet Ann Jacobs recounted the unique turmoil of her enslaved existence in her autobiography:

I now entered on my fifteenth year—a sad epoch in the life of a slave girl. My master began to whisper foul words in my ear. . . . [I] was compelled to live under the same roof with him—where I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things. My soul revolted against the mean tyranny. But where could I turn for protection? . . . [I] know that some are too much brutalized by slavery to feel the humiliation of their position; but many slaves feel it most acutely, and shrink from the memory of it.

When they told me my newborn babe was a girl, my heart was heavier than it had ever been before. Slavery is terrible for men; but it is far more terrible for women. Superadded to the burden common to all, *they* have wrongs, and sufferings, and mortifications peculiarly their own.⁸⁸

‘who being more at large, was to watch the proper Opportunity.’ The woman had served as a lookout and alerted the leader as to the number of sailors on deck. She had also stolen all the weapons used in the mutiny.” She was punished savagely for her feats: “The Woman he hoisted up by the Thumbs, whipped, and slashed her with Knives before the other Slaves till she died.” *Id.* at 63-64. (footnote omitted) (quoting 2 DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE TO AMERICA 266 (Elizabeth Donnan ed., 1930)).

“In another incident, in 1785, the captain of a Bristol slaver was attacked by a group of women who tried to throw him overboard. When he was rescued by his crew the women threw themselves down the hatchway. Some died from the injuries incurred in their desperate plunge. Others starved themselves to death. Nine years earlier a similar incident had occurred aboard the Rhode Island vessel, *Thames*.” *Id.* at 63-64 & n.6. See also *infra* Part A, III, D, this text.

85. Sterling, *supra* note 83, at x. See also JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT 11-12 (1985) (discussing the double exploitation of slave women, for both their physical labor and reproductive ability).

86. Darlene Hine and Kate Wittenstein, *Female Slave Resistance: The Economics of Sex*, in THE BLACK WOMAN CROSS-CULTURALLY 289, 296 (Filomina Chioma Steady ed., 1981).

87. The sexual exploitation of enslaved women was also a way to humiliate and symbolically attack enslaved men. Angela Davis, *Reflections on the Black Woman’s Role in the Community of Slaves*, in 12 BLACK SCHOLAR Nov.-Dec. 1981, at 2, 12-13.

88. Harriet Ann Jacobs, *Incidents in the Life of a Slave Girl: Written by Herself*, in WRITTEN BY HERSELF: AUTOBIOGRAPHIES OF AMERICAN WOMEN: AN ANTHOLOGY 7, at 10-12 (Jill Kerr Conway ed., 1992) (emphasis in original).

Similarly, the enslaved woman Bethany Veney noted the increased tension accompanying the birth of a daughter, whose “almost certain doom is to minister to the unbridled lust of the slaveowner. When Veney’s daughter was born, she wished that both of them could ‘die right

Slave girls, whose work began at the age of four or five, had responsibilities at a much earlier age than slave boys.⁸⁹ The girls began by caring for babies and by the age of ten worked full-time either in the house or in the fields.⁹⁰ "At the point of puberty, a slave girl was doing the work of a woman, which was scarcely distinguishable from a man's."⁹¹ To till the soil, enslaved African American women were often grouped with white and African American men.⁹²

During this period, white women were hampered by the "bonds of true womanhood" and told that their sphere was the home. In addition to being a "woman in a society ruled by men," black women had to face being "black in a white society, and slave in a free society."⁹³ These three forces served to make African American women the least powerful group of individuals in antebellum America.

B. *Slave Criminality*

Enslaved men and women generally were outside of the public system of punishment.⁹⁴ Instead, slaves were disciplined by their owners, as only free blacks were eligible for public punishment. The criminal justice system, however, was instrumental in maintaining dominion over slaves and former slaves. Comprehensive slave codes created by state legislatures regulated the relationship of slaves to society.⁹⁵ Legally, slaves were at once property and persons. Ironically, slaves came closest to personhood and equality under the law upon allegations of criminality. The law in a criminal trial considered a slave to be a responsible individual and therefore meted out harsh punishments accordingly.⁹⁶

there and then'." PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 44 & nn.29-30 (1984) (quoting BETHANY VENNEY, *THE NARRATIVE OF BETHANY VENNEY, A SLAVE WOMAN* 26 (1889)).

89. Sterling, *supra* note 83, at 6.

90. Sterling, *supra* note 83, at 7.

91. Sterling, *supra* note 83, at 13.

92. GIDDINGS, *supra* note 88, at 36-37; *see also* JORDAN, *supra* note 47, at 77. For example, a 1643 Virginia statute designated that "tithable persons"—those who worked the ground, whether slave or free—included all adult men and black women. Maryland enacted a similar statute in 1654. (footnote omitted).

93. WHITE, *supra* note 84, at 15.

94. *See infra* pp. 17-19.

95. KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 171-91 (1956) (reciting examples of "punishment" inflicted on slaves and condoned by state legislatures); *see also* SCHWARTZ, *supra* note 57, at 26-28 (describing the severity of the criminal system toward slaves as compared to free people).

96. DANIEL J. FLANIGAN, *THE CRIMINAL LAW OF SLAVERY AND FREEDOM: 1800-1868*, 1-2 (and sources cited) (1987); *see also* MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

This paradox was epitomized by *United States v. Amy*,⁹⁷ the first case in which a slave was a defendant in a federal prosecution. Amy was accused of stealing a letter from the United States mail. Amy's attorney objected to her prosecution by arguing that she could not be considered a "person" subject to the penalties of the law. Amy was convicted, and her appeal was heard by Chief Justice Taney, who authored the Supreme Court opinion in *Dred Scott v. Sandford*.⁹⁸ Following the reasoning in *Dred Scott*, the defense attorney argued that "[b]y indicting Amy under an act of Congress that forbade 'any person' to steal a letter from the United States mail, the government had confounded Amy's natural personality with her status as legal property."⁹⁹ It was argued that if the act was construed to include Amy, it was unconstitutional because it operated to take private property without just compensation. In a perverse defense, Amy's attorney argued on her behalf that, Amy should be "tried, and, if guilty, properly punished under the state laws, for larceny. . . She ought to be whipped, and sent about her business. . . ."¹⁰⁰ In overruling the motion for a new trial, Chief Justice Taney propounded on the slave's dual legal status: "He is a person, and also property. As property, the rights of [sic] owner are entitled to the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it. . . ."¹⁰¹

United States v. Amy was unique since it was the first time that the issue regarding the slave's human or property status in the criminal context arose in a federal court.¹⁰² Southern state courts had

97. 24 Cas. 792 (No.14,445) C.C.D. (Va. 1859); see also FLANIGAN, *supra* note 96, at 3, (discussing whether a "slave" was a "person" for purposes of punishment).

98. 60 U.S. 393 (1857) (holding that slaves were not to be considered citizens).

99. FLANIGAN, *supra* note 96, at 2-3. "Though he was partially incorrect, Howard argued that slaves were not subject to the common law and that they could be punished only under penal statutes specifically directed at the servile class. True, the framers of the United States Constitution had not included the word "slave" in that document and had twice designated slaves as "persons." But on both occasions the framers had been speaking of these natural persons as property." *Id.* at 2-3.

100. *Amy*, 24 F. Cas. at 795. The federal act punished the theft of United States mail by imprisonment from two to ten years. At defense counsel's suggestion, Amy would be subject to the harsh corporal punishment of whipping.

101. *Amy*, 24 F. Cas. at 810. Although Chief Justice Taney cited no authority for the proposition, the matter had been considered previously. Federalist No. 54 described the way in which a southerner would classify the legal status of slaves, writing that, "we must deny the fact, that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property." THE FEDERALIST No. 54 (James Madison or Alexander Hamilton).

102. FLANIGAN, *supra* note 96, at 5 (citing THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 89, 263 (1968)).

resolved similar dilemmas by establishing comprehensive slave codes regulating the relationship of the slave to society.¹⁰³ On occasions when the legislature inadvertently omitted specific offenses from the slave codes, the courts had to decide whether a slave could be considered a person within the meaning of the regular penal statutes.¹⁰⁴ With some variation from state to state, slaves were accorded human status under the penal code only when it was absolutely necessary for the punishment of a crime.¹⁰⁵

The punishment inflicted on slaves was often brutal. Common punishments during the early colonial period and often extending into the nineteenth century included cropping of the ears, branding, and castration.¹⁰⁶ Slave owners rationalized their brutality as necessary for efficient work performance.¹⁰⁷

103. FLANIGAN, *supra* note 96, at 5 (citing THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 89, 263 (1968)).

104. FLANIGAN, *supra* note 96, at 5 (citing THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 89, 263 (1968)).

105. For example, "according to Judge Thomas R.R. Cobb, . . . a Georgia jurist, [Chief Justice] Taney was wrong in *U.S. v. Amy*. A year before Taney's decision Cobb had written that slaves could be punished only under special statutes." However, the Georgia law did not apply to all of the slaveholding states. FLANIGAN, *supra* note 96, at 5 (citing THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 89, 263 (1968)).

In the 1790s, South Carolina judges developed a different rule. See *State v. Simmons & Kitchen*, 3 S.C.L. 6 (1794) (holding that slaves have rights under the laws and have the capacity to commit crimes). The Louisiana Supreme Court, during the 1840s and 1850s, was ambiguous in its rulings. In 1854, two whites, who had assisted a slave escape from jail, defended on the ground that the statute forbade assisting 'any person' escape from jail and thus did not include slaves. The court rejected this argument stating that although slaves were for the most part property, they could be 'persons' for some purposes, including the present situation. In contrast, a year later, the court held that a slave could be punished for manslaughter of another slave even though this crime was not listed as a crime in the slave code. The court agreed with the defendant that neither the general criminal statutes nor the common law was applicable; however, the court affirmed the conviction because of the catch-all clause of the slave code allowing courts to punish for any crimes not included in the code. FLANIGAN, *supra* note 96, at 5-6 (citing 2 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 277 (Helen T. Catterall ed., 1929) II, 277).

106. Even cropping of the ears remained as a punishment for many years. Until 1827 Delaware's punishments for attempted rape included "whipping, nailing to the pillory, and loss of ears. . . ." Until 1821, Maryland allowed cropping of the ears as a punishment for slaves. As late as 1847, Virginia allowed cropping of the ears as a punishment for hog stealing and perjury; South Carolina continued this practice into the nineteenth century, and Georgia continued the practice until the 1830s. FLANIGAN, *supra* note 96, at 13 (citing 2 JOHN C. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 21, 77, 79, (1968)); and JAMES C. BALLAGH, A HISTORY OF SLAVERY IN VIRGINIA 87 (1902)).

"Branding, which served both as punishment and as a means of protecting innocent purchasers from buying criminal bondsmen, survived in a few states until the late antebellum period." Alabama, Georgia, and Mississippi, for example, continued branding well into the latter 1800s. FLANIGAN, *supra* note 96, at 14-15.

107. Sterling, *supra* note 83, at 333.

In the nineteenth century, revenge generally was replaced as a goal of criminal punishment.¹⁰⁸ For example, the Alabama constitution directed future legislators to base the penal code "on principles of reformation and not of vindictive justice."¹⁰⁹ However, these principles were ignored by legislators when they formed the slave code.¹¹⁰ Moreover, although some of the more brutal punishments of the colonial period declined in the nineteenth century, every state still had a larger number of offenses for slaves than for whites.¹¹¹ In general, when statutes designated a crime as capital, any attempt by a slave to commit that crime resulted in a death sentence.¹¹² Whites did not incur similar penalties for mere attempts.¹¹³ Attempted poisoning, though only a form of attempted murder, always

108. GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* 178 (2d ed. 1856).

109. *Id.*

110. "While statutes applying to whites carefully divided homicide into degrees and distinguished between murder and manslaughter, slaves usually could be guilty of mere homicide of whites. For example, the Alabama code punished slaves for voluntary or involuntary manslaughter on whites with death, but if a slave committed manslaughter on another slave or a free black, the law allowed only the infliction of up to 100 stripes and branding in the hand at the discretion of the jury. Attempted murder of whites and assaults with intent to kill brought the death penalty." FLANIGAN, *supra* note 96, at 25.

111. The Arkansas constitution guaranteed that "any slave who shall be convicted of a capital offence, shall suffer the same degree of punishment as would be inflicted on a free white person, and no other. . . ." However, this provision had a severely limited meaning. Convicted and sentenced to death for attempted rape, Charles, a slave, appealed claiming that the constitution forbade the imposition of the death penalty on him when whites did not have to endure the same punishment. The Supreme Court of Arkansas rejected his argument, finding that the constitution did not deprive the state of the power to discriminate against slaves. According to the court, "The provision was doubtless inserted in the constitution from a feeling of humanity towards the unfortunate African race, and in order to secure them against that barbarous treatment and excessive cruelty which was practiced upon them in the earlier period of our colonial history." *Charles v. State*, 11 Ark. 390, 405 (1850) (citing ARK. CONST., art. III, § 25).

Historian George M. Stroud catalogued 68 capital crimes that Virginia slaves could commit, none of which were similarly punished for white offenders. STROUD, *supra* note 108, at 170-74. In Alabama, although it was not mandatory, whites could suffer death upon committing treason, first degree murder, or aiding and abetting a slave insurrection. On the other hand, slaves in Alabama suffered, without exception, the death penalty for approximately 17 offenses, ranging from insurrection to robbery (as well as being accessories before the fact for any of these crimes). STROUD, *supra* note 108, at 178-79. In South Carolina, whites could commit 27 capital offenses while slaves were subject to death for 36 offenses. STROUD, *supra* note 108, at 183.

In 1811, Kentucky slaves could be put to death for conspiracy to rebel, administering poisons with intent to kill, voluntary manslaughter, and the rape of a white woman. By 1852, various legislatures had expanded the list to include arson, shooting at or wounding a white person with intent to kill, robbery, voluntary manslaughter while in the process of committing a felony, and attempting to destroy bridges or locks. IVAN MCDUGLE, *SLAVERY IN KENTUCKY, 1792-1865*, 38 (1970).

As stated by Stroud, "In general, therefore, death has been resorted to as the only punishment, according to the sentiments of slave-holders, adapted to a state of slavery, for all offences except those of a trivial nature." STROUD, *supra* note 108, at 187-88.

112. FLANIGAN, *supra* note 96, at 25-26.

113. FLANIGAN, *supra* note 96, at 25-26.

was a separate offense, reflecting the significance of that particular crime in slaveholding society.¹¹⁴ Thus, although it was important that slaves were not punished by dismemberment or torture for noncapital crimes, the increase of capital offenses during the nineteenth century greatly outweighed the beneficial effects of other reforms in criminal punishment.

C. *Postbellum*

For most people of African descent, formal emancipation followed Lee's surrender at Appomattox, in April 1865.¹¹⁵ The defeat of the Confederacy meant freedom for over four million slaves.¹¹⁶ Ironically, emancipation found freed women empty handed, without home, land, tools, or other necessary resources.¹¹⁷ Free blacks were at the bottom of the social order by every demographic measurement. Historian Dorothy Sterling observed, "Disenfranchised, denied employment, excluded from schools, they had the lowest incomes and the highest mortality rates in the region. Yet, they survived, having developed the tools for survival under the stress of slavery."¹¹⁸

African American women's subordination continued after emancipation. Lacking literacy, employment and the franchise, discrimination and terrorism forced most black women to assume roles much like those they had assumed during slavery. Nevertheless, the number of black women in the work force remained disproportionately higher than the number of white women. Most freed women worked as sharecroppers, tenant farmers, washerwomen, or wage laborers.¹¹⁹ Although they obtained greater control over their

114. "Mississippi, for example, decreed the death penalty for poisoning wells, cisterns, and reservoirs as well as the master's food or drink. FLANIGAN, *supra* note 96, at 25-26 (citing Ala. Code, Pt. 4, Tit. 1, Ch. 2, Art. X, Sec. 3312, 3314; *State v. Stephen*, 15 Ala. 534 (1849); *Bob v. State*, 29 Ala. 20 (1856); *Henry v. State*, 33 Ala. 389 (1859); The Revised Code of the Statute Laws of the State of Mississippi (Jackson, 1957), ch. 33, sec. 10). See *infra* Part B, III, D, *this text*.

115. For some, emancipation predated the Civil War, dating back to colonial times. For example, in 1800, there were 47,000 free blacks living in the North, most having been freed after the American Revolution and by 1860, there were 225,000 free blacks in the North. Slavery, however, did remain in New York State until 1827 and in New Jersey until 1846. As of 1850, there were 236 slaves in the North, as reported in the census. Sterling, *supra* note 83, at 87, 213.

116. "In 1790 there had been less than 700,000 slaves. By 1830 there were more than two million. . . . At the last census before the Civil War, the slave population had grown to 3,953,760. . . . The increase of the slave population to virtually 4 million persons by 1860 is an eloquent testimony to the extent to which slavery had become entrenched in the Southern states in the nineteenth century." JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 185-86 (1967).

117. Sterling, *supra* note 83, at 331 (discussing how most freedwomen worked as sharecroppers, tenant farmers, or wage laborers and how only a few were able to buy land).

118. Sterling, *supra* note 83, at 87.

119. Sterling, *supra* note 83, at 87.

lives, freedwomen were scarcely better off economically than they had been as slaves.¹²⁰

African American women's work was central to family survival, either as the sole or contributing source of family income.¹²¹ Where black women's employment opportunities were limited, in contrast, employment opportunities for white women had broadened after the war. Many white women began to work in factories or as clerks in stores and business offices.¹²² Moreover, freedwomen were paid less than freedmen.¹²³

After the passage of the Reconstruction Acts, black men were empowered to vote and to hold political office.¹²⁴ Despite this, neither black nor white women were yet allowed to enjoy either change in the laws. Indeed, in five Southern states black men were a majority of the electorate.¹²⁵ Whites responded to burgeoning black political power with organized violence against freedmen and women.¹²⁶ The Klan terrorized and brutalized black politicians and their families, as well as, other emancipated blacks.¹²⁷ As Frederick Douglass reproved:

You say you have emancipated us. You have; and I thank you for it. But what is your emancipation? . . . [W]hen you turned us loose, you gave us no acres. You turned us loose to the sky, to the storm, to the whirlwind, and, worst of all you turned us loose to the wrath of our infuriated masters.¹²⁸

Abject living conditions, limited employment opportunities and terrorism prompted an extraordinary migration among blacks in the spring of 1879. The "Exodusters" included hundreds of black families who sought safety and better opportunities in midwestern and northern states.¹²⁹

120. Sterling, *supra* note 83, at 87.

121. WHITE, *supra* note 84, at 163-64.

122. WHITE, *supra* note 84, at 164.

123. On one Georgia plantation, for example, freedmen laborers received \$140 a year while freedwomen laborers received from \$60 to \$85. Sterling, *supra* note 83, at 328.

124. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

125. Sterling, *supra* note 83, at 344.

126. One month after Congress passed the first Reconstruction Act over President Andrew Johnson's veto, leading southerners met in Nashville to draw up a constitution for the Klu Klux Klan. Sterling, *supra* note 83, at 344.

127. Sterling, *supra* note 83, at 344-50.

128. FREDERICK DOUGLASS, *Preface to THE TROUBLE THEY SEEN: THE STORY OF RECONSTRUCTION IN THE WORDS OF AFRICAN AMERICANS* xix (Dorothy Sterling ed., 1994).

129. For example, by 1880, over 15,000 black migrants were at work on the farms and in the towns of Kansas. Sterling, *supra* note 83, at 372.

In the postbellum period, former slave owners used violence to express their frustrations. Black women were beaten for attempting to protect their children or when they asserted themselves in the mildest way.¹³⁰ They were beaten when they were late to work or failed to perform to their employer's satisfaction.¹³¹ They were abused whether they cohabited with their boss or rejected his advances.¹³² Sometimes freedwomen were punished for complaining to the Freedmen's Bureau concerning their mistreatment.¹³³

D. *Crime as Resistance*

Any discussion of antebellum and postbellum crime must involve an analysis of crime as a means of black resistance to slavery and post-slavery subordination. Black women were not highly represented in fugitive slaves numbers. Seventy-seven percent of the runaways advertised in colonial South Carolina during the 1730s were men, a pattern which persisted throughout the century.¹³⁴ Some of the reasons why women were underrepresented in the fugitive population had to do with restricted mobility associated with childbearing and childrearing responsibilities.¹³⁵ Nevertheless, black women did resist their enslavement. Some engaged in direct acts of resistance, such as the murder of masters, arson, and the refusal to be whipped.¹³⁶ Other acts of resistance included shoddy workmanship, cruelty to animals, work slowdowns, and running away.¹³⁷

Other forms of resistance included feigning illness, controlling reproductive functions, and inducing abortions.¹³⁸ The use of poison was particularly well suited to women's resistance because of their duties as cooks and nurses on the plantation. In 1755, a

130. Sterling, *supra* note 83, at 333.

131. Sterling, *supra* note 83, at 333.

132. Sterling, *supra* note 83, at 334-35.

133. Sterling, *supra* note 83, at 336.

134. South Carolina was not unique. The 1,500 newspaper advertisements published in Williamsburg, Richmond, and Fredericksburg, Virginia, from 1736 to 1801 revealed much the same pattern. Of the runaways whose sex could be discerned, 1,138 were men, while only 142 were women. The same pattern existed in antebellum Huntsville, Alabama, where, between 1820 and 1860, of the 562 fugitives advertised, 473 were listed as male and only 19% of the runaway ads described women. In 1850, 31.7% of the runaways advertised for in New Orleans newspapers were women. WHITE, *supra* note 84, at 70 & nn.25-29.

135. Many slave women between 16 and 35 years old, the age bracket of most runaways, were often either pregnant, nursing an infant, or were caring for at least one small child. WHITE, *supra* note 84, at 70.

136. WHITE, *supra* note 84, at 77-78.

137. WHITE, *supra* note 84, at 71-77.

138. WHITE, *supra* note 84, at 79-86. For example, an 1869 South Carolina court case revealed that a slave woman sold as "unsound" and barren in 1857 had three children after emancipation. WHITE, *supra* note 84, at 85.

Charleston slave woman was accused of poisoning her master and was burned at the stake.¹³⁹ Similarly, a special issue of the *South Carolina Gazette*, in 1769, reported that a slave woman had poisoned her master's infant child.¹⁴⁰ As Professor Deborah Gray White states, "[N]o one will ever know how many slave owners and members of their families were poisoned."¹⁴¹

Arson, a capital offense for slaves in almost every state, was uniquely suited to slave resistance. Female slaves, who committed very few capital crimes in nineteenth century Virginia, constituted almost one-third of the convicted arsonists.¹⁴² In 1681 the state of Massachusetts tried a slave named Maria and two male slaves for attempting to set fire to their master's home. As punishment, one of the men was hanged and the other banished.¹⁴³ The Puritan Court, however, judged Maria's crime as more serious than arson. The court found that "she did not have the feare of God before her eyes" and that her action was "instigated by the devil."¹⁴⁴ Maria was burned at the stake.¹⁴⁵

The act of insurrection became an issue of importance during this period. State legislatures acknowledged its importance by dispensing with the normal waiting period between the guilty verdict and the execution. For example, in 1708, four slaves were executed for killing seven whites in Newton, Long Island. Of the four slaves, the three men were hanged, the one woman was burned at the stake.¹⁴⁶ In 1712, twenty-three male and female slaves engineered a major revolt in New York City in which they armed themselves with guns and knives and set fire to a slaveholder's house.¹⁴⁷ In 1732, the discovery of a slave plot in Louisiana resulted in the hanging of a black woman and the "breaking on the wheel"¹⁴⁸ of four of her male co-conspirators.¹⁴⁹ In 1741, a slave named Kate and a black boatswain

139. WHITE, *supra* note 84, at 79.

140. WHITE, *supra* note 84, at 79.

141. WHITE, *supra* note 84, at 79.

142. FLANIGAN, *supra* note 96, at 48 & Table I.

143. GIDDINGS, *supra* note 88, at 39.

144. GIDDINGS, *supra* note 88, at 39.

145. Similarly, in 1766 a slave woman in Maryland was executed for setting fire to her master's home, tobacco house, and outhouse, burning them all to the ground. The prosecutor in the case noted that there had been two other houses full of tobacco burnt "in the country this winter." GIDDINGS, *supra* note 88, at 39.

146. GIDDINGS, *supra* note 88, at 39.

147. They were ultimately subdued, although after substantial injury and death. Among those arrested was a slave woman who was visibly pregnant. GIDDINGS, *supra* note 88, at 40.

148. GEORGE RYLEY SCOTT, A HISTORY OF TORTURE (1940 & reprinted in 1994). "Breaking on the wheel" was a European form of punishment in which a person was strapped to a large wheel, too large for their frame, and the wheel was turned until their bones broke.

149. GIDDINGS, *supra* note 88, at 40.

were convicted of trying to burn down the entire community of Charlestown, Massachusetts.¹⁵⁰ Like Maria, Kate was singled out for having a “malicious and evil intent.”¹⁵¹

African American women also resisted white oppression by defending themselves in the courts. Eliza Gallie’s case demonstrates the systematic violations of African American women’s legal rights. According to Lebsock:

In November 1853, Eliza Gallie, a free black woman of Petersburg, [Virginia] was arrested and charged with stealing cabbages from the patch of Alexander Stevens, a white man. She was tried in mayor’s court and sentenced to thirty-nine lashes. There was nothing unusual in this; free black women were frequently accused of petty crimes, and for free blacks as for slaves, whipping was the punishment prescribed for by law. What made the case a minor spectacle was that Eliza Gallie had resources, and she fought back. She filed an appeal immediately, and two weeks later she hired three of Petersburg’s most eminent attorneys and one from Richmond as well. “If the Commonwealth, God Bless her, has not met her match in Miss Liza,” a local newspaper commented, “it won’t be for lack of lawyers.” The case came up in hustings court in March 1854.¹⁵²

Gallie was pronounced guilty and sentenced to twenty lashes on her bare back at the public whipping post. At first, she considered another appeal, but deciding that the case was hopeless, dismissed her lawyers and took her punishment.¹⁵³

Historian Suzanne Lebsock notes that, while this case was unusual, it reflects the contradiction inherent in the “historic” cultural image of the African American woman, observing:

Eliza Gallie was relatively speaking, a powerful woman, propertied, autonomous (divorced actually), and assertive. But she was helpless in the end, the victim of the kind of deliberate humiliation that for most of us is past imagining. So it is with our perception of the history of Black women as a group. On the one hand, we have been told that Black women, in slavery and afterward, were a formidable people, “matriarchs,” in fact. And yet we know that all along Black women were dreadfully exploited. Rarely has so much power been attributed to so vulnerable a group.¹⁵⁴

150. GIDDINGS, *supra* note 88, at 39.

151. GIDDINGS, *supra* note 88, at 39.

152. SUZANNE LEBSOCK, *THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860* 87-88 (1984).

153. *Id.* at 88.

154. *Id.*

IV: AFRICAN AMERICAN WOMEN'S EXPERIENCES IN PENAL INSTITUTIONS

Numerous studies have documented the historical trend of incarcerating disproportionately large numbers of African Americans and treating them harshly.¹⁵⁵ However, because these studies have seldom made distinctions by sex, as well as race, they frequently have ignored differences between black male and female prisoners and significant differences between black and white women. Partiality was extended mainly to whites. Chivalry filtered white women out of the prison system, helping to create even greater racial imbalances among female prisoner populations. As notes women's prison historian Nicole Rafter, "partiality toward whites contributed to development of a bifurcated system, one track custodial and predominantly black, the other reformatory and reserved mainly for whites."¹⁵⁶

Convicted female offenders seldom faced the same consequences as male offenders though women were convicted and imprisoned under the same statutory provisions. Between the Civil War and World War I, however, ten states enacted legislation establishing separate facilities for convicted female criminals.¹⁵⁷ These statutes also established the use of indeterminate sentencing for women offenders.¹⁵⁸

The reformatory ideal embodied the notion that women criminals should be "rehabilitated" rather than "punished."¹⁵⁹ It followed, therefore, that women should be detained in the institution for as

155. See THE SENTENCING PROJECT, *supra* note 28, at 3 (stating that 23% of black men in the age group 20-29 is either in prison, jail, on probation, or parole on any given day compared to 6.2% of white men. For women, the statistics are: 2.7% of black women as compared to 1% of white women).

156. NICOLE H. RAFTER, *PARTIAL JUSTICE : WOMEN, PRISONS, AND SOCIAL CONTROL* 155 (1990).

157. These ten states were Indiana, Iowa, Maine, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin. By 1915 the other nine states (Alabama, Nebraska, Oregon, Arizona, Arkansas, Connecticut, Michigan, North Carolina, and Rhode Island) enacted similar legislation. Mark C. Clements, Comment, *Sex and Sentencing*, 26 SW. L.J. 890, 891 (1972) (citing Rogers, *A Digest of Laws Establishing Reformatories for Women in the United States*, 8 J. CRIM. L. & CRIMINOLOGY 518, 520 (1917)).

158. This trend originated around 1869, when Indiana became the first state to establish a separate reformatory for women. Prior to 1869, women prisoners were incarcerated in the same county jails and penitentiaries that housed male convicts. Seven of the 10 states used solely an indeterminate sentence, two used both the determinate and the indeterminate, and one gave the trial judge discretion to use either. Carolyn Engel Temin, *Discriminatory Sentencing of Women Offenders: The Argument for ERA in a Nutshell*, 11 AMER. CRIM. L. REV. 355, 358 (1973) (citing Rogers, *A Digest of Laws Establishing Reformatories for Women in the United States*, 8 J. CRIM. L.C. & P.S. 518, 526 (1917)). See discussion of indeterminate and determinate sentencing scheme, *infra* Part C, I, A & B, this text.

159. *Id.* at 358.

long as necessary to achieve the desired level of "rehabilitation."¹⁶⁰ In order to accomplish this, the statutes which established these "rehabilitative homes" also contained special sentencing provisions which applied only to the women sentenced to the particular institution.¹⁶¹ Because most of the statutes required all women over sixteen years old convicted of a crime to be sentenced to the reformatories, sex-based differential sentencing resulted.¹⁶² The sentencing statutes, therefore, often resulted in women getting longer sentences than men. Indeed, in the early twentieth century, it was thought that the ideal sentence to a women's reformatory should be "indeterminate with no limits at all on the minimum and maximum terms that an inmate could be forced to serve."¹⁶³

This type of disparate sentencing scheme was exemplified by the Muncy Act of Pennsylvania.¹⁶⁴ It required that all women over the age of sixteen who had been convicted of an offense punishable by more than one year imprisonment, be given a general sentence to Muncy. If the offense was punishable by a term of three years or less, they could be confined for three years. If the crime called for a term longer than three years, then the maximum punishment prescribed by law for the offense was the maximum sentence.¹⁶⁵ The judge possessed neither the discretion to impose a shorter maximum sentence than the maximum provided by law nor the power to fix a minimum sentence at which the woman would be eligible for parole.¹⁶⁶

160. *Id.*

161. *Id.*

162. *Id.*

163. Most states put some limit on the maximum sentence—usually the maximum term prescribed by law for the particular offense. Temin, *supra* note 158, at 358-59 (citations omitted).

164. In 1913, Pennsylvania created the State Industrial Home for Women by the Act of July 25, 1913, P.L. 1311. It was known colloquially as the "Muncy Act," after the geographical location of the institution. Temin, *supra* note 158, at 359.

165. Temin, *supra* note 158, at 359.

166. As noted by Carolyn Temin, the sentencing laws of Pennsylvania discriminated against women in at least five ways:

- 1) They permitted a court to send a woman to Muncy for three years even if the maximum for the offense was less than three years, whereas a man could not be sentenced to more than the maximum punishment prescribed by law;
- 2) They mandated that women receive the maximum legal penalty if convicted of a crime punishable by more than three years, whereas a man could be sentenced to less than the maximum prescribed by law;
- 3) A woman was not to receive any minimum sentence, whereas a man was to have a minimum sentence not to exceed one-half of the maximum sentence imposed in those cases where the judge in his discretion could impose a flat sentence stating a maximum only.
- 4) Under Pennsylvania law, where a sentence is imposed for less than two years, the sentencing judge also had parole jurisdiction; whereas, if the sentence imposed is two

By contrast, the Pennsylvania statute for sentencing male offenders allowed the judge to sentence offenders to shorter periods than the maximum prescribed by law. In addition, the judge was required to set a minimum sentence of not longer than one-half of the actual maximum sentence.¹⁶⁷ Where the statute prescribed "simple imprisonment," the judge could impose a flat maximum term provided by law for the offense.¹⁶⁸

Statutes similar to the Muncy Act remained in effect in several jurisdictions until fairly recently such as those in Massachusetts,¹⁶⁹ New Jersey¹⁷⁰ and Connecticut.¹⁷¹ Iowa law permitted women to be confined up to five years for a misdemeanor,¹⁷² whereas men

years or more, jurisdiction to parole lay exclusively with the parole board. Since all sentences to Muncy were for more than two years, they came under the jurisdiction of the parole board. A person sentenced to less than two years could engage a lawyer to present and argue a petition for parole on his behalf. The inmate also could present witnesses and enjoy the full panoply of due process rights. On the other hand, the Pennsylvania Board of Probation and Parole, made its decisions in closed sessions and did not permit representation by counsel at its hearings.

5) Under Pennsylvania law, where a statute prescribes "simple imprisonment" the sentence must be served in the county jail rather than in a state correctional institution. Under the Muncy Act, only women sentenced for offenses punishable by one year or less were eligible to serve their sentences in the county jail. There are very few such offenses in the Pennsylvania criminal code. Therefore, many women ended up in a penitentiary (i.e. Muncy) for offenses which would have sent a man merely to the county jail.

Temin, *supra* note 158, at 358.

This effect of Muncy was declared unconstitutional in *Commonwealth v. Stauffer*, 214 Pa. Super. 113, 251 A.2d 718 (1969) (holding that the statute providing for those sentenced to simple imprisonment to be held in county jail precluded the Defendant from being sentenced to the State Correctional Facility at Muncy). This cite refers to the list of five factors above as well as the sentence about *Commonwealth v. Stauffer*. See Temin, *supra* note 158, at 359-61 (noting that "In Pennsylvania the county jail is preferable to Muncy because of its location and other less tangible reasons which make 'county time' less onerous to serve. A person incarcerated at Muncy is almost always cut off from her relatives and friends.").

167. Temin, *supra* note 158, at 359.

168. PA. STAT. ANN. tit. 19, § 1057 (1964). "Wherever any person is convicted of any crime punishable by simple imprisonment, the court may, in its discretion, pronounce a sentence either for a fixed term or for an indefinite term, as may seem proper . . . in no case to exceed the maximum term prescribed by law . . ."

169. 1 MASS. GEN. LAWS ANN. ch. 125, § 16 (West 1958). "The Massachusetts Correctional Institution, Framingham shall be the institution of the commonwealth where all females convicted of crimes . . . shall be imprisoned and detained."

170. N.J. STAT. ANN. § 30:4-155 (West 1964) (repealed 1979). "The several courts in sentencing to the women's reformatory shall not fix or limit the duration of the sentence . . . but the time which the prisoner shall serve in the reformatory or on parole shall not exceed five years . . . or the maximum term provided by law for the offense . . ."

171. CONN. GEN. STAT. ANN. § 18-65 (West Supp. 1974). "Women over sixteen years of age who have been . . . convicted of, or who plead guilty to, the commission of felonies; second, persons convicted of, or who plead guilty to, the commission of misdemeanors; . . . third, women sentenced to community correctional centers. . . The Court imposing a sentence on offenders of any class shall not fix the term of such commitment. . ."

172. IOWA CODE ANN. § 245.7 (West 1969) (repealed 1985). ". . . A female convicted of a crime less than a felony shall not be detained therein longer than five years under one commitment."

could only be imprisoned for a maximum of one year unless otherwise stated in the statute defining the offense.¹⁷³ In Maine, women between the ages of seventeen and forty could be sentenced to reformatories for up to three years even if the maximum punishment for the offense was less.¹⁷⁴ Men, on the other hand, could only receive such treatment between the ages of seventeen and twenty-six.¹⁷⁵ Maryland permitted judges to sentence women convicted of crimes punishable by three months imprisonment to the state women's reformatory for an indeterminate period not to exceed the maximum term of imprisonment provided by law.¹⁷⁶

Attacks on such sentencing statutes failed because the courts consistently held that gender-based differential sentencing was constitutional on the ground that women constituted a reasonable class for discriminatory treatment in sentencing statutes.¹⁷⁷ Courts justified legislative distinctions which imposed longer sentences on women than men as reasonable in view of the state's purpose of providing more effective rehabilitation for women.¹⁷⁸ The Superior Court of Pennsylvania, for example, found "the inherent physical and psychological differences between men and women" to be persuasive:

This court is of the opinion that the legislature reasonably could have concluded that indeterminate sentences should be imposed on women as a class, allowing the time of incarceration to be matched to the necessary treatment in order to provide more effective rehabilitation. Such a conclusion could be based on the physiological and psychological make-up of women, the type of crime committed by women, their relation to the criminal world, their role in society, their unique vocational skills and pursuits and their reaction as a class to imprisonment, as well as the number and type

173. IOWA CODE ANN. § 687.7 (West 1950). "Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding five hundred dollars. . . ."

174. ME. REV. STAT. ANN. tit. 34, § 853-54 (West 1968) (repealed 1975). "When a woman is sentenced to the Reformatory for Women, the court imposing the sentence shall not fix the term of commitment to the reformatory. The duration of the commitment . . . may not exceed three years."

175. *Id.* § 802.

176. MD. CODE ANN., (Criminal Law) art. 27, § 689(e) (1994). ". . . the Courts of this State, instead of imposing sentences of fixed duration upon female offenders, may sentence them to the Maryland Correctional Institution for Women—Jessup for an indeterminate period of time which may not exceed the maximum term of imprisonment provided by the statute. . . ."

177. *Pennsylvania v. Daniel*, 210 Pa. Super. 156, 162 (1967), *rev'd*, 243 A.2d 400 (Pa. 1968) (detailing the Muncy Act, which stated that women were to be treated differently than men for sentencing purposes).

178. *Id.* at 164 (stating that "this court is of the opinion that the legislature reasonably could have concluded that indeterminate sentences should be imposed on women as a class . . . in order to provide more effective rehabilitation").

of women who are sentenced to imprisonment rather than given suspended sentences.¹⁷⁹

Although a number of state legislatures revised previously discriminatory sentencing provisions, for African American women, sentencing schemes remained discriminatory in intent and effect.¹⁸⁰ Prior to 1865, black women entered the prisons of the Northeast and Midwest in numbers grossly disproportionate to their representation in the general populations of these regions.¹⁸¹ In the South, however, few blacks of either sex were held in state prisons before the Civil War.¹⁸² Thus in the South, as in the North, though with opposite effects, racism played an important role in determining the composition of prison populations in the antebellum period.¹⁸³

After the Civil War, the prisons of the Northeast and Midwest continued to be filled with blacks while the formerly white Southern prisons increased their black population greatly.¹⁸⁴ Even the emerging prison system of the West imprisoned blacks in proportions that far exceeded their small representation in the general population.¹⁸⁵ Historically, fewer black women were imprisoned than either black or white men, but black women were often imprisoned in greater proportions of the female prisoner population than were black men in the male prisoner population.¹⁸⁶ For example, the data shows that significantly greater proportions of black women than black men appeared in the 1880 prisoner census for the Midwest and South; in the 1904 prisoner census, this pattern appeared in all regions, and it continued to appear in the South in 1923.¹⁸⁷ Between 1797 and 1801, 44% of the women sentenced to New York's prison were black, compared to 24% of the men.¹⁸⁸ At the Ohio penitentiary in 1840, 49% of the female convicts, but only 10% of the

179. *Id.* (ordering the four year sentence of a woman convicted of robbery vacated in favor of an indeterminate sentence).

180. For example, Arkansas originally permitted women misdemeanants to be sentenced to confinement in the women's penitentiary, whereas only male felons could be so confined. This was changed in 1971 specifically because it discriminated against women. 1939 Ark. Acts 117, §1, at 270; ARK. CODE ANN. § 46-804 (Michie Supp. 1971). Discriminatory statutes also were repealed by the legislatures of Kansas and Ohio. KAN. STAT. ANN. § 21-4601 et seq. (Supp. 1970); OHIO REV. CODE ANN. § § 5145.01, 5143.23 (Anderson 1970).

181. RAFTER, *supra* note 156, at 131.

182. RAFTER, *supra* note 156, at 131. See also *supra* Part A, III, C, this text.

183. RAFTER, *supra* note 156, at 131 (explaining that blacks in the South were disciplined by their owners rather than through the penal system as they were in the North).

184. RAFTER, *supra* note 156, at 131-32.

185. RAFTER, *supra* note 156, at 132.

186. RAFTER, *supra* note 156, at 141 & Table 6.3.

187. RAFTER, *supra* note 156, at 141 & Table 6.3.

188. RAFTER, *supra* note 156, at 141 & Table 6.3.

males, were black.¹⁸⁹ Of the men held in 1868 at the Tennessee penitentiary, 60% were black in contrast to 100% of the women.¹⁹⁰

Prison historian Nicole Rafter's research of women in prison documents the historically disproportionate numbers of African American women in U.S. penal institutions. Studying the internal records of five institutions after the Civil War, Rafter found that in all cases except the Albion reformatory, the number of blacks incarcerated was disproportionately large.¹⁹¹

Only at New York's Albion reformatory was the number of black female prisoners proportionate to the state's black population.¹⁹² Albion primarily focused on petty criminals who seemed likely to respond to rehabilitation, unlike reformatories in other states that accepted felons and misdemeanants and put little effort into retraining.¹⁹³ It seems that African American women were not perceived as likely to be rehabilitated, as Albion's prisoner registries allocated no space for recording race, while leaving space for entries on a large number of variables (including family history of insanity and epilepsy).¹⁹⁴

Racism was most obvious in southern criminal justice systems. After the Civil War, in addition to white legislators passing laws directed against blacks, justice officials sought to increase state revenues by leasing convicts to private contractors.¹⁹⁵ Black men and women constituted the overwhelming majority of those affected by these efforts. Indeed, in the period 1865-1900 for example, southern contractors leased black female prisoners to farm and mine alongside black men.¹⁹⁶ As a function of the screening out of white female

189. RAFTER, *supra* note 156, at 141 & Table 6.3.

190. RAFTER, *supra* note 156, at 141 & Table 6.3.

191. Over 70% of women committed to the Tennessee penitentiary in the 1860-1887 period were black; this figure rose to over 90% at the turn of the century, when racial tensions ran especially high, and declined to only 65% by 1926-1934, the final sampling period. Over the period 1860 to 1930, the number of blacks in Tennessee fell from 26% to 18% of the total population. The proportion of black women held at New York's State Prison for Women at Auburn rose from 12.5% at the start of the sampling period to nearly 40% at its close, a period during which the number of blacks in New York increased from 2% to 3% of the total population. Similarly, the population of Ohio as a whole rose from 2% to 5% black in the period 1890-1930, but the proportion of black women in its penitentiary increased steadily from 26% to nearly 52%, and blacks constituted over 25% of the population of the Ohio reformatory from the time it opened. The institutions studied were Tennessee State Penitentiary, Auburn (New York) State Prison, Ohio Penitentiary, Albion (New York) Reformatory, and Ohio Reformatory for Women. RAFTER, *supra* note 156 at 132 and Table 6.1.

192. RAFTER, *supra* note 156, at 132 and Table 6.1.

193. RAFTER, *supra* note 156, at 132 and Table 6.1.

194. In later years, the clerk penciled "colored" at the top of the page when black women were admitted. RAFTER, *supra* note 156, at 132.

195. RAFTER, *supra* note 156, at 134.

196. RAFTER, *supra* note 156.

offenders, judges sometimes refused outright to send white women to penal institutions; however, little concern was paid to the incarceration of black women. For many white women, then, gender and race interacted to keep their numbers in state prisons low.¹⁹⁷

Clearly, black women did not benefit from the "chivalry" extended to white females. A North Carolina report of 1922 described one institution as being so horrible that "the judge refuses to send white women to this jail, but negro women are sometimes sent."¹⁹⁸ Similarly, Eugenia Lekkekerker, a probation prison superintendent, wrote in 1931 that the high incarceration rate of women of color was due not only to "strong social (and sometimes judicial) prejudice" but also to black women's lack of access to alternatives "such as probation or private protective work" that channeled white women out of prisons.¹⁹⁹

Racial, gender, and class bias thus influenced both crime rates and administrative policies in correctional institutions. An examination of current statistics reveals how much remains unchanged from previous eras. According to the United States Justice Department, the number of women in state and federal prisons increased from 12,331 to 43,845 from 1980 to 1990; that is an increase of 256%, compared with a 140% increase in the male prison population.²⁰⁰ The legacy of these historical biases is discussed in the next section.

PART B. IMAGES, IDEOLOGY, AND AFRICAN AMERICAN WOMEN'S CRIMINALITY

The legacy of race, gender and class inequality is evident in African American women's disproportionate representation in arrest and incarceration rates. Negative cultural images of African American women based on stereotypes have been central to the problem of African American women's circumscribed role and limited access to societal resources and institutions, and have contributed to their overrepresentation in the criminal justice system. As former prisoner Antonio Gramsci instructs, ideological hegemony succeeds in systematically reinforcing cultural stereotypes which are essential in maintaining the subordination and coercion of disempowered groups.²⁰¹ Thus, a critical function of cultural images is the creation

197. RAFTER, *supra* note 156, at 134-35.

198. RAFTER, *supra* note 156, at 134.

199. RAFTER, *supra* note 156, at 135.

200. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 27, at 634-35.

201. See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1st ed. 1971).

of certain perceptions and expectations regarding a group's likelihood of contributing to and participating in key societal institutions. One underlying assumption is that certain groups of individuals are contributing members of society, while others are simply a burden. In dichotomous thought, one group is deserving, while the other is unworthy; one group is innocent, the other is guilty; one group merits alternative sanction, the other deserves harsh punishment.

Negative cultural images have been instrumental in depriving African American women of opportunities, resources and recognition of their value as human beings and contributing members of society. Thus, while the total number of African American women and their children who live in abject poverty in the United States has diminished since the late nineteenth century, their relative numbers remain high. In 1989, 46.5% of African American women who headed families had incomes below the poverty level.²⁰² Studies reveal that black women have greater relative poverty as children. They also have greater poverty upon arrest than white female offenders. As a group, African American women offenders are more often unemployed or working in low-income jobs, and living below the poverty line.²⁰³ As a result, black women's involvement in crime is often related to their responsibility for meeting the economic needs of their families.²⁰⁴

Poverty alone, however, does not fully explain the overrepresentation of African American women in prisons, since white women comprise a higher proportion of all impoverished women.²⁰⁵ A popular explanation for differences between African American and white female criminality centers around the distinctions in their socialization and gender roles.²⁰⁶ As Diane K. Lewis argues more persuasively, "a key to understanding the overrepresentation of Black women in correctional institutions and crime statistics lies not in

202. CLAUDETTE E. BENNETT, U.S. DEP'T OF COMMERCE, No. 480, THE BLACK POPULATION IN THE UNITED STATES : MARCH 1994 AND 1993 25 (1995).

203. Lewis, *supra* note 30, at 96.

204. Also, Lewis and Bresler's study of the San Francisco Women's jail, in 1981, found that while 57% of the black inmates with children were caring for them before incarceration, this was only true for 15% of white inmate mothers. Similarly, in the San Francisco population, as a whole, family responsibilities fell more heavily on black women. Although they were only 14% of the total adult female population, they headed almost half of the female headed families living in poverty. Lewis, *supra* note 30, at 97.

205. Lewis, *supra* note 30, at 96.

206. Theorists argue that according to ethnic cultural dictates, black children are expected to be assertive, nonconforming, independent, nurturing, expressive emotionally and focused in personal relationships, regardless of their sex. Since these traits are specialized according to sex among whites, black women who display them are perceived as more "masculine" (*i.e.*, crime-prone) than white women, by the dominant culture. LEWIS, *supra* note 30, at 98-99.

cultural and social differences, *per se*, but in the dominant society's reactions to them."²⁰⁷

The dominant ideologies of the slavery era generated some of the most enduring negative cultural representations of African American women. Among the planter class of the antebellum South, where women were subordinate in the gender hierarchy but reaped the benefits of race and class asymmetry, the "cult of true womanhood" defined the model woman as "the ideal wife and mother; as good, passive, delicate, pure, submissive, calm, frail, small, and dependent."²⁰⁸ While the male hierarchy enforced the Victorian code of modesty on white women, it was contrasted by near total disrespect for African American women.²⁰⁹

Two enduring negative images that reflected the prevailing Euro-American views of African American women during this period were (1) "Jezebel," the sexually aggressive, provocative woman governed entirely by libido; and (2) "Mammy," the religious, loyal, motherly slave devoted to the care of the slave owner's family.²¹⁰ "The image of Jezebel was used to explain sexual liaisons between slave owners and enslaved black women; that is, slave owners attributed these liaisons to the hypersexuality of the female slave who was purported to be the aggressor or seducer."²¹¹ The perceptions of African American women as promiscuous left them vulnerable to sexual crimes.²¹²

Although Emancipation freed African American women from slavery, it did not free them from the "Jezebel" or "Mammy" images. Instead,

[M]ammy became a national symbol of perfect domesticity at the very time that millions of black women were leaving the cotton fields of the South in search of employment in the Northern urban areas. Surely there is some connection between the idea of

207. Lewis, *supra* note 30, at 99.

208. Leith Mullings, *Images, Ideology, and Women of Color*, in *WOMEN OF COLOR IN U.S. SOCIETY* 267 (Maxine Baca Zinn and Bonnie Thornton Dill eds., 1994).

209. *Id.*

210. *Id.* at 267. K. SUE JEWELL, FROM MAMMY TO MISS AMERICA AND BEYOND: CULTURAL IMAGES AND THE SHAPING OF U.S. SOCIAL POLICY (1993) at 35-44; WHITE, *supra* note 84, at 164.

211. JEWELL, *supra* note 210, at 37.

212. From emancipation through more than two-thirds of the twentieth century, no Southern white male was convicted of raping or attempting to rape a black woman. Moreover, African American women had little or no recourse to justice when the perpetrator was black. When a black man raped a black woman, police consistently reported the crime as "unfounded," and in the relatively few cases that reached the courts, the testimony of black female victims was seldom believed by white juries. WHITE, *supra* note 84, at 164-65.

Mammy, the service and domestic jobs readily offered to black women, and their near-exclusion from other kinds of work.²¹³

Professor Jewell adds, "[A]s a symbol of African American womanhood, the image of mammy has been the most pervasive of all images constructed by the privileged and perpetuated by the mass media. Although the image of mammy originated in the South during slavery it has permeated every region of the United States."²¹⁴

Another myth of black womanhood—Sapphire, a domineering black woman who consumes men—emerged a century after slavery.²¹⁵ In contrast to the sexual manipulations of Jezebel, Sapphire emasculates men by the aggressive usurpation of their role. Her assertive demeanor identifies her with Mammy, but unlike Mammy, she is devoid of maternal compassion and understanding. Sapphire is as tough, efficient and tireless as Mammy, but, whereas Mammy operates within the boundaries prescribed for women, Sapphire operates within a man's world.²¹⁶

It long has been recognized that African American women had limited choices of occupation until after the Civil Rights Movement. Prior to that time, African American women generally could only choose to become either a teacher or a domestic. The proportion of African American women in domestic service jobs continues to be high, despite increased occupational mobility between 1960 and 1980.²¹⁷ The harsh reality that confronts many African American women clearly indicates that race, gender and class places them in multiple jeopardy to experience adverse consequences from the interactive effects of race, gender and class discrimination. As Professor Judy Scales-Trent argues:

Black women also have a strong argument that they are a "discrete and insular" minority, that they are the object of historical

213. WHITE, *supra* note 84, at 165.

214. JEWELL, *supra* note 210, at 37.

215. Sapphire developed from the numerous inaccurate interpretations of black women's history. The Sapphire myth was adopted in the scholarly work of E. Franklin Frazier and Daniel P. Moynihan, reflected in their respective matriarchy theses. Apparently, neither Frazier nor Moynihan could believe that black women could play crucial roles in black families without dominating men. According to Frazier, "the Negro woman as wife and or mother was the mistress of her cabin, and save for interference of master or overseer, her wishes in regard to mating and family matters were paramount." E. FRANKIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* 125 (1939).

The Department of Labor's 1965 study of the black family was based in part on Frazier's work. Noting that "the fundamental fact of Negro American family life is the often reversed roles of husband and wife," it found the black woman's role debilitating for black men. U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 30-31, 40 (1965).

216. FRAZIER, *supra* note 215.

217. In 1980, African American women still accounted for 52% of all private household cleaners and one-fourth of all those employed as maids. JEWELL, *supra* note 210, at 44.

prejudice and stereotypes, and that this prejudice and insularity affect their ability to use the political processes to protect their interests. From the colonial period to the present, various state and private actors have singled them out for treatment different than meted out to white women or black men. This has resulted in the creation of a group which is overrepresented among those living in poverty, and underrepresented among those who influence the political process. It is a group which carries the degraded statuses of both blacks and women, and finds its life chances thereby doubly limited. Any state action which burdens this group should be subject to at least strict scrutiny under the Equal Protection Clause.²¹⁸

For as long as crime statistics have been compiled, crime and poverty have been linked. Data on social welfare, health, employment and education make it clear that African Americans experience material conditions of life that are significantly worse than those faced by white Americans.²¹⁹ In 1991, using the U.S. Department of Labor's official poverty line, 30.4% of black families had incomes below the poverty level.²²⁰

Clearly, crime control priorities and social welfare policies are intertwined, particularly as they impact upon African American women's lives. Society readily punishes poor women of color who do not fit within middle-class images of womanhood. Notably, the caricature of the black Welfare Queen perpetuates the indelible image of undeserving African American women, which legitimates government policies in the areas of social welfare and criminal justice.²²¹

The reality is that women cannot raise children at minimum standards of living on existing social welfare programs.²²² In 1988 and 1990, Kathryn Edin interviewed fifty women (Aid to Families with Dependent Children recipients) living in Chicago and other areas of

218. Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 39 (1989).

219. TONRY, *supra* note 25, at 128.

220. TONRY, *supra* note 25, at 128 (estimating the percent of children in black single parent homes headed by women who lived below the poverty level).

221. As Michael Tonry notes, the personification of welfare fraud during the 1976 and 1980 presidential campaigns of former President Ronald Reagan was Linda Taylor, an African American woman from Chicago who reportedly collected welfare benefits under several aliases. TONRY, *supra* note 25, at 10.

222. "In January 1993, not one state provided AFDC benefits for single parent households of three people that reached the Bureau of Census' 1992 poverty threshold of \$11,187 (\$932 per month) for a household of that size. The median monthly benefit level nationally was \$367, ranging from \$120 and \$164 in Mississippi and Alabama respectively to \$703 in Suffolk County, New York, and \$923 in Alaska (where living costs are the nation's highest). In Mississippi, AFDC benefits equal 13% of the federal poverty level. In only 14 states did benefits reach even half of the federal poverty level." TONRY, *supra* note 25, at 14.

Cook County, Illinois about their incomes and expenses.²²³ Each of the fifty women had outside sources of support, ranging from unreported jobs, to support from families, to illegal income from prostitution and drug dealing. Trying to survive, the women reported that they felt morally entitled to ignore the income-reporting rules because they could not support their children or improve their and their children's lives through working.²²⁴ Edin and Christopher's study revealed that women's welfare offenses did not result in lavish lifestyles. Several of the families escaped absolute deprivation because of earnings from drug dealing and theft, undisclosed support from family or boyfriends, unreported minimum-wage jobs, or awards from an auto accident. The majority of the families:

[d]id without things that almost everyone regards as essential. Half lived in very bad neighborhoods. Half lived in badly run-down apartments, where the heat and hot water were frequently out of order, the roof leaked, plaster was falling off the walls, or windows fitted so badly that the wind blew through the apartment in the winter. One in four did without a telephone. . . . Most said their food budgets were too tight for fresh fruit or vegetables.²²⁵

Because socioeconomic conditions affecting African American women are the reason for their higher relative offending rates, society must focus on changing those conditions, rather than continually scapegoating and overly punishing members of these communities. As discussed in the following sections, this course has not been taken.

PART C: PUNISHMENT IN THE TWENTIETH CENTURY: MANDATORY SENTENCING, THE "DRUG WAR," AND AFRICAN AMERICAN WOMEN

I. THEORIES OF SENTENCING

A. *Indeterminate Sentencing*

Two major theories have developed in the area of sentencing. The first theory is that offenders should be sentenced to identical terms for the same offense.²²⁶ The second theory is that individualized

223. TONRY, *supra* note 25, at 151 (citing KATHRYN EDIN AND CHRISTOPHER JENCKS REFORMING WELFARE, IN RETHINKING SOCIAL POLICY (Christopher Jencks ed., 1992)).

224. TONRY, *supra* note 25, at 151 (citing KATHRYN EDIN AND CHRISTOPHER JENCKS, REFORMING WELFARE, IN RETHINKING SOCIAL POLICY (Christopher Jencks ed., 1992)).

225. TONRY, *supra* note 25, at 16.

226. CESARE MARCHESI DI BECCARIA, *ESSAYS ON CRIMES AND PUNISHMENTS* (Caesar Bonesana and Edward D. Ingraham trans., 2d ed. 1793). Professor Beccaria favored identical disposition of all persons convicted of the same crime.

disposition is based on the character and personality of the offender. The second model favors indeterminate sentencing based on the offender's rehabilitation progress, so that when an offender enters prison neither the offender nor the sentencing court can project the length of the term. "In punishment theory, the first position has classically been called retributivism, but in contemporary discourse it has been termed the 'desert,' or 'just deserts'."²²⁷

The latter position has been referred to as having utilitarian and individualistic goals, including general and specific deterrence, incapacitation and rehabilitation, which aim to "treat" the individual and secure the future protection of society.²²⁸ Indeterminate sentencing prevailed around the turn of the century and existed in every state until the late 1970s to early 1980s. Historically, indeterminate sentencing schemes were decidedly biased based on race and gender.²²⁹

B. *Determinate Sentencing*

Much of the impetus for determinate sentencing has come in reaction to the alleged failure of the rehabilitation model, the indeterminate sentence and parole.²³⁰ Advocates of determinate sentencing argue that it ensures equality in punishments by curtailing the unfettered discretion of trial judges, because all offenders receive the same punishment for the committed offense.²³¹ Thus, the lack of proportionality, the extensive disparity, the inability to predict

227. Dean J. Spader, *Megatrends in Criminal Justice Theory*, 13 AM. J. CRIM. LAW 157, 164 (1986).

228. *Id.* at 164-65. See also Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297 (1974) (discussing the extent to which confinement should be indeterminate and dependent on the ability to treat the prisoner and danger to society if the prisoner is released and to what extent it should be based on considerations of justice and proportionality).

229. See *supra* Part A, IV, this text.

230. See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981) (discussing the rise and fall of rehabilitation as a principal goal of sentencing); AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971) (discussing disparate findings in indeterminate sentencing); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION* 18 (1976) (concluding that "the rehabilitative disposition is plainly untenable"); MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973) (arguing that the rehabilitative model of sentencing is both irrational and unfair); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); Maurice Rosenberg, *Judicial Discretion of the Trial Court*, *Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971) (discussing the unreviewed discretion of the trial judge over various aspects of a case); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) (asserting that the Supreme Court has been excessively concerned with protecting the autonomy of the criminal justice system and the substantial degree of discretion of decisionmakers in the system when faced with allegations of racism in sentencing).

231. *Id.*

accurately and the failure of rehabilitation all have led to a widespread discontent with a purely positivistic system of sentencing.

Former Federal District Court Judge Marvin Frankel is widely credited for spearheading the modern determinate sentencing movement.²³² Judge Frankel recommended the creation of a sentencing commission and nomenclature-based classification of crimes having specified presumptive sentences for periods of imprisonment to accompany each crime category.²³³ In addition, the offender would be graded on a scale of limited factors to be considered in aggravation or mitigation of sentence, such as education and employment.²³⁴ Since the rehabilitative and indeterminate sentencing schemes fell into disrepute in the late 1970s and early 1980s, the federal government and at least forty-six states have enacted sentencing guidelines and mandatory sentencing laws for a wide variety of crimes.²³⁵

In the Federal Sentencing Reform Act of 1984, Congress abolished the United States Parole Commission, created a United States Sentencing Commission and directed this agency to draft sentencing guidelines for the federal courts.²³⁶ Although much of the debate over the efficacy of determinate sentencing schemes has focused on the federal sentencing guidelines, notable state efforts toward determinate sentencing reform preceded those of the federal

232. See, e.g., FRANKEL, *supra* note 230; Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225 (1984) (concluding that a sentencing commission of experts is the best approach to make criminal sentencing rational, fair, and adaptable to changing circumstances).

233. FRANKEL, *supra* note 230, at 118-24.

234. FRANKEL, *supra* note 230, at 111-15.

235. See Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679 (1992) (stating that judges overwhelmingly favor state sentencing guidelines over federal sentencing guidelines); SANDRA SHANE-DUBOW, ALICE P. BROWN, AND ERIK OLSEN, *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT* 290-92 (1985) [hereinafter SHANE-DUBOW] (describing a state-by-state survey).

236. Sentencing Reform Act, 18 U.S.C. § 3551 (1988). The federal guidelines became effective on November 1, 1987, but many federal judges considered them unconstitutional and started to apply them only after the Supreme Court upheld their constitutionality 15 months later in *Mistretta v. United States*, 488 U.S. 361 (1989) (holding that sentencing guidelines were not an excessive delegation of legislative power or a violation of separation of powers).

According to Professor Albert Alschuler, "The federal sentencing guidelines reflect a more ambitious effort to confine discretion than any current state guidelines." Albert A. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 988 (1991). "The federal sentencing grid has 258 boxes, more than any of the states' schemes." *Id.* See also 28 U.S.C. § 994(a)(1)(A) (1988) (detailing guidelines for sentencing in criminal cases with regard to probations, fines and terms of imprisonment). In addition to extremely narrow sentencing ranges for every guidelines category, the Sentencing Reform Act allows judges to depart from the guidelines only when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1985 & Supp. 1994).

government,²³⁷ often with harsher results.²³⁸ Several states abolished parole, several greatly narrowed the range of judicial discretion; and several promulgated sentencing guidelines, some drafted by sentencing commissions and others by judges.²³⁹ In 1976, the California Uniform Determinate Sentencing Act abolished the state's parole board and established statutory presumptive sentences for all serious offenses.²⁴⁰ In 1980, a Minnesota sentencing commission enacted Guidelines.²⁴¹

In New York, sentencing reform culminated in the "Rockefeller Drug Laws," mandating long minimum prison sentences for possession or distribution of various quantities of drugs.²⁴² The Rockefeller Drug Laws have been called "the most extreme" in the retributive trend in criminal justice policy.²⁴³ The general policy of New York

237. In 1976, California adopted its Uniform Determinate Sentencing Law. See Cal. Penal Code, §§1170, 3000, 3040 (West Supp. 1991) (creating a presumptive sentence for each statutory offense, with a narrow range of permissible deviations from the legislative presumption). Minnesota was the first state to establish a sentencing commission to promulgate guidelines. See MINN. STAT. ANN., § 244.09 (West 1992) (enabling legislation). Many states followed Minnesota's example, e.g., WASH. REV. CODE § 9.94A.310 (West Supp. 1992); 204 PA. CODE §§ 303.1-9 (1991). By early 1992 at least 13 states had adopted guidelines systems or had established sentencing commissions to develop sentencing standards. See Knapp & Hauptly, *supra* note 235, at 679 (discussing the implementation of guidelines sentencing systems in Florida, Kansas, Louisiana, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Washington). See discussion in Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 63-64 (1993) (discussing the skewed result when progressive sentencing guidelines are paired with mandatory sentencing in criminal law).

238. Sentencing Guidelines and harsh mandatory punishments for drug offenses. U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES & POLICY STATEMENTS 71 (1987).

239. See SHANE-DUBOW, *supra* note 235, at 279-92 (summarizing historical trends in sentence reform and noting that few states assess the import of their reforms); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1551 (1981) (discussing sentencing reforms in various jurisdictions).

240. CAL. PENAL CODE, § 1170 (West 1991).

241. MINN. STAT. § 9 (12) (1980). Under the Minnesota scheme, a sentencing judge consulted a complex grid in order to figure out a defendant's "score." One dimension of the grid was the nature of the crime, ranked from the most heinous, like murder, down to less serious crimes. Another dimension of the grid was the defendant's "criminal history score," to determine whether a defendant was a repeat offender. Once the defendant was placed on the grid, the judge could give the presumptive sentence, or vary the presumptive sentence slightly by providing a written justification for the departure. LYNNE GOODSTEIN & JOHN HEPBRUN, *DETERMINATE SENTENCING AND IMPRISONMENT: A FAILURE OF REFORM 76-80* (1985).

The Minnesota Sentencing Guidelines, unlike the federal guidelines, list aggravating and mitigating factors without specifying their weight. The guidelines declare that the listed aggravating and mitigating circumstances as well as unlisted ones may justify departure from the guidelines' narrow penalty ranges. At the same time, these guidelines forbid departure "unless the individual case involves substantial and compelling circumstances." Minnesota Sentencing Guidelines and Commentary § II.D.2 at 18-20 (1984).

242. N.Y. PENAL LAW § 70.00 (2) (a) (McKinney 1987 & Supp. 1995).

243. FRIEDMAN, *supra* note 43, at 411. New York State Penal Law divides felonies into six classes (from class A-I to class E) which differ progressively in allowable minimum and maximum sentence lengths. Conviction for a class A-I offense, the most serious felony class, carries a

during the 1960's had been to reserve criminal penalties for higher-level drug traffickers, while emphasizing drug treatment for low-level users.²⁴⁴ The Joint Committee notes further that, this approach being recognized as a failure, "the Governor and New York Legislature decided to try a new approach: the law was changed to prescribe severe and mandatory penalties for drug offenses at all levels."²⁴⁵ The principal purposes of the 1973 drug law were to frighten potential drug offenders with the threat of "get-tough" laws, and to reduce the amount of addiction-related crime by jailing some hardened criminals for long periods, thereby preventing them from committing further crimes.²⁴⁶ If a person is convicted of a Class A drug felony, by plea or at trial, the judge has virtually no sentencing discretion under New York's mandatory Rockefeller Drug Laws. According to the Joint Committee's report:

Punishment became more severe under the 1973 law. . . . Between 1972 and 1974 under the old law, only three percent of those convicted and sentenced to prison for drug felonies received a minimum sentence of more than three years. During 1974 and 1975, when the new law was in effect, 22% received minimum sentences of more than three years. Under the old drug law, lifetime prison sentences had been extremely rare: they were imposed only in cases involving large amounts of drugs. By contrast, some 1,777 persons convicted under the new drug law were sentenced to lifetime prison terms (imprisonment plus parole) between September 1973 and June 1976.²⁴⁷

Guidelines and mandatory minimum punishment schemes had the ostensibly laudable goal of decreasing racial and other disparities in criminal sentencing.²⁴⁸ While United States Supreme Court Justice Stephen Breyer was a circuit court judge, he wrote that Congress

mandatory minimum sentence of at least fifteen years and a maximum of life. N.Y. PENAL LAW § 70.00 (McKinney 1994). See THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE DRUG ABUSE COUNCIL, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE 149-51, 155-56 (1977) [hereinafter JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION] (describing the law in detail). Further, "[t]he 1973 law instituted an important difference between the lifetime maximum sentence required for class A drug felonies and the lifetime maximum mandated for other class A felonies [by providing that] class A drug felons could never be discharged from parole supervision. Class A drug lifetime sentences were thus truly for the life of the convicted felon." *Id.* at 151.

244. JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, *supra* note 243, at 3.

245. JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, *supra* note 243, at 3.

246. JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, *supra* note 243, at 3.

247. JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, *supra* note 243, at 16.

248. See, e.g., Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991) (reporting that disparities in federal criminal sentencing persist despite Congress's goals, in enacting sentencing guidelines and of eliminating disparities).

enacted the federal sentencing statute in 1984 to serve two goals.²⁴⁹ The first was to have honesty in sentencing, where the sentence a judge imposed was the sentence a prisoner served, without being reduced by parole officers.²⁵⁰ The second goal was to reduce the huge disparities in sentencing.²⁵¹

The federal sentencing guidelines were designed to limit the influence of social factors, such as the defendant's education and employment record, on sentencing determinations.²⁵² The guidelines state that family ties and responsibilities, age, employment skills, emotional conditions, and drug and alcohol dependence, are generally irrelevant in determining whether a sentence should depart from the guidelines.²⁵³ To reduce racial and class disparities in sentencing, the Minnesota Sentencing Guidelines Commission provided in its guidelines that education, living arrangements, and marital status should not be used to justify departures from sentencing guidelines.²⁵⁴ As discussed, *infra* Section III. A-B, however, measures such as the imposition of harsher penalties for identical narcotic substances, "crack" and "powdered" cocaine, exacerbated the gross disparities and disproportionate punishments between African American and European American defendants.

II. IMPACT OF SENTENCING REFORM ON WOMEN

The severity trend in modern sentencing reform statutes has resulted in the exponential growth of the federal and state prison populations, and has had a particularly devastating impact on communities of color.²⁵⁵ Professor Michael Tonry concluded that the War on Drugs has caused an increasing black disproportion in the inmate population.²⁵⁶ Drug arrests are a principal reason that the proportions of African Americans in prison and more generally under criminal justice system control have risen rapidly in recent years.²⁵⁷

249. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

250. *Id.*

251. *Id.*

252. TONRY, *supra* note 25, at 169 (quoting the Sentencing Reform Act of 1984).

253. TONRY, *supra* note 25, at 169.

254. TONRY, *supra* note 25, at 127.

255. TONRY, *supra* note 25, at 113.

256. TONRY, *supra* note 25, at 113.

257. "The pattern of increasing Black percentages is apparent in the aggregate national data on arrests and in state data. [Data on t]he national arrest rates per 100,000 population for whites and nonwhites from 1965 to 1991 . . . [show that] nonwhite rates were higher than white rates, usually at least double, throughout that period. From the early 1970s onward, white drug arrest rates were basically stable, fluctuating around 300 per 100,000. After 1980, nonwhite rates rose steadily and then skyrocketed: [b]y 1988 they were five times higher than white rates."

What is most reprehensible about the modern sentencing laws is the predictability of their disproportionate impact on communities of color. Professor Tonry asserts that the impact of the War on Drugs on young, inner-city minority males was foreseeable, and that the drug war's architects could justifiably be held accountable for the foreseeable consequences of their policies.²⁵⁸ Thus, such laws could be viewed as inherently racist.²⁵⁹

African American women currently represent over forty-five percent of the women in United States federal prisons.²⁶⁰ This is an alarming rate since the entire African American population is only fourteen percent of the United States population.²⁶¹ Between 1983 and 1993, the number of women in New York City jails increased from 310 to 2,000; while women in State prisons rose from 610 to 3,553.²⁶²

In the twentieth century, as in the past, poverty is the major correlative in African American women's involvement in criminality. Two-thirds of offenders sent to prison are convicted of property, drug and public disorder crimes.²⁶³ The median net worth for African Americans in 1988 was \$4,606, less than a tenth of the median net

TONRY, *supra* note 25, at 110-11 (citing Alfred Blumstein, *Making Rationality Relevant: The American Society of Criminology 1992 Presidential Address*, CRIMINOLOGY, Jan. 1993).

258. TONRY, *supra* note 25, at 4.

259. In my view, policymakers' knowledge that the harsh sentencing schemes would have a devastating and disproportionate impact on mostly poor inner-city communities of color render the laws inherently racist. Accordingly, one commentator notes that

Although damaging the lives of countless young blacks was probably not their primary aim, the architects of the War on Drugs no doubt foresaw the result. . . . For most purposes, an action taken to achieve a result is ethically indistinguishable from an action taken with knowledge that a result will almost certainly occur. In the criminal law, for example, if death results, setting fire to a house for the purpose of killing the sleeping occupants is first-degree murder, as is setting fire to a house for the purpose of defrauding an insurance company, but with knowledge that the occupants will most likely die. . . .

TONRY, *supra* note 25, at 4-5. Nevertheless, Tonry argues that the designers of sentencing guidelines intended to eliminate rather than increase racial disparities in sentencing. TONRY, *supra*, note 25, at 127. See also Randall Kennedy, *Changing Images of the State: The State, Criminal Law, and Racial Discrimination*, 107 HARV. L. REV. 1255 (1994) (criticizing a Minnesota Supreme Court decision which invalidated a state law prescribing harsher penalties for crack cocaine possession than for powdered cocaine possession).

260. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 27, at 636 (Table 6.97—Type of Commitment Offense Among Federal Prison Inmates by Sex and Race).

261. ECONOMICS AND STATISTICS ADMINISTRATION, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 17 (1994) (reporting Census Bureau data showing that the population of blacks in 1992 was 31,635,000 out of total United States population of 225,082,000).

262. NEW YORK STATE DEP'T OF CORRECTIONAL SERVICES, REPORT ON CHARACTERISTICS OF NEW COMMITMENTS (1993) [hereinafter CHARACTERISTICS OF NEW COMMITMENTS].

263. JAMES AUSTIN & JOHN IRWIN, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, WHO GOES TO PRISON 1 (1990). Larceny remains the number one property offense for women's arrest. See CHARACTERISTICS OF NEW COMMITMENTS, *supra* note 262, at 8 (reporting higher percentages of commitments of females for grand larceny and forgery than for other property offenses).

worth for white Americans.²⁶⁴ Female-headed households are at substantially greater risk of poverty. In the United States, 44% of African American families are headed by single mothers, compared with 13% of white families.²⁶⁵ The median income for an African American household headed by a single woman is 38% of that for an African American married couple.²⁶⁶

Another major reason for the increased incarceration of black women is the nation's "war on drugs." Mandatory and guideline sentencing laws, particularly those assessing higher penalties for all levels of drug involvement are having a devastating impact on African American women who are receiving the severe punishments. Women are particularly affected by the Rockefeller Drug Laws. While male drug commitments increased from 32% in 1987 to 43.7% in 1989, the proportion of the female population imprisoned for drug offenses rose from 42.4% to 66.4% in the same period.²⁶⁷

The number of women in custody in New York state prisons increased 333.9% between 1982 and 1984.²⁶⁸ Between 1988 and 1991, the number of women committed to New York State prisons as second-felony drug offenders under mandatory sentencing laws increased 276%, while the number of women committed as first-felony drug offenders increased 147%.²⁶⁹ In New York, drug offenses account for over 70% of the women sentenced to prison and 80% of all women in prison have substance abuse problems. According to

264. Rochelle L. Stanfield, *Black Frustration*, NAT'L J., May 16, 1992, at 1162.

265. *Id.* The 1990 census provides the percentage of each family category by income bracket based on data from 1989:

Fam. Inc.	BLACKS		WHITES	
	Intact Cpl.	Single Fem.	Intact Cpl.	Single Fem.
Under \$5,000	2.2%	21.6%	1.3%	10.9%
\$5,000-9,999	7.8	22.4	3.4	15.2
\$10,000-14,999	10.2	15.4	6.4	14.1
\$15,000-19,999	10.0	11.5	7.4	12.1
\$20,000-24,999	9.7	6.9	7.8	10.9
\$25,000-34,999	17.3	11.1	16.9	15.5
\$35,000-49,999	20.2	6.7	22.1	12.4
\$50,000-59,999	8.1	2.1	10.8	3.6
\$60,000-74,999	8.3	1.5	10.0	
\$75,000 and above	6.3	0.9	13.9	2.5
Median Income	\$30,650	\$11,630	\$39,208	\$18,946

Id.

266. *Id.*

267. THE CORRECTIONAL ASSOCIATION OF NEW YORK, WOMEN IN PRISON FACT SHEET (1990) [hereinafter WOMEN IN PRISON FACT SHEET].

268. WOMEN IN PRISON FACT SHEET (1995). All other references to the FACT SHEET will be to the 1990 edition.

269. Rhea Schaeffer, *Treatment, Not Jail, Saves Lives and Money*, N.Y. TIMES, Feb. 6, 1995, at 16 (letter from the Director of the Women in Prison Project of the Correctional Association of New York).

the Correctional Association of New York, the rate of growth in new court commitments between 1987 and 1989 was approximately three times greater for women than for men—98.9% for females versus 33.5% for males.²⁷⁰ The growth in both populations is, in large part, the result of increased commitments for drug offenses. From January 1987 through December 1989, drug commitments for females rose 211%, and rose 82% for males.²⁷¹ Over the three year period, African American women on average accounted for 46.1% of the female new court commitment population, followed by Hispanic women at 36.3 %, and whites at 17.5 %.²⁷²

Incarcerated women (61.2%) were more likely than men (32.2 %) to be committed for drug offenses.²⁷³ Men (53.6%) were more likely than women (26.1%) to be committed for violent felony offenses. Black women as a proportion of all female drug commitments increased from about 35% in 1987 to 41% in 1989, while white women declined from 13.8% to 9.3% in 1989.²⁷⁴

According to the New York State Department of Correctional Services, most female "inmates report that their offenses involved cocaine, crack or opiates. . . . In 1988, 43.3% of women reported that the drug leading to their conviction was cocaine, and another 30.6%, specified crack. This self-reported pattern of commitment was reversed in 1989, with 44.8% of females citing crack, and 33.9% [citing] cocaine."²⁷⁵ The Department also reports that in 1988, those incarcerated for either selling or possessing crack in 1988, 49.4% were black, 43.3% Hispanic and 7.3% white. The percentage of Hispanic [women's] crack admissions in 1989 was nearly identical to that of 1988, while black [women's] crack admissions were up and white, down."²⁷⁶ The proportion of women incarcerated from New York City in 1989 for crack offenses was nearly double the proportion incarcerated for cocaine offenses (40.7% versus 20.7%).²⁷⁷

270. WOMEN IN PRISON FACT SHEET, *supra* note 267 (reporting statistics on New York's female prison population).

271. WOMEN IN PRISON FACT SHEET, *supra* note 267.

272. NEW YORK STATE DEP'T OF CORRECTIONAL SERVICES, FEMALE DRUG COMMITMENT POPULATION 1987-1989, at 5 (1990) [hereinafter FEMALE DRUG COMMITMENT POPULATION].

273. NEW YORK STATE DEP'T OF CORRECTIONAL SERVICES, COMPARISON OF MALE & FEMALE INMATES UNDER THE DEPARTMENT'S CUSTODY AS OF DECEMBER 31, 1990, at 3 (1990). Approximately 51% of the total commitments for drug offenses is comprised of Hispanic women. Black women accounted for another 38%, and whites, the remaining 11%. *See also* FEMALE DRUG COMMITMENT POPULATION, *supra* note 272, at 23.

274. FEMALE DRUG COMMITMENT POPULATION, *supra* note 272, at 23.

275. FEMALE DRUG COMMITMENT POPULATION, *supra* note 272, at 25.

276. FEMALE DRUG COMMITMENT POPULATION, *supra* note 272, at 29.

277. FEMALE DRUG COMMITMENT POPULATION, *supra* note 272, at 32.

Many women find themselves incarcerated because they have been forced or tricked into carrying drugs for dealers.²⁷⁸ Often the dealers are boyfriends, spouses or other relatives that use the threat of retaliation if the women do not agree to carry large amounts of drugs, frequently across state or national borders.²⁷⁹ These women are victimized again by the criminal justice system by serving long sentences for drug possession. Queens County statistics on female A-I drug defendants are illuminating:

Data . . . indicate that 115 (70 percent) of these women were sent to prison between 1986 and 1990. Queens sent more women charged with A-I drug felonies to state prison than did any other county in New York during this period. Likewise, Queens sent a greater *proportion* of women arrested for A-I drug felonies to prison than the boroughs of Manhattan, Brooklyn, Bronx or Staten Island.²⁸⁰

While the Queens County statistics do not report the race of the female drug couriers charged with A-I felonies, data indicate that Latina and African American women constituted the overwhelming majority of women charged with A-I drug felonies in Queens County and of those incarcerated between 1986 and September 30, 1991.²⁸¹

III. ANGELA THOMPSON AND EIGHTH AMENDMENT PROPORTIONALITY ANALYSIS

At the sentencing phase of her trial for the sale of 2.3 grams of "crack" cocaine to an undercover police officer, a class A drug offense under the Rockefeller Drug Laws, Angela Thompson was originally sentenced to eight years to life imprisonment.²⁸² This sentence was upheld by a majority of the Appellate Division of the New York Supreme Court.²⁸³ On cross-appeal by the State, however, the New York Court of Appeals reversed the lower courts and ordered Angela Thompson to receive the mandatory minimum of fifteen years to life imprisonment.

278. See CORRECTIONAL ASSOCIATION OF NEW YORK, *INJUSTICE WILL BE DONE: WOMEN DRUG COURIERS AND THE ROCKEFELLER DRUG LAWS 2-9* (1992) [hereinafter *INJUSTICE WILL BE DONE*] (detailing case histories of women drug couriers).

279. *Id.*

280. *Id.* at 19.

281. Eight percent were white, 40% were black, and 52% were Hispanic. Charges were dropped against 37% of the white women, 29% of the black women, and 25% of the Hispanic women. Of the Queens women receiving life prison terms as a result of A-I drug felony arrests, 6% were white, 24% were black, and 70% were Hispanic. *INJUSTICE WILL BE DONE*, *supra* note 278, at 20.

282. *New York v. Thompson*, 6190 A.D.2d 162, 163 (N.Y. 1993) (reporting and upholding trial court disposition).

283. *Id.*

At the center of the debate over Angela Thompson's case was the applicability of the Eighth Amendment under both the United States and New York Constitutions. Thus, this Article now focuses on the modern rendering of "just deserts theory" and analyzes the Eighth Amendment as a mandate for proportionate punishment, with particular attention to the lives of African American women and the nation's war on drugs. In this respect, Angela Thompson's case must be viewed in historical light in order to illuminate the struggles of black women within the criminal justice system.²⁸⁴ As stated earlier, the fundamental issue to be addressed is whether the drug laws, mandating life imprisonment and lifetime parole on parole release, and operating disparately in communities of color, prescribe sentences so disproportionately severe as to constitute cruel and unusual punishment in violation of constitutional limitations.

A. *Proportionality Analysis by the Supreme Court*

The Eighth Amendment to the United States Constitution provides: "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²⁸⁵ In the context of capital cases, the Supreme Court has consistently held that this provision contains a proscription against disproportionate sentences.²⁸⁶ In *Furman v. Georgia*,²⁸⁷ the Supreme Court continued to apply this analysis to capital cases. A sharply splintered Court delivered the *Furman* opinion. The *Furman* majority emphasized the arbitrariness of unstructured discretion in the hands of the sentencing judge. Such subjective judgments constituted cruel and unusual

284. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 543-44 (discussing jurisprudential models for minority feminist legal scholarship).

285. U.S. CONST. amend. VIII. The New York Constitution is nearly identical: "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." N.Y. CONST. art. I, sec. 5.

286. See *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (striking a capital sentence for a felony murder conviction because the defendant accomplice did "not himself kill, attempt to kill, or intend that a killing take place"); cf. *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that the death penalty is proportional in felony murder cases where the accomplice's participation in the felony is "major" and his mental state is one of reckless indifference to human life); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty is grossly disproportionate to the crime of rape); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's revised death penalty provisions); *Furman v. Georgia*, 408 U.S. 238, 306 (Stewart, J., concurring), 314 (Marshall, J., concurring) (1972) (both justices observing that "excessive" penalties are "cruel" for Eighth Amendment purposes).

287. 408 U.S. 238 (1972) (5-4 decision). The Court struck down a Georgia death penalty statute for murder as discriminatory and arbitrary. Justices Brennan and Marshall voted to reverse the sentences because they found the death penalty to be *per se* unconstitutional. *But see Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's revised death penalty statute).

punishment, as the recipients of the death penalty become a "capriciously-selected, random handful."²⁸⁸

By 1976, many state legislatures responded to the *Furman* decision by revising their statutes to provide structured sentencing discretion. In the three cases of *Gregg v. Georgia*,²⁸⁹ *Proffitt v. Florida*,²⁹⁰ and *Jurek v. Texas*,²⁹¹ the Supreme Court upheld capital punishment statutes as revised by Georgia, Florida and Texas. In writing for the 7-2 majority in *Gregg*,²⁹² Justice Stewart held that the Court may not "require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."²⁹³ The statutory problems in *Furman* were found to be adequately remedied. The arbitrariness concern was remedied by procedural revisions such as a bifurcated trial-sentence where the guilt-determination stage was separated from the sentencing stage. The revised statutes also guided sentencer discretion by defining aggravating and mitigating circumstances, and mandated appellate review of all death sentences.²⁹⁴

288. *Furman v. Georgia*, 408 U.S. 238, 309 (Stewart, J., concurring).

Following a brief per curiam opinion, each member of the 5-4 majority issued his own concurring opinion. Justice White found that the infrequency of the imposition of capital punishment diminished its impact as a deterrent; thus, the death penalty was cruel and unusual by virtue of its occasional imposition. *Id.* at 310, 312-14. Justice Douglas was concerned that the death penalty was not only capriciously imposed, but also imposed in a racially discriminatory manner. *Id.* at 240, 256-57. Justices Brennan (*id.* at 305) and Marshall (*id.* at 314, 359) opined that capital punishment was *per se* cruel and unusual punishment.

The dissenting opinions of Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist, differed from the majority on three primary issues. First, Justice Rehnquist criticized what he perceived to be the majority's judicial activism. *Furman v. Georgia*, 408 U.S. 238, 465 (Rehnquist, J., dissenting). Second, the dissenters insisted that the death penalty did not offend contemporary standards of humaneness. *Id.* at 414, 442-43 (opinion of Powell, J.). Third, the dissenters opined that competent juries were capable of rendering reasonable decisions even in the absence of specific statutory guidance. *Id.* at 375, 400-03 (opinion of Burger, C.J.).

289. 428 U.S. 153 (1976).

290. 428 U.S. 242 (1976).

291. 428 U.S. 262 (1976).

292. 428 U.S. 153 (1976).

293. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976). In *Gregg*, the Court established four objective criteria for Eighth Amendment analysis: "(1) a bifurcated proceeding where the penalty was considered separately from the guilt of the defendant; (2) specific standards that narrowed the class of death-eligible defendants; (3) the consideration of all relevant information, especially mitigating circumstances, in the penalty phase, and (4) meaningful appellate review." Olivia O. Singletary, Comment, Harmelin v. Michigan: *The Most Recent Casualty in the Supreme Court's Struggle to Develop a Standard for Eighth Amendment Proportionality Review*, 54 OHIO ST. L.J. 1205, 1209 (1993) (footnote omitted).

294. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). Justices Marshall and Brennan dissented, finding that a punishment may be excessive, and therefore cruel and unusual, even though there may be public support for it. *Id.* at 229. The majority opinion noted that whereas 35 state legislatures had enacted capital punishment legislation, the penalty did not offend contemporary societal standards. *Id.* at 179 (dismissing petitioner's argument that standards of decency required a destruction of capital punishment).

Gregg emphasized the special character of the death penalty, as "unique in its severity and irrevocability."²⁹⁵ In requiring extensive procedural safeguards, particularly those involving consideration of aggravating and mitigating circumstances, *Gregg* articulated the human dignity principle underlying the Eighth Amendment.²⁹⁶ As such, the Court upheld the death penalty, but determined that a constitutional violation would occur if punishment were disproportionate in comparison to the seriousness of the crime.²⁹⁷

Race and imposition of the death penalty have been historically intertwined.²⁹⁸ Challenges to capital punishment based on racial discrimination have been advanced on Equal Protection Clause and Cruel and Unusual Punishments Clause theories. In *McCleskey v. Kemp*, the Supreme Court found the statistical data revealing the correlation between racial bias and the implementation of the death penalty in Georgia insufficient to establish a constitutional violation.²⁹⁹ The Court rejected *McCleskey's* Eighth Amendment argument on the basis that the statistics did not establish that race governed capital punishment decisions such that the death penalty law was implemented in an arbitrary and capricious manner.³⁰⁰ To dissenting Justices Brennan, Marshall, Blackmun and Stevens, however, the statistical evidence "reveal[ed] that the risk that race influenced *McCleskey's* sentence [was] intolerable by any imaginable standard."³⁰¹

While the Court has reluctantly applied proportionality principles in capital cases, it has much less consistently applied these principles

295. *Id.* at 187 (citation omitted).

296. *Id.* at 173 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

297. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

298. *See, e.g.*, Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 440-47 (1988) (criticizing the *McCleskey* court's failure to consider the need to protect black victims of crime); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1473, 1603-26 (1988) (describing racial disparities in capital sentencing and possible remedies); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 54-6 (1984) (reporting statistical evidence of racially discriminatory imposition of the death penalty); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, (1988) (arguing for "community-based" equal protection jurisprudence in capital sentencing that will give black communities the same protection from crime that white communities enjoy, by eliminating racial discrimination).

299. 481 U.S. 279 (1987). The Baldus Study was based on more than 2,000 Georgia murder cases tried in the 1970s. The study revealed that blacks whose victims were white had the highest probability of receiving the death sentence. Writing for the 5-4 majority, Justice Powell stated that the Baldus statistics failed to show that "any of the decision makers in *McCleskey's* case acted with discriminatory purpose." *Id.* at 297.

300. *Id.* at 307 (holding that risk of racial prejudice in death penalty cases is small enough to disallow an Eighth Amendment claim).

301. *Id.* at 325 (Brennan, J., dissenting).

in the context of noncapital cases.³⁰² The question as to whether a term of imprisonment could be so excessively disproportionate to the offense so as to violate the Eighth Amendment was not addressed by the Supreme Court until 1892, in *O'Neil v. Vermont*.³⁰³ Nearly twenty years later, the Supreme Court decided *Weems v. United States*, the seminal case with respect to the proportionality principle.³⁰⁴ *Weems* recognized the applicability of disproportionately analysis to excessive imprisonment. In *Weems*, the Court reversed the contested sentence because of the unusually harsh nature of the punishment and because it recognized that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."³⁰⁵ The Court compared the punishment of the defendant to those imposed in the same jurisdiction for crimes that the Court considered to be more serious than the one for which the defendant

302. In addition to death penalty cases, proportionality review has been applied in enforcement of prisoners' rights cases. See, e.g., *Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (holding that rape of pre-operative transsexual by another inmate amounted to cruel and unusual punishment where prison officials took no precautions despite knowledge that petitioner would be particularly vulnerable to sexual attack by other inmates); *Hudson v. McMillian*, 112 S. Ct. 995 (1992) (holding Eighth Amendment applicable to a prisoner who was beaten by guards but did not suffer "significant injury"); *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992) (holding that a prisoner was not required to exhaust administrative appeals before bringing a federal claim against prison officials for neglecting his medical and psychiatric needs in violation of the Eighth Amendment).

303. William H. Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 *FORDHAM L. REV.* 639, 642 (1979) (citing *O'Neil v. Vermont*, 144 U.S. 323 (1892)). In *O'Neil*, the defendant was licensed to sell liquor in New York, and had been sentenced to serve 19,914 days (over 54 years), for conviction on 307 counts of illegal sale of liquor shipped to Vermont. The majority did not reach the question of whether the penalty violated the Eighth Amendment since that point had not been raised as error. *Id.* at 643 (citing *O'Neil*, 144 U.S. at 331). The majority also stated that the Eighth Amendment did not apply to the states. *Id.* at 642 (citing *O'Neil*, 144 U.S. at 332). This view was expressly rejected in 1962 in *Robinson v. California*, 370 U.S. 660 (1962).

Mulligan notes that in a dissenting opinion, Justice Field "considered the fact that the penalty was more harsh than could have been imposed for burglary or manslaughter, and concluded that 'it was one which, in its severity, considering the offenses of which [the defendant] was convicted, may justly be termed both unusual and cruel.'" *Id.* at 342 (citing *O'Neil* 144 U.S. at 339) (Field, J., dissenting).

304. Mulligan, *supra* note 303, at 362 (citing *Weems v. United States*, 217 U.S. 349 (1910)).

The Court was construing the Philippines' Bill of Rights which contained a cruel and unusual punishment clause identical to the language of the Eighth Amendment. The defendant, an official of the Philippine government, was convicted of falsifying public records and was sentenced under the Penal Code of the Philippines, then a United States territory, to fifteen years of hard and painful labor, with a chain at the ankle hanging from the wrists. He was stripped of the right of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his property. He was placed on surveillance by the state for the rest of his life, and could not vote, hold office, receive retirement pay, or even change his residence without permission. Mulligan, *supra* note 303, at 362 (citing *Weems*, 217 U.S. at 364-66).

305. Mulligan, *supra* note 303, at 367.

had been convicted.³⁰⁶ It also compared the punishment under attack with those imposed in other jurisdictions for the same crime.³⁰⁷ This two-step comparison constitutes the major part of the contemporary proportionality test.³⁰⁸ *Weems* affirmed two constitutional principles relevant to Eighth Amendment analysis: first, the legislature's preeminent role in determining crimes and punishments, a role subject to constitutional limitations;³⁰⁹ and second, the evolutive nature of the Eighth Amendment.³¹⁰ As Chief Justice Warren later stated in *Trop v. Dulles*,³¹¹ "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³¹²

Application of the proportionality principle has proven to be erratic in practice, particularly in noncapital cases. For example, in *Rummel v. Estelle*,³¹³ a majority of the Court upheld a legislative determination of proportionality under a Texas recidivist statute for a defendant who had been convicted of three nonviolent felonies involving minor theft of property.³¹⁴ In *Hutto v. Davis*, the Court upheld a forty-year sentence for the possession of less than nine ounces of marijuana.³¹⁵ Despite these prior rulings, in *Solem v. Helm*,³¹⁶ the Court overturned a sentence of life in prison without parole for a defendant convicted of seven nonviolent felonies as violative of the Eighth Amendment.³¹⁷

306. Mulligan, *supra* note 303, at 362 (citing *Weems*, 217 U.S. at 380) (comparing the penalty for falsification of documents to the punishments for certain degrees of homicide, and for "misprision of treason . . . conspiracy to destroy the Government by force . . . larceny and other crimes").

307. Mulligan, *supra* note 303, at 643 (citing *Weems*, 217 U.S. at 380-81 (comparing the Spanish penal code that prescribed the contested punishment to the United States penal law penalty for the similar crime of embezzlement).

308. Mulligan, *supra* note 303, at 643 (citing *Hart v. Coiner*, 483 F.2d 136, 141-42 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974)); *New York v. Brodick*, 332 N.E.2d 338, 342 (N.Y.), *cert. denied*, 423 U.S. 950 (1975).

309. Mulligan, *supra* note 303, at 644 (citing *Weems*, 217 U.S. at 379).

310. Mulligan, *supra* note 303, at 644 (citing *Weems*, 217 U.S. at 378) (noting that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice").

311. 356 U.S. 86 (1958).

312. *Id.* at 101.

313. 445 U.S. 263 (1980).

314. *Rummel v. Estelle*, 445 U.S. 263, 285 (1980). The defendant in *Rummel* was convicted of obtaining \$120.75 by false pretenses and had two prior nonviolent felony convictions, one involving fraudulent use of a credit card for \$80.00 and the other involving passing a forged check for \$28.36. *Id.* at 265-66.

315. 454 U.S. 370 (1982) (per curiam).

316. 463 U.S. 277 (1983).

317. *Solem v. Helm*, 463 U.S. 277 (1983). The five-member majority in *Solem* distinguished *Rummel* on the grounds that the defendant in that case had the possibility of obtaining parole, whereas the defendant in *Solem* was given a sentence with no eligibility for release absent executive clemency. *Id.* at 300-03.

In its most recent statement on proportionality, the Supreme Court cast further confusion on the applicability of Eighth Amendment jurisprudence with regard to noncapital offenses. In *Harmelin v. Michigan*,³¹⁸ the defendant was sentenced to life imprisonment without possibility of parole pursuant to a Michigan statute requiring such punishment for the possession of more than 650 grams of any mixture containing cocaine.³¹⁹ The majority of the Court reaffirmed the principle that gross disproportionality of a sentence of imprisonment violates the Eighth Amendment's Cruel and Unusual Punishments Clause.³²⁰ However, the Court simultaneously distanced itself from the standards announced in *Solem*.³²¹ The Court was sharply divided on the issue of whether Harmelin's life sentence constituted cruel and unusual punishment.³²² In writing for the plurality, Justice Scalia's opinion affirmed the Michigan Court of Appeals' decision upholding the sentence. Two members of the Court, however, voted to affirm because they found no Eighth Amendment proportionality requirement applicable to noncapital sentences.³²³ Three members voted to affirm because, based on the severity of the crime of cocaine distribution, the sentence was constitutional under the narrow proportionality test that they concluded was applicable to noncapital sentences.³²⁴ The four dissenters believed that the sentence was unconstitutionally disproportionate to the offense.³²⁵

Justice Scalia, joined by Chief Justice Rehnquist, found no requirement of proportionality within the language or meaning of the Eighth Amendment.³²⁶ Justice Scalia rejected Harmelin's argument that his sentence was disproportionate to the gravity of the offense.³²⁷ Finding that the three-factor test announced in *Solem* had been

318. 501 U.S. 957 (1991).

319. *Harmelin v. Michigan*, 501 U.S. 957, 961 & n.1 (1991). Under the Michigan statute, the purity of the mixture and whether the person intends to distribute the drug are irrelevant to the sentencing decision. *Id.* at 1021-25 (White, J., dissenting).

320. *Id.* at 996-97 (Kennedy, J., concurring with O'Connor and Souter, JJ.); *id.* at 1012 (White, J., dissenting with Blackmun and Stevens, JJ.).

321. *Id.* at 957.

322. *Id.* at 996-97 (Kennedy, J., concurring with O'Connor and Steven, JJ.); *id.* at 1012 (White, J., dissenting with Blackmun and Stevens, JJ.).

323. *Id.* at 994 (opinion of Rehnquist, C.J. & Scalia, J.).

324. *Harmelin v. Michigan*, 501 U.S. 957, 1002-04 (Kennedy, O'Connor, & Souter, JJ., concurring in part and in the judgment.)

325. *Id.* at 1021-27 (White, Blackmun, & Stevens, JJ., dissenting); *Id.* at 1027-28 (Marshall, J., dissenting).

326. *Id.* at 974-76.

327. *Id.* at 74 (finding nothing in the Eighth Amendment that would preclude a disproportionate punishment, even if appellant could prove that the punishment was disproportionate).

rejected in *Rummel*, Justice Scalia stated that *Solem* should be overruled.³²⁸

In a concurring opinion, Justice Kennedy, joined by Justices O'Connor and Souter, voted to affirm Harmelin's sentence.³²⁹ However, Justice Kennedy concluded that the Court's previous decisions had recognized only a "narrow" proportionality requirement in the Cruel and Unusual Punishments Clause.³³⁰ According to Justice Kennedy, the only relevant inquiry under the *Solem* criteria was the severity of the sentence relative to the seriousness of the offense.³³¹ Justice Kennedy emphasized that the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime."³³²

Based on his belief that proportionality review should not be conducted except in death penalty cases, Justice Scalia provided no analysis on the merits of Harmelin's claim.³³³ Between the plurality opinion by Justice Scalia, and the concurring opinion by Justice Kennedy, the extent of proportionality analysis in Eighth Amendment jurisprudence in noncapital sentencing remains unclear. According to Singletary, "The dissent's view can be best summarized by a quotation from Justice White: 'While Justice Scalia seeks to deliver a swift death sentence to [*Solem*], Justice Kennedy prefers to eviscerate it, leaving only an empty shell.'³³⁴ In refusing to specifically address the merits of Harmelin's claims, the Court extolled the principle of federalism in recognizing legislative prerogative to determine criminal punishments.³³⁵ Arguably, however, the Court

328. *Id.* at 964. Justice Scalia provided an extensive historical analysis of the Eighth Amendment, concluding that the term "cruel and unusual punishments" was not understood at the time of the adoption of the Eighth Amendment to include the concept of proportionality. *Id.* at 975-84. Justice Scalia further reasoned that appellate review of sentencing that includes a proportionality analysis merely substitutes subjective judicial determinations for the determinations of legislatures. *Id.* at 986-90.

329. *Harmelin v. Michigan*, 501 U.S. 957, 966 (concurring with Justice Scalia in his decision, but not in his approach to the Eighth Amendment).

330. *Id.* 996-97 (Kennedy, J., concurring in part and in the judgment).

331. *Id.* at 1004-05 (Kennedy, J., concurring).

332. *Id.* at 1001 (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). Justice Kennedy did not find it necessary to conduct an internal and external comparison of Harmelin's sentence with those in the State of Michigan and in other jurisdictions. Justice White stated in his dissent that *stare decisis* required the application of the three-pronged test in *Solem*. *Id.* at 1021. Rather, Justice Kennedy determined that no punishment of incarceration, even life imprisonment without parole, would be grossly disproportionate to an offense involving the possession of a substantial amount of drugs. *Id.* at 1002-03. According to the Justice, ostensibly non-violent drug offenses are actually linked to violent crimes, because drug users commit crimes for drug money, and because the drug business itself leads to violent crime.

333. Singletary, *supra* note 293, at 1232.

334. Singletary, *supra* note 293, at 1237 (citing *Harmelin* at 1018 (White, J., dissenting)).

335. *Harmelin*, 501 U.S. at 986.

abdicated its responsibility to provide concise judicial review on the issue of proportionality for dispositive resolution of this matter throughout the states.³³⁶

B. *Proportionality Analysis by the State of New York*

I. *Gravity of the Offense*

In the state of New York, *New York v. Broadie*,³³⁷ established the principles governing Eighth Amendment analysis. In *Broadie*, the New York Court of Appeals adopted the principle that a sentence may constitute cruel and unusual punishment if it is " 'cruelly' excessive, that is, grossly disproportionate to the crime for which [it is] exacted."³³⁸ Yet the *Broadie* court found that sentences imposed by the drug laws were not so disproportionate as to constitute cruel and unusual punishment.³³⁹ In *Broadie*, eight defendants convicted of drug offenses challenged the constitutionality of Rockefeller Drug Laws classifying their offenses as class A felonies,³⁴⁰ and sentencing provisions imposing a mandatory maximum sentence of life imprisonment and minimums from one or six years to eight and one-third years.³⁴¹

As the court summarized in *New York v. Thompson*,³⁴² "in assessing the proportionality of the mandatory drug sentences, [the *Broadie* majority] focused on the following factors: (1) the gravity of the offense, primarily in terms of the harm it causes society, but also in comparison with punishments imposed for other crimes in [New

336. Dissenting from a denial of *certiorari* in *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), Justice Marshall stated:

It is axiomatic that this Court should approach Eighth Amendment challenges with caution, lest it become 'under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.' (citation omitted). But neither should the Court abdicate the function conferred by the Eighth Amendment, to determine whether application of a given legislative judgment results in punishment grossly out of proportion to specific offenses. I decline to join the Court in its abdication here.

439 U.S. 1091, 1102 (1979). In *Carmona*, appellants challenged the constitutionality of their mandatory indeterminate life sentences for the sale of an individual dose of cocaine and the possession of one ounce of cocaine. The district court found the sentence unconstitutionally disproportionate. 436 F. Supp. 1153, 1162 (S.D.N.Y. 1977), *rev'd*, 576 F.2d 405, 417 (2d Cir. 1978).

337. 332 N.E.2d 338 (N.Y. 1975).

338. *New York v. Broadie*, 332 N.E.2d 338, 341 (N.Y. 1975), *cert. denied*, 423 U.S. 950 (1975) (appendix) (citation omitted).

339. *Id.* at 346-47.

340. N.Y. PENAL LAW, §§ 220.40, 220.39, 220.18 (McKinney 1991).

341. N.Y. PENAL LAW, § 70.00 (2) (a), subd. (3), par. (a), cls. (ii) and (iii); *Broadie*, 332 N.E.2d at 341.

342. 633 N.E.2d 1074 (N.Y. 1994).

York] as well as with punishments for the same or similar crimes in other jurisdictions . . . and (2) 'the character of the offender and the gravity of the threat he [or she] poses to society.'"³⁴³

Considering the "gravity" element of the *Broadie* cruel and unusual punishments analysis, the *Broadie* court found that "[d]rug dealing in its present epidemic proportions is a grave offense of high rank."³⁴⁴ The Court reasoned that the legislature, in making this assessment, could properly view criminal narcotics sales as "the crucial link" in the pernicious cycle of drug abuse,³⁴⁵ symptoms of the widespread and pernicious phenomenon of drug distribution. In measuring the social harm in drug distribution, the drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse.³⁴⁶

The New York Court of Appeals reaffirmed these positions in *Thompson*:

[T]ime has not eroded this Court's conclusion in *Broadie* that the selling of narcotic drugs represents a grave offense of the first magnitude. Neither has it altered our conclusion on the second element, that, in comparison to the sanctions for other crimes under our Penal Law and for the same or similar drug offenses in other jurisdictions, the mandatory sentences for drug offenses are 'relatively severe, but not irrationally so, given the epidemic dimensions of the problem.'³⁴⁷

The assessment of the perceived severity of drug offenses warrants historical analysis and context. According to Lawrence Friedman, in the nineteenth century, drug laws existed as "scattered" pieces of legislation.³⁴⁸ In general, addiction was not a crime, nor was the sale or use of narcotics.³⁴⁹ However, this situation changed dramatically in the twentieth century when state legislatures enacted the first initiatives.³⁵⁰ For example, in 1905, a New York law declared cocaine, morphine, and opium to be "poisons," not to be sold at retail

343. *New York v. Thompson*, 633 N.E.2d at 1076 (citing *New York v. Broadie*, 332 N.E.2d 338, 343 (N.Y. 1975)).

344. *Thompson*, 633 N.E. 2d at 1076 (citing *New York v. Broadie*, 332 N.E.2d 338 (N.Y. 1975)). "Although the statutory sentencing scheme at the time equated the punishment level for drug dealing with that for the most heinous crimes of violence defined in the Penal Law, this Court [in *Broadie*] found such severity not to be unreasonable because 'drug-related crimes may be much more prevalent, that is, have a higher and rising incidence, than other crimes comparably punished or equally grave crimes not as severely punished, requiring greater isolation and deterrence.'" *Id.* (citing *Broadie*, 332 N.E.2d at 338).

345. *New York v. Broadie*, 332 N.E. 2d 338, 344 (N.Y. 1975).

346. *Id.* at 342 (citations omitted).

347. *Thompson*, 633 N.E.2d at 1077 (citing *Broadie*, 332 N.E.2d at 338).

348. FRIEDMAN, *supra* note 43, at 355.

349. FRIEDMAN, *supra* note 43, at 355.

350. FRIEDMAN, *supra* note 43, at 355.

without a warning label.³⁵¹ However, "the first major landmark of the drug wars was the [federal] Harrison Narcotic Drug Act [of 1914]."³⁵² Although ostensibly enacted as a tax statute, its real aim was to curtail drug traffic.³⁵³ It applied to opium and its derivatives, and also, very notably, to "coca leaves" and their derivatives. This act was significant, as it put cocaine in the same pariah class as heroin and morphine.³⁵⁴

From a legal perspective, crime is an act that violates the social norms, and its prohibition is buttressed by a punishment administered by the state through a proceeding in its own name. But John Gillin observed that, viewed from a broader sociological perspective, crime is "an act that has been shown to be actually harmful to society, or that is believed to be socially harmful by a group of people that has the power to enforce its beliefs and that places such act under the ban of positive penalties."³⁵⁵ This approach reveals that the definition of crime is relative, for whether an act is socially harmful depends on the interpretation of some group—that group, as criminologist John Gillin says, which has sufficient power to make its beliefs an effective and functioning part of the social order.³⁵⁶

Rudolph Gerber observes that the "federal drug policy, past and present, has functioned largely as a means to brand marginalized ethnic groups as deviant."³⁵⁷ The prohibition of certain drugs has also reflected racial stereotyping. As narcotics laws historian David Musto states, "[c]ocaine raised the specter of the wild Negro, opium

351. FRIEDMAN, *supra* note 43, at 355 (citing 35 Stats., Part 1, chap. 100, p.614 (Act of Feb. 9, 1909)). It was unlawful under this act to import opium or any opium derivative except for "medicinal purposes." FRIEDMAN, *supra* note 43, at 135.

352. FRIEDMAN, *supra* note 43, at 355 (citing 38 Stats. 785 (Act of Dec. 17, 1914)).

353. FRIEDMAN, *supra* note 43, at 355.

354. FRIEDMAN, *supra* note 43, at 355.

355. JOHN L. GILLIN, *CRIMINOLOGY AND PENOLOGY* 9 (3d ed. 1945). As Judge Rudolph J. Gerber notes, for example:

[T]he drug war and its disparate impact continues as the last vestige of [the] earlier ethnic war against those who get their highs without access to the protected, acceptable drugs of the upper class, such as tobacco and alcohol . . . For everyone who dies from cocaine poisoning, fifteen die from alcohol and sixty from tobacco - related illnesses. The mortality rate for tobacco users—is estimated—to be more than 100 times greater than that rate for cocaine users. Rudolph J. Gerber, *A System in Collapse: Appearance vs. Reality in Criminal Justice*, 12 ST. LOUIS U. PUB. L. REV. 225, 228-29 (1993).

356. GILLIN, *supra* note 355, at 9. See also MARVIN E. WOLFGANG, *Race and Crime, in CHANGING CONCEPTS OF CRIME AND ITS TREATMENT* 38 (HUGH J. KLARE ED., 1966) (discussing symposium for the centenary of the Howard League for Penal Reform). See *supra* part A-III A-D, this text.

357. GILLIN, *supra* note 355, at 228 (citing RICHARD MILLER, *THE CASE FOR LEGALIZING DRUGS* 100, 104 (1991)).

the devious Chinese, morphine the tramps in the slums."³⁵⁸ On the longstanding influence of racial stereotyping of African Americans and cocaine, Musto writes:

The problem of cocaine proceeded from an association with Negroes in about 1900, when a massive repression and disenfranchisement were under way in the South, to a convenient explanation for crime waves. . . . In each instance, there were ulterior motives to magnify the problem of cocaine among Negroes, and it was to almost no one's personal interest to minimize or portray it objectively. As a result, by 1910 it was not difficult to get legislation almost completely prohibiting the drug.³⁵⁹

Thus, the Rockefeller Drug Laws and the federal sentencing guidelines, which represented the current "get tough" approach for all levels of drug activity and for all categories of offenders, reflect a continuing devaluation of those who are most likely to become ensnared within mandatory sentences. Consequently, as people of color in the United States continue to experience pervasive discrimination in all areas of society—employment, housing, and health—they also are deliberately targeted by the excessive punitiveness of current legislative penal schemes.

Evidence of the disproportionate penalties associated with offenses perceived or known to be committed by African Americans can be seen in the legislative treatment of "crack" versus "powdered" cocaine, which are pharmacologically identical. While facially such laws do not appear to be discriminatory, in reality, the overwhelming majority of those arrested for crack cocaine are black. Thus, blacks convicted under such laws are virtually certain to receive a greater punishment for a seemingly facially neutral drug offense than will white offenders.

For example, the Minnesota legislature established penalties for first time cocaine users to be four years in prison for crack cocaine, and probation for powdered cocaine.³⁶⁰ A higher proportion of black cocaine traffickers (27% as compared to 4% for whites) were prosecuted and sentenced for trafficking in crack rather than powder cocaine.³⁶¹ Of those convicted of trafficking in crack, 83% were black.³⁶² Crack trafficking sentences were, on average, double the

358. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 255 n.15 (1973) (cited in FRIEDMAN, *supra* note 43, at 355).

359. MUSTO, *supra* note 358, at 255 n.15.

360. MINN. STAT § 152.021 (Supp. 1995).

361. DOUGLAS C. McDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, *SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986-1990*, 8-9 (1993).

362. *Id.* at 106. Seven percent of all crack traffickers were Hispanic, 11% were white. *Id.* In contrast, of offenders convicted of trafficking in powdered cocaine, 41% were white, 29%

powdered cocaine sentences.³⁶³ In *Minnesota v. Russell*,³⁶⁴ Minnesota prosecuted five African American men for possession of crack cocaine. In challenging their convictions, the defendants established that 97% of those charged with possession of crack cocaine were black, while nearly 80% of those charged with possession of powder cocaine were white.³⁶⁵ There were substantial differences in penalties. For possession of less than ten grams of powder cocaine, the penalty was up to five years imprisonment.³⁶⁶ At the trial level, Judge Pamela Alexander concluded that minorities were sentenced to much longer periods of incarceration than whites, simply on the basis of the drug used.³⁶⁷ Applying Minnesota's rational basis test, Judge Alexander found this disparity to violate the Equal Protection Clause of Minnesota's Constitution. Her findings were upheld on appeal.³⁶⁸ Regrettably, the Minnesota legislature responded to the *Russell* decision by increasing the penalties for powder cocaine to match those for crack cocaine.³⁶⁹

Under current federal statutes, the penalties for crack cocaine are also more severe than those for powder cocaine.³⁷⁰ Every federal appellate court that has addressed this question has concluded that racial disparities based on the type of cocaine do not violate the Equal Protection Clause.³⁷¹ Increasingly, however, judges are beginning to examine the evidence of racial disparity in federal statutes and guidelines governing the sentencing of crack cocaine. For example,

black, and 30% Hispanic. *Id.* at 94.

363. *Id.* at 1.

364. 477 N.W.2d 886 (Minn. 1991).

365. *Id.* at 887 n.1.

366. MINN. STAT. § 152.023-.025 (Supp. 1993).

367. *Russell*, 477 N.W.2d at 889-91.

368. *Id.* at 887.

369. MINN. STAT. § 152.023-.025 (Supp. 1993).

370. 21 U.S.C. § 841(b)(1) (Supp. 1993).

371. See *United States v. Stevens*, 19 F.3d 93, 96-97 (2d Cir. 1994) (finding there is a rational basis for cocaine sentencing guidelines) (citing *United States v. Reece*, 994 F.2d 277, 278-79 (6th Cir. 1993) (per curiam)); *United States v. Williams*, 982 F.2d 1209, 1213 (8th Cir. 1992) (holding there is a rational basis for more severe penalties for crack); *United States v. Frazier*, 981 F.2d 92, 95 (3d Cir. 1992) (finding there is no evidence that Congress' distinction between crack and powdered cocaine was motivated by race), *cert. denied*, 113 S. Ct. 1661 (1993); *United States v. Galloway*, 951 F.2d 64, 65-66 (5th Cir. 1992) (per curiam) (determining there was no discriminatory purpose behind the different sentencing guidelines for crack and powdered cocaine); *United States v. King*, 972 F.2d 1259, 1260 (11th Cir. 1992) (per curiam) (concluding there is a rational basis for different penalties for crack and powdered cocaine); *United States v. Harding*, 971 F.2d 410, 412-14 (9th Cir. 1992) (holding the distinction between crack and powdered cocaine is rational), *cert. denied*, 113 S. Ct. 1025 (1993); *United States v. Thomas*, 900 F.2d 37, 39-40 (4th Cir. 1990) (finding that Congress could rationally have determined that distribution of crack cocaine merits a harsher sentence than distribution of powdered cocaine); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (concluding there are several factors that provide a rational basis for distinguishing between crack and powdered cocaine).

Judge Heaney of the Eighth Circuit, has questioned whether the harsh distinction in sentencing between powder and crack cocaine is justified.³⁷² Judge Clyde Cahill, of the federal district court in St. Louis, concluded that penalizing blacks more seriously for the use of crack cocaine constituted a direct and frontal assault on black communities in violation of the Equal Protection Clause.³⁷³ In *United States v. Clary*, Judge Cahill observed that “[i]nasmuch as crack and powder cocaine are really the same drug . . . it appears likely that race rather than conduct was the determining factor.”³⁷⁴ Judge Cahill also raised concerns regarding prosecutorial discretion.³⁷⁵ After reviewing patterns of prosecution in fifty-seven cases prosecuted in the Eastern District of Missouri over a three year period, Judge Cahill stated that, “[w]ithout explanation, the logical inference to be drawn [from the fact that fifty-five black offenders were prosecuted but only one white offender was prosecuted] is that the prosecutors in the federal courts are selectively prosecuting black defendants who were involved with crack, no matter how trivial the amount, and ignoring or diverting whites when they do the same thing.”³⁷⁶

In *United States v. Walls*,³⁷⁷ Judge Louis Oberdorfer of the District Court for the District of Columbia concluded that mandatory crack penalties do not violate the Equal Protection Clause, stating that:

372. *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) (questioning 100 to 1 ratio used in setting minimum penalties for crack and powdered cocaine. “Congress had no hard evidence before it to support the contention that crack is 100 times more potent or dangerous than powder cocaine.”).

Judge Bright, who also sits on the Eighth Circuit, has argued that the racial disparities created by the guidelines were not considered by the Sentencing Commission and can constitute a mitigating factor which justifies the downward departure where not precluded by statute. *United States v. Lattimore*, 974 F.2d 971, 977 (8th Cir. 1992) (Bright, J., dissenting), *cert. denied*, 113 S. Ct. 1819 (1993); *United States v. Williams*, 982 F.2d 1209, 1214-15 (8th Cir. 1992) (Bright, J., concurring).

373. *United States v. Clary*, 846 F. Supp. 768, 772 (E.D. Mo. 1994) (“The ‘100 to 1’ ratio, coupled with mandatory minimum sentencing provided by federal statute, has created a situation that reeks with inhumanity and injustice.”), *rev’d*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

374. *Id.* at 770.

375. *Id.* at 787-90.

376. *Id.* at 790. Similarly, researchers have analyzed the correlation between race and crack charging practices in Los Angeles. Their findings also support the conclusion that race is a motivating factor in federal charging decisions. See generally, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 FED. SENT. R. 36 (1993) (analyzing *United States v. Jenkins*, Case No. Cr. 91-632-TJH (pending) and suggesting that the racial distribution for crack offenses is widely different from the racial distribution for arrests). The data surveyed in the Los Angeles study reveal that not a single Anglo was charged at the federal level over a four-year period from 1988 to 1992. See Joseph E. Finley, *Discrimination in Crack Charging in Los Angeles: Do Statistics Tell the Whole Truth About “Selective Prosecution?”*, 6 FED. SENT. R. 113 (1993) (discussing the implications of selective prosecution claims based on the Equal Protection Clause).

377. 841 F. Supp. 24 (D.D.C. 1994).

[a]lthough the disparity between the crack and powder penalties and the heavy impact of that disparity on black defendants is manifestly unfair, the record . . . does not provide a preponderance of evidence that the disparate impact can be traced to a discriminatory purpose. . . . Moreover, our Court of Appeals has established . . . that the reasons that the government has given for the greater penalties for crack as opposed to powder cocaine offenses satisfy rational basis review, despite the apparent similarity between the two forms of the drug and the extreme concentration of crack convictions among the black population.³⁷⁸

Significantly, however, Judge Oberdorfer held that statutory mandatory minimum sentences for crack cocaine constituted cruel and unusual punishment in violation of the Eighth Amendment as applied to two of four defendants in that case.³⁷⁹ Judge Oberdorfer's ruling was the first federal decision to find the harsher statutory penalty for crack cocaine, as compared to that for powder cocaine, unconstitutional.³⁸⁰ Judge Oberdorfer found that mandatory sentences made only "marginal contributions to any discernable social or public purposes"³⁸¹ when applied to defendants whose conduct was in part driven by their underlying addiction to crack and who were only "bit players" in the conspiracy.³⁸²

The view that the differential punishments between "crack" and "powder" cocaine in cases like *Russell*, *Clary* and *Walls* constitute disparate and disproportionately harsh sentences is not shared by all scholars addressing this issue.³⁸³ Notably, Professor Randall Kennedy has written that "*Russell* was wrongly decided. . . . [A]s a constitutional matter, the state [of Minnesota] was justified in penalizing possession of crack cocaine more harshly than possession of powdered cocaine notwithstanding the racial demographics that

378. *Id.* at 31.

379. *Id.* at 31-32.

380. *Id.* at 31-32. Judge Oberdorfer found the punishment cruel and unusual only as applied to two particular defendants. He stated, "[w]hether the same . . . conclusion, will be appropriate to some of the many defendants who face these penalties remains for the courts that sentence them to determine." *Id.* at 32.

381. *Id.* at 33 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972)).

382. *United States v. Walls*, 841 F. Supp. 24, 33 (D.D.C. 1994)

383. See e.g., Regina Austin, "*The Black Community, Its Lawbreakers, and a Politics of Identification*," 65 S. CAL. L. REV. 1769, 1770-71 & nn.3-7 (1992) (stating

Nothing illustrates the multiple threats to the ideal of "the black community" better than black criminal behavior and the debates it engenders. There is no shortage of controversy about the causes, consequences, and cures of black criminality. To the extent there is consensus, black appraisals of questionable behavior are often in accord with those prevailing in the dominant society, but sometimes they are not. In any event, there is typically no unanimity within "the community" on these issues.).

emerged from the operation of this sentencing scheme."³⁸⁴ Professor Kennedy argues that well-meaning scholars who seek to "champion the interests of African Americans . . . retard the efforts to control criminality"³⁸⁵ by leveling "overblown and counterproductive"³⁸⁶ allegations against states as evidence of invidious racial discrimination.³⁸⁷ While Professor Kennedy's primary point is that crime disproportionately affects members of communities of color *as victims* is accurate and worthy of sustained attention, it is preposterous to presume that members of directly affected communities advocate *greater* punishments for offenders who are persons of color than for white offenders.³⁸⁸ Clearly, state and federal governments have failed communities of color in both respects by simultaneously underprotecting law-abiding citizens and overpunishing their members who commit criminal offenses.

In the omnibus Violent Crime Control and Law Enforcement Act of 1994, Congress directed the United States Sentencing Commission to examine the differential federal sentencing policy relating to the possession and distribution of powder cocaine and crack cocaine.³⁸⁹ Under the current federal sentencing guideline scheme, the penalties for first-offense cocaine trafficking provide for a five-year mandatory minimum penalty for 5 *grams* or more of crack cocaine or 500 *grams* or more of powder cocaine; a ten-year mandatory minimum penalty

384. Kennedy, *supra* note 259, at 1256.

385. Kennedy, *supra* note 259, at 1255.

386. Kennedy, *supra* note 259, at 1256.

387. Kennedy, *supra* note 259, at 1258 (citing Dorothy Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945 (1993) (arguing that states regard control of reproduction as a means of addressing crime); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991) (maintaining that the drug war victimizes minorities and that, instead of imposing criminal sanctions, the government should pursue a policy of treatment, education and rehabilitation); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231 (1993) (suggesting that a black nationalist approach to criminal law would reject the "views of the mid to late nineteenth century white elites" embodied in substantive criminal law).

388. Indeed, as Professor Regina Austin posits:

Degenerates, drug addicts, ex-cons, and criminals are not always "the community's" "others." Differences that exist between black lawbreakers and the rest of us are sometimes ignored and even denied in the name of racial justice. "The black community" acknowledges the deviants' membership, links their behavior to "the community's" political agenda, and equates it with race resistance. "The community" chooses to identify itself with its lawbreakers and does so as an act of defiance. Such an approach might be termed the "politics of identification."

Austin, *supra* note 383, at 1774.

389. U.S. Sentencing Commission, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995) at I. See also *Cocaine: Crack and Powder*, WASH. POST, Mar. 10, 1995, at A20 (concurring with the U.S. Sentencing Commission's preliminary report as to the currently unjust sentencing guidelines that disproportionately distinguish between crack cocaine and powdered cocaine).

for 50 *grams* or more of crack cocaine or 5,000 *grams* or more of powder cocaine.³⁹⁰ This sentencing differential is commonly described as the "100-to-1 quantity ratio."³⁹¹

In what U.S. Sentencing Commission member Wayne A. Budd described as a "defining moment" in the responsibilities of public service, members of the U.S. Sentencing Commission recommended an end to the sentencing disparity between powder cocaine and crack cocaine.³⁹² Referring to the Sentencing Commission's extensive 250-page report, Commissioner Budd testified before the Senate Judiciary Committee that, "[W]e looked hard for a justification for the 100-to-1 quantity ratio, and found, unanimously that there was no empirical or policy justification for it."³⁹³

It should be noted that the Commission's recommendation does not disavow a belief in the greater danger of crack versus powdered cocaine usage or enterprise. Rather, it concluded that a disproportionate penalty ratio of 100-to-1 could not be justified. The Commission therefore recommended that while base sentences for crack and powder cocaine should be equalized, final sentences should be raised by new enhancements for all forms of cocaine use.³⁹⁴ Whereas the prevalence of such enhancements may be greater in crack cocaine involvement, e.g., violence, drive-by shootings, sale to juveniles or to pregnant women, sale in protected areas, significant prior criminal records, and other factors, arguably the same enhancements could render the base penalty more severe for powder cocaine involvement as well. Thus, the final sentences would be more reflective of the seriousness of the actual offense and the individual offender.

Nevertheless, an end to the disparity is not in sight. On September 7, 1995, a House Judiciary subcommittee voted to reject the Commission's recommendations for sentencing parity. As voiced by House Judiciary Committee member Representative John Conyers, the House

390. U.S. Sentencing Commission, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995) at iii. Emphasis added.

391. *Id.* at iii.

392. Testimony of Wayne A. Budd, U.S. Sentencing Commission, Before the Committee on the Judiciary of the United States Senate, Aug. 10, 1995, 1995 FEDERAL DOCUMENT CLEARINGHOUSE, at 4.

393. Testimony of Wayne A. Budd, U.S. Sentencing Commission, Before the Committee on the Judiciary of the United States Senate, Aug. 10, 1995, 1995 FEDERAL DOCUMENT CLEARINGHOUSE, at 4. See generally U.S. Sentencing Commission, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

394. U.S. Sentencing Commission, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY XIV, 198-200 (1995). See also Testimony of Richard P. Conaboy, Chairman, U.S. Sentencing Commission, Before the Committee on the Judiciary of the United States Senate, Aug. 10, 1995, at 1-3.

subcommittee's rejection "absolutely ensures the continuation of manifestly unjust sentences."³⁹⁵

2. Character of the Offender

Addressing the proportionality issues related to the extent of Angela Thompson's individual culpability and the threat she poses to society, the New York Court of Appeals followed similar findings made regarding the defendants whose sentences were reviewed in *Broadie*, in which the Court determined that

although not all of the defendants were "hardened" criminals, each was convicted of at least 'street' sales or possession of large amounts of narcotics and none was what might be described as merely an 'accidental' offender; therefore . . . each could reasonably be considered a serious threat to society meriting severe punishment.³⁹⁶

Accordingly, in *Broadie* and in *Thompson*, the sentences were not deemed to be grossly disproportionate to the crime committed. Writing for the majority in *Broadie*, Chief Judge Breitel deferred to the Legislature's judgment stating,

[t]hus, to achieve the deterrence, so far seemingly elusive, the would-be drug trafficker had to be put on notice that, should he be caught, his fate was sealed regardless of his position in the hierarchy of distribution and regardless of the quantity of drugs in which he dealt.³⁹⁷

Subsequently, in *New York v. Jones*,³⁹⁸ the New York Court of Appeals determined whether the imposition of the mandatory maximum sentence of life imprisonment for a drug-related offense violated the constitutional prohibitions against cruel and unusual punishments. The defendant, a millhand in a large-scale heroin packaging and distribution operation, was arrested in a January 1970 raid and charged with joint possession (along with fourteen others) of over four pounds of heroin. The prosecution offered the defendant and the other millhands the opportunity to plead guilty to a lesser offense with a one-to-three-year sentence but the defendant chose to go to trial. She was found guilty. Jones appealed on the grounds that the mandatory sentence she received was cruel and unusual punishment, but a majority of the Court of Appeals dis-

395. Lori Nitschke, *Law/Judiciary: Panel Rejects Plan for Sentences*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, Sept. 11, 1995, at 1-2.

396. *New York v. Thompson*, 633 N.E.2d 1074, 1076 (N.Y. 1994) (citing *New York v. Broadie*, 332 N.E.2d 338, 343 (N.Y. 1975), cert. denied, 423 U.S. 950 (1975)).

397. *Broadie*, 332 N.E.2d at 344.

398. 350 N.E.2d 913 (N.Y. 1976).

agreed.³⁹⁹ The majority's holding contrasts sharply with the dissent's conclusion that the inconsistency between the sentences given to the defendant and to the other millhands, who had accepted the prosecution's offer to plead guilty to a lesser offense, was cruel and unusual punishment because it presented such a gross violation of the principle of equality of treatment for equally blameworthy offenders and because it essentially punished the defendant for exercising her right to a trial.⁴⁰⁰

Again, in *New York v. Donovan*, mandatory sentences for drug selling and possession were measured against the constitutional proscriptions of cruel and unusual punishments.⁴⁰¹ In *Donovan*, the defendant's boyfriend was a drug dealer who sold close to four ounces of cocaine to an undercover officer. The defendant's role in the drug sale involved procuring the cocaine. For her participation in the scheme, she was convicted of first degree criminal sale and first degree criminal possession of a controlled substance. Donovan herself made no profit from the sale, and the pre-sentence report described her involvement as "out of character" for her.⁴⁰² The prosecution offered her the option of pleading guilty to a lesser offense and receiving a one to three year sentence.⁴⁰³ Donovan rejected this offer, was convicted at trial and received the minimum mandatory sentence of fifteen years to life imprisonment. In contrast, Donovan's boyfriend cooperated with the authorities and, in return, received a sentence of lifetime probation, despite the fact that he was the principal actor in the drug sale.⁴⁰⁴ On appeal, the Court of Appeals found the defendant's sentence did not constitute cruel and unusual punishment.⁴⁰⁵

Norman Little, who was Angela Thompson's uncle and codefendant at trial, ran a major drug-selling operation in Harlem. He was the focus of a police investigation and prosecution in which the police made four separate undercover drug purchases as part of an attempt to arrest Little and shut down his drug operation.⁴⁰⁶

At some point, Little began using Thompson as part of his drug operation.⁴⁰⁷ Thompson was charged with an A-I felony for her

399. *Id.* at 915.

400. *Thompson*, 633 N.E.2d at 1076-77 (discussing *Jones*, 350 N.E.2d 913).

401. 451 N.E.2d 492 (N.Y. 1983), *aff'g* 454 N.Y.S.2d 118 (N.Y. App. Div. 1983).

402. *Donovan*, 454 N.Y.S.2d at 119-22 (Mollen, J., dissenting).

403. *Id.*

404. *Id.*

405. *Thompson*, 633 N.E.2d 1074, 1077 (citing *Donovan*, 451 N.E.2d 492 (N.Y. 1983)).

406. *Id.* at 1081.

407. *Id.*

participation.⁴⁰⁸ The prosecution offered her a deal in which she would plead guilty to a lesser offense and receive a sentence of three years to life and, just before trial, another deal in which she would receive four years to life, but Thompson refused both offers.⁴⁰⁹ The State subsequently argued: “[f]rom the start, the People knew that Thompson had committed a class A-I felony meriting a sentence of fifteen years to life; *their plea offer was an act of grace, extended in an effort to mitigate the undeniable anguish caused by cases like this.* [H]aving rejected the offer, Thompson cannot reasonably complain that she is now exposed to a sentence of fifteen years to life. She should be resentenced to that term.”⁴¹⁰ The State’s rather glib reasoning illustrates Professor (and former federal district court judge) Albert Alschuler’s observation that “[t]he sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors.”⁴¹¹ Moreover, it must be contrasted with the treatment of the cases against co-defendant Norman Little. He was indicted, *inter alia*, for five criminal sales of a controlled substance in the first degree, including four separate sales on different dates. In a deal with the State, he pleaded guilty to only one count, under which he was sentenced to fifteen years to life imprisonment.⁴¹² In other words, despite three prior felony and seven prior misdemeanor convictions, he received the same sentence for an offense at least five times the magnitude of wrongfulness for which Angela Thompson was convicted and sentenced.⁴¹³

408. *Id.* at 1081-82 (Bellacosa, J., dissenting).

409. *Id.* at 1082 (Bellacosa, J., dissenting).

410. Brief for Respondent-Cross-Appellant (District Attorney), at 44, *New York v. Thompson*, 596 N.Y.S.2d 421 (1993) (emphasis added).

411. Alschuler, *supra* note 236, at 926. See also Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550, 566-68 (1978) (arguing that plea bargaining in a system of fixed sentences combines the worst features of charge bargaining and sentence bargaining, where “[u]nder a fixed-sentencing regime, bargaining about the charge would be bargaining about the sentence.”).

In addition, it is misleading to regard the minimum of the indeterminate sentence as the constitutional benchmark for Eighth Amendment purposes. More than the harsh mandatory minimum, it is the maximum term of an indeterminate sentence that is the pertinent standard for Eighth Amendment purposes. In the New York drug law scheme, the variation between the mandatory minimum sentences for A-I, A-II, and A-III offenses is vitiated because each class A offender is subject to a maximum term of life imprisonment. Thus, the “total failure to tailor the maximum indeterminate sentence in any meaningful way to the culpability of the offender, the gravity of the offense, and the peculiar circumstances of each case. . . renders the life sentences imposed. . . constitutionally suspect.” *Carmona v. Ward*, 436 F. Supp. 1153, 1169-70 (S.D.N.Y. 1977), *rev’d*, 576 F.2d 405, 413 n.13 (2d Cir. 1978) (finding revisions in class A offenses, with the possibility of lifetime parole no longer presents possibility of a “life sentence”), *cert. denied*, 439 U.S. 1091 (1979).

412. *Thompson*, 633 N.E. 2d at 1083 (Bellacosa, J., dissenting).

413. In addition, defense counsel argued, without contradiction, another aspect of disproportionality at the sentencing of Angela Thompson:

Ruling that the punishment her uncle received did not establish the gross disproportionality of Thompson's sentence, the court explained:

While undoubtedly his far greater culpability merited substantially more punishment than defendant received, the comparative leniency in treatment of defendant's uncle is significantly less than that objected to in *New York v. Jones* . . . and *New York v. Donovan*. . . . And, even in those cases, the disparity in punishment was not sufficient to establish gross disproportionality.⁴¹⁴

Thus, as in *Jones* and *Donovan*, where the defendants rejected similar plea offers of three years to life, the court of appeals held that a disparity of this type does not amount to cruel and unusual punishment.⁴¹⁵ Significantly, however, former Chief Judge Breitell, who authored the seminal *Broadie* decision, ardently dissented against the very kind of disproportionate sentencing in *New York v. Jones*, under near-identical circumstances to *Thompson*.⁴¹⁶

The New York Court of Appeals's decision in *Thompson* was the first decision concerning disproportionate sentencing since *New York v. Broadie*, in which that court overruled a lower court's imposition of a sentence more lenient than the legislatively mandated minimum sentence as a means of achieving a constitutional sentence.⁴¹⁷

There was also, during this arrest, the arrest of a third female, who could have been charged with an A-I felony, a young lady, I believe similar in age to the defendant. She had made or assisted in the sale, A-I weight, to Officer Dante Grey. And during the hearings it came out, I believe, her nickname was Shorty. But, my memory could be wrong, that the District Attorney's Office decided not to prosecute her because they were afraid at that time that if they had arrested her, Mr. Little would know who the undercover officer was at that time, and this was early on in the proceedings. . . . But it shows how another young individual, just like Miss Thompson, doing the exact same act, because of discretionary decisions by the District Attorney's Office, is not standing here today, before the Court, facing these consequences. That she's not being sentenced, she hasn't even been charged. It's alleged she did the same thing that Miss Thompson did on one occasion. The undercover testified, I believe, truthfully at trial. He never saw Angela Thompson on any other date during this investigation, before arrests were made, other than that one date that the sale was made. This was over a six week period of time, he's back and forth to that location. It shows the type of involvement Miss Thompson had That type of disparity where individuals are not prosecuted for legitimate reasons, and because of the fear it might have that they might give information to someone else who has been arrested, and the type of disparity where Mr. Little receives the same sentence that this defendant faces today, although he chose to plead guilty and she chose to go to trial, maintaining her innocence, shows why this particular case is not a case where 15 to life should be given to the defendant.

Thompson, 633 N.E.2d at 1083 (Bellacosa, J., dissenting) (citing *New York v. Thompson*, Sup. Ct., NY County, Dec. 11, 1989, Bing-Newton, J., indictment No. 03994-89, Sentencing Minutes).

414. *Thompson*, 633 N.E.2d at 1078.

415. *Id.* at 1078-79.

416. *Id.* at 1083, (Bellacosa, J., dissenting) (citing *New York v. Jones*, 350 N.E.2d 913, 915 (N.Y. 1976), (Breitell, C.J., dissenting)).

417. *Id.* at 1085 (Bellacosa, J., dissenting), (citing *New York v. McCleese*, 522 N.E.2d 1055 (N.Y. 1988) (affirming a Supreme Court decision that found a minimum mandatory sentence

Thompson, therefore, demonstrates the problems caused when judicial discretion is eliminated from sentencing. Defendants who have challenged the limitation or removal of trial court discretion in sentencing, however, have not been successful. Although some defendants have maintained that individualized sentencing is a liberty interest protected by due process, courts have not accepted these arguments.⁴¹⁸ In other cases, defendants have argued that depriving trial judges of sentencing is a violation of the principle of separation of powers.⁴¹⁹ Courts have not accepted this argument either, however, because the legislative, judicial and executive branches of government have historically shared sentencing responsibilities.⁴²⁰

Thus, it is the Eighth Amendment's proscription against cruel and unusual punishment which most strongly supports the principle for individualized sentencing.⁴²¹ This support is especially apparent in death penalty litigation. In such cases, the sentencing judge must "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁴²² Justices Stewart, Powell, and Stevens, underscored the principle in the *Woodson v. North Carolina* plurality decision:

[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally

was not cruel and unusual punishment)); *New York v. Ortiz*, 478 N.E.2d 187 (N.Y. 1985) (holding mandatory sentences were unconstitutional); *New York v. Donovan*, 451 N.E.2d 492, *aff'g* 454 N.Y.S.2d 118 (N.Y. App. Div. 1982); *New York v. Jones*, 350 N.E.2d 913 (N.Y. 1976). *Compare*, *New York v. Martinez*, 595 N.Y.S.2d 39 (N.Y. App. Div. 1993) (reducing sentence of four and a half to nine years for criminal sale of a controlled substance in the third degree reduced to two to four years because sentencing statute was unconstitutionally applied), *appeal denied*, 619 N.E.2d 674 (N.Y. 1993); *with* *New York v. Skeffery*, 591 N.Y.S.2d 1012 (N.Y. App. Div. 1992) (affirming reduction of mandatory sentence of fifteen years to life for criminal possession of a controlled substance in the first degree reduced to five years to life); *and* *New York v. Andrews*, 574 N.Y.S.2d 719 (N.Y. App. Div. 1991) (reducing mandatory minimum sentence of fifteen years to life for A-I drug felony to five years to life to avoid being "cruel and unusual"), *appeal denied*, 590 N.E.2d 1206 (N.Y. 1992); *New York v. Ramirez*, 210 N.Y.L.J. 22 (1993) (giving 17 year-old defendant a sentence of probation following a conviction of criminal sale of a controlled substance in the second degree). *But cf.*, *New York v. Royster*, 457 N.Y.S.2d 726 (Rockland County Ct. 1982) (sentencing defendant who pleaded guilty to one count of criminal sale of a controlled substance in the third degree to five years probation), *vacated*, 464 N.Y.S.2d 560 (N.Y. App. Div. 1983).

418. Lowenthal, *supra* note 237, at 118.

419. Lowenthal, *supra* note 237, at 118-19.

420. Lowenthal, *supra* note 237, at 119.

421. Lowenthal, *supra* note 237, at 119.

422. *Lockett v. Ohio*, 438 U.S. 586, 587 (1978).

indispensable part of the process of inflicting the penalty of death.⁴²³

Furthermore, as Professor Alschuler has stated, “[d]esert and proportionality have as much to do with human beings and their circumstances as they have to do with harm.”⁴²⁴ Accordingly, the focus should be on the offender rather than on the offense.⁴²⁵ Treating cases involving the same offense alike without regard for the circumstances of the offender is inconsistent with the ideal of equality.⁴²⁶

When courts have tried to make exceptions to the U.S. Sentencing Commission’s guidelines in order to take into consideration a defendant’s background, the commission has reacted by changing its rules to eliminate courts’ ability to deviate from the guidelines.⁴²⁷ The victims of such rule changes have generally been offenders who have overcome bleak life prospects. For example, when the Eighth Circuit Court of Appeals affirmed a sentence reduction for a Native American defendant who overcame childhood hardship to achieve a commendable work record,⁴²⁸ the commission decided to forbid reductions for “employment-related contributions and similar prior good works.”⁴²⁹ Similarly, after the Ninth Circuit affirmed a sentence reduction due to a defendant’s lack of guidance as a youth,⁴³⁰ the commission changed its policy so that reductions for “lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing,” would not be allowed.⁴³¹ This effort by the commission to eliminate any regard of offenders’ background has primarily affected disadvantaged offenders. Kate Stith and Steve Yoh, in a 1993 article on the federal sentencing guidelines, concluded that “denying judges the opportunity to mitigate sentences on the basis of social disadvantage has worked *against* poor and minority defendants.”⁴³²

423. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), *quoted in* Lowenthal, *supra* note 237, at 123.

424. Alschuler, *supra* note 236, at 909.

425. Alschuler, *supra* note 236, at 910.

426. Alschuler, *supra* note 236, at 916.

427. TONRY, *supra* note 25, at 169.

428. *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990).

429. TONRY, *supra* note 25, at 169-70.

430. *United States v. Lopez*, 945 F.2d 1096 (9th Cir. 1991), *amended by* 956 F.2d 203 (9th Cir. 1992).

431. TONRY, *supra* note 25, at 170.

432. Kate Stith and Steve Yoh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 287 (1993) *quoted in* TONRY, *supra* note 25, at 170 (emphasis added).

3. Rara Avis: *The "Rare Case" Exception*

Significantly, the analysis of the lower and appellate courts in *Thompson*, and the majority and dissenting opinions at each level, centered on the so-called "rare case" exception enunciated in *New York v. Broadie*.⁴³³ In *dicta* at the end of the opinion, Chief Judge Breitel pronounced in *Broadie*: "[t]his is not to say that in some rare case on its particular facts it may not be found that the statutes have been unconstitutionally applied."⁴³⁴

Although the courts were not provided guidance in identifying the "rare case," the exception has been interpreted to "apply to defendants whose involvement in the offense is only accidental or who only technically fit the statutory definition of the offender class."⁴³⁵ Underlying such a standard, then, would seem to be an acknowledgment of the varying levels of culpability and personal circumstances between drug operation masterminds and their minions. The exception, however, has been rendered meaningless for two primary reasons.

First, the lack of genuine guidance has left courts unable or unwilling to find the exception in cases where it might apply. Chief Justice Breitel himself vigorously dissented to the Court of Appeal's refusal to apply the exception in *New York v. Jones*, wherein he found "[t]he mandatory sentence of life imprisonment . . . unconscionable and barbaric because of the gross inequality of treatment of like persons involved in the identical crime."⁴³⁶ Similarly in the New

433. 332 N.E.2d 338, 347 (N.Y. 1975). In *Thompson*, the trial court applied this "rare case" exception in holding that a fifteen-year minimum would be unconstitutional in this case. She sentenced Angela Thompson to eight years to life. See *New York v. Thompson*, 596 N.Y.S.2d 421, 423 (N.Y. App. Div. 1993) (Asch, J., with Carro and Rosenberger, JJ.) (affirming the judgment of the Supreme Court, New York County). But see *id.* at 425 (Wallach, J., with Sullivan, J.P., dissenting) (arguing that Angela Thompson's crime "was no mere technical or accidental violation of the narcotics laws"), *rev'd* 633 N.E.2d 1074, 1078 (1994) (Levine, J., with Kaye, C.J., Simons, and Smith, JJ.) ("[T]he foregoing factors militate against finding that [Thompson] is the rare case we envisaged in *Broadie*"). But see *id.* at 1081 (Bellacosa, J., with Ciparick, J., dissenting) ("This case falls within *Broadie*'s "rare case" exception, examined, understood and applied in the brighter light of contemporary standards, based on twenty years of experience and empirical data").

434. *New York v. Broadie*, 332 N.E.2d 338, 347 (N.Y. 1975) (Breitel, C.J.) (citation omitted), *cert. denied*, 423 U.S. 950 (1975)). See also *Thompson*, 633 N.E.2d at 1076 (finding that "street" sales of narcotics warranted severe punishment on public policy grounds, even if the defendants were not hardened criminals). This type of sentencing was not unconstitutionally applied according to the court.

435. *Thompson*, 596 N.Y.S.2d at 425 (Wallace, J., dissenting) (citing *Broadie*, 332 N.E.2d at 343).

436. *New York v. Jones*, 350 N.E.2d 913, 915 (N.Y. 1976) (Breitel, C.J., dissenting). The defendant was a 37 year-old woman with no prior convictions. She and 14 others were involved with a heroin processing operation were prosecuted for acting in concert to possess over four pounds of heroin. Twelve of the codefendants pleaded guilty to lesser offenses. Of these

York Supreme Court's *Thompson* opinion, the justices supporting the reduced sentence also noted that it was the Defendant's first conviction.⁴³⁷

In addition, however, the justices asserted Angela Thompson's youth was one of the central bases for the unconstitutionality of the mandatory sentence in this case.⁴³⁸ While this factor was clearly compelling in light of the harsh nature of the sentence, there was no indication that youth, *per se*, was envisaged as a rare circumstance to be considered by the courts. Indeed, indications suggest the contrary. Apparently, the New York Legislature consciously decided to include youths of Thompson's age within the ambit of the A-I drug felony mandatory minimums.⁴³⁹ Nevertheless, on comparable facts, the appellate courts have upheld downward departures from mandatory sentences on the bases of age (youth), role and degree of participation, and differential sentences of co-defendants.⁴⁴⁰ Thus, affirming the "rare case" exception appears to be less a matter of principled consistency than caprice.

Second, those cases that conceivably merit "rare case" consideration are not rare at all. Indeed, the cases are far too typical, involving many defendants of color, especially disproportionate numbers of African American and Latina women. Thus, despite the repeated focus on Thompson's youth, remarkably, there was scant mention of her race, gender, parental or economic status.⁴⁴¹ Judge Bellacosa's dissent was the first to explicitly *suggest* that the combination of these characteristics might be relevant within the comprehensive consideration of sentencing factors.⁴⁴² Judge Bellacosa stated that "[e]mpirical data and analysis may even be developed or discovered from

codefendants, the principal got a sentence of 8 1/3 to 25 years, 3 "lieutenants" received indeterminate sentences of 5 years, and 8 millhands, who had committed the same crimes as Jones, received indeterminate sentences of 3 years.

Jones did not accept the offer to plead guilty to a lesser offense. Instead, she exercised her right to trial and was convicted by a jury. Jones was subsequently sentenced to the mandatory term of 15 years to life. *Id.* at 916 (Breitel, C.J., dissenting) (citing N.Y. PENAL LAW § 70.00(2)(a)-(3)(a)).

437. *Thompson*, 596 N.Y.S.2d at 422.

438. *Id.* at 424.

439. *New York v. Thompson*, 633 N.E.2d 1074, 1078 (N.Y. 1994) (Levine, J.) (citing N.Y. CRIM. PRO. LAW § 720.10(2)(a), N.Y. CRIM. PRO. LAW § 220.10(5)) (discussing the prevalence of adolescents marketing illegal drugs and the likelihood that the Legislature rationally determined that teenage drug dealers pose a serious threat to society).

440. *See supra* note 411, and accompanying text (discussing judicial discretion in sentencing).

441. *Thompson*, 633 N.E.2d 1074, 1079 (N.Y. 1994) (holding that because someone was a youth did not justify vacating a life sentence for cocaine dealing on grounds that the sentence was cruel and unusual punishment).

442. *Id.* at 1087 (Bellacosa, J., dissenting) (citing MACDONALD AND CARLSON, *supra* note 361, at 10-14 (noting wide sentencing disparities based on race in the crack cocaine offense category)).

official correctional records and reports to show that these kinds of mandatory sentences fall disproportionately and exploitatively on young minority recruits including, as in this case, an African American teenage woman."⁴⁴³

In this regard, available data reveals the "rare case" exception to be an ineffective safeguard against what is manifestly a problem of systemic, not isolated, dimensions. The impact of the New York State drug laws was predictable, and their inequities by now are quite apparent. As Judge Levine acknowledged:

[T]he harsh mandatory treatment of drug offenders embodied in the 1973 legislation has failed to deter drug trafficking or control the epidemic of drug abuse in society, and has resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the cost of imprisonment would have been better spent on treatment and rehabilitation. The experience of the last two decades has clearly vindicated the doubts Chief Judge Breitel expressed in *New York v. Broadie* on the wisdom of the draconian drug sentencing laws.⁴⁴⁴

However, rather than address the institutional deprivations that define the communities most likely to find drug possession or distribution a tenable life option, the New York legislature and judiciary, as well as other jurisdictions embracing the current "severity revolution,"⁴⁴⁵ have perpetuated the historical devaluation and excessive criminalization of the members of these communities.

In affirming the trial judges' sentence in *Thompson*, Supreme Court Justice Asch noted that "[t]he genius of our constitutional system is that it is not static, but rather, yields to the lessons and requirements of changing times."⁴⁴⁶ This statement is particularly true of the evolving nature of Eighth Amendment analysis. The Rockefeller Drug Laws enacted twenty years ago have proven counterproductive in quelling the drug problem and have resulted in harsh, disproportionate mandatory sentences.⁴⁴⁷

The mandatory minimum sentence of fifteen years with the prospect of incarceration for life represents one of the most severe penalties prescribed under New York State law.⁴⁴⁸ It expresses society's and the Legislature's highest level of condemnation for the

443. *Id.* at 1087.

444. *Id.* at 1080.

445. Alshuler, *supra* note 236, at 903. This is Professor Alshuler's terminology for the current emphasis on retributive ideals in United States sentencing policies.

446. *New York v. Thompson*, 596 N.Y.S.2d 421, 424 (N.Y. App. Div. 1993).

447. TONRY, *supra* note 25, at 175.

448. N.Y. PENAL LAW §§ 60.10, 7.05.

most serious offenders who commit the most reprehensible crimes such as, murder in the first and second degrees,⁴⁴⁹ kidnapping in the first degree,⁴⁵⁰ and arson in the first degree.⁴⁵¹ Furthermore, such harsh penalties and ostensibly color-blind sentencing guidelines⁴⁵² fail to recognize that poverty, educational deprivation and family instability fall disproportionately on women of color, thus, perpetuating their subordinate position in society. Moreover, cultural images of African American women based on stereotypes are at the very foundation of the problem of African American women's limited access to societal resources and institutions. Thus, treating such circumstances as mitigating factors would tend to diminish disparities in sentencing.

While courts must accord appropriate deference to the legislature regarding its presumptively constitutional sentencing schemes, the imposition of prison terms so disproportionate in length, in comparison to the gravity of the offense and the dangerousness of the offender, should be deemed cruel and unusual under the Eighth Amendment of the United States Constitution.

PART D: CONCLUSION

Although the foregoing discussion has centered on the impact of sentencing reform in the State of New York, clearly the dynamics it addresses have far-ranging significance. With over one million people in custody,⁴⁵³ the United States incarcerates a higher proportion of its people than any other country in the world,⁴⁵⁴ and women are the fastest growing population in custody.⁴⁵⁵ New York leads the nation with a five-fold increase over the past decade in the number of women behind bars.⁴⁵⁶ But these numbers do not reflect a parallel rise in crime. While the United States' overall incarceration rate sharply increased in the past decade, the crime rate has significantly

449. N.Y. PENAL LAW §§ 125.27, 125.25.

450. N.Y. PENAL LAW § 135.25.

451. N.Y. PENAL LAW § 150.20.

452. Congress instructed the U.S. Sentencing Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d) (1988). See generally Breyer, *supra* note 249.

453. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE U.S., 1992 iii (1995).

454. See Mara Maver, *Americans Behind Bars: The International Use of Incarceration 1992-1993* (The Sentencing Project, Washington, D.C.) Sept. 1994, at 3 (Table 1) & 4 (Figure 1) (comparing the rates of incarceration for selective nations).

455. SNELL, *supra* note 453, at v.

456. Susan Brenna, *Mother and Child Reunion*, NEWSDAY, Aug. 25, 1994, at B4.

decreased.⁴⁵⁷ Today, African American women are arrested and imprisoned in greater numbers because of changes in legislative responses to the “war on drugs,” law enforcement practices, and judicial decision-making, rather than changes in the underlying circumstances in their lives.

The unwritten subtext of contemporary sentencing reform enactments perpetuates the historical perception of African American women as unworthy and unredeemable, thereby legitimating their harsh treatment under such laws. As the first part of this Article illustrates, throughout their experience in the United States, African Americans have been arrested, convicted and incarcerated grossly out of proportion to their numbers in the population. Continuing disparities exist between African Americans and whites in virtually every measurable category. And, as we have seen, the status of being an African American woman still carries a vulnerability to being both labeled and severely punished as a criminal. This vulnerability does not apply to white women. The methods by which African American women’s rights escape legal protection continue to occur in subtler institutionalized forms. The result is justice that is nearly as cruel today as it was during colonial and antebellum periods.

Throughout American history, the subordination of blacks was supported by a series of stereotypes and beliefs that rationalized the imposition of adverse conditions upon their lives.⁴⁵⁸ Prior to the civil rights reforms, blacks were formally subordinated by the state. Today, overt forms of discrimination have been reduced; however, African Americans continue to experience being the “other” in symbolic⁴⁵⁹ and material terms.⁴⁶⁰

457. TONRY, *supra* note 25, at 166 (demonstrating the increased harshness of sentencing in the United States). Professor Tonry states:

Since the 1970s, sentencing in the United States has become progressively harsher between 1980 and 1994, while crime rates were either falling (according to the National Crime Victimization Survey based on its interviews of victims) or the number of inmates in American prisons and jails triples.

Id.

458. *See generally*, DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* (1975) (analyzing the origins and implications of slavery in western culture); JORDAN, *supra* note 47 (examining attitudes of whites towards negroes during European and African settlement of what became the United States); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* (1984) (addressing the nature of relations between blacks and whites in the American south); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955) (describing the history of racial segregation and “Jim Crow” laws).

459. Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 10 HAR. L. REV. 1331, 1337 (1988) (defining “symbolic subordination” as “the formal denial of social and political equality to all Blacks, regardless of their accomplishments. Segregation and other forms of social exclusion—separate restrooms, drinking fountains, entrances, parks, cemeteries, and dining facilities—reinforced a racist ideology that

Noting not only the injustice, but also the counterproductive aspect of mandatory drug laws, in affirming the trial court's sentencing decision at the Supreme Court level in *Thompson*, Justice Asch wrote for the majority:

A system of justice which mandates a fifteen year prison sentence, as a minimum, on a seventeen year old girl, who was not cared for by parents and under the domination of her uncle, who was the prime mover in the sale of narcotics, also mandates a lifetime of crime and imposes on the community, upon her release, a woman who may be incapable of anything but criminal activity. If we do not attempt to rehabilitate such young people, we condemn ourselves as well.⁴⁶¹

The New York City Bar Association and the Drug Abuse Council studied the Rockefeller Drug Laws from 1973 to 1976, when the new laws were in full force.⁴⁶² Its 1977 report concluded that the Rockefeller Drug Laws did not achieve their objectives.⁴⁶³ Furthermore, the Committee concluded: "[drug use] is incontrovertibly deeply rooted in broader social maladies. Narcotics use in particular is intimately associated with, and a part of, a wider complex of problems that includes family break-up, unemployment, poor income and education, feeble institutional structures, and loss of hope."⁴⁶⁴ Now, more than two decades later, it is clear that New York State and the Nation would be better served by offering women options, such as alternatives to incarceration, community corrections and/or

Blacks were simply inferior to whites and were therefore not included in the vision of America as a community of equals.").

460. According to Professor Crenshaw, "material subordination, on the other hand, refers to the ways that discrimination and exclusion economically subordinated Blacks to whites and subordinated the life chances of Blacks to those of whites on almost every level. This subordination occurs when Blacks are paid less for the same work, when segregation limits access to decent housing, and where poverty, anxiety, poor health care, and crime create a life expectancy for Blacks that is five to six years shorter than for whites." *Id.* at 1377 (citing BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 69-71 (107th ed. 1987)).

As Professor Crenshaw recognizes, "[t]hese two manifestations of racial subordination are not mutually exclusive. In fact, it only makes sense to separate various aspects of racial oppression in this post-civil rights era in order to understand how the movement changed some social norms and reinforced others. Most Blacks probably did not experience or perceive their oppression as reflecting two separate structures." *Id.* at 1377 n.177.

461. *New York v. Thompson*, 596 N.Y.S.2d 421, 424 (N.Y. App. Div. 1993). See also Michael Z. Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 821-22 (1990) (arguing that "[c]riminalization also makes it harder than it already is for felons to find legitimate work, thereby increasing the likelihood of a new arrest/and or parole or probation violation, and further incarceration.").

462. JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, *supra* note 243, at 7.

463. JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, *supra* note 243, at 7.

464. JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, *supra* note 243, at 7.

treatment.⁴⁶⁵ For many women, incarceration becomes the last stop in a long series of circumstances that has prevented them from participating in their families and contributing in their communities. Social structures and systems of domination must be recognized for their own roles in maintaining African American women and their communities in a position of marginality. As stated by Michael Tonry:

The willingness of the drug war's planners to sacrifice young black Americans cannot be justified. Crime and drug abuse do disproportionately affect disadvantaged minority communities. Amelioration of their effects should be a paramount policy priority. . . . What was clear both then and now is that a program built around education, drug abuse treatment, and social programs designed to address the structural social and economic conditions that lead to crime and drug abuse would have much less destructive impact on disadvantaged young blacks than would a program whose primary tactics were the arrest, prosecution, and lengthy incarceration of street-level sellers who are disproportionately black and Hispanic.⁴⁶⁶

"Mandatory minimum sentences have been widely condemned. The Judicial Conference of the United States, the twelve Circuit Courts of Appeals or their Judicial Councils, the American Bar Association, the Federal Courts Study Committee, and other groups have called for their repeal."⁴⁶⁷ In 1993, Judge Jack Weinstein, Senior Judge of the U.S. District Court for the Eastern District of New York, decided to stop handling drug cases. He did so, he said, because:

I need a rest from the oppressive sense of futility that these drug cases leave. . . . I have taken my name out of the wheel for drug cases. . . . This resolution leaves me uncomfortable since it shifts

465. In a survey of 48 states, the District of Columbia, Guam and Puerto Rico, the National Association of State Alcohol and Drug Abuse Directors found that 1,838,833 people sought treatment for substance addiction at publicly funded treatment centers during fiscal year 1989 and that 462,906 of them were women. WILLIAM BUTYNSKI ET AL., *STATE RESOURCES AND SERVICES RELATED TO ALCOHOL AND OTHER DRUG ABUSE PROBLEMS* 21, 25, 33 (1990).

Constance Weisner, of the University of California at Berkeley, stated in a presentation before the National Institute on Drug Abuse "that in an undisclosed U.S. county, '26% of drug users in jail have had a drug treatment episode in the last year' prior to incarceration, while 'in the drug treatment sample, 78% have had a jail episode in the last year.' What these and other data indicate, Weisner said, is that drug users 'get to jail before they get to treatment.'" *Id.* at 9-10.

James Collins, of Research Triangle Institute, added the observation that "[drug] offenders generally do as well as others in treatment." *Id.* See also *Research Measuring Current Need for Drug Abuse Treatment Should be Conducted—NIDA Meetings*, 37 *THE BLUE SHEET*, Aug. 10, 1994, at 10-11.

466. TONRY, *supra* note 25, at 123.

467. David C. Leven, *Curing America's Addiction to Prisons*, 20 *FORDHAM URB. L.J.* 641, 655 (1993) (citing LYNN S. BRANHAM, *THE USE OF INCARCERATION IN THE UNITED STATES: A LOOK AT THE PRESENT AND THE FUTURE* 22 (Apr. 1992)). Mr. Leven is a member of the Criminal Justice Section of the ABA.

the "dirty work" to other judges. At the moment, however, I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade. . . . I am just a tired old judge who has temporarily filled his quota of remorselessness.⁴⁶⁸

The proportionality principle is significant to retributivist notions of fairness in criminal sentencing. For utilitarians, punishment is an inherent evil which should be used as sparingly as possible so proportionality is not a primary concern. As postulated by eminent utilitarian theorist Jeremy Bentham, punishment "ought only to be admitted in as far as it promises to exclude some greater evil."⁴⁶⁹ For retributivists, such as Kant, however, the proportionality rationale is more central to a just punishment scheme. To date, however, the Supreme Court, the Second Circuit and the New York Court of Appeals have declined to set aside a term of incarceration because of its excessive length, even though the principle of proportionality has been accepted.⁴⁷⁰ If the Eighth Amendment is to have any meaning, all drug offenders simply cannot be deemed to deserve punishments as harsh as those of murderers or other violent offenders. Therefore, in view of courts' unyielding deference to legislative prerogative, state and national legislatures must act to reverse these draconian measures. As a nation, the debate on the response to crime must include the courage and insight of Justice Juanita Bing-Newton, the trial judge, who saw her future and her fate linked to Angela Thompson:

This case is bringing me to tears literally. In the three years I've sat on the Bench, I've never been reduced to tears. I do so because I look at the defendant, that I know a Judge is not supposed to; I put myself in the feet of Angela Thompson and I can remember being an 18 year old girl . . . and it's very difficult for me to wipe out all that in my life, and then sentencing her to 15 years to life without wiping out the possibility of Angela Thompson. . . .

I conclude that the defendant, to be sentenced to 15 years to life, would be getting an unconstitutional sentence. And I will not sentence her to 15 years to life. I make this and I want the record

468. Jack B. Weinstein, *Perspective: No More Drug Cases*, 209 N.Y. L.J. 2 (1993).

469. JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* (John Bowring, ed.) (1843), quoted in TONRY, *supra* note 25, at 152.

470. *Downey v. Perini*, 518 F.2d 1288 (6th Cir. 1975), *vacated and remanded on other grounds*, 423 U.S. 993 (1975) (striking down a sentence for a term of years solely because of its length). This is the only circuit court to do so. In *Downey*, the defendant received a sentence of 30 to 60 years imprisonment for his first offense of possession and sale of a small amount of marijuana. In today's atmosphere, it is likely that *Downey* would be overruled by *Harmelin*.

to be clear. . . . I make this determination not on a discretionary basis, but in applying the *Broadie* standard to this case.⁴⁷¹

The importance of such empathy cannot be overstated. In what Professor Samuel Pillsbury has called “the empathy obligation,” part of evaluating the offender’s offense requires an effort by the decision-maker to empathize with the offender, that is, care for the good in his or her character.⁴⁷² Many African American women in United States society and its penal institutions are locked in a spiral of physical, emotional and economic distress. Despite years of resistance and struggles to survive, adverse systemic conditions lock many of them into a vicious cycle of poverty, substance abuse, criminal behavior, incarceration and compromised health.

A more effective approach to criminal sentencing would balance society’s concern for safety with the constitutional mandate for proportionate punishment. For African American women, a comprehensive approach to sentencing would require that their humanity and potential be recognized by a society that has seldom valued them for such. Recognition of this sort, through properly conceived penal sanctions and sentencing determinations which properly balance objective and subjective factors, would begin to end the cycle of despair, criminality, disparate treatment, and excessive punishment that pervades many African American women’s lives.

471. *New York v. Thompson*, 596 N.Y.S.2d at 422-23.

472. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 693 (1989). Defining the “empathy obligation,” Professor Pillsbury states that:

Empathy values and seeks to find the good in the offender’s character. Thus the sentencer should be informed of the obligation to care about the offender as a morally worthy creature and should be given the opportunity to hear about [her] good deeds, [her] capacity for and desire to do good.

Id. at 694 (footnote omitted).

Under this construction, “while empathy does not preclude a judgment of culpability,” importantly, the decisionmaker who feels empathy for the offender will “care about potential limitations on culpability.” *Id.* So defined, such empathy comports with the constitutional demands of proportionality review.