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### The Injustice of Formal Gender Equality in Sentencing

Emma DeCourcy

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# THE INJUSTICE OF FORMAL GENDER EQUALITY IN SENTENCING

*Emma DeCourcy\**

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“Merely denouncing sexism in sentencing without examining the effect of so-called gender-neutral sentencing ultimately operates to the detriment of women whose lives are shaped by the existing gender social structure.”<sup>1</sup>

### INTRODUCTION

Over the past 40 years, the entire United States penal population has grown at an unprecedented rate, and the rate of female incarceration is growing at twice the rate of men.<sup>2</sup> Given that there does not appear to be an increase in female criminality that corresponds with the increase in female incarceration, it may be inferred that the rising rate of female imprisonment is the result of changes in criminal justice law and policy that “prescribe simplistic, punitive enforcement responses to complex social problems.”<sup>3</sup>

While criminological research has paid increased attention to women and girls over the past decade, there is still much work left to be done. This Note aims to address a perceived gap in existing scholarship on female incarceration — existing research and proposed

1. Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 921 (1993).

2. THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 1 (2018), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [<https://perma.cc/2EWA-YGAA>].

3. Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 1, 1–2 (Barbara E. Bloom ed., 2003).

Nationally, the number of women in state and federal prisons increased nearly eightfold between 1980 and 2001, from 12,300 to 93,031 . . . . Despite these figures, there does not appear to be a corresponding increase in women’s criminality. In 1998, nearly two-thirds of women in state prisons were serving sentences for nonviolent offenses . . . . Women are arrested and incarcerated primarily for property and drug offenses, with drug offenses representing the largest source of the increase (36%) in the number of women prisoners in 1998. Interestingly, the proportion of women imprisoned for violent crimes has continued to decrease. The rate at which women commit murder has been declining since 1980, and the per capita rate of murders committed by women in 1998 was the lowest recorded since 1976. Of the women in state prisons in 1998, 28 percent had been incarcerated for a violent offense[.]

*Id.* at 1.

solutions have tended to focus on prison conditions and post-incarceration re-entry. While such work is imperative, an examination of the female pathways to incarceration is equally important. This Note argues reforms that target the front end of the incarceration process, namely sentencing, should be employed to address the rapidly rising rate of female incarceration.

Prior to 1970, the United States followed an indeterminate sentencing model, under which multiple actors in the criminal justice system had broad discretion in imposing sentences for individual offenders. In the 1970s, however, as crime rates began to rise, many attacked the indeterminate model for its allegedly inconsistent results.<sup>4</sup> In response, Congress passed the Sentencing Reform Act of 1984 (SRA), which authorized the creation of the Federal Sentencing Guidelines.<sup>5</sup> Sentencing inconsistencies, particularly across gender and race, were a key area of concern for critics of indeterminate sentencing.<sup>6</sup> Notably, the text and the legislative history of the SRA both reveal “Congress’s concern with outcome inequality under the prior indeterminate system and the explicit search for greater sentencing equality through sentencing reform.”<sup>7</sup> The intention behind adopting the determinate sentencing model, therefore, was to move away from indeterminacy’s resulting formal outcome inequality, where “[d]ifferent sentences for similar offenses responded to the circumstances and characteristics of each offender.”<sup>8</sup>

Yet, while the Federal Sentencing Guidelines were “designed to reduce race, class, and other unwarranted disparities in sentencing,” many criminologists credit the expansion in the female prison population to the adoption of determinate sentencing structures at both the state and federal level, which brought with it gender-blind mandatory sentencing statutes and the “corresponding ‘equalization’ of justice.”<sup>9</sup> These findings raise questions as to the true consequences of formal equality in sentencing for female offenders.<sup>10</sup>

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4. See John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 241 (2006).

5. Sentencing Reform Act, 18 U.S.C. § 3551 (1984).

6. See Pfaff, *supra* note 4, at 241 (noting there was a “growing concern that, either consciously or unconsciously, judges were taking into account impermissible factors such as defendants’ race and sex when meting out punishments”).

7. Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 273 (2005).

8. *Id.* at 272.

9. Stephanie Bontrager et al., *Gender and Sentencing: A Meta-Analysis of Contemporary Research*, 16 J. GENDER RACE & JUST. 349, 363 (2013); see also

Part I of this Note first provides a brief overview of the mass incarceration crisis in America and the changes in criminal justice policy, namely sentencing policy, to which it is attributed. Part I then discusses the impact of changes in sentencing policy on female sentencing outcomes. Part II proposes a framework of inquiry to be used by policymakers engaged in the creation of gender-responsive sentencing policies. This framework includes an analysis of the scope and nature of female incarceration, the correlates of female criminality, and the impact of existing gender-neutral policies on women involved in the criminal justice system. Finally, Part III discusses the efficacy of gender-neutral sentencing policies in action and identifies two policies that exemplify proper application of the framework presented in Part II.

### I. MASS INCARCERATION, SENTENCING REFORM, AND WHAT IT ALL MEANS FOR WOMEN IN CRIMINAL JUSTICE SYSTEM

Although efforts have been made to reduce the size of the incarcerated population — particularly state prison populations — such efforts have been more effective for men than for women.<sup>11</sup> The gamut of policy areas that must be addressed to accomplish true reform are too vast for any one discussion. By necessity, therefore, this Note specifically addresses only sentencing policy.<sup>12</sup> To that end, this Part discusses the recent history of sentencing policy reforms in America within the context of the mass incarceration crisis and the impact of such reforms on women involved in the criminal justice system.

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Covington & Bloom, *supra* note 3, at 4 (“[T]he current model of justice — called the ‘equalization’ approach — emphasizes parity and then utilizes a male standard. Therefore, increased incarceration of women takes the place of alternatives to prison.”).

10. See Barbara A. Koons-Witt, *The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines*, 40 CRIMINOLOGY 297, 301–02 (2002) (“[S]entencing guidelines may have had unintended consequences and undesirable effects as well, notably, an increase in the likelihood of incarceration for women, including nonviolent offenders.”).

11. See WENDY SAWYER, PRISON POLICY INITIATIVE, THE GENDER DIVIDE: TRACKING WOMEN’S STATE PRISON GROWTH PRISON POLICY INITIATIVE (2018), [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html) [<https://perma.cc/UQ6K-58K3>] (“The total number of men incarcerated in state prisons fell more than 5% between 2009 and 2015, while the number of women in state prisons fell only a fraction of a percent (0.29%).”).

12. This Note focuses specifically on sentencing because changes in sentencing policy have been found to have particularly clear gendered consequences. See, e.g., Covington & Bloom, *supra* note 3, at 5–6.

### A. The Rise of Mass Incarceration in America

While an in-depth discussion of mass incarceration is beyond the scope of this Note, a cursory examination of the mass incarceration crisis in the United States is critical to understanding the context within which the current state of female incarceration arises. This Section begins, therefore, by presenting empirical data that quantifies the mass incarceration crisis, and then introduces the changes in criminal justice policy, namely sentencing policy, that have caused it.

The magnitude of incarceration in a society is typically measured by the incarceration rate, shown as a ratio of those people in prison and jail as compared to the general population at a given moment in time.<sup>13</sup> Depending on the goals of the measurement, the rate of incarceration can be calculated for specific geographic areas, ranging from a neighborhood to an entire state, and for specific demographics, including race, age, and gender.<sup>14</sup>

For purposes of calculating the rate of incarceration in the United States, the incarcerated population includes those who are confined in federal prison, state prison, and jail.<sup>15</sup> People who are confined in federal prisons run by the United States Bureau of Prisons have been sentenced for federal crimes, primarily those federal crimes which involve “robbery, fraud, drugs, weapons and immigration.”<sup>16</sup> State prisons run by individual State Departments of Corrections primarily confine those who are serving time for felony convictions or those who are incarcerated for violating the terms of their parole.<sup>17</sup> Local jails generally confine people who are convicted of misdemeanor crimes, have received sentences of less than one year, or are awaiting trial and have not paid or are ineligible for bail.<sup>18</sup>

Prior to 1970, the rate of incarceration in the United States had remained relatively constant for 50 years.<sup>19</sup> In 1972, however, the incarceration rate began to grow rapidly and continued to increase

13. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 19, 64 (Jeremy Travis et al. eds., 2014), <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes> [<https://perma.cc/Z97H-MPB8>].

14. *See id.*

15. *See id.* at 37.

16. *Id.* at 38.

17. *Id.* at 38. (“The state prison population can be broadly divided into three offense categories: violent offenses (including murder, rape, and robbery), property offenses (primarily auto vehicle theft, burglary, and larceny/theft), and drug offenses (manufacturing, possession, and sale).”).

18. *Id.* at 40.

19. *See id.* at 33.

annually by 6% to 8% through 2008, at which point it plateaued at an all-time high.<sup>20</sup> In absolute numbers, the American penal population increased by almost two million people in 40 years.<sup>21</sup> By the end of 2016, there were over 6.6 million people under the control of the United States correctional systems, including those held in jails and prisons as well as those on probation and parole.<sup>22</sup> Comparatively speaking, the rate of incarceration in the United States is substantially higher than any other country: for example, in 2009, the incarcerated population in the United States constituted approximately 23% of the total number of people incarcerated worldwide.<sup>23</sup>

Observers have identified a shift in our conception of the nature of criminal punishment, and the resulting changes in law and policy concerning sentencing, as a “likely culprit” behind mass incarceration.<sup>24</sup> In the United States, the 1960s were filled with a “complex combination of organized protests, urban riots, violent crime and drug use, [and] the collapse of urban school,” and economic opportunities for many Americans began to decline.<sup>25</sup> In the 1970s, technological advancements and globalization led to mass layoffs and factory closings in the industrial sector.<sup>26</sup> Then, throughout the 1980s, employment among young Americans continued to fall, and “a wave of crack cocaine use and related street crime hit many of the nation’s already distressed inner cities.”<sup>27</sup>

The socioeconomic turmoil and rising crime rates of the 1960s, 1970s, and 1980s contributed to “public fears of crime and support for tougher sanctions” which, in turn, led to a shift in federal and state-level criminal justice policy, including major changes in the categorization of crime and the severity of criminal punishments.<sup>28</sup> This shift has manifested in the adoption of sentencing laws and guidelines “providing for lengthy prison sentences for drug and

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20. *Id.* at 34. In 1972, for every 100,000 U.S. residents, 161 were incarcerated in prisons and jails. *Id.* at 33. By 2012, 707 people were incarcerated for every 100,000, and the rate of incarceration in America was the highest in the world. *Id.* at 33–34.

21. *See id.* at 36.

22. *See* U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 (2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6226> [<https://perma.cc/Q3Z9-83BW>].

23. *See* NAT’L RESEARCH COUNCIL, *supra* note 13, at 36–37.

24. *See* JONATHAN SIMON, MASS INCARCERATION: FROM SOCIAL POLICY TO SOCIAL PROBLEM 13, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS (Joan Petersilia & Kevin R. Reitz eds., 2012).

25. *Id.* at 24.

26. *Id.* at 25.

27. *Id.* at 25.

28. *Id.* at 25.

violent crimes and repeat offenses, and the enactment in more than half the states and in the federal system of three strikes and truth-in-sentencing laws” in almost every state system and in the federal system.<sup>29</sup> These laws and guidelines have been identified as a primary cause of mass incarceration.<sup>30</sup>

### B. A Brief History of Modern Sentencing Reform

Following World War II, the “penological arena was permeated by a general rehabilitative thrust,” prompted by the relative prosperity, low crime rates, and optimism of the 1950s.<sup>31</sup> The shift to a rehabilitative approach is also credited to a 1965 survey compiled for the President’s Commission on Law Enforcement and Administration of Justice, which found the “brutal and degrading” prison conditions in which offenders lived were “the poorest possible preparation for their successful reentry into society, and often merely reinforce in them a pattern of manipulation or destructiveness.”<sup>32</sup> In response, the American penal system moved away from the belief that imprisonment is the most effective means of deterring crime towards a treatment-focused anti-institutional model that attempted to avoid incarceration “by keeping offenders in the community and helping them, through various programs, to reintegrate.”<sup>33</sup>

A key expression of the treatment-focused model was the widespread adoption of the indeterminate sentencing structure.<sup>34</sup> The indeterminate approach was grounded upon the assumption that

29. *Id.* at 70.

30. *Id.* at 70.

31. *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”); PHILIP GOODMAN ET AL., *BREAKING THE PENDULUM* 78 (2017) (in describing the rehabilitative ideal, renowned legal scholar Francis Allen explained, “it is assumed that measures employed to treat the convicted offender should serve a therapeutic function, that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions and in the interests of social defense”); Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 169, 189 (1995) (“The generalized conclusion that prison unrest was the result of insufficient rehabilitative programs led, however, to an intensification of the therapeutic thrust in prisons after the early 1950s spate of prison riots.”).

32. Rotman, *supra* note 31, at 193.

33. *Id.* at 194–95.

34. See SANDRA SHANE-DUBOW ET AL., U.S. DEP’T OF JUSTICE, *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT* 6 (1985) (“By the 1960’s, every state of the nation had an indeterminate sentencing structure or some variation.”).



“the offender suffered from some physical, psychological, or social-environmental affliction.”<sup>35</sup> Under this system, the legislature established maximum, but rarely minimum, sentences.<sup>36</sup> In individual cases, judges were granted substantial discretion to impose any sentence below the maximum.<sup>37</sup> While a judicially imposed sentence established the maximum number of years that an individual would be incarcerated, the *actual* term that the individual would serve was later decided by a parole board based on “the gravity of the crime, the prisoner’s behavior in prison, and the parole board’s prediction of his likely success during the parole release term.”<sup>38</sup>

At the height of the indeterminate sentencing regime, it has been estimated that people who were incarcerated served between one-third and two-thirds of the judicially imposed sentence in prison. The remaining unserved time, or the difference between the maximum sentence set by the judge and the time actually spent in prison, was served under conditional release.<sup>39</sup> Sentencing was thus said to be indeterminate because “the lengths of prison sentences could not be determined at sentencing. They became known in individual cases only when the last of the judicial, correctional, and parole board decisions was made.”<sup>40</sup>

*i. The Fall of the Indeterminate Sentencing Model*

In the late 1960s, the indeterminate approach was attacked on multiple fronts.<sup>41</sup> From a socio-political perspective, rising rates of serious crime in the 1960s and 1970s fueled the public’s call for sentencing reform and intensified mounting political pressure to move away from the “assumed leniency” of the indeterminate model toward a model premised on equal treatment.<sup>42</sup> Some critics focused primarily on issues of equality and argued sentences were too

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35. *Id.*

36. Norval Morris, *The Contemporary Prison: 1965–Present*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 227, 242 (1998).

37. *Sentencing Reform*, in SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 6 (Michael Tonry & Kathleen Hatlestad eds., 1997).

38. Morris, *supra* note 36, at 242.

39. *Id.*

40. *Sentencing Reform*, *supra* note 37, at 6.

41. See, e.g., Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 1 (1972) (“The ‘phase’ of our system thus characterized is by and large a bizarre ‘nonsystem’ of extravagant powers confided to variable and essentially unregulated judges, keepers and parole officials.”).

42. See Morris, *supra* note 36, at 243.

arbitrary, as evidenced by the fact that “[s]imilarly situated defendants could receive dramatically difference sentences based on which judge each faced or what day each appeared before a given judge.”<sup>43</sup> Such criticisms focused on the indeterminate model’s embrace of formal outcome inequality, where “[d]ifferent sentences for similar offenses responded to the circumstances and characteristics of each offender.”<sup>44</sup>

According to this line of argument, because the indeterminate model incorrectly assumes that “crime is the product of individual pathology,” it thus requires actors in the criminal justice system to make highly subjective assessments of individual pathology in sentencing.<sup>45</sup> The discretionary exercise of power by those making such subjective assessments, therefore, “had contributed to the development and continuation of a dual system of justice which was unfair to the poor, non-white, and the politically weak.”<sup>46</sup>

Many critics further cited to rising rates of serious crime, arguing that indeterminate sentences undermined the “deterrent power” of the law.<sup>47</sup> The theory of deterrence is premised on the assertion that, in deciding whether to engage in criminal behavior, a would-be offender balances costs — including probability of arrest, probability of conviction, and severity of the sanction likely to be imposed — against potential benefits.<sup>48</sup> If the costs outweigh the benefits, criminal activity will be discouraged.<sup>49</sup> Indeterminate sentencing, these critics assert, undermines the deterrent power of the criminal sanctions by creating inconsistencies across sentences for similar

43. Pfaff, *supra* note 4, at 241.

44. Miller, *supra* note 7, at 272.

45. SHANE-DUBOW ET AL., *supra* note 34, at 7–8. This was based on American Friends Service Committee’s *Struggle for Justice: A Report on Crime and Punishment in America* (1971):

The final report of the group specifically criticized the indeterminate sentencing structure for its assumption that: 1) crime is the product of individual pathology; 2) penology has the knowledge to affect treatment of criminal; 3) experts have established a sufficient body of knowledge to diagnose the particular factors resulting in criminal activity; 4) knowledge for practice in criminology is free from biases of race, class, or status; 5) useful and accurate means of measuring the success of treatment exists; and finally that 6) discretionary power is a necessary attribute of a fair and efficient criminal justice system.

*Id.*

46. *Id.* at 8.

47. Pfaff, *supra* note 4, at 241.

48. See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 206–08 (2013).

49. *Id.* at 206.

crimes.<sup>50</sup> In balancing the costs and benefits of criminal behavior, therefore, would-be criminal offenders are unable to properly account for the severity of the punishment that is likely to be imposed for a given criminal act.

*ii. The Adoption of the Federal Sentencing Guidelines*

After nearly a decade of debate, Congress passed the Sentencing Reform Act (SRA) in 1984, which authorized the formation of the U.S. Sentencing Commission and, by extension, the creation of the Federal Sentencing Guidelines.<sup>51</sup> The Federal Sentencing Guidelines are “a system of multiple recommended sentences and dispositions”<sup>52</sup> designed to guide judicial decisions by requiring the sentencing judge to “assign numerical weight to numerous aggravating and mitigating factors” relating to the offender’s criminal conduct criminal history.<sup>53</sup> With the introduction of the Federal Sentencing Guidelines, the perceived purpose of criminal punishment shifted away from rehabilitation toward deterrence, and the focus of sentencing “away from the personal characteristics of the offender to the circumstances of the offense.”<sup>54</sup>

*iii. State-Level Adoption of the Determinate Model*

Prior to the introduction of determinate sentencing, every state had an indeterminate sentencing system.<sup>55</sup> The federal sentencing reform

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50. Pfaff, *supra* note 4, at 241.

51. See The Sentencing Reform Act, 18 U.S.C. § 3551 (1984); see also Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 191 (1994).

The Sentencing Reform Act embodies Congress’ rejection of traditional penal rehabilitationism. The Act: (1) abolishes parole and adopts a determinate ‘real time’ sentencing scheme; and (2) structures and narrows judicial sentencing discretion through the creation of a single administrative agency — the United States Sentencing Commission — empowered to promulgate presumptively binding sentencing guidelines.

*Id.*

52. FREDERIQUE A. LAUBEPIN, PENAL SANCTIONING IN THE UNITED STATES: EXPLAINING CROSS-STATE DIFFERENCES 18 (2015) (“Under sentencing guidelines, each offense or offense class will have multiple sentencing recommendations based on the prior criminal history of the offender, and recommended prison terms are generally determined according to the severity of the offense committed *and* the prior criminal history of the offender.” (emphasis in original)).

53. Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 86 (1988).

54. Nagel & Johnson, *supra* note 51; see also Koons-Witt, *supra* note 10, at 300.

55. See SHANE-DUBOW ET AL., *supra* note 34, at 6.

movement, however, “prompted America’s reconsideration of its penal goals” nationwide.<sup>56</sup> In response to the federal adoption of the determinate model, every state curtailed its previously indeterminate system through a variety of mechanisms, including “three-strikes” laws and the adoption of truth-in-sentencing laws.<sup>57</sup>

### C. The Impact of Sentencing Reform on Female Sentencing Outcomes

The significance of gender in sentencing decisions has varied over time, with some recent data indicating that women no longer receive leniency based on gender, as they once did. In the 1970s, research examining the impact of extralegal factors, such as gender, revealed that female offenders “receive[d] more favorable sentences than *similarly situated* male offenders.”<sup>58</sup> This disparity in treatment was regarded by some as the result of paternalism.<sup>59</sup> Proponents of the paternalistic theory assert that judges are more lenient towards women because they perceive women as “less threatening, dangerous and culpable” than men, and feel a “paternalistic desire to protect and aid women in times of need.”<sup>60</sup> Metadata analysis suggests that the sentencing disparity between men and women was at its lowest in the 1980s during the transition to determinate sentencing.<sup>61</sup> This transition was characterized by a push to eliminate judicial discretion; policymakers’ preference for “equal sentencing over special treatment of women offenders” effectively ended judicial consideration for “mitigating circumstances such as family obligations, and has translated into longer prison terms for women.”<sup>62</sup>

The Federal Sentencing Guidelines were designed to be entirely neutral as to gender, and explicitly state that “sex is not relevant in the determination of a sentence.”<sup>63</sup> Empirical investigations of the

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56. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 9 (2003).

57. Pfaff, *supra* note 4, at 242. Three-strikes laws require that offenders receive “dramatically increased” sentences following a third criminal conviction. *Id.* at 245. Truth-in-sentencing laws require that offenders serve a specific percentage of their sentences before they are eligible for release. *Id.*

58. Nagel & Johnson, *supra* note 51, at 185.

59. Bontrager et al., *supra* note 9, at 353 (emphasis in original).

60. *Id.*

61. *See id.* at 365.

62. *Id.* at 350–51.

63. Raeder, *supra* note 1, at 906 (citing to U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (U.S. SENTENCING COMM’N 1992)).

relationship between determinate guidelines and sentencing outcomes for women have, however, produced inconsistent results.<sup>64</sup> Early research on determinate guidelines indicated that sentencing disparities between male and female offenders were disappearing, as sentence length and severity were increasing for women.<sup>65</sup> Later studies conducted in the 1990s contradict earlier findings, with more than two-thirds of all estimates “reflecting less severe sentencing outcomes for female offenders.”<sup>66</sup> Yet, the most recent empirical studies, based on data from 2000–2006, “clearly demonstrate that women no longer enjoy significantly shorter sentences, have lower odds of incarceration, or have better chances at a sentencing departure than their male counterparts.”<sup>67</sup>

The above survey of studies is by no means exhaustive, but it reflects the outcome-based emphasis of much of the empirical testing on gender and sentencing. While the inconsistent results across these studies *may* reflect empirical realities, it is also possible that such inconsistencies can be attributed, in part, to the unique methodological challenges involved when conducting empirical studies in the criminal justice context, such as “presence of appropriate controls, time frame of the study, and punishment outcome.”<sup>68</sup> Nonetheless, Richard Bierschbach and Stephanos Bibas assert, and this Note argues, that the greatest weakness in this body of research is not, in fact, the inconsistent results. Rather, most concerning is the way this research frames and operationalizes the

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64. See Bontrager et al., *supra* note 9, at 351.

65. See Kay A. Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLIN L. REV. 237, 243 (1982).

66. Bontrager et al., *supra* note 9, at 365.

67. See *id.* at 365–66.

By 2006, the number of studies finding significant differences in incarceration for male and female offenders dropped to 50% and the number showing a departure advantage for female offenders declined to 60%. Finally, sentence length differentials have declined sharply over time according to the analysis. In the 1980s, 83% of the estimates indicated that women received significantly shorter sentences than men, but that figure dropped to 40% between 2000 and 2006.

*Id.*; Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43, 54–55 (citing to a study in Cassia Spohn, *Gender and Sentencing of Drug Offenders: Is Chivalry Dead?*, 9 CRIM. JUST. POL’Y. REV. 365 (1998), which tested for an interaction between gender and sentences imposed on drug offenders in Chicago, Illinois, finding that preferential treatment of female offenders was “confined to cases involving offenders without dependent children and to offenders without a prior conviction for a drug offense”).

68. Bontrager et al., *supra* note 9, at 364.

concept of equality in sentencing through outcome-oriented terms that “deflect attention from political, policy and structural choices.”<sup>69</sup>

By referring to differences in sentencing outcomes as “disparities,” these studies “presuppose[] that equal outcomes are good and unequal outcomes are bad,” and thus the language of equality and disparity obscures the “more positive” ways that sentencing differences can be understood.<sup>70</sup> To that end, this Note argues, it is not a consideration of disparities between male and female sentencing outcomes that is most valuable in the context of policy change and reform. Instead, it is the consideration of whether female sentencing outcomes reflect just results when correlates of female crime and relative harm are taken into account. By way of example, the following section discusses specific changes in sentencing policy, such as drastic changes in drug enforcement practices,<sup>71</sup> which have “distinctly disadvantaged” women.<sup>72</sup> While men, too, have been affected by sentencing reform, “it is clear that women have suffered disproportionately to the harm their drug behavior represents.”<sup>73</sup>

### *i. The War on Drugs*

Drug offenses committed by women represent the largest source of the increase in women in prison. This increase can be traced to sentencing policy changes, at both the state and national levels, that mandated incarceration for low-level drug offenses.<sup>74</sup> Today, a higher

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69. Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1457 (2016).

70. *Id.* at 1451.

71. *See infra* Section I.C.

72. Barbara Bloom et al., *Women Offenders and the Gendered Effects of Public Policy*, 21 REV. POL’Y RES. 31, 38–39 (2004).

Mandatory minimum sentencing for drug offenses has significantly increased the numbers of women in state and federal prisons. Between 1995 and 1996, female drug arrests increased by 95% while male drug arrests increased by 55%. In 1979, approximately one in ten women in US prisons was serving a sentence for a drug conviction; in 1999, this figure was approximately one in three.

*Id.* at 38.

73. *Id.*

74. *See, e.g.*, NAT’L RES. CTR. ON JUSTICE INVOLVED WOMEN, FACT SHEET ON JUSTICE INVOLVED WOMEN IN 2016 (2016), <https://cjinvolvedwomen.org/wp-content/uploads/2016/06/Fact-Sheet.pdf> [<https://perma.cc/FP9V-GS9F>] (stating that between 1986 and 1999, the number of women who were incarcerated for drug-related offenses in state facilities increased 888%).

proportion of incarcerated women than incarcerated men are serving sentences for drug-related offenses.<sup>75</sup>

The “War on Drugs” was officially declared by President Nixon in 1971, but the anti-drug agenda was escalated significantly during the Reagan Administration with the enactment of the Comprehensive Crime Control Act of 1984 (Crime Control Act).<sup>76</sup> Referred to as “the most significant series of changes in the federal criminal justice system ever enacted at one time,” the Crime Control Act includes many chapters addressing specific crime-related concerns.<sup>77</sup> Chapter II of the Act contains the Sentencing Reform Act of 1984.<sup>78</sup>

While these changes in law and policy increased the risk of arrest for both men and women, “there have been clear gendered impacts in practice” that have increased the probability of female incarceration, such as the fact that women are more likely to be involved in the low-level offenses that are targeted by “broken windows” policing and drug law enforcement.<sup>79</sup> In the 1990s, changes in law enforcement policies, significantly the shift towards “broken windows” policing, contributed to an increase in the arrests of women.<sup>80</sup> These changes emphasized the need to control low-level offenses in order to prevent more serious crimes.<sup>81</sup> At the same time as the risk of arrest for low-level crimes began to increase, the enactment of new federal drug laws in the late 1980s both shifted the public opinion about the dangers of drug abuse and resulted in “historically unprecedented

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75. *See id.*; *see also* E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2016 (2018) (“A quarter (25%) of females serving time in state prison on December 31, 2015, had been convicted of a drug offense, compared to 14% of males . . . . More than half (56% or 6,300) of female federal prisoners were serving sentences for a drug offense, compared to 47% of males (75,600).”).

76. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

77. Joseph E. diGenova & Constance L. Belfiore, *An Overview of the Comprehensive Crime Control Act of 1984 — The Prosecutor’s Perspective*, 22 AM. CRIM. L. REV. 707, 707 (1985).

78. *See supra* Section I.B.ii.

79. The “broken windows” theory is the theory that shifting policing priorities toward minor offenses would, over time, have the effect of preventing more serious crime. ELIZABETH SWAVOLA ET AL., VERA INST. OF JUSTICE, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 6 (2016), <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf> [<https://perma.cc/K39A-MMUM>]. The policing practices that stemmed from the broken windows theory “stressed responses to quality-of-life and other low-level offenses — such as petty theft, disorderly conduct, public intoxication, loitering, or vagrancy.” *Id.*

80. *Id.*

81. *Id.*

rates of imprisonment for drug use and possession.”<sup>82</sup> For example, between 1995 and 1996, women arrested for drug-related offenses increased by 95% while male drug-related arrests increased only 55%.<sup>83</sup>

*ii. Mandatory Minimum Sentencing*

Mandatory minimum sentencing statutes require a judge to sentence an offender who has committed a specific crime to a specified minimum term of incarceration.<sup>84</sup> While mandatory minimum laws have been implemented for many types of offenses,<sup>85</sup> such laws are particularly frequent for drug offenses.<sup>86</sup> Some scholars assert such mandatory minimum statutes, when combined with the inflexible Sentencing Guidelines regime, “result in lengthy incarceration of such women whose actual role in drug cases is often quite limited.”<sup>87</sup> Many women who are incarcerated for drug offenses often become involved in drug crime through an existing relationship with a male drug trafficker — perhaps a father, brother, boyfriend or husband — upon whom they are financially dependent or may fear.<sup>88</sup> Such women, referred to by some scholars as “women of circumstance,” are typically minimally involved with their partner or family member’s illegal drug activity, yet, upon arrest, they are commonly charged with conspiracy.<sup>89</sup> Under federal conspiracy laws,<sup>90</sup> a woman’s presence in the home may be used as circumstantial evidence of participation in a conspiracy — as a result, “merely

82. NAT’L RESEARCH COUNCIL, *supra* note 13, at 120.

83. Covington & Bloom, *supra* note 3, at 5.

84. See Shimica Gaskins, “Women of Circumstance” — *The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1539–40 (2004).

85. Today, most convictions under statutes requiring mandatory minimum penalties relate to controlled substances, firearms, identity theft, and child sex offenses. See U.S. SENTENCING COMM’N, OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (2017).

86. *Id.* at 11 (“In recent years, drug trafficking offenses have accounted for approximately two-thirds of the offenses carrying a mandatory minimum penalty, significantly higher than the next largest class of offenses.”). The Anti-Drug Abuse Act of 1986 established mandatory minimum penalties for many drug trafficking offenses, and in 1988 Congress further extended the reach of these mandatory penalties to drug trafficking conspiracies “thereby broadening the scope of mandatory minimum penalties to include virtually all offenders in drug trafficking organizations.” *Id.*

87. Raeder, *supra* note 1, at 907.

88. Gaskins, *supra* note 84, at 1533.

89. See *id.* at 1533, 1537.

90. See, e.g., 18 U.S.C. § 371 (2000).



permitting drugs in the home, answering the door, or answering the telephone could establish that the wife or girlfriend was a knowing member of the conspiracy.”<sup>91</sup>

At sentencing, mandatory minimum statutes for drug conspiracies permit a judge to consider *only* the quantity of drugs and the size of the conspiracy in assigning a sentence — factors such as an offender’s individual role in the conspiracy are not accounted for.<sup>92</sup> “Women of circumstance,” therefore, are often sentenced not as minor participants, but are held “accountable for the offense as if they were the principal conspirators.”<sup>93</sup>

Mandatory minimum sentencing statutes present a clear example of a gender-neutral sentencing policy that results in sentencing outcomes for women that are disproportionate to the harm caused by their conduct. As discussed in Section I.C, it is important to understand that differences in sentencing outcomes across gender are not always bad. In fact, such differences are necessary where gender-neutral policies, such as mandatory minimum laws, do not account for differences in culpability between major participants and minor ancillary players in a given crime.

## II. THE FUTURE OF REFORM: A PROPOSED FRAMEWORK FOR THE CREATION OF GENDER-SPECIFIC SENTENCING POLICIES

This Note argues, first, that future reform efforts should specifically target the problem of female incarceration through changes to sentencing policy and, second, that such changes must account for the unique causes and consequences of female incarceration if they are to be successful. To that end, this Part outlines a suggested framework of inquiry to be used by policymakers in the creation of gender-responsive sentencing policies and reforms. First, one must examine the *scope* of the problem, by determining the rate at which women are being incarcerated, and the *nature* of the problem, by reviewing the backgrounds and demographics of women who are incarcerated.<sup>94</sup> Next, in order to create policies that address the scope and the nature of the female incarceration, one must investigate the unique causal and correlative mechanisms by which it occurs.<sup>95</sup> Finally, in the context of policy reform, one must evaluate the impact of existing

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91. Gaskins, *supra* note 84, at 1538.

92. *See id.* at 1541.

93. *Id.* at 1541–42.

94. *See infra* Section II.A.

95. *See infra* Section II.B.

sentencing policies on female incarceration, in light of insights gleaned from the inquiry outlined above.<sup>96</sup>

This Note argues that an evaluation of current criminal justice policies, when informed by an analysis of the scope, nature, and correlates of female criminal behavior, reveals that current sentencing policies must be a major focus of reform efforts due to the impact of such policies on the rising rate of female incarceration in America.

### A. The Scope and Nature of the Problem

While mass incarceration has resulted in the imprisonment of substantially more men than women, the growth rate of incarceration for women has outpaced men by more than double since 1980.<sup>97</sup> From 1980 to 2016, the number of women who were incarcerated increased by more than 700%<sup>98</sup> and the United States now has the highest incarceration rate for women of any country in the world.<sup>99</sup>

The above data, which reveals a striking picture of the current state of female incarceration, raises the question of *why* — why does the United States have the highest female incarceration rate in the world? While there is no single answer to this important question, an investigation into *who* incarcerated women actually are, beyond just the numbers, is an appropriate place to start.

Over 80% of women in jail are incarcerated for non-violent offenses.<sup>100</sup> Moreover, many women are in jail for violating the terms of their parole or probation, not for committing a new crime.<sup>101</sup> In 2016, over half of female federal prisoners had been convicted of a drug offense, as compared to 47% of male federal prisoners.<sup>102</sup> Likewise, a quarter of women serving time in state prison in 2015 had

96. *See infra* Section II.C.

97. THE SENTENCING PROJECT, *INCARCERATED WOMEN AND GIRLS 1* (2018), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [<https://perma.cc/2EWA-YGAA>]; *see also* WENDY SAWYER, *THE GENDER DIVIDE: TRACKING WOMEN'S STATE PRISON GROWTH PRISON POLICY INITIATIVE* (2018), [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html) [<https://perma.cc/Z34V-QDKB>] (“Nationwide, women’s state prison populations grew 834 over nearly 40 years — more than double the pace of the growth among men.”).

98. NAT’L RES. CTR. ON JUSTICE INVOLVED WOMEN, *supra* note 74.

99. ALEKS KAJSTURA, *STATES OF WOMEN’S INCARCERATION: THE GLOBAL CONTEXT 2018 PRISON POLICY INITIATIVE* (2018), <https://www.prisonpolicy.org/global/women/2018.html> [<https://perma.cc/4SU8-Y6SL>].

100. SWAVOLA ET AL., *supra* note 79, at 9.

101. *See id.*

102. E. ANN CARSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2016 13* (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/73SM-CLDK>]. Drug offenses include trafficking and possession. *Id.*

been convicted of a drug offense, as compared to 14% of men in state prison.<sup>103</sup>

Of critical importance is the fact that, according to 2014 figures, Black women are *twice* as likely to be incarcerated than White women.<sup>104</sup> Women who become involved with the criminal justice system are disproportionately women of color and are often characterized as having a history of physical and sexual abuse, substance abuse, and poverty.<sup>105</sup> Demographic data gathered in 2016 supports this finding: six out of ten women in jail did not have full-time employment prior to their arrest, and nearly 30% of incarcerated women had received public assistance, as compared to 8% of incarcerated men.<sup>106</sup> Research reveals that women's economic marginalization through precarious, low-paying jobs, is a contributing factor in a number of crimes frequently attributed to women, such as drug offenses.<sup>107</sup> Additionally, almost 80% of women who are incarcerated in jails are mothers, the majority of whom are single mothers.<sup>108</sup>

As many of these women experience poverty prior to incarceration and do not have household income from a spouse, they often do not

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103. *Id.*

104. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 15 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/QLM5-RA44>].

105. Emily J. Salisbury & Patricia Van Voorhis, *Gendered Pathways: A Quantitative Investigation of Women Probationers' Paths to Incarceration*, 36 CRIM. JUST. & BEHAV. 541, 543 (2009); *see also* BARBARA BLOOM ET AL., A THEORETICAL BASIS FOR GENDER-RESPONSIVE STRATEGIES IN CRIMINAL JUSTICE 2 (2002). Salisbury and Voorhis describe female criminal offenders as:

[L]ess likely to have committed violent offenses and more likely to have been convicted of crimes involving drugs or property . . . . Women confront life circumstances that tend to be specific to their gender such as sexual abuse, sexual assault, domestic violence, and primary caregiver or dependent children. The characteristics of criminal justice-involved women thus reflect a population that is marginalized by race, class and gender.

*Id.*

106. SWAVOLA ET AL., *supra* note 79, at 10.

107. *See* Amy Reckdenwald & Karen F. Parker, *The Influence of Gender Inequality and Marginalization on Types of Female Offending*, 12 HOMICIDE STUD. 208, 211 (2008). Prior to the emergence of the crack cocaine in the 1980s, drug selling was a male-dominated trade. *See id.* at 211. The introduction of the crack cocaine markets, however, produced new opportunities for women's involvement in drug sales and distribution, while, at the same time, women's increased use of drugs "created a reliance on illegal incomes to support their drug use during times of shrinking labor markets and rising unemployment levels." *Id.* at 211; *see also* Kristy Holtfreter et al., *Poverty, State Capital, and Recidivism among Women Offenders*, 3 CRIMINOLOGY & PUB. POL'Y 185, 203 (2004); SWAVOLA ET AL., *supra* note 79.

108. SWAVOLA ET AL., *supra* note 79, at 7.

have means sufficient to support their children for the length of their detention or upon their release.<sup>109</sup> As a result, the children of incarcerated single mothers are often placed in foster care.<sup>110</sup> Incarcerated mothers with children who entered the foster care system are half as likely to reunite with their children upon release, as compared to non-incarcerated mothers with children in foster care.<sup>111</sup> Separation, therefore, is a major source of stress for the majority of women who are incarcerated, as their detention exacerbates difficulties related to strained finances and limited support systems.<sup>112</sup> For example, common barriers to regular visitation by children include the children's distance from the prison, lack of access to transportation, and "limited economic resources on the part of the caregiver."<sup>113</sup> Furthermore, when trying to regain custody of their children, mothers who are incarcerated may not have access to the resources often required to meet reunification requirements, such as parent education, drug treatment, counseling and vocational training.<sup>114</sup> Research has found that, for women in prison, such parental stresses are linked to misconduct and reoffending upon release.<sup>115</sup>

### B. Connecting the Dots: Theories of Female Crime

For the purposes of policy creation and reform, an understanding of the general backgrounds and demographics of women who are incarcerated is most useful when mapped against known causal and correlative mechanisms by which female criminal behavior occurs. As discussed in this Section, theories of female criminal behavior provide key insight into the unique reasons *why* women commit crime.

In the context of criminal justice reform, the value of such insights cannot be understated. As previously discussed in Section I.C, the rising rate of female incarceration has been correlated with major changes in policy that produced a largely gender-neutral approach to criminal punishment. This "gender-neutral" approach does not, however, treat women and men equally, but rather treats women as if

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109. *Id.* at 17.

110. *Id.* at 18.

111. *Id.*

112. *Id.* at 17.

113. Barbara Bloom & Meda Chesney-Lind, *Women in Prison: Vengeful Equity*, in *IT'S A CRIME: WOMEN AND JUSTICE* 183, 188 (Roslyn Muraskin ed., 2000).

114. *Id.*

115. SWAVOLA ET AL., *supra* note 79, at 17.

they were men.<sup>116</sup> Yet, in every category of crime, except for sex work, women offend at lower rates than men.<sup>117</sup> The empirical reality of the divergence in male and female patterns of criminal offending — the so-called gender gap in crime — has led scholars to question whether female criminal behavior “can be explained by theories developed mainly by male criminologists to explain male crime.”<sup>118</sup> The study of female offenders has produced a number of gender-specific theories that seek to explain the gender gap by identifying the root causes of female crime.<sup>119</sup>

*i. Pathways Perspective*

Much of the criminological scholarship that focuses on female offending does so through the “pathways” perspective, which investigates women’s distinct pathways to crime and recidivism as compared to men, and draws upon research detailing “the broad life disadvantages and social circumstances that put women at risk of ongoing criminal involvement, many of which are fundamentally gendered experiences.”<sup>120</sup> Unlike traditional criminological research, which relies primarily on pre-sentence reports and official criminal justice records for data, studies premised on the pathways hypothesis collect and analyze interviews with women “to uncover the life events that place girls and women at risk of criminal offending.”<sup>121</sup> This method of data collection allows scholars to “sequence the life events that shape women’s choices and behaviors” and place them at risk of criminal behavior.<sup>122</sup> Such studies have produced evidence that a

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116. Covington & Bloom, *supra* note 3, at 4 (“[W]omen offenders are being swept up in a system that appears to be eager to treat women equally, which actually means as if they were men. Since this orientation does not change the role of gender in prison life or corrections, female prisoners receive the worst of both worlds.”).

117. Darrell Steffensmeier & Emilie Allan, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 ANN. REV. SOC. 459, 460 (1996).

118. *Id.* at 464.

119. An important caveat to this Note is that it discusses research primarily concerned with cisgender women involved in the criminal justice system. Transgender women, and, in particular, transgender women of color, have unique life experiences that may contribute to how they become involved in the criminal justice system, and additionally they receive different treatment by that system. See *generally* SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS (2007), <https://srlp.org/its-war-in-here/> [<https://perma.cc/VB98-M9VT>].

120. Salisbury & Van Voorhis, *supra* note 105, at 542.

121. BLOOM ET AL., *supra* note 105, at 5.

122. *Id.*

history of abuse, both physical and sexual, appears to be the “major root[] of subsequent delinquency, addiction, and criminality.”<sup>123</sup>

*ii. Economic Marginalization Theory*

The economic marginalization hypothesis posits that economic disadvantage is a substantial predictor of female crime.<sup>124</sup> One study, which tested the influence of gender inequality and economic marginalization on female crime, suggests female offending continues to increase because women are increasingly economically marginalized.<sup>125</sup> Specifically, the results of the study support the notion that women commit crimes out of economic necessity.<sup>126</sup>

Proponents of the economic marginalization theory suggest that the “feminization of poverty,” not women’s liberation, is most relevant to women’s criminality.”<sup>127</sup> The “feminization of poverty,” a term first introduced by Diana Pearce in 1978, describes the overrepresentation of women in poverty in the United States.<sup>128</sup> Pearce discusses the uniqueness of female poverty, noting that much of women’s poverty is due to two causes that are specific to women: “Women often must provide all or most of the support for their children, and they are disadvantaged in the labor market.”<sup>129</sup>

Pearce further identifies disparities in public assistance as a key driver of the feminization of poverty, noting that women are underrepresented in beneficiaries of the “more generous, work-related” social insurance benefits, but overrepresented among recipients of public assistance, a “far less generous, means-tested program.”<sup>130</sup> The “masculine” social welfare programs are social insurance schemes, such as unemployment insurance and social security, primarily benefiting men as “rights bearers and rewarding

123. Barbara Bloom & Stephanie Covington, *Addressing the Mental Health Needs of Women Offenders*, in *WOMEN’S MENTAL HEALTH ISSUES ACROSS THE CRIMINAL JUSTICE SYSTEM* 9 (Rosemary Gido & Lanette Dalley eds., 2008).

124. Reckdenwald & Parker, *supra* note 107, at 208.

125. *Id.* at 216.

126. *Id.*

127. BLOOM ET AL., *supra* note 105, at 5.

128. *See generally* Diana Pearce, *The Feminization of Poverty: Women, Work, and Welfare*, 11 *URB. & SOC. CHANGE REV.* 28 (1978).

129. Diana Pearce, *Welfare Is Not for Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty*, 19 *CLEARINGHOUSE REV.* 412, 415 (1985).

130. Susan W. Hinze & Dawn Aliberti, *Feminization of Poverty*, in *THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY* 3 (George Ritzer ed., 2007) (citing Diana Pearce, *The Feminization of Poverty: Women, Work, and Welfare*, 11 *URB. & SOC. CHANGE REV.* 28 (1978)).

productive labor.”<sup>131</sup> As low-income women are disproportionately represented in the “non-standard” workforce as “part-time, temporary or home workers,”<sup>132</sup> they do not receive social insurance benefits such as unemployment insurance because “a significant employment and earnings history is necessary for eligibility” and few low-income women meet these qualifications.<sup>133</sup> The “feminine” social welfare programs, such as cash assistance and food stamps, are less generous, “have a heavy surveillance component, and devalue reproductive labor.”<sup>134</sup>

Further, since 1978, changes to the family structure, the economy, and public assistance have contributed to the feminization of poverty.<sup>135</sup> With respect to demographic shifts in the family structure, factors such as rising divorce rates and an increase in children born to unmarried mothers are highly relevant.<sup>136</sup> Marriage at later ages and increasing divorce rates have produced a “larger proportion of adult women living independently.”<sup>137</sup> As a result, as women often earn less income than men, women are at a greater risk for poverty.<sup>138</sup> For the same reason, and since women are more often the caregiver for dependent children, single mothers in particular are at risk of poverty.<sup>139</sup>

### *iii. The Relational Theory of Female Development*

The relational theory addresses gender differences from the perspective of psychological development.<sup>140</sup> While traditional psychological theories have “described individual development as being a progression from childlike dependence to mature independence,” relational theorists posit that this conception of development, which assumes that “separation is the route to maturity,” describes only the male experience.<sup>141</sup> A woman’s psychological development, by contrast, is primarily motivated by

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131. *Id.*

132. *Id.* at 5.

133. ROBERT MOFFITT, WELFARE REFORM: THE US EXPERIENCE 6 (IFAU Inst. for Labour Mkt. & Educ. Pol’y, Working Paper No. 2008:13, 2008).

134. Hinze & Aliberti, *supra* note 130, at 3.

135. *See generally id.*

136. *Id.* at 4.

137. *Id.*

138. *Id.*

139. *Id.* at 4–6.

140. BLOOM ET AL., *supra* note 105, at 8.

141. *Id.*

establishing connections, as “[f]emales develop a sense of self and self-worth when their actions arise out of, and lead back into, connections with others.”<sup>142</sup>

A woman’s psychological development is hindered, however, by the presence of *disconnections* within interpersonal relationships.<sup>143</sup> Whereas a childhood environment characterized by “mutuality, empathy, and power with others” fosters growth, an environment of abuse — such as those experienced by most of the women in the correctional system — produces “disempowerment, confusion or lack of clarity, diminished self-worth, and a turning away from relationships.”<sup>144</sup> A relational context is crucial to the creation of successful criminal justice policy, as such a context provides insight into “the reasons why women commit crimes, their motivations, the ways in which they change their behaviors, and their reintegration into the community.”<sup>145</sup> Considering relational theory during the process of policy creation and reform may yield policies that address the roots of female criminality from a much earlier stage — for example, if a policy targets and prevents the childhood abuse prevalent among the demographics of women who are statistically more likely to be incarcerated, it may have the effect of reducing criminal behavior in such women at later stages in their lives.<sup>146</sup>

### C. The Impact of Equalization in Sentencing on Women

Before existing sentencing policies can be reformed to address the rapidly rising rate of female incarceration, it is imperative that policymakers comprehend the full impact of existing policies on women who are involved in the criminal justice system. Such a comprehension requires an awareness of the unique life circumstances and experiences shared by women who are incarcerated, as discussed in Section II.B, and the connections between these circumstances and experiences and criminal behavior. With this awareness, it becomes evident that the standardization of criminal punishment has yielded inequitable outcomes for female offenders.

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 9.

146. See *supra* Section II.A for a discussion of the broadly shared history of abuse among women who are involved in the criminal justice system.



There has been substantial debate regarding the “equalization”<sup>147</sup> approach, which emphasizes parity but applies a male standard, embodied in determinate sentencing, and questions raised as to whether gender-neutral policies do, in fact, result in equality for women.<sup>148</sup> The Federal Sentencing Guidelines, for example, were designed to “reduce race and class disparities in sentencing males,” yet in implementation have resulted in a number of factors that are “integral to the lives of female offenders” being ignored.<sup>149</sup> Myrna Raeder, a leading scholar on the role of gender in sentencing, posits that “ironically, the downplaying of family and community ties in order to ensure that indigent minority males were not disadvantaged in sentencing resulted in women being sentenced more harshly than previously.”<sup>150</sup> Furthermore, scholars Kathleen Daly and Michael Tonry examined the potential consequences of the shift toward determinate sentences and argue that, because determinate sentencing guidelines are based on “past average sentences for men or on an average for men’s and women’s sentences,” the development of determinate sentencing grids “equalizes justice by increasing female prison terms to the equivalent of their male counterparts.”<sup>151</sup> As discomfort with the rigidity of the determinate regime mounts,<sup>152</sup> scholarly attention has begun to focus on the ways formal equality subjugates marginalized groups, including women.<sup>153</sup> To that end, the next Section explains why the standardization of criminal punishment through gender-neutral policy creation does not, in fact, result in gender equality.

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147. See Covington & Bloom, *supra* note 3, at 4 (“[T]he current model of justice — called the ‘equalization’ approach — emphasizes parity and then utilizes a male standard. Therefore, increased incarceration of women takes the place of alternatives to prison.”).

148. Raeder, *supra* note 1, at 921.

149. *Id.* at 908.

150. *Id.*

151. Bontrager et al., *supra* note 9, at 351 (quoting Kathleen Daly & Michael Tonry, *Gender, Race and Sentencing*, 22 CRIME & JUST. 201, 206 (1997)).

152. See, e.g., *United States v. Booker*, 543 U.S. 220 (2005) (holding that federal district judges are no longer required to impose a sentence within the range prescribed by the Federal Sentencing Guidelines, thus making the Guidelines discretionary).

153. See Ashlee Riopka, *Equal Protection Falling Through the Crack: A Critique of the Crack-to-Powder Sentencing Disparity*, 6 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 121, 121 (2015).

#### D. The Problem with Formal Equality

The standardization of punishment is appealing on a number of levels. The modern sentencing system assigns punishment based only on the crime committed and the offender's criminal history, thus bypassing contentious moral debates over "the purposes of punishment or what makes offenders alike or different in meaningful ways."<sup>154</sup> This simplification, however, results in important sentencing questions, such as "what factors make cases relevantly alike, who should measure them against which purposes of punishment, and how to resolve conflicts among those purposes," being entirely overlooked.<sup>155</sup>

In the context of sentencing, equality presumably means "treating like cases alike."<sup>156</sup> Under the current approach to sentencing, "equality" is created by standardizing the number of years in prison assigned for each crime. This conception of equality, however, "focuses not on equal inputs or fair processes but on uniform *outputs*."<sup>157</sup> The formulation of fairness that characterizes the modern sentencing system largely reduces equality to mere mathematics. As the only permissible inputs are the type of crime committed and the offender's criminal history, the output does not account for many important factors that make cases relevantly similar or different, such as culpability.<sup>158</sup> The equality deficiencies in the modern system become particularly clear when considered in the context of mandatory minimum sentences:

Mandatory minimum penalties, for instance, might eliminate disparities and achieve formal equality of punishments among offenders convicted of the same crime. But virtually no one would contend that they achieve individualized justice: The big fish deserve more punishment than the medium and small fry, even if they all violated the same statute.<sup>159</sup>

As gender is not a permissible input, this approach similarly fails to account for the differences between male and female offenders relevant to establishing culpability and resulting harm.<sup>160</sup>

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154. Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1465 (2016).

155. *Id.* at 1455.

156. *Id.* at 1449.

157. *Id.* at 1450 (emphasis in original).

158. *See id.*

159. *Id.*

160. See *supra* Section I.C.ii for a discussion of the disparate sentencing outcomes for women under mandatory minimum drug laws.

### E. The Individualized Approach: Gender-Responsive Policies

A review of the backgrounds of female offenders makes clear that there are better ways to address and prevent women's criminality than are presently in use, such as adopting gender-responsive policies to improve the management and treatment of women in the criminal justice system.<sup>161</sup> Support for gender-responsive criminal justice policies can be found in the scholarship of gender difference theory and critical criminology. These schools of thought establish justifications for gender-responsiveness that are neither based on traditional female gender roles in society nor on recidivism statistics, but rather on the impact of structural inequality on female identity and behavior.<sup>162</sup>

Addressing the realities of women's lives through gender-responsive policies is "fundamental" to improved outcomes at all phases of the correctional system — policies that are responsive to the unique issues facing female offenders will be "more effective" in intervening in the pathways to crime that "both propels and returns women into the criminal justice system."<sup>163</sup> For example, a focus on women's lived experiences when formulating strategies for crime prevention would draw attention to the connections among crime, violence, substance abuse, and trauma that increase a woman's risk of incarceration.<sup>164</sup> Furthermore, the pathways and relational explanations discussed in Section II.C offer precise targets for criminal justice intervention.<sup>165</sup> The following sections provide theoretical support for individualization and gender-responsiveness.

#### *i. Gender Difference Theory*

Gender difference theory is premised on the assertion that there are "behavioral, social, cultural and psychological differences" between men and women, and thus, in many contexts, equal treatment of men and women does not result in true equality for women.<sup>166</sup> Gender-based differences in treatment, experience, and expectation, it is argued, "correlate with different modes of thinking,

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161. See Covington & Bloom, *supra* note 3, at 14; see also *supra* Section I.C.

162. See e.g., BLOOM ET AL., *supra* note 105.

163. *Id.* at 16–17.

164. See *id.* at 17.

165. See *supra* Section II.C; see also BLOOM ET AL., *supra* note 105, at 17–18.

166. Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 10 (1990).

acting, interrelating, and interpreting reality.”<sup>167</sup> Under this theory, gender is not understood as an individual characteristic, but rather as a “social organizing principle” that sorts people into two “separate but unequal” groups.<sup>168</sup> Generally speaking, difference theorists aim to amplify the voices and stories of women, “who traditionally have been excluded, subordinated and marginalized in the power structures of society” within the patriarchal social order.<sup>169</sup> Gender difference theory is particularly powerful tool in the legal context — by providing insights into “gender bias, marginality and exclusion,” gender difference may inform a restructuring of the role of the law in perpetuating “hierarchy and domination.”<sup>170</sup>

### *ii. Critical Criminology*

Broadly speaking, criminology is defined as the “systematic study of the nature, extent, cause, and control of law-breaking behavior.”<sup>171</sup> Classical criminology is premised on the belief that, because people are rational and freethinking, individuals are “free to choose crime as one of a range of behavioral options.”<sup>172</sup> The classical theory, therefore, does not account for impact of structural inequality on criminal behavior.<sup>173</sup> More recent schools of thought, collectively termed “critical” criminologies, analyze crime from a “wider, more holistic and globally aware perspective.”<sup>174</sup> These theoretical frameworks center on the belief that “humans create cultural

167. *Id.* at 12.

168. Johanna Foster, *An Invitation to Dialogue: Clarifying the Position of Feminist Gender Theory in Relation to Sexual Difference Theory*, 13 GENDER & SOC’Y 431, 433 (1999).

169. Bender, *supra* note 166, at 12.

170. *Id.* at 46–47.

171. MARK M. LANIER ET AL., ESSENTIAL CRIMINOLOGY 7 (4th ed. 2015).

Although criminology’s subject matter is elastic, or flexible, the categorical core components include: (1) the definition and nature of crime as harm-causing behavior; (2) different types of criminal activity, ranging from individual spontaneous offending to collective organized criminal enterprises; (3) profiles of typical offenders and victims, including organizational and corporate law violators; (4) statistical analysis of the extent, incidence, patterning, and cost of crimes . . . and (5) analysis of crime causation.

*Id.*

172. *Id.* at 68.

173. See *id.* at 66–67 (“A further criticism of classical justice is that setting punishments equally, or even proportionately, takes no account of differences in offenders’ motivation, in their ability to reason, or in their perception of the meaning and importance of punishment.”).

174. *Id.* at 297.

solutions to their life problems in social structures which are largely not of their own making.”<sup>175</sup> In contrast to classical criminology, critical theories do not assume the decision to engage in criminal behavior is one that an individual makes rationally, but rather look for the causes of crime “in the system and social structure of society.”<sup>176</sup> The aim of critical criminology, then, is to dissect the power relations involved in the law and the fairness of the current social order to identify solutions that “promote justice rather than simply repress criminals.”<sup>177</sup>

Feminist criminology is a school of thought falling under the critical criminology umbrella. The key feature of feminist criminology distinguishing it from mainstream criminology is its conception of the *nature* of gender.<sup>178</sup> Broadly speaking, feminist criminologists view gender relations as “fundamental organizers” of our society’s social structure.<sup>179</sup> Social constructs of gender, such as masculinity and femininity, are based on “assumptions that men are superior to women,” which are then reflected in our social, economic, and political structures.<sup>180</sup>

Feminist criminology developed largely in response to a perceived defect in mainstream criminological theory — gender blindness.<sup>181</sup> Traditional approaches to the study of crime largely ignored the role played by women, instead “focusing exclusively or implicitly on explaining male participation in crime.”<sup>182</sup> Mainstream theories of crime causation are, therefore, grounded in *male* models of behavior, and “cannot adequately explain the experiences of delinquent girls or criminal women.”<sup>183</sup>

The framework of inquiry presented in this Part, supported by the theories of critical criminology and gender difference theory

175. GREGG BARAK ET AL., CLASS, RACE, GENDER & CRIME: THE SOCIAL REALITIES OF JUSTICE IN AMERICA 43 (Sarah Stanton & Carli Hansen eds., 5th ed. 2018).

176. LANIER ET AL., *supra* note 171, at 297–98 (“[A]ny analysis of crime causation needs also to ‘consider how offenders have themselves been ‘victimized,’ first by society, and subsequently by the criminal justice system through its selective processing of the powerless.’”).

177. BARAK ET AL., *supra* note 175, at 46.

178. *See* LANIER ET AL., *supra* note 171, at 274.

179. *See id.* at 275.

180. *Id.*

181. *See id.* at 276.

182. *Id.*

183. Emily Gaarder & Joanne Belknap, *Tenuous Borders: Girls Transferred to Adult Court*, 40 CRIMINOLOGY 481, 483 (2002).

presented above, provides a structure within which policymakers can grapple with the rising rate of female incarceration and its consequences. Part III of this Note shifts away from theory in favor of action and discusses specific policy changes that embody the framework discussed above.

### III. GENDER-RESPONSIVE SENTENCING POLICIES IN PRACTICE

While Part II of this Note outlines a suggested framework of analysis for policymakers to consult in the process of creating gender-responsive sentencing policies, this Part identifies two policies, risk assessment instruments and gender-responsive diversion programming, that exemplify the proper application of this framework.

Although the goal of eliminating gender bias in sentencing is an important one, it cannot be achieved “simply by legislating gender neutrality in sentencing.”<sup>184</sup> Just as it is accepted that differences in male and female physiology “have consequences in such contexts as pregnancy, health, strength, and longevity,” so too must the “gendered nature of crime and familial relationships” be accepted and considered legitimate sentencing factors.<sup>185</sup> The following Part provides examples of powerful, realistic gender-responsive policies that are compatible with the theories of crime discussed in Part II.

#### A. Risk Assessment Instruments

Under the indeterminate sentencing regime discussed in Section I.B, assessments of an individual offender’s risk of committing future crime were an essential component of criminal sanctioning.<sup>186</sup> The purpose of such risk assessments is to predict which individuals are at a high risk of committing future crime and, in turn, “to use that information to determine who should go to prison and who can safely be released.”<sup>187</sup> While sentencing based on risk assessments fell out of favor during the shift to the determinate model in the 1970s, the last decade has seen a resurgence in the incorporation of risk assessment in criminal sanctioning.<sup>188</sup>

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184. Raeder, *supra* note 1, at 921.

185. *Id.*

186. See John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 *FED. SENT’G REP.* 158, 158 (2014).

187. Rebecca Foxwell, *Risk Assessment and Gender for Smarter Sentencing*, 3 *V.A. J. CRIM. L.* 435, 441 (2015).

188. See Monahan & Skeem, *supra* note 186, at 158.

The resurgence of risk assessments in sentencing can likely be attributed to fiscal concerns: “The fiscal condition of most American jurisdictions is so dire that maintaining what is by international standards an absurdly bloated prison population is simply not a sustainable option.”<sup>189</sup> Risk assessment instruments, in theory, divert those who are at low-risk of recidivating away from incarceration and into alternative punishments or treatments, thus reducing prison populations and expenses.<sup>190</sup> Four states in particular — California, Utah, Pennsylvania, and Virginia — have established detailed risk assessment mechanisms that inform judges of an individual’s “statistical risk of recidivating” at the time of sentencing.<sup>191</sup> These mechanisms assess a variety of “risk factors,” which are factors that are correlated with crime and precedes it in time.<sup>192</sup> Risk factors commonly assessed include age, gender, number of prior arrests, and mental health.<sup>193</sup>

As it has been argued that the use of group data to predict individual risk based on gender may be unconstitutional,<sup>194</sup> the below paragraphs provide an overview of this scholarly debate. A constitutional challenge to risk assessment classifications based on gender are likely to be brought under the Equal Protection Clause.<sup>195</sup> Under the Equal Protection Clause, certain classifications — including race, ethnicity, and religious beliefs — have been identified as “suspect classes” and are generally prohibited.<sup>196</sup> Classifications based on sex, on the other hand, may be permitted where such a classification serves a “substantial” state interest.<sup>197</sup> In her article, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, Sonja Starr asserts that the use of gender classifications to inform individual sentencing decisions is likely unconstitutional because it impermissibly discriminates based on

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189. *Id.*

190. See Foxwell, *supra* note 187, at 442.

191. *Id.*

192. *Id.* It is important to note that these risk factors are correlated with, not causes of, crime, as “thus far, it has been impossible to test them in controlled experiments.” *Id.*

193. See *id.* at 444.

194. See e.g., Sonja Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

195. See Foxwell, *supra* note 187, at 452; see also Michael Tonry, *Prediction and Classification: Legal and Ethical Issues*, 9 CRIME & JUST. 367, 373–74 (1987).

196. Foxwell, *supra* note 187, at 452.

197. Michael Tonry, *Prediction and Classification: Legal and Ethical Issues*, 9 CRIME & JUST. 367, 374 (1987).

“statistical generalizations.”<sup>198</sup> Scholar Rachel Foxwell, however, argues that the evidence upon which Starr relies to support her claim is questionable.<sup>199</sup>

For instance, Starr cites *Craig v. Boren*, in which the Supreme Court held unconstitutional a law making the legal drinking age higher for men than for women, in support of her proposition that it is unconstitutional to infer an individual tendency from group statistics.<sup>200</sup> According to Foxwell, the Court held only that the *specific* statistical evidence presented in this case was insufficient to justify the law, not that inferences based on group statistics were prohibited in all cases.<sup>201</sup> In comparison, the body of statistical evidence behind gender and crime, particularly gender and recidivism, is “robust and well understood.”<sup>202</sup>

The Supreme Court in *United States v. Virginia* announced an intermediate level of scrutiny for equal protection challenges to classifications based on gender.<sup>203</sup> To survive an equal protection challenge, the justification for the gender-based classification must be “exceedingly persuasive,” and the state must show both that the classification serves “important governmental objectives,” and that the means employed are “substantially related to the achievement of those objectives.”<sup>204</sup> Finally, the reason for the classification cannot be based on “archaic and overbroad generalization about gender” or “outdated misconceptions.”<sup>205</sup> According to Foxwell, “given the strength of the data on gender and crime — as well as the importance of the government’s interest in preventing crime — it appears that the use of gender in sentencing risk assessments would pass a constitutional challenge under the Equal Protection Clause.”<sup>206</sup> Other scholars, such as John Monahan, agree that gender as a risk factor should have “little difficulty” surviving an Equal Protection challenge.<sup>207</sup>

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198. *See generally* Starr, *supra* note 194.

199. *See* Foxwell, *supra* note 187, at 455–58.

200. 429 U.S. 190, 208–10 (1976).

201. Foxwell, *supra* note 187, at 455.

202. *Id.* at 466.

203. *See* *United States v. Virginia*, 518 U.S. 515, 531 (1996).

204. *Id.* at 533.

205. Foxwell, *supra* note 187, at 466.

206. *Id.*

207. John Monahan, *The Inclusion of Biological Risk Factors in Violence Risk Assessments*, in *BIOPREDICTION, BIOMARKERS AND BAD BEHAVIOR* 57, 68 (Irina Singh et al. eds., 2014).



Despite the strength of the argument that gender-specific risk assessment instruments would survive an equal protection challenge, the application of such risk assessments may not sufficiently address the correlates of female criminality. While the use of risk assessment instruments may reduce individual sentences for female offenders, it does not serve the greater purposes of rehabilitation. In the alternative, as discussed below, gender-responsive diversion programming both addresses the correlates of female criminality and serves the greater purposes of rehabilitation.

### B. Diversion Programming and Alternatives to Incarceration

This Note argues that alternatives to incarceration (ATI) programs, also referred to as criminal justice diversion programs, represent another sentencing policy that is responsive to the unique life circumstances and experiences of women, in accordance with the framework presented in Part II. Broadly speaking, post-conviction ATI or diversion programs aim to place an individual who is facing incarceration on a justice track that is “less restrictive and affords more opportunities for rehabilitation and restoration.”<sup>208</sup> Such programs often include the use of the court’s authority to provide “behavioral health care and other services” in lieu of incarceration.<sup>209</sup>

The implementation of ATI “began in the 1980s in response to the emerging recognition that prison populations were growing out of control.”<sup>210</sup> Over time, ATI programs came to include rehabilitation-oriented programming such as drug treatment, new methods of accountability such as community service, and new methods of supervision such as home confinement and electronic monitoring.<sup>211</sup> A nation-wide survey of criminal justice diversion programs and initiatives conducted in 2013 identified a diversity of existing programs, ranging from “statewide statutes affecting thousands to problem-solving courts serving dozens.”<sup>212</sup> In light of this Note’s focus on sentencing policies, this Section will discuss diversion

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208. CTR. FOR HEALTH & JUSTICE AT T.A.S.C., NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES 6 (2013) [hereinafter CTR. FOR HEALTH & JUSTICE].

209. *Id.* at 23.

210. Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 237 (2009).

211. *Id.* at 237–38.

212. CTR. FOR HEALTH & JUSTICE, *supra* note 208, at 6.

programming targeted at the post-conviction phase of criminal justice administration.<sup>213</sup>

This Section focuses on the ATI system in New York City for two reasons. First, ATI programs in New York City are uniquely well-funded<sup>214</sup> and have been the subject of research and evaluation that document the process of implementation and find that New York City’s ATI programs are effective in “reducing recidivism and achieving prison displacement.”<sup>215</sup> Second, the ATI system in New York City differs from other ATI systems nationwide in the structure of its gender-responsive programs.<sup>216</sup> Each ATI program in New York City that serves felony defendants is under contract to treat either a general population of offenders or “one of three special populations — substance abusers, women, or youth.”<sup>217</sup>

The Center for Alternative Sentencing and Employment Services (CASES) is one example of a program that is under contract to specifically treat women offenders. CASES provides female offenders with a history of frequent low-level criminal involvement who are facing charges or have been convicted in New York County Criminal Court with gender-responsive ATI programming.<sup>218</sup> This program, Women’s Diversion Services, provides services designed to address “past trauma and reduce behaviors associated with criminal activity” through supportive counseling, psychiatric services, mentoring, and referrals to address immediate needs.<sup>219</sup>

In their counseling services, CASES provides trauma-informed care with sessions that address “asking for help, setting boundaries in relationships, engaging others in supporting one’s recovery, self-care, and coping with triggers associated with negative behaviors, including substance abuse.”<sup>220</sup> Through mentoring services, the program

213. For a discussion of programs that target diversion at the law-enforcement phase and at the pre-trial or prosecution phase, see *id.* at 11–22.

214. See Weissman, *supra* note 210, at 240 (“New York City is unique among jurisdictions in its investment in ATI programs, now amounting to more than twelve million dollars.”).

215. *Id.* at 242–43.

216. See Rachel Porter et al., *Balancing Punishment and Treatment: Alternatives to Incarceration in New York City*, 24 FED. SENT’G REP. 26, 26 (2011).

217. *Id.*

218. *Alternatives to Incarceration*, CTR. FOR ALTERNATIVE SENT’G & EMP. SERVS., <https://www.cases.org/alternatives-to-incarceration/> [https://perma.cc/ZL8G-DZCB] (last visited Dec. 22, 2019).

219. *Women’s Diversion Services*, CTR. FOR ALTERNATIVE SENT’G & EMP. SERVS., <https://www.cases.org/womens-diversion-services/#!> [https://perma.cc/2MY7-J79D] (last visited Dec. 22, 2019).

220. *Id.*

provides training to help female offenders develop skills to approach everyday activities such as “navigating public agencies, applying for entitlements, asking for help, and accessing community resources.”<sup>221</sup> CASES also provides referrals tailored to each individual woman’s needs and goals, including referrals to “job training, adult education, medical care, leisure and recreation services, mental health treatment, drug treatment, bereavement services, legal assistance, domestic violence services, and/or child welfare preventive services.”<sup>222</sup>

The CASES program, this Note argues, is a prime example of a sentencing policy that accounts for and responds to the scope and nature of female incarceration, the correlates of female criminal behavior, and the impact of existing policies on women who are involved in the criminal justice system. First, the rising rate of female incarceration in New York State closely mimics that of the nation.<sup>223</sup> Second, the nature of female incarceration in New York State, that is, the demographics of women who are incarcerated, is similar to that of the country at large.<sup>224</sup> Third, the CASES program is designed to address the correlates of female criminality.<sup>225</sup> For example, the counseling services provided by CASES incorporate the pathways perspective.<sup>226</sup> through trauma-informed care that helps individual women identify and address the life events that may have led to criminal behavior.<sup>227</sup> Further, by providing referrals to job training and adult education, CASES interrupts the cycle of economic marginalization for female offenders.<sup>228</sup> The CASES program also provides services that address the relational theory of female development: mentoring services offer female offenders an opportunity to establish connections and learn how to take advantage

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221. *Id.*

222. *Id.*

223. From 1973 to 2006, the number of women in New York State prisons has increased by almost 645%. WOMEN IN PRISON PROJECT, CORR. ASSOC. OF N.Y., WHY FOCUS ON INCARCERATED WOMEN? 1 (2006). Between 1980 and 2016, the number of women who are incarcerated in America increased by more than 700%. *See supra* Section II.A.

224. More than 71% of New York’s female inmates are women of color, most of whom come from low-income neighborhoods and are survivors of sexual or physical abuse. WOMEN IN PRISON PROJECT, CORR. ASSOC. OF N.Y., *supra* note 223, at 2. Compare to similar national demographics discussed *supra* Section II.A.

225. *See supra* Section II.B for a discussion of theories of female criminal behavior.

226. *See supra* Section II.B.i.

227. *See Women’s Diversion Services, supra* note 219; *see also supra* Section II.B.i.

228. *See supra* Section II.B.ii for a discussion of the economic marginalization theory of female crime.

of community resources.<sup>229</sup> Finally, programs like CASES provide meaningful alternatives to existing sentencing policy that embrace differences in sentencing outcomes and promote rehabilitation as opposed to demanding equalization and promoting incapacitation.<sup>230</sup>

### CONCLUSION

Dynamism is an inherent and important quality of the criminal justice system, and thus changes in the philosophical foundations of the system are to be expected over time. The nationwide rejection of the indeterminate sentencing model, however, is a shift of particular consequence. The departure from the rehabilitative model at both the state and federal level was not merely a reflection of oscillating political ideologies, but rather signaled a “deeper change in conception — discourse, objectives, and techniques — in the penal process.”<sup>231</sup> With this change, a foundational premise of the American criminal law, the focus on “intention in order to assign guilt,”<sup>232</sup> has given way to a system concerned primarily with “techniques to identify, classify, and manage groups” sorted by perceived dangerousness, and the deployment of control over offenders in the aggregate in place of “traditional techniques for individualizing or creating equity.”<sup>233</sup>

In 1970, former U.S. Attorney General Ramsey Clark wrote that, regarding the purpose of punishment in the American criminal justice system:

Rehabilitation is individual salvation. What achievement can give society greater satisfaction than to afford the offender the chance, once lost, to live at peace, to fulfill himself and to help others? Rehabilitation is also the one clear way that criminal justice processes can significantly reduce crime.<sup>234</sup>

This statement, when considered in the context of recent calls for criminal justice reform in both the political and cultural spheres, is striking for its compassion toward criminal offenders. Arguably, the

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229. See *Women’s Diversion Services*, *supra* note 219. For a discussion of the benefits women derive from establishing personal connections, see *supra* Section II.B.ii.

230. See *supra* Section I.C.

231. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 449 (1992).

232. *Id.* at 451.

233. *Id.* at 450.

234. Alschuler, *supra* note 56, at 8–9.

indeterminate sentencing model of the 1950s, with its rehabilitative underpinnings and focus on individuality, embodied many of the principles that the modern reform movement demands. A mere return to the indeterminate model, however, would be insufficient to address the need for substantive equality in sentencing.

The determinate model that has dominated the criminal justice system for the past two decades has led to, among other consequences, an unprecedented rise in female incarceration, which calls for urgent reform. As, for now, the numerical population of women who are incarcerated remains much smaller than that of men, there is still an opportunity for realistic and attainable course correction. Although this Note focuses on gender-responsiveness in the sentencing context, similar reform efforts are needed at all stages of the pre-incarceration process for criminal justice-involved women, particularly in the arrest and bail processes. If we are to stop the dark history and ongoing crisis of male mass incarceration from repeating itself, it is critical that substantive equality be established for female offenders through gender-responsive policy reforms.