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## “Lock Her Up!” How Women Have Become the Fastest-Growing Population in the American Carceral State

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# **“Lock Her Up!”**

## **How Women Have Become the Fastest-Growing Population in the American Carceral State**

Spencer K. Beall\*

*The majority of discourse on American mass incarceration attempts to explain the outsize populations in jails and prisons as the result of a political war against a specific group of people (e.g. against a certain race, against the poor), rather than against crime itself. Less attention has been paid to women, even though they are the fastest-growing population in the carceral state. Since the 1970s, law enforcement has imprisoned women at twice the rate of men, despite relatively static female criminality patterns. Rampant sexual abuse, inadequate female healthcare, and pitiless shackling during labor and childbirth are among the consequences of rapidly locking women into a corrections system established for—and designed by—men. This study provides a glimpse of women’s incarceration since 1960 by analyzing female criminality and the egregious gender discrimination that women face behind bars. After examining two competing gendered theories behind the disproportionate rise in women’s imprisonment, this study takes a third approach, framing the precipitous growth in women’s incarceration as a mechanism to remove “undesirable” women from society. Using this analysis, this study concludes by recharacterizing the larger framework of mass incarceration as a “War on Undesirables,” created from a convergence of neoliberal attitudes, white nationalism, and renewed Victorian patriarchal values in American politics. Rather than view mass incarceration through a narrowed lens, the Undesirables theory expands our view of mass incarceration by accounting for the*

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*rising presence and mistreatment of all affected groups in the carceral state, including blacks, the low-income, women, LGBTQ, and immigrants.*

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## INTRODUCTION

“I’m no more a witch than you are a wizard!”

Sarah Good<sup>1</sup>

Female criminality is a curious fixture in American society. While

<sup>1</sup> Sarah Jobe, *Sarah Good, Salem Witch Trials: Documentary Archive and Transcription Project*, <http://salem.lib.virginia.edu/people/good.html> (Sarah Good was one of nineteen women executed for witchcraft in Salem, Massachusetts, 1692).

there have been notably fewer female offenders throughout American history in comparison to men, society has developed numerous categories of female criminality, punishing women for an array of moral and/or gender-constructed crimes.<sup>2</sup> American society has historically sanctioned women for a greater variety of offenses than men—from witchcraft to crimes against public order (e.g. streetwalking, prostitution, drunkenness)—*in addition to* male-dominated crimes including nonviolent property transgressions (e.g. larceny and fraud) and violent crime.<sup>3</sup> Despite minor changes in female criminality,<sup>4</sup> women’s incarceration rates have increased substantially since 1960.<sup>5</sup> By the 1970s, women’s incarceration rates began to outpace male imprisonment two-fold, making women today’s fastest growing population in prisons and jails nationwide.<sup>6</sup> From 1970 to 2009, female incarceration rates increased from 5600 to 114,979 women in jail or prison across the country. Outside of physical confinement, another 800,000 women were placed on probation or parole by 2010.<sup>7</sup> The United States now imprisons approximately one-third of the 625,000 women and girls that are incarcerated across the globe, even though women in the United States

<sup>2</sup> CYNDI BANKS, *WOMEN IN PRISON*, 3 (2003).

<sup>3</sup> *Id.*

<sup>4</sup> The vast majority of women are imprisoned for nonviolent drug offenses (MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS*, 5–6 (2015)) and property crimes. *WOMEN’S PRISON ASS’N 2016 REPORT* 31 (2016). *See also* BANKS, *supra* note 2, at 43 (noting that fraud is one of the current top-five most prevalent offenses for women, “which did not make the top-ten list for men.”); Valentina Zarya, *This is Why Women are the Fastest-Growing Prison Population*, *FORTUNE* (Dec. 10, 2015), <http://fortune.com/2015/12/10/prison-reform-women> (noting “[i]n 2000, 40% of women’s criminal convictions leading to incarceration were for drug crimes, according to the ACLU.”).

<sup>5</sup> *See* BANKS, *supra* note 2, at 164–65 (noting that since 1990, female felony convictions in state courts have more than doubled the rate of increase of male felony convictions, and that “while the number of male prisoners in state and federal prisons has grown 77% . . . the number of female prisoners has increased 108%.”).

<sup>6</sup> The 1972 male incarceration rate was twenty-four times greater than women’s incarceration rate, yet dropped to only eleven times greater than women’s incarceration rate by 2010. Dan Moshenberg, *The Growth of Women’s Incarceration in the United States*, *WOMEN IN AND BEYOND THE GLOBAL* (May 1, 2014) (citing Jeremy Travis & Bruce Western, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, NAT’L RES. COUNCIL (2014)), <http://www.womeninandbeyond.org/?p=13371>.

<sup>7</sup> Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1250 (2012).

represent only five percent of the global population.<sup>8</sup>

Despite these startling developments, the vast majority of recent scholarship on American mass incarceration focuses almost exclusively on affected low-income men of color. These studies largely ignore women as a group, if they include them at all. While low-income, African American men represent the largest incarcerated population by numbers, women are by far the fastest-growing incarcerated group. The disproportionate rise of women's incarceration compared to men undermines women's social and political agency and personifies numerous human rights violations against women.<sup>9</sup> This paper examines women's incarceration as a unique feature of American mass incarceration by studying the rise of female imprisonment across races and social classes.

This paper has two primary goals. First, it attempts to explain both the unprecedented rise in women's incarceration since 1960, and why women have become the fastest-growing population in U.S. jails and prisons. I argue that the changes in women's imprisonment rates occurred from a resurgence of patriarchal politics aiming to subjugate and exclude "undesirable" women from American society.<sup>10</sup> These politics are manifested in both the sheer growth of incarcerated women as compared to male imprisonment rates despite largely static patterns of female criminality, and rampant gender bias governing the treatment of women in confinement.<sup>11</sup> Second, I intend to show that by representing women as a distinct group within the carceral state, we may reframe our understanding of mass incarceration as a much broader phenomenon than a neoliberal war on "social evils" (e.g. War on Crime, War on Drugs) or on a singular group of people (e.g. War on Black People, War on Poor People).<sup>12</sup> To be clear, I am not recommending that we detract from

<sup>8</sup> GOTTSCHALK, *supra* note 4, at 4.

<sup>9</sup> I define "agency" in this context as a woman's sense of gender-based empowerment in a conventionally male-dominated society, allowing her to exert her feminine influence against gender discrimination in societal, political, and economic sectors.

<sup>10</sup> In framing her research around the mistreatment of black women in jails and prisons, Priscilla Ocen contends that "undesirability" is tantamount to race. Ocen, *supra* note 7, at 1244. I argue that while "undesirability" may definitely be derived from racial prejudice, "undesirability" is not limited to women of color.

<sup>11</sup> MEDA CHESNEY-LIND & LISA PASKO, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME*, 112 (3d ed. 2013); BANKS, *supra* note 2, at 74.

<sup>12</sup> Sara Mayeux, *The Idea of "The Criminal Justice System,"* AM. J. OF CRIM. L. 40 (OCT. 9, 2017) (noting how mass incarceration may have also served to "[widen] class inequality."); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS*

studying the racial and economic facets of mass incarceration but only that we expand the lens to avoid overshadowing other affected groups and enrich our understanding of mass incarceration as a wider-sweeping phenomenon. By examining the tightening of patriarchal values that has led to an explosion in women’s imprisonment *in addition to* neoliberalism and racial prejudice as the underlying causes of mass incarceration, we can reframe our understanding of mass incarceration as war on social “undesirables.” By “undesirables” I refer to individuals from groups outside the conservative white male elite, including women of all social classes and racial/ethnic backgrounds, men of color or different ethnicities, immigrants, the low-income, and members of the LGBTQ community. Only by referring to mass incarceration as an issue that affects everyone outside of the white male elite can we prepare to move forward and develop broad-based solutions to confront it.

The first section of this paper provides a brief analysis of the most prominent schools of thought regarding the causes and development of American mass incarceration, which predominately center around neoliberal racial and economic prejudice. The first section pinpoints certain flaws in the prevailing interpretations of American mass incarceration, illustrating that viewing mass incarceration through a neoliberal, racial, and/or fiscal lens does not explain the increases in different social groups’ imprisonment rates, especially women’s rates. The second section focused on the rising rate of incarceration of women as a group that has been largely glossed over in other scholars’ analyses of the carceral state. Within this section, there is an overview of women’s historic role within the American criminal justice system and the current state of women’s treatment behind bars as a context for comparing trends in female criminality to the disproportionate rise in women’s incarceration from 1960 to the present. In the third section of this paper, I apply my findings regarding rising female imprisonment rates to the larger framework of mass incarceration. By tracing women’s outsize incarceration rates to a tripartite convergence of heightened patriarchal values, neoliberal attitudes, and a resurgence of racial politics, I offer a different explanation for the rise of American mass incarceration as a “War on Undesirables,” those outside the white male elite profile. This paper establishes a basis for addressing the problem of mass incarceration as a human rights crisis in an age of racial bias, patriarchal domination

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INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (2012) (emphasizing mass incarceration as a pointed form of racial oppression in the post-Jim Crow era).

and neoliberalism.

### I. A NATION UNDER LOCK AND KEY—WHAT IS MASS INCARCERATION AND HOW DID WE GET HERE?

Mass incarceration is a product of “war.” From the beginning of the mid-twentieth century, America has engaged in numerous wars on certain “social evils,” from a “War on Communism” to Wars on Poverty, Crime, Drugs, and most recently, President Donald Trump’s War on Immigration. All of these wars have contributed to what is now referred to as “mass imprisonment,” a term David Garland first coined to describe America’s outsized incarceration rate.<sup>13</sup> Although scholars have widely accepted Garland’s description of our current carceral phenomenon, it begs the question of what brought about this regime—that is, what began the wars that locked so many people in prisons and jail, and who were these wars designed to fight? While some scholars have credited the Johnson and Nixon administrations with laying the foundations for America’s mass incarceration model with the War on Crime, many scholars have pointed to Reagan’s subsequent War on Drugs as the true “factory” from which mass incarceration metastasized into the globe’s largest carceral system, garnering America’s enduring reputation as “the world’s warden.”<sup>14</sup> In underscoring the prominence of Reagan’s first War on Drugs (1982) in building a nation of prisoners, Jonathan Simon and others have highlighted the central role of neoliberalism in the rapid expansion of the American mass incarceration model, creating a society governed through crime.<sup>15</sup> While Garland posits that mass imprisonment was something that America “drifted into” (in lieu of a “proposed, researched . . . debated and democratically agreed . . . policy”), others suggest that the carceral regime was a strategic attack against specific social groups, namely African Americans and the low-income

<sup>13</sup> MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1 (David Garland, ed., 2001).

<sup>14</sup> GOTTSCHALK, *supra* note 4, at 5.

<sup>15</sup> Many scholars attribute the start of neoliberalism to Ronald Reagan’s first term as president, beginning a transition to privatization and pro-corporation policies both within and outside the criminal justice system. KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 5 (2008); JONATHAN SIMON, GOVERNING THROUGH CRIME, HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4–5 (2007).

population.<sup>16</sup> Many scholars, including Marie Gottschalk, maintain that neoliberal politics are “at the root” of America’s current mass incarceration regime that directly seeks to suppress the poor in support of economic privatization.<sup>17</sup> Because African Americans comprise a large percentage of the low-income population, mass incarceration consequently targets disproportionate numbers of African American men. In this light, we might consider mass incarceration an indirect form of racial suppression by the circumstances.<sup>18</sup> Other scholars call out mass incarceration as a political mechanism for *direct* racial suppression. Michelle Alexander, for example, emphasizes the War on Drugs’ introduction of mandatory sentencing regimes to penalize crack (used predominately among low-income blacks) more harshly than cocaine as part of a “well disguised racial social control” regime.<sup>19</sup> There are two key

<sup>16</sup> GARLAND, *supra* note 13, at 2. See Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 12 (David Garland, ed., 2001) (suggesting that race and ethnicity are “intimately” linked with mass incarceration when “. . . policymakers talk of the need to remove ‘weeds’ from our neighborhoods through federally funded Weed and Seed programs.”). See also Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L. J. 2176, 2187 (2012–13) (“The poor, and especially poor people of color, are [the American criminal justice system’s] primary victims.”).

<sup>17</sup> Marie Gottschalk, *The Folly of Neoliberal Prison Reform*, BOSTON REV.: A POLITICAL AND LITERARY FORUM (June 8, 2015), <http://bostonreview.net/books-ideas/marie-gottschalk-neoliberal-prison-reform-caught>. See HEDAR AVARIM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 13 (2015) (citing Loïc Wacquant, Joe Soss, Richard Fording, and Sanford Schram’s theory that neoliberalism is at the root of our trend of separating the wealthy and powerful population from America’s “weakest citizens” and low income people of color); RICK RUDELL, AMERICA BEHIND BARS: TRENDS IN IMPRISONMENT, 1950 TO 2000, 21 (2004) (underscoring mass imprisonment’s appeal to wealthy stakeholders through privatization of prisons, etc.).

<sup>18</sup> Carol Swain, *Apply Compassion Offered Illegal Immigrants to the Most Vulnerable Citizens*, BOSTON REV. (May 1, 2009), <http://bostonreview.net/archives/BR34.3/swain.php>. Known as the “conflict theory of law,” or “minority threat theory of law,” by which crime control is designed to “regulate threats to the interests of dominant groups,” as manifested by police brutality against minorities and mass incarceration. Malcolm D. Holmes, *Minority Threat and Police Brutality: Determinants of Civil Rights Criminal Complaints in U.S. Municipalities*, 38 CRIMINOLOGY 343, 343–68 (2000).

<sup>19</sup> RUDELL, *supra* note 17, at 22–23 (emphasizing legislation’s strategy to racially subordinate African Americans by creating the 100:1 sentencing ratio based on the fact that crack is most commonly used by black communities for its low cost in lieu of higher-priced cocaine. The 100:1 sentencing ratio equalizes one gram of crack to one-hundred grams of cocaine, ensuring that typically minority crack users receive higher sentences than typically white cocaine users). ALEXANDER, *supra* note 12; see also Stephanie R.



gaps in both the economic and racial frameworks. First, these theories fail to account for the larger breadth of mass incarceration's impact as a means of social control by not addressing the growing rates of imprisonment of other social groups—namely women across all races and social strata—who fall into neither the low-income nor African American categories.<sup>20</sup> Second, in focusing too narrowly on a single race or social class, these frameworks undermine our understanding of mass incarceration as a wide-sweeping human rights issue in favor of interpreting mass incarceration as a fiscal problem.<sup>21</sup> Gottschalk rightly distinguishes that, although neoliberal mass incarceration is generally used to primarily target the poor and racial minorities, “the carceral state has grown so expansive that it now deeply penetrates wide swaths of political, economic, and social life . . . .”<sup>22</sup> However, scholarship still has largely fallen short in showing *how* mass incarceration affects the “wide swaths . . . of . . . social life” by failing to focus in depth on other equally important characteristics of affected groups (e.g. gender, sexual orientation).<sup>23</sup> For example, the fiscal and race-centered theories each fail to explain the recently inverted trends of black male incarceration rates (decreasing twenty-one percent) and white male incarceration rates (rising four percent) from 2000 to 2014.<sup>24</sup> Nor do these theories account for the marked increase in white and Hispanic women's incarceration rates during this period (fifty-six percent and seven percent, respectively)

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Bush-Baskette, *The War on Drugs as a War Against Black Women*, in CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY 119 (Susan L. Miller, ed., 1998) (using statistics that show the disproportionate representation of black females in prison to support her thesis that the War on Drugs as a specific war on black females).

<sup>20</sup> SIMON, *supra* note 15, at 18 (emphasizing that one of the “assumptions to avoid” is the presumption that [mass incarceration] “is primarily about the poor and minorities . . .”).

<sup>21</sup> GOTTSCHALK, *supra* note 4, at 19.

<sup>22</sup> *Id.* at 13.

<sup>23</sup> Bruce Western, for example, acknowledges that women's incarceration rates have risen more rapidly than men's rates since 1980, but affirms that the “main effect of the prison boom on gender relations is due precisely to the . . . fact that men go to prison, and women are left . . . to raise families and contend with ex-prisoners returning home after release.” BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 15 (2006). Western goes on to study in detail the effect of mass incarceration on African American and white men of varying education levels, social status, and other characteristics, but he does not provide any further inquiry into *why* women's incarceration rates post-1980 have increased at quicker rates than men. *See id.*

<sup>24</sup> *Incarcerated Women and Girls*, THE SENTENCING PROJECT: RESEARCH AND ADVOCACY FOR REFORM 2 (Nov. 2015), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

compared to the frequency for male counterparts in those same racial and ethnic groups (a four percent increase for white men, and an eleven percent decrease for Hispanic men).<sup>25</sup> Although more men are incarcerated by number than women, these disparate incarceration rates illustrate how comparing women's and men's imprisonment rates by numbers is highly distortive, “paint[ing] a falsely optimistic picture.”<sup>26</sup> See Figure 1. By examining Figure 1, we notice that although the white, black, and Hispanic female populations in jails and prisons are much lower than men (of all races and economic strata), this numerical representation alone does not indicate that women are incarcerated twice as frequently as men of any race or ethnicity. Further, while black men comprise the highest incarcerated population in the United States, black male imprisonment actually declined by twenty-one percent, while white women's rates increased fifty-six percent between 2000 and 2014.<sup>27</sup> See Figure 2. To bridge this gap between the profound increases in women's imprisonment in the context of mass incarceration, and to support the notion that mass incarceration should be viewed more broadly as a human rights problem that impacts a myriad of social groups, the next section examines women's changing position in the American penal system.

## II. WOMEN IN THE AMERICAN CARCERAL STATE

Part A of this section provides a context of women's past and present role in the American criminal justice system in order to examine women's position in the American carceral state. This section (1) gives a brief pre-1960 history of women's criminality and incarceration in America, and (2) provides a glimpse of the contemporary treatment of women within jails and prisons. In Part B examinee the relationship between female criminality from 1960-present and the significant increase in women's incarceration that has *outpaced* male incarceration rates. By the end of this section, we will see that patterns of female

<sup>25</sup> *Id.*

<sup>26</sup> Candace Kruttschnitt, *The Paradox of Women's Imprisonment*, 139 DAEDALUS 32, 36 (2010); Aleks Kajstura & Russ Immarigeon, *States of Women's Incarceration: The Global Context*, PRISONPOLICY.ORG, <https://www.prisonpolicy.org/global/women/> (last visited Apr. 14, 2018). Kajstura and Immarigeon note that even some of the most liberal U.S. states incarcerate women at higher rates than most of the forty-four countries around the world with the highest female imprisonment rates. Even Rhode Island, with the lowest women's imprisonment rate in the country, would equal the fifteenth highest women's incarceration rate in the world. *Id.*

<sup>27</sup> *Incarcerated Women and Girls*, *supra* note 24 (citing statistics from the Bureau of Justice Statistics).

criminality do not correlate with the rise in women's incarceration. In examining the possible explanations for this result, this paper illustrates how women's incarceration is a broad sweeping political mechanism to exclude "undesirable" women from American society, diminishing female social and political agency and violating women's basic human rights.

### A. Context—Examining Women's Past and Present Roles in the American Criminal Justice System

#### 1. *A History of Women's Criminality and Incarceration in America (pre-1960)*

In observing that women's incarceration rates in America experienced a tenfold increase between 1925 and 2000, it is clear that women's imprisonment rates had begun to increase long before the War on Drugs began.<sup>28</sup> With the exception of prostitution, streetwalking, and certain other low-level moral and/or gender-constructed offenses, women in United States prisons during the twentieth century have historically committed similar kinds of offenses as men, with the exception of violent crimes.<sup>29</sup> Of the comparatively few violent crimes involving female offenders, most have been perpetrated in the context of domestic violence against abusive spouses/partners, with women often receiving "harsher penalties than men who kill their partners."<sup>30</sup> To help analyze why women's incarceration rates have risen both leading up to and during the

<sup>28</sup> By contrast, white men's incarceration rates measured a sixfold increase. RUDELL, *supra* note 17, at 11. The first federal women's prison opened in 1927, leading twenty-three states to establish women's prisons by 1940. BANKS, *supra* note 2, at 123.

<sup>29</sup> BANKS, *supra* note 2, at 3. In 1998, only seventeen percent of all violent crime arrests were attributed to female perpetrators. *Id.* at 42. In 2010, approximately thirty-seven percent of women in state prisons had committed violent crimes, compared to fifty-four percent of men. These statistics, however, do not include women incarcerated in federal prisons. *Prisoners in 2011 in STATISTICS OF WOMEN IN THE JUSTICE SYSTEM*, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE (Jan. 2014), <https://www.csosa.gov/newsmedia/factsheets/statistics-on-women-offenders-2014.pdf>.

<sup>30</sup> Nancy Kurshan, *Behind the Walls: The History and Current Reality of Women's Imprisonment*, in *CRIMINAL INJUSTICE, CONFRONTING THE PRISON CRISIS* 154 (Elihu Rosenblatt, ed., 1996) (citing Denver psychologist Angela Browne). Shelley Bannister highlighted the gender-regulative underpinnings of the criminal justice system by looking at the law's gender bias against women who kill their abusers, determining that the law incarcerates these women for three reasons: "(1) to deter other women from believing that they can similarly resist; (2) to reinforce . . . the belief that [women] have no right to their own bodies' integrity and no right to . . . resist male attack; and (3) to protect and assert men's power over women." *Id.*

mass incarceration regime, it may be helpful to look at Banks’ categorization of the three most prominent types of female criminals in pre-carcer America: (1) women offending public order (i.e. drunkenness), (2) women offending chastity (including prostitutes, “fallen” or lascivious women,<sup>31</sup> adulteresses, and “stubborn” women who ran away from home or whose behavior their families could not “control”), and (3) women who committed crimes against property and person (including women who committed violent crime, perceived as the most dangerous type of female criminals).<sup>32</sup> While keeping in mind that prostitution is still subject to criminal sanction, we may rule out the first two more-antiquated constructions of female criminality as contributing factors in the rise of women’s imprisonment in the decades leading up to the beginning of the War on Drugs and the onset of mass incarceration. By the beginning of the War on Drugs, violent crime constituted only a marginal portion of illicit activity among women. Nonviolent property and drug offenses became the top contributors to female criminality. *See* Figure 3.

## 2. “Forgotten Inmates:”<sup>33</sup> *The Present State of Women’s Incarceration*

Today, the overwhelming majority of women in jail or prison share at least one of four common factors. They are predominately (1) women of color, (2) either low-income or extremely poor [*See* Figure 4], (3) experiencing some kind of mental or physical illness, and (4) survivors of sexual and/or physical violence.<sup>34</sup> While the majority of incarcerated

<sup>31</sup> According to the Victorian ideology that the ideal woman was “a moral exemplar within the family, responsible for maintaining spiritual and moral values, “fallen women” were perceived as socially “disruptive” because “they were a temptation for men to engage in sin.” In this same vein, the law treated women’s misconduct more seriously than men’s because of the widespread view that women who deviated from their roles as obedient wives and mothers by “[denying] their own womanly natures when committing crime . . . actually encouraged male criminality.” BANKS, *supra* note 2, at 2–3.

<sup>32</sup> *Id.* at 15–16.

<sup>33</sup> ELIZABETH SWAVOLA ET AL., VERA INST. OF JUSTICE, *OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM* 13 (2016) (accentuating how women’s overall diminished population in jails as compared to men has misguided scholars and the public into thinking that incarceration of women is slight), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/overlooked-women-and-jails-report/legacy\\_downloads/overlooked-women-and-jails-report-updated.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/overlooked-women-and-jails-report/legacy_downloads/overlooked-women-and-jails-report-updated.pdf).

<sup>34</sup> Compare statistics from The Vera Institute of Justice report (SWAVOLA ET AL., *supra* note 33) with statistics from the ACLU. According to the Vera report, African American women constitute approximately forty-four percent of women in jails. White women

women are women of color, it is important to note that between 2000 and 2014, African American women's incarceration rates declined by forty-seven percent, while white women's rates rose by fifty-six percent.<sup>35</sup>

In beginning the title of its study of women in jail with "Overlooked," the Vera Institute for Justice emphasized its reasons for focusing on the incarceration of women. Due to the relative lack of attention devoted to increasing rates of female imprisonment in studies of American mass incarceration, women have become "forgotten inmates." Over time, scholars have contributed a rough depiction of the discriminatory female experience in jail and prison relevant to male counterparts, but the recent statistics in the Vera Report sharpen these sketches into a clearer reality of the disparaging treatment women face behind bars. Routine practices common to jails and prisons nationwide indicate the visible gender bias of the criminal justice system; female inmates are subjected to either deliberately harmful (if not retributive) policies and procedures that were designed for male inmates, or at least recklessly disregard women's health and unique needs. In addition to frequent male supervision of women while showering, dressing, and using the toilet, male officers routinely conduct invasive strip searches of female inmates, and jails and prisons even fail to provide women with basic hygiene products.<sup>36</sup> A pending suit by the ACLU on behalf of female

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account for thirty-six percent of jailed women, and Hispanic women represent roughly fifteen percent. The remaining five percent include women from different races or ethnicities. *Id.* at 11. In looking at all incarcerated women (both in jail and in state and federal prison), the ACLU determines that black women represent thirty percent of all incarcerated women in the U.S. despite constituting thirteen percent of the total American female population. Hispanic women—while comprising eleven percent of American women—account for sixteen percent of incarcerated women. *Facts About the Over-incarceration of Women in the United States*, ACLU (2017) <https://www.aclu.org/other/facts-about-over-incarceration-women-united-states>.

Seventy-five percent of women in jail reported to have had some symptom of a mental disorder within the last year; an estimated thirty-two percent of jailed women are affected by serious mental illness (especially bipolar disorder, schizophrenia, and depression). Drug or alcohol abuse or dependence affects eighty-two percent of jailed women during their lifetime. Fifty-three percent of women in jail have some type of health problem. Furthermore, eighty-six percent of women in jail report having suffered from at least one incident of sexual violence in their lifetime, and seventy-seven percent report they have been victims of partner violence, resulting in high rates of PTSD when booked into jail. SWAVOLA ET AL., *supra* note 33, at 7–11.

<sup>35</sup> *Incarcerated Women and Girls*, *supra* note 24, at 2.

<sup>36</sup> ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 62–63 (2003) (citing a report of a black female prisoner who spoke about the routine body cavity searches forced upon female inmates in a New Jersey facility: "The women call it 'getting finger-fucked' . . . . Some

inmates at Michigan’s Muskegon County Jail has charged the County with violating women’s constitutional rights by denying the women clean undergarments, sanitary napkins, and toilet tissue while serving jail time.<sup>37</sup> One of the plaintiffs (a former inmate) recalls having male guards watch her in the shower and while using the bathroom, “warn[ing] her to better not ‘bleed on the floor’” after denying her menstrual pads when she started menstruating.<sup>38</sup> To make matters worse, women are more vulnerable to sexual abuse behind bars upon booking, both by male guards and inmates.<sup>39</sup> Guards sometimes use various methods of sexual assault as disciplinary measures, and some prisons employ forced sterilization as a means of sanctioning female inmates, illustrating the ways in which female prisoners lose complete autonomy over their bodies.<sup>40</sup> Compared to incarcerated men, incarcerated women are disproportionately impacted by sexual harassment and violence. While women comprise only thirteen percent of individuals incarcerated in local jails, twenty-seven percent of victims of inmate-on-inmate sexual victimization and sixty-seven percent of victims of staff-on-inmate sexual victimization are female.<sup>41</sup> Although the federal Prison Rape Elimination Act (PREA) of 2003 obliges all carceral facilities to assess inmates’ risk of sexual harm and to provide safe housing to the vulnerable population, many jails segregate women in solitary confinement where women are subjected to continuous surveillance—often by male staff—with little to no privacy.<sup>42</sup> Solitary confinement produces numerous deleterious effects, including negative mental health repercussions caused by restricted human contact, and reduced access to jail services, exercise and leisure opportunities, and mental health programs. Consequently, many women are hesitant to speak

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of [the officials] try to put one finger in your vagina and another one up your rectum at the same time.”); SWAVOLA ET AL., *supra* note 33, at 14.

<sup>37</sup> *ACLU of Michigan Sues Muskegon County Over Unconstitutional Policies, Hazardous Conditions at Jail*, ACLU OF MICHIGAN (Dec. 4, 2014), <http://aclumich.org/article/aclu-michigan-sues-muskegon-county-over-unconstitutional-policies-hazardous-conditions-jail>.

<sup>38</sup> *Id.*

<sup>39</sup> Female prisoners’ vulnerability to sexual abuse by male guards may be explained by the idea that “they are no longer members of the ‘gentle sex,’ and for this violation of gender role expectations they are subject to harsh treatment, including sexual abuse.” BANKS, *supra* note 2, at 71; SWAVOLA ET AL., *supra* note 33, at 14 (citing data from 2009 to 2011 which showed that women comprised thirteen percent of local jail populations, yet twenty-seven percent of inmate-on-inmate sexual victimization).

<sup>40</sup> See Ocen, *supra* note 7, at 1253.

<sup>41</sup> SWAVOLA ET AL., *supra* note 33, at 14.

<sup>42</sup> *Id.* at 15.

out against sexual harm to avoid being placed in these circumstances.<sup>43</sup>

The difficult experience of female detention is often worse for inmates who are mothers or who are pregnant while incarcerated. Among women in state prisons, approximately eighty percent are mothers and the vast majority are single parents.<sup>44</sup> Two-thirds of incarcerated mothers must leave behind a young child,<sup>45</sup> and carceral policies make it difficult for mothers to keep contact with their children while in jail or prison.<sup>46</sup> If a woman is pregnant while incarcerated, her access to basic gynecological and obstetric care is often severely limited. Less than 50% of women in jail receive any form of prenatal care during their pregnancy.<sup>47</sup> Pregnant women are frequently required to perform the same prison jobs as male inmates, often involving strenuous lifting and cleaning, which poses considerable harm to the fetus.<sup>48</sup> For over one hundred years many state and local jails have failed to provide medical assistance to women in labor, and those that do provide medical assistance routinely shackle pregnant women by the hands and/or ankles during labor and childbirth, causing needless physical pain and distress.<sup>49</sup> It must be emphasized that although shackling is common practice for both men and women in receiving medical treatments or physical exams, it is only very rarely used during surgery or other invasive medical procedures.<sup>50</sup> Yet using iron

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 7.

<sup>45</sup> Over 1.5 million children have a parent in prison, and more than 8.3 million children have a parent under some form of correctional supervision. More than one in five of these children are under five years old. ACLU, *supra* note 34.

<sup>46</sup> The high cost of telephone calls, for example, can effectively prohibit mothers' communication with their families. Zarya, *supra* note 4.

<sup>47</sup> SWAVOLA ET AL., *supra* note 33, at 17.

<sup>48</sup> Regina Cardaci, *Care of Pregnant Women in the Criminal Justice System*, 113 AM. J. OF NURSING 40 (2013) (citing reports of former pregnant inmates who were forced to "perform strenuous tasks during pregnancy, such as cleaning with heavy industrial mops and brooms while using 'harsh chemicals' [without] sufficient rest."); see also T.A. Ryan & James Grassano, *Pregnant Offenders: Profile and Special Problems*, in FEMALE OFFENDERS: MEETING NEEDS OF A NEGLECTED POPULATION 52 (AM. CORR. ASS'N, 1993) (citing a case where a pregnant inmate with a history of miscarriages received no dispensation from performing "rigorous janitorial work," resulting in stillbirth).

<sup>49</sup> Ocen, *supra* note 7, at 1242, 1254–55 (citing two 2011 instances where pregnant women in two separate jails were denied requests for medical assistance during labor; one mother was forced to give birth alone on the floor of her cell, and the other was left to deliver her baby over the toilet, finding that the umbilical cord had become wrapped around her newborn's neck); Zarya, *supra* note 4. See also SWAVOLA ET AL., *supra* note 33, at 17.

<sup>50</sup> Ocen, *supra* note 7, at 1256 n.96.

cuffs is a mainstay for women giving birth<sup>51</sup> regardless of the severity of the crimes women had committed prior to incarceration, reflecting disproportionately cruel treatment against female inmates that male inmates do not have to endure.<sup>52</sup> Jail and prison staff members generally separate newborns from mothers within a couple of hours of delivery,<sup>53</sup> transferring the infants to foster care, adoption agencies, or a designated caregiver.<sup>54</sup> These practices not only illustrate widespread practices of female discrimination within jails and prisons but also show how the criminal justice system deprives women of their fundamental human rights to health and safety during their pregnancies in addition to basic rights as mothers.<sup>55</sup>

<sup>51</sup> At least thirty-six states shackle pregnant women during labor and childbirth. *Id.* at 1255–56. As of 2010, only seven states legally proscribed shackling during pregnancy. The Center for Reproductive Justice, et al., *Rep. on the United States’ Compliance With Its Human Rights Obligations in the Area of Women’s Reproductive and Sexual Health, Joint Report to the 9<sup>th</sup> Sess. of the Universal Periodic Review Working Group of the Human Rights Council* (Nov. 22–Dec. 3, 2010), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CRR%20UPR%20Report-US-2010.pdf>.

<sup>52</sup> One woman who was imprisoned when she was five-and-a-half months pregnant at Arkansas’ Department of Corrections for writing bad checks described how she was forced to deliver her baby in shackles. Line Melhus, *How are Pregnant Prisoners and Their Babies Treated in the American Correctional System? An In-Depth Look at Prison Nurseries and Community-Based Residential Parenting Programs, Parental Rights and Healthcare*, at 6 (Spring 2013) (unpublished M.A. thesis, University of Oslo) (on file with author and available at [https://www.duo.uio.no/bitstream/handle/10852/37084/130513\\_Masteroppgave\\_Melhus\\_DUO.pdf?sequence=2](https://www.duo.uio.no/bitstream/handle/10852/37084/130513_Masteroppgave_Melhus_DUO.pdf?sequence=2)).

<sup>53</sup> Sarah Yager, *Prison Born*, THE ATLANTIC (July/Aug. 2015), <https://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297/>.

<sup>54</sup> BANKS, *supra* note 2, at 82. As of 2016, only eight out of one hundred women’s prisons in the United States have nursery facilities. Darren Boyle, *Raised Behind Bars: Inside America’s Maximum Security Prisons Where Babies Get to Stay with Their Felon Mothers While They Serve Their Jail Sentences*, DAILY MAIL (May 25, 2016), <http://www.dailymail.co.uk/news/article-3608322/Born-bars-Inside-America-s-maximum-security-prisons-babies-stay-felon-mothers-serve-jail-sentences.html>.

Bedford Hills Correctional Facility is one example which allows nursing mothers to keep their children for up to eighteen months, depending on certain circumstances. Ely Brown & Alexa Valiente, *Babies Born, Raised Behind Bars May Keep Mothers From Returning to Prison*, ABC NEWS (Feb. 7, 2014), <http://abcnews.go.com/US/babies-born-raised-bars-mothers-returning-prison/story?id=22413184>.

<sup>55</sup> Both the Committee Against Torture and the Human Rights Committee have “expressed concern” about pregnancy shackling. The Special Rapporteur on Violence Against Women has determined that this practice contravenes international standards. Priscilla Ocen illustrates how shackling is “one way of punishing women for choosing to



Even outside of confinement, the ill effects of high female incarceration rates resound in communities who lose wives, mothers, caregivers, and family members to the criminal justice system. Research indicates that local drug crime rates increase when women's incarceration rates go up, showing that female imprisonment has more deleterious community effects than male incarceration.<sup>56</sup> In the 1980s, "mainstream" criminology frequently blamed female criminals for negative community impacts from their incarceration by attributing juvenile delinquency to "working, irresponsible, and/or single mothers."<sup>57</sup> This double standard inherently creates a double punishment for women, blaming "deviant" women even after they have served their sentence for being bad mothers and homemakers. As within jail or prison, drug addiction programs for women are scarce upon reentry into society. These programs fail to meet the needs of female inmates who have been scarred from sexual abuse and other trauma, and increase their likelihood of being incarcerated again from relapse into drugs.<sup>58</sup> For women who were separated from infants or young children while incarcerated, their maternal bonds may be damaged such that it can be impossible to develop close mother-child relationships if they are able to resume normal parental contact upon release.<sup>59</sup> It is common, however, for women to be separated permanently from their children if mothers give birth while incarcerated, due to difficulties in locating and reclaiming their children from foster care or adoption agencies.<sup>60</sup>

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become mothers while incarcerated," reflecting the criminal justice system's perception of women as "'bad mothers' by virtue of their incarceration." Ocen, *supra* note 7, at 1258.

<sup>56</sup> Sandra Enos, *Mass Incarceration: Triple Jeopardy for Women in a "Color-Blind" and Gender-Neutral Justice System*, 6 J. OF INTERDISCIPLINARY FEMINIST THOUGHT 1, 19 (2012).

<sup>57</sup> Mary Bosworth distinguishes the "mainstream" criminology that existed prior to the emergence of a "robust" feminist criminology in the 1980s. MARY BOSWORTH, EXPLAINING U.S. IMPRISONMENT 243–44 (2010).

<sup>58</sup> KATHRYN WATTERSON, WOMEN IN PRISON: INSIDE THE CONCRETE WOMB 44 (1996).

<sup>59</sup> A fetus begins to learn its mother's smell and the sound of her voice during the third trimester, which becomes key to soothing the baby during the "transition into extra-uterine life." Core maternal attachment continues to develop over the infant's first days after birth, which are impaired when the mother and infant are separated, sometimes with long-term negative effects on the child's cognitive and emotional development. Regina Sullivan et.al, *Infant Bonding and Attachment to the Caregiver: Insights from Basic and Clinical Science*, 38 CLINICS IN PERINATOLOGY 643, 645 (Oct. 9, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3223373/>.

<sup>60</sup> Kruttschnitt, *supra* note 26, at 35.

and the conditions of women’s confinement today both illuminate how the carceral state has never been intended to house mothers, young women, and girls at even a fraction of the current levels.<sup>61</sup> Women have nonetheless been swept into jails and prisons over the past decades at unprecedented rates, where they have been treated as an afterthought at best. The next subsection of this paper will examine how trends in women’s criminality and women’s incarceration rates explain how this has happened.

### **B. Female Criminality vs. Rising Women’s Incarceration (1960 to present)**

This subsection (1) chronicles the development of female criminality from 1960 to present in order to (2) investigate how female incarceration has increased during this period to surpass the rate of male incarceration. We will observe that female criminality has remained largely static with pre-1960 historic precedent that we have seen in subsection (a) with respect to the type of crimes most common to female perpetrators today (what scholars denote as “female” crimes), and the proportionately lower rates of female perpetration in comparison to much higher rates of male perpetration. We may then attempt to explain why—despite an overall consistency in the nature of female criminality—female incarceration rates have nevertheless risen concurrently with male rates since 1960 and have since outpaced men as the most quickly incarcerated population in the United States.

#### *1. Female Criminality Since 1960*

Women and girls’ incarceration rates began significantly increasing before the “War on Drugs” began in 1982.<sup>62</sup> The relevant question is whether higher female incarceration rates were actually driven by an increase in female criminality. While the few women in jails and prisons prior to 1960 were charged with low-level property, public disorder, and/or moral offenses, women’s crime rates temporarily went up for both non-traditional (male-dominated) transgressions (e.g. murder)

<sup>61</sup> Priscilla Ocen suggests that mistreatment of women in confinement—such as shackling pregnant inmates—is either a result of an “unthinking exportation” of ‘prison rules . . . to a hospital setting’ (for the women who are transferred to a hospital for childbirth) or the result of a “male-centric approach to corrections” that has not yet been modified to appropriately accommodate women inmates. Ocen, *supra* note 7, at 1243.

<sup>62</sup> By 1971, although there was only one additional federal women’s prison since the first was opened in 1927, thirty-four states had separate women’s prisons (up from the twenty-three female state facilities in 1940). BANKS, *supra* note 2, at 123.

and political violence from 1960 to 1975. Concurrently with this upward crime rate, the overall female arrest rate rose 60.2% during this time frame. Although robbery and murder represented two significant growths in non-traditional female transgressions during this period, increasing 380.5% and 105.7%, respectively, the majority of arrests accounted for traditional, nonviolent female crimes.<sup>63</sup> For example, while the arrest rate for juvenile females outpaced the total female arrest rate during this period (exhibiting an increase of 253.9%), the vast majority of juvenile girls' offense patterns during this period remained consistent with pre-1960 trends of nonviolent "female crimes," such as public disorder.<sup>64</sup> Female involvement in violent crime began to significantly decline during the 1980s, despite the marked surge in female incarceration during the War on Drugs.<sup>65</sup> Beginning with the introduction of broken windows policing during the 1980s, female incarceration rates have risen the fastest for low-level drug and "other-except-traffic" crimes, including local ordinance violations and public disorder transgressions.

Reflecting pre-1960 trends of female criminality, most women today are arrested for crimes consistent with historic (pre-1960) "women's" offenses, including (1) "other-except-traffic" crimes, (2) drug offenses, including Driving Under the Influence (DUIs), (3) low-level property offenses, including shoplifting, (4) "simple assault" (e.g. kicking, biting, shoving), or (5) violating a parole/probation appointment based on a prior offense.<sup>66</sup> The significant question becomes: what is the relationship, if any, between female criminality and women's skyrocketing incarceration rate between 1960 and the present? Did female offending rates ever outpace those of men to account for the disproportionate rise in women's incarceration? The most recent data from the Bureau of Justice Statistics in 2004 shows that eighty-two percent of women in jail committed nonviolent property (thirty-two percent), drug (twenty-nine percent), or public order (twenty-one percent) offenses.<sup>67</sup> In citing statistics from 2004, Jennifer Schwartz and Darrell

<sup>63</sup> CHESNEY-LIND & PASKO, *supra* note 11.

<sup>64</sup> *Id.*; Sandra M. Stehno & Thomas M. Young, *Young Women and the Juvenile Justice System: An Examination of National Data and Summaries of Fourteen Alternative Programs*, NAT'L CRIM. JUST. REFERENCE SERV. 9 (Feb. 1980), <https://www.ncjrs.gov/pdffiles1/Digitization/77899NCJRS.pdf>.

<sup>65</sup> BANKS, *supra* note 2, at 74. Banks underscores that, of the fewer post 1980 violent crimes committed by women, at least one-half were committed against abusive partners or spouses.

<sup>66</sup> SWAVOLA ET AL., *supra* note 33, at 9, 23–24.

<sup>67</sup> *Id.* The remaining twelve percent of women in jail presumably accounts for violent

Steffensmeier highlight that the most prominent disparity between male and female crime is that women have been over twice as likely as men to be involved in minor property crimes (e.g. larceny, fraud, forgery, embezzlement).<sup>68</sup> Although minor property offenses have historically been one of the more common crimes among women, we may apply multiple theories to explain the reason that women’s involvement is higher than men’s involvement in this category.

(i) Rita Simon’s *opportunity theory* suggests that as more women entered the labor force during the women’s liberation movement, women were exposed to the same opportunities as men to commit pecuniary offenses such as fraud, larceny, and forgery.<sup>69</sup> Darrell Steffensmeier provides an alternate interpretation of the opportunity theory. Steffensmeier posits that the expansion of female criminality in the post-War on Drugs period occurred because of increased financial pressure from female *inequality* (citing the “pink-collar ghetto”) and/or fiscal instability from rising divorce rates that caused single women and single mothers to take the “opportunity” to commit these crimes out of economic necessity.<sup>70</sup>

(ii) Meda Chesney-Lind and Lisa Pasko offer the more gender-neutral theory of *economic marginalization* to explain the rise of minor property offenses among women. They argue that poverty causes women to engage in criminal behavior in the same way it does men.<sup>71</sup> This theory may also explain the rise in female drug use during and after the War on Drugs, in which women affected by poverty were just as likely as men—and for the same reasons—to use drugs, be charged with DUIs, and become involved in drug-dealing.

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crime and women incarcerated for parole or probation violations.

<sup>68</sup> Jennifer Schwartz & Darrell Steffensmeier, *The Nature of Female Offending: Patterns and Explanation*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 47 (Ruth T. Zaplin, ed., 2008).

<sup>69</sup> JUDITH A. WARNER, WOMEN AND CRIME 25 (2012).

<sup>70</sup> Schwartz and Steffensmeier suggest that while more women entered the workplace during and after the women’s liberation movement, the pink-collar ghetto and corporate glass ceiling excluded women from many moderate and upper-level career positions that remained reserved for men. They note that because the pink-collar ghetto and corporate glass ceiling continue to exclude women from upper-level career positions, women have considerably more limited opportunities than men to commit white collar crime, at least partially explaining society’s particularly strong reprove for female executives like Martha Stewart for alleged implication in the “masculine” crime of insider trading. Schwartz & Steffensmeier, *supra* note 68, at 65.

<sup>71</sup> CHESNEY-LIND & PASKO, *supra* note 11, at 114–17.

(iii) In her theory of *gender entrapment*, Beth Richie contends that has been a clear link between “culturally constructed gender identity development . . . and women’s participation in illegal activities” in the post-War on Drugs era.<sup>72</sup> With regard to African American women in particular, Richie emphasizes that ill repercussions of domestic violence, sexual or physical violence, and/or childhood abuse both increase women’s likelihood to commit crimes and increase women’s vulnerability once trapped inside the criminal justice system.<sup>73</sup> In analyzing the most common characteristics of the average female criminal of the 1980s and the post-War on Drugs period—poverty, racial/ethnic minority status, single motherhood, and sexual victimization—the gender entrapment theory helps explain the increased appeal for women to write a bad check to make ends meet or commit petty theft to care for their families.

Women commit more minor *property* crimes—the category in which they outpace men—by either having the same inclination as men to commit crimes (as the economic marginalization theory argues), or out of economic and/or personal hardship caused from oppression (as the opportunity and gender entrapment theories suggest). Because men outpace women in the remaining categories of crimes most common among women today, female criminality does not match the disproportionate rise in female incarceration. This supports the argument that gender discrimination influences the criminal justice system and suggests that patriarchal politics are one extralegal factor that help account for the growth in women’s imprisonment both before and after the War on Drugs began.<sup>74</sup>

## 2. *The Rise of Women’s Incarceration Since 1960*

*“Since 1970, the number of women in jail nationwide has increased 14-fold—from under 8,000 to nearly 110,00. . .”*

<sup>72</sup> BETH RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 4 (1996). Richie is a Professor of African American Studies and Criminology, Law and Justice at The University of Illinois at Chicago.

<sup>73</sup> Specifically, Richie notes that the “acute injuries, chronic pain, sexual degradation, and emotional trauma” that battered women experience from these forms of abuse “[create] chaos in their lives,” increasing women’s propensity to turn to crime. Richie, *supra* note 72 at 159. JUDITH GREENE & KEVIN PRANIS, *PART I: GROWTH TRENDS AND RECENT RESEARCH*, IN *WOMEN’S PRISON ASS’N REP.* 22 (2016).

<sup>74</sup> Although he does not suggest specific extralegal factors, Ruddell notes that extralegal factors must be influencing the use of incarceration, as changes in rates of violent crime and property crime do not fully explain the rise in correctional populations. RUDDELL, *supra* note 17, at 39.

The Vera Institute of Justice, August 2016<sup>75</sup>

*“Since 2010, the female jail population has been the fastest growing correctional population, increasing by an average of 3.4% annually.”*

Bureau of Justice Statistics, December 2014<sup>76</sup>

Women and men’s crime rates have increased concurrently during the latter half of the twentieth century. Yet, women’s incarceration rates have gone up seven hundred percent between 1980 and 2014, growing twice as fast as male imprisonment rates.<sup>77</sup> The salient question thus becomes: why are more women being arrested now than in 1960, and why are women’s incarceration rates outpacing men’s? It appears that a strengthening of patriarchal politics has been a prominent extralegal factor bearing on this trend, based on the patterns of disproportionate female incarceration rates and the unfair treatment of women in confinement as discussed in the previous subsections. I will explore two theories that seek to address the gendered dimension of rising incarceration by illustrating how the patriarchal politics have subjugated women through the criminal justice system, making them the fastest-growing group in American jails and prisons. The first is Meda Chesney-Lind’s hypothesis that America has been “more willing to arrest women” since women’s liberation by treating women like men in the criminal justice system.<sup>78</sup> As explained below, Chesney-Lind’s hypothesis seems to suggest women’s outsize incarceration is a political “backfire” against the new-wave feminist movement. The second theory examined below is Katherine Beckett and Thomas and Mary Edsall’s “backlash theory,” which suggests that there has been a calculated law enforcement agenda based on “sexual politics” to subjugate women after the women’s liberation movement.<sup>79</sup> At the end of this subsection, the section draws on

<sup>75</sup> SWAVOLA ET AL., *supra* note 33, at 6. “Gender entrapment” theorists, however, would seem to suggest that patriarchal politics is one of them.

<sup>76</sup> U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORR. POPULATIONS IN THE U.S., 2013 1 (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

<sup>77</sup> *Incarcerated Women and Girls*, *supra* note 25, at 1; Zarya, *supra* note 4.

<sup>78</sup> Clifford Krauss, *The Nation*; *Women Doing Crime, Women Doing Time*, N.Y. TIMES (July 3, 1994), <http://www.nytimes.com/1994/07/03/weekinreview/the-nation-women-doing-crime-women-doing-time.html>.

<sup>79</sup> To better understand the “backlash theory,” we need to explore the theory of “sexual politics,” pioneered by American feminist scholar, Kate Millett, during the second-wave feminism movement. Millett notes how “sexual dominion obtains nevertheless as perhaps the most pervasive ideology of our culture and provides its most fundamental concept of power . . . because our society, like all other historical civilisations, is a patriarchy . . . the

both theories to present the argument that the rise of women's incarceration rates is the result of a patriarchal war against "undesirable" women.

*a. The "Backfire" Theory: Increasing Female Incarceration By Locking Women Up Like Men*

In the early 1990s, Chesney-Lind responded to the significant increase in women's imprisonment by suggesting that many more women have been swept into the criminal justice system because law enforcement is "simply . . . more willing to incarcerate women."<sup>80</sup> As the criminal justice system grew "tougher" on crime, it mandated harsher punishments for *all* offenses, including traditional "women's crimes," such as prostitution and petty theft.<sup>81</sup> Chesney-Lind and Pasko argue that prior chivalric tendencies on the part of male offenders, law enforcement officers, and judges may have been responsible for covering up women's offenses, and/or minimizing or waiving women's punishment if she committed a crime.<sup>82</sup> Chesney-Lind and Pasko suggest there was (1) a concurrent decline of "chivalry" and (2) a widening of the law enforcement "net," such that the criminal justice system was more willing to incarcerate women and placed greater focus on lower-level, nonviolent offenses (e.g. loitering, drug transportation), respectively. Although these two contributing factors may appear to promote a gender-neutral justice policy, the outsized female incarceration rates in comparison to those of men strongly belies gender equality.

The crackdown on women had little to do with any change in female behavior, as shown by a largely consistent pattern of female criminality in line with historic trends during and after the War on Drugs.

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military, industry, technology, universities, science, political office, and finance—in short, every avenue of power within the society, including the coercive force of the police, is entirely in male hands." KATE MILLETT, *SEXUAL POLITICS* 25 (1970). Millett's theory of "sexual politics" will be important to Beckett and Edsall's theory by underscoring how American criminal justice policies and law enforcement practices have always been designed by men (understanding that men continue to dominate both the governments that develop these policies and the law enforcement agencies that execute them). In designing and enforcing these policies and practices, men have the power to reinforce sexist patriarchal values that bolster male social and political authority (e.g. by establishing prison rules that regulate the attire and conduct of female inmates according to conservative gender norms, as shown in Figures 5 and 6).

<sup>80</sup> Krauss, *supra* note 78.

<sup>81</sup> CHESNEY-LIND & PASKO, *supra* note 11, at 112–16, 126.

<sup>82</sup> Schwartz & Steffensmeier, *supra* note 68, at 51; WATTERSON, *supra* note 58, at 37.

Instead, law enforcement’s greater willingness to arrest women may illustrate a retributive state “backfire” against women’s social, political, and economic advancement that occurred after the women’s liberation movement began. The retributive crack down on women had little to do with any prominent change in female behavior as shown by a largely consistent pattern of female criminality in line with historic trends during and after the War on Drugs. Women were not only “swept up in a societal move to ‘get tough on crime,’” but were being arrested at twice the rate of men.<sup>83</sup> The decline of chivalry in tandem with a marked crackdown on low-level crimes inherently targeting more women simply exacerbated the problem that law enforcement not only vengefully treated women as “equals” by locking women up like men but actively sought to ensure that women “catch up” to male prison populations by incarcerating women at faster rates.<sup>84</sup> The introduction of “broken windows” policing in the 1980s and 1990s illustrates one example. Reflecting a zero-tolerance policy for drugs by cracking down on minor offenses affecting “quality of life” (e.g. loitering, public drunkenness, petty theft, and disorderly conduct), “broken windows” policing increased arrest rates for both men and women but simultaneously exerted “clear gendered impacts” that substantially increased likelihood and frequency of female arrests.<sup>85</sup>

*b. The “Backlash” Theory—Outsized Women’s Incarceration as a Reassertion of Patriarchal Authority*

Attributed to the work of Katherine Beckett, and Thomas and Mary Edsall, the “backlash” theory contends that rising incarceration of women and other groups beginning before the War on Drugs was a form of state counterattack against the social resistance movements of the 1960s and 1970s to reassert racial and patriarchal legitimacy.<sup>86</sup> Arguing that Republicans “used racially coded appeals” to attract whites who had grown “disillusioned with the late 1960s’ ‘excesses’ of civil rights, Black

<sup>83</sup> CHESNEY-LIND & PASKO, *supra* note 11, at 127.

<sup>84</sup> *Id.* at 129. Chesney-Lind and Pasko cite arrest data from 2000 and 2009, showing that the War on Drugs “has translated into a war on women,” with adult women being arrested at a 15.4% increased rate for drug offenses compared to a 7.7% increase for men. *Id.* at 101.

<sup>85</sup> SWAVOLA ET AL., *supra* note 33, at 23.

<sup>86</sup> AVARIM, *supra* note 17, at 12 (citing KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1999) (“punitivism is a top-down backlash against the civil rights movement’s gains in racial and social justice . . .”); RUDELL, *supra* note 17, at 56.



Power, and . . . mass protests and violent uprisings,” many scholars support the backlash theory to explain the rise in incarceration of women, blacks, and other resistant groups before and after the War on Drugs.<sup>87</sup> Ruddell highlights the link between social disruption of the 1960s and 1970s and public policy, underscoring that the perception of social problems (urban discontent, women’s protests, etc.) from these movements likely had a much greater influence on public policy than an actual increase in crimes itself.<sup>88</sup> Ruddell thus posits that the “demand for change in the social relationships between males and females, between ethnic minorities and the mainstream white majority during the social movements of the 1960s to 1970s caused the state [to emphasize] punitive crime control as a matter of re-establishing legitimacy.”<sup>89</sup> Banks takes this argument further by emphasizing the backlash’s unique effect on women in particular, illustrating the backlash theory as a result of a revived sense of Victorian-esque values that sought to punish female criminals for deviating from prescribed gender norms.<sup>90</sup> To illustrate an example, we might look to certain prisons’ policies for female inmates during the 1960s and 1970s that reaffirmed women prisoners’ accordance with female gender identity while punishing them. *See* Figures 5 and 6. The highlighted rules in particular indicate how prisons attempted to instill a renewed sense of feminine docility into women who had acted outside of their gender norms by enforcing ladylike conduct.

Banks’ emphasis on the connection between the backlash and Victorian gender-bias carries through to the War on Drugs, during which one of the highest and fastest growths in the female corrections population took place.<sup>91</sup> The introduction of “broken windows” policing has a different meaning here than under the “backfire” theory. Rather than

<sup>87</sup> NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 7 (2014). Rick Ruddell, Cyndi Banks, Meda Chesney-Lind, and Lisa Pasko represent a portion of scholars supporting the backlash theory.

<sup>88</sup> RUDDELL, *supra* note 17, at 165. Ruddell references the rapid increase of social disturbances during this period that contributed to the warped public perception of activists (namely women) as criminals. Ruddell’s data indicates that while only there was only one urban ethnic protest, riot, or demonstration on record in 1955, there were 246 such events in 1960. *Id.* at 92.

<sup>89</sup> *Id.* at 56.

<sup>90</sup> BANKS, *supra* note 2, at 2–3.

<sup>91</sup> Although we will later observe that women’s incarceration rate continued to outpace men’s imprisonment rates in the years that followed, we can see how quickly the War on Drugs affected female imprisonment by looking at statistics taken in 1991, showing that 12,600 women were incarcerated for drug offenses, an increase of 432% since 1986. WATTERSON, *supra* note 58, at xviii.

simply widening the arrest net to inevitably capture more female offenders, certain “broken windows” policies began to deliberately target and punish women more severely than men. For example, although prostitution accounted for less than one percent of female arrests in 2014, many jurisdictions began to employ discriminatory practices that maximized opportunities to arrest women for prostitution. This practice continues today through tailored sting operations in low-income, black and/or predominately ethnic neighborhoods where police believe prostitution may be taking place, leading to women’s arrest as suspected prostitutes for simply “standing or walking in a particular area[,] . . . accepting a ride to a destination, or carrying condoms.”<sup>92</sup> With regard to drug offenses, many women endure the same punishment as “their more significantly involved counterparts, for instance, by simply taking a phone message, or allowing . . . [a] family member to keep items at their home.”<sup>93</sup> As a result, even when women are not “co-equal or independent actors” and rather have “minimal or no involvement or knowledge” of illicit activity, they are frequently sanctioned as accomplices or conspirators.<sup>94</sup>

*c. A War Against “Undesirable” Women: An  
Alternative Explanation for Rising Women’s  
Incarceration*

[*On the Salem Witch Trials of 1692*]

“The story of Eve, the original sinner, was projected onto women living in the Puritan society. Powerful women . . . who transgressed the boundaries of the gender binary were seen as an evil.”<sup>95</sup>

[*Speaking about Donald Trump as a Republican presidential candidate*] “All of it was so egregious. I hated it, I cringed . . . but it didn’t stop me . . . . She’s a liar.” (referring to *Hillary Clinton*)—Paula Filar, 71<sup>96</sup>

<sup>92</sup> SWAVOLA ET AL., *supra* note 33, at 26.

<sup>93</sup> *Id.* at 27.

<sup>94</sup> *Id.*

<sup>95</sup> Maggie Rosen, *A Feminist Perspective on the History of Women as Witches*, 6 DISSENTING VOICES 21, 23–24 (2017).

<sup>96</sup> Susan Chira, *‘You Focus on the Good’: Women Who Voted for Trump, in Their Own Words*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/14/us/women-voters-trump.html>

Drawing from both the backfire and backlash theories, I argue that women's disproportionate incarceration rate is the result of a political war on "undesirable" women. Whether law enforcement is more inclined to arrest women by vindictively equalizing men and women's treatment under the law (backfire)—with particular contempt for excessive harm that women experience from lacking necessary accommodations in jails and prisons—or to vengefully force women back into traditional gender roles (backlash), both theories provide support for how new law enforcement policies aim to suppress and exclude socially "undesirable" women from society, specifically, female lawbreakers who are either low-income, promiscuous, and/or stepping outside traditional gender roles by committing masculinized crimes.<sup>97</sup>

Chesney-Lind and Pasko's research supports this argument in emphasizing the revival of Victorian values in law enforcement. Chesney-Lind and Pasko note that a vivid "imagery of women's depravity for those women whose crimes . . . put them outside the ranks of 'true women'" explains the rise in female incarceration from 1960 to the present for political violence, violent crime, having the "wrong" sexual orientation, or for transgressing outside the scope of traditional "women's crimes."<sup>98</sup>

<sup>97</sup> "Masculinized crimes" include transgressions that are more violent or "confrontational," such as murder and burglary (see WARNER, *supra* note 69) as well as white-collar offenses such as money laundering.

<sup>98</sup> CHESNEY-LIND & PASKO, *supra* note 11, at 129. Chesney-Lind sees women's criminalization for political violence as perhaps the strongest representation of what she delineates as the first female crime wave, taking place predominately during the 1970 and 1970s "where the 'liberated female crook' was a white political activist, a 'terrorist,' and a drug-using hippie." *Id.* at 55.

Aileen Wuornos may be one of the best examples of the criminal justice system's characterization of the "bad" (as opposed to "mad" or mentally unstable) female killer. Wuornos killed seven men during her work as a prostitute, claiming that she killed some of the men in self-defense to ward off attempted rape and physical abuse, and some others purely to rob them. Seen by society and the criminal justice system as a "social outcast, filthy prostitute . . . violent bisexual [and] evil monster that needed to be executed so that she would never kill again," Wuornos was executed in 2002 after twelve years on death row. Her story illustrates that being seen as "unwoman" can cost a female criminal her life. Georgie Ann Weatherby et al., *The Value of Life: Female Killers and the Feminine Mystique*, 2 J. OF CRIMINOLOGY & CRIM. JUST. RES. & EDUC. 1, 2–3 (2008). The 2011 to 2012 National Inmate Survey indicated that the number of women incarcerated in the U.S. who identify as lesbian or bisexual is "eight times greater than the 3.4 % of American women overall who identify as lesbian or bisexual" showing that "for women in particular, failing to conform to societal norms of femininity . . . may lead to differences in treatment in the criminal justice system." Carolyn Crist, *LGBT Individuals More Likely to be Incarcerated*, REUTERS (Dec. 23, 2016), <http://www.reuters.com/article/us-health->

For example, while the prosecution lacked evidence to prove Martha Stewart engaged in insider trading nor could prove that Stewart even knew that her broker's advice was based on material nonpublic information, the judge nonetheless imprisoned Stewart, causing her to lose her executive position in her company and much of her credibility.<sup>99</sup> We might also compare the American public's disproportionate outrage against presidential candidate Hillary Rodham Clinton for allegedly lying about use of a personal email account to receive and send classified emails with the public's attitude toward a similar mishap of former President George W. Bush.<sup>100</sup> Even where there was no evidence that Clinton had committed any crime, then President-elect Donald Trump increased his popularity in promising to prosecute the “nasty woman” for lying.<sup>101</sup>

The development of gendered policies with terms such as “crack baby,” “crack whore,” “welfare queen,” and “Bad Girls” during the War on Drugs also illustrate how gender-biased law enforcement policies sought to target “undesirable” women.<sup>102</sup> The “crack baby” and “crack

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lgbt-incarceration-usa-idUSKBN14C1ZI.

<sup>99</sup> Michael Maiello, *We Owe Martha Stewart an Apology*, THE DAILY BEAST (May 22, 2015), <http://www.thedailybeast.com/articles/2015/05/22/it-s-time-for-america-to-pardon-martha-stewart.html>; see also Jacob G. Hornberger, *The Wrongful Conviction of Martha Stewart*, THE FUTURE OF FREEDOM FOUNDATION (Mar. 10, 2004), <https://www.fff.org/explore-freedom/article/wrongful-conviction-martha-stewart/> (underscoring that men, acting as federal officials, have gotten away with perjury before, citing the Waco Massacre and the wrongful prosecution of Randy Weaver, whereas Martha Stewart was convicted for alleged perjury that was much less serious).

<sup>100</sup> Between 2003 and 2009, the Bush administration purportedly “lost” twenty-two million emails. Nina Burleigh, *The George W. Bush Administration ‘Lost’ 22 Million Emails*, NEWSWEEK (Sept. 23, 2016), <http://www.newsweek.com/2016/09/23/george-w-bush-white-house-lost-22-million-emails-497373.html>.

<sup>101</sup> See comments from former Director of the FBI, James Comey in November 2016 that there was no evidence of criminal wrongdoing in the latest batch of emails tied to her email server. Alan Yuhas et al., *FBI Has Found no Criminal Wrongdoing in New Clinton Emails, Says Comey*, THE GUARDIAN (Nov. 7, 2016), <https://www.theguardian.com/us-news/2016/nov/06/fbi-director-hillary-clinton-email-investigation-criminal-james-comey>. One year later, in November 2017, Attorney General, Jeff Sessions, found insufficient evidence to investigate Hillary Clinton for criminal wrongdoing because of an inadequate factual basis necessary to appoint special counsel. Andrew Buncombe, *Sessions admits there is not enough evidence for the FBI to investigate Hillary Clinton*, THE INDEPENDENT (Nov. 14, 2017), <http://www.independent.co.uk/news/world/americas/us-politics/jeff-sessions-hillary-clinton-investigation-not-enough-evidence-fbi-latest-a8055296.html>.

<sup>102</sup> BOSWORTH, *supra* note 57, at 125–26. “Bad Girls . . . can be black or brown or red or beige or white—as long as they are also poor, aggressive, drug-addicted, or selling sexual favors.” WATTERSON, *supra* note 58, at 37.

where” verbiage had a very unique impact on women’s incarceration by offering “a powerful iconography of multiple social deviance” including “non-marital sexuality . . . drug addiction, and aberrant maternal behavior.”<sup>103</sup> Similarly, the terms “welfare queens” and “Bad Girls” denounced women as criminals for not only being drug-addicted but also poor and sexually promiscuous. Reflecting the same connotation of “undesirability,” the concept of the “underclass” garnered comparable popularity during the 1980s incarceration explosion in referring to the “underserving, urban, Black population of the poor.”<sup>104</sup> It thus seems that law enforcement was not only seeking to target “undesirable” women, but “undesirable” groups as well.

### III. WOMEN’S IMPRISONMENT IN THE LARGER CONTEXT OF MASS INCARCERATION: A WAR ON “UNDESIRABLES”

In studying the rise of women’s imprisonment as a state attack on female autonomy within the larger context of mass incarceration, we can observe mass incarceration through a new lens. Instead of being a war on “social evils” of crime, drugs, or poverty, or a war on certain groups of people (e.g. blacks, women, the poor)<sup>105</sup> This section argues that mass incarceration has been a political War on “Undesirables.” Just as we recognized a backlash against women’s liberation that significantly increased female incarceration beginning with rise of second-wave feminism, we may attribute a similar pattern to numerous phenomena that have shaped mass incarceration. These phenomena include: (1) the rise in the imprisonment of African Americans during and after the Civil Rights movement of the 1960s, (2) the noted increase in arrest rates of LGBTQ persons after the legalization of gay marriage, demands for greater LGBTQ acceptance and equality with gay pride demonstrations, and (3) the expansion of immigrant detention facilities amidst intensifying protests for undocumented immigrant rights by the DREAMer movement.<sup>106</sup> In drawing from Dean Spade’s analysis, just as there has

<sup>103</sup> Enid Logan, *The Wrong Race, Committing Crime, Doing Drugs and Maladjusted for Motherhood: The Nation’s Fury over Crack Babies*, 26 SOC. JUST. 75, 115–16 (1999).

<sup>104</sup> WATTERSON, *supra* note 58, at 37; BOSWORTH, *supra* note 57, at 126.

<sup>105</sup> SIMON, *supra* note 15, at 18.

<sup>106</sup> The 2011 to 2012 National Inmate Survey reported that gay or bisexual men have been more likely than straight men to have prison sentences greater than ten years, and that lesbian or bisexual women also receive longer sentences than straight women. Crist, *supra* note 98. See also DEAN SPADE, *NORMAL LIFE, ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 8–9 (2011) (providing a glimpse at the deliberate mistreatment that LGBTQ persons suffer while incarcerated in prisons and

been a powerful resurgence of conservative patriarchal values since the women’s liberation movement, there has also been a concurrent rise of racial supremacy and neoliberal ideologies of economic power.<sup>107</sup> The rise of the racial supremacy and neoliberal politics accounts for the heightened incidences of police brutality against African Americans and ethnic minorities, as well as the transition from a “catch and release” to a “catch and return” immigration policy.<sup>108</sup> In addition to Dean Spade’s analysis, this re-conception of mass incarceration as a “War on Undesirables” can be squared with other scholars’ existing constructions of mass imprisonment. Michel Foucault’s “massive elimination” theory posits that prison is the state’s means of eliminating those who commit socially unacceptable behavior based on the “economy of biopower,” by which the state (the dominant) eliminates others (the socially deviant) to make itself ‘biologically stronger.’<sup>109</sup> The Undesirables theory supports Foucault’s thesis of biopowered massive elimination by recognizing the influence of elite white male power in subverting and excluding the socially “undesirable” from society.<sup>110</sup> Natalie Cisneros further develops

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jails); Johnson v. Johnson, No. 03-10455 (N.D. Tex. 2002) (presenting the claim of a former prisoner who was subjected to repeated prison rape because of his sexual orientation); Michael May, *Los Infiltradores*, AMER. PROSPECT (June 21, 2013), <http://prospect.org/article/los-infiltradores>.

<sup>107</sup> SPADE, *supra* note 104, at 78. Citing ethnic studies scholar Dylan Rodriguez, Spade pinpoints the ill effects suffered by the criminal justice and welfare systems from political backlash against the “explosive liberation movements of the 1960s and 1970s” that resisted “white supremacy, heteropatriarchy, capitalism, and colonialism.”

<sup>108</sup> Bob Libal et al., *A Prison is Not a Home: Notes from the Campaign to End Immigrant Family Detention*, in BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 253 (Jenna M. Loyd, Matt Mitchelson, & Andrew Burrige, eds., The University of Georgia Press, 2012).

<sup>109</sup> Natalie Cisneros, *Resisting ‘Massive Elimination’: Foucault, Immigration, and the GIP*, in ACTIVE INTOLERANCE: MICHEL FOUCAULT, THE PRISONS INFORMATION GROUP, AND THE FUTURE OF ABOLITION 244, 246 (Patty Zurn & Andrew Dilts, eds., Palgrave MacMillan Press, 2016).

<sup>110</sup> In being denied the right to vote, incarcerated and formerly-incarcerated persons are stripped of “political citizenship.” Marie Gottschalk: “Caught: The Prison State and the Lockdown of American Politics,” DIANE REHM (Jan. 7, 2015), [https://dianerehm.org/shows/2015-01-](https://dianerehm.org/shows/2015-01-07/marie_gottschalk_caught_the_prison_state_and_the_lockdown_of_american_politics)

07/marie\_gottschalk\_caught\_the\_prison\_state\_and\_the\_lockdown\_of\_american\_politics. Forty-eight out of fifty prohibit incarcerated felons from voting, while thirty-three states also exclude parolees and/or probationers from the polls. Fourteen states prevent some or all convicted felon from exercising their voting rights. IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 165 (Mary Pattillo, David Weiman, & Bruce Western, eds., Russell Sage Foundation, 2004). In the 2016 election, approximately 6.1 million Americans were unable to vote due to felony convictions. Melissa Franqui,

Foucault's theory by emphasizing mass incarceration's as "a complex political instrument that targets individuals deemed abnormal" through a process of "modern racism," painting the prison system as a mechanism geared to rehabilitating society, not the criminal.<sup>111</sup> The War on Undesirables framework supports this idea. Since the rehabilitative prison model disappeared from the American carceral state in the 1970s, the meaning of correctional facilities or penitentiaries has become obsolete.<sup>112</sup> In abandoning efforts to help offenders repent and reform from their crimes to regain entry into society, the criminal justice system has switched to a retributive policy based on social removal in the name of protecting society from criminals. While Angela Davis characterizes the prison system as a "black hole" that "devours social wealth" to sustain itself, the prison system must be analyzed foremost as a repository for human bodies.<sup>113</sup>

The Undesirables theory is also a better vehicle to measure the extent that mass incarceration transcends any law and order function and instead serves as a mechanism of social elimination based on gender, sexual orientation, race, ethnicity, and/or social class. One key difference between Foucault's theory and the Undesirables concept is that Foucault's theory appears to be premised upon law and order, whereas the "Undesirables" notion accounts for the elimination of people who are

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*Felony Disenfranchisement: The Untold Story of the 2016 Election*, THE SALON (Nov. 8, 2016), [http://www.salon.com/2016/11/28/felony-disenfranchisement-the-untold-story-of-the-2016-election\\_partner/](http://www.salon.com/2016/11/28/felony-disenfranchisement-the-untold-story-of-the-2016-election_partner/).

<sup>111</sup> Cisneros supports her theory of "modern racism" based on Foucault's notion that "prison is not only punitive; it is also part of an eliminative process," interpreting Foucault's lectures as explaining that racism "is the strategy that allows for the exposure of these deviant, abnormal, 'bad' races to violence, expulsion, and social, political, or literal death . . . [requiring] members of the dangerous, inferior, or abnormal 'subraces' . . . [to] . . . be eliminated—either symbolically or literally—for the security of social order." Cisneros, *supra* note 109, at 245–46.

<sup>112</sup> Betsy Matthews, *Corrections, Rehabilitation and Criminal Justice in the United States, 1970-Present*, EASTERN KENTUCKY UNIVERSITY (Feb. 3, 2015), <https://corrections.eku.edu/insidelook/corrections-rehabilitation-and-criminal-justice-united-states-1970-present>. See also Natasha Frost, *In Norway's Prisons: A Model for the U.S.?*, HERE & NOW (Sept. 13, 2011), <http://hereandnow.legacy.wbur.org/2011/09/13/norway-american-prisons>; Adam Gopnik, *The Caging of America*, THE NEW YORKER (Jan. 30, 2012), <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> (explaining how experts in the 1970s and 1980s thought the rehabilitative system was useless and that the best approach to protect society from offenders and reduce crime was to "warehouse them, for shorter or longer periods.").

<sup>113</sup> DAVIS, *supra* note 36, at 16–17.

socially unacceptable, regardless of the severity of the crime committed. For example, while Foucault’s thesis bolsters the idea that prison is a vehicle for eliminating persons who the criminal justice system perceives as socially “abnormal,” from violent murderers (e.g. Aileen Wuornos, Charles Manson) to nonviolent teens convicted of sex crimes (e.g. Owen Labrie), it does not lend as much support to victims who were incarcerated for no real “crime” at all (e.g. Sandra Bland). The Undesirables theory, by contrast, accounts for both those who have threatened social order and those who have threatened the status quo of the white male elite with the rise of a racially biased and patriarchal neoliberal state. Within this framework, it is easier to observe commonalities among otherwise disparate criminals that all have been swept into the growth of American jails and prisons, including: the nonviolent transgender activist, the battered wife who tried to fight back against her husband, the poor African American drug user, and the parent who wrote a bad check to feed her children. Although Foucault sought to inform the public of the threats to human rights occurring from “intolerable” prison conditions and other unjust effects of incarceration on criminals, I think that viewing American mass incarceration as a War on Undesirables offers a more holistic human-rights framework. In addition to the degradation and abuse that “undesirables”—particularly women, immigrants, and LGBTQ individuals—face within confinement, the very fact that individuals are swept into the criminal justice system because of their sex, gender identity, race, ethnicity, and/or social status represents a pervasive human rights crisis in itself.<sup>114</sup> Once an individual comes under the control of the carceral state, successful re-entry into society becomes as difficult as possible.<sup>115</sup> Even after serving their full sentence, formerly incarcerated

<sup>114</sup> Ocen, *supra* note 7; see also DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION, HUMAN RIGHTS WATCH (Aug. 2010) (reporting on new detainee allegations of sexual assault against staff members in immigrant detention facilities as part of a “pattern” of sexual assault, abuse, and harassment claims within these detainment centers). Sharon Dolovich notes that almost all LGBTQ inmates become “automatic targets” for sexual harm in confinement based on their sexual orientation and/or gender identification, whether inflicted by staff-members or other prisoners. The common practice across most U.S. jails and prisons of housing inmates based on their genitalia largely exacerbates this vulnerability. Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 93 (2011).

<sup>115</sup> By the end of 2015, 4,650,900 adults were under probation or parole (one in every fifty-nine adults). Danielle Kaeble & Thomas Bonczar, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES (Dec. 21, 2016), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5784>.



persons are without basic forms of aid necessary to help them survive (including social welfare benefits, employment opportunities, and drivers' licenses), much less re-integrate into society by regaining voting rights and other basic privileges. Once an individual is incarcerated, they will likely be excluded from mainstream society for life to some degree, deprived of the most fundamental rights to life, liberty, and happiness.

## CONCLUSION

As the American carceral state continues to expand, it is critical to examine all impacted social groups in order to develop solutions toward an end of mass incarceration. Current leading frameworks that characterize mass incarceration as a War on Drugs, a War on Black People, or a War on Poverty are too limited in scope by failing to account for the breadth of affected populations, particularly women. Since women's imprisonment rates began outpacing male rates in the 1970s, women have become the fastest-growing incarcerated group in America.

Our study of female incarceration since 1960 has produced five key observations. First, the significant increase in women's imprisonment began during the 1960s and 1970s before the War on Drugs and the onset of mass incarceration. Second, because the lion's share of female criminal activity involves traditional types of "women's crimes" such as petty property offenses, public order transgressions, and minor assault, contemporary female criminality is largely consistent with historic patterns. Nevertheless, the criminal justice system incarcerates women at faster rates than men, inconsistent with historical patterns. Third, the most common profile of today's typical female inmate (i.e. low-income women suffering from a mental or physical disorder, substance abuse, sexual trauma and/or domestic violence) indicates that the criminal justice system "throws away" women who are most in need of public aid by incarcerating them in lieu of providing access to social welfare programs and medical intervention. Fourth, although African American women outnumber other racial groups of incarcerated females, female incarceration cannot be analyzed as a problem that disproportionately affects a single race. As Figure 2 shows, recent trends indicate that the criminal justice system is rapidly targeting more white and Hispanic women as well. Lastly, the past and present treatment of women in confinement illuminates the rampant sexism and patriarchal power within the carceral state.

All five of these observations suggest that the state has enlisted the criminal justice system as a means of direct patriarchal retribution

against “undesirable” women. “Undesirable” women are those who are poor, sexually promiscuous, and/or violate gender mores by breaking the law—especially by committing masculinized crimes. By incorporating the patriarchal framework of women’s incarceration into the larger context of the carceral state, we may characterize mass incarceration as a War on “Undesirables”—a perfect storm of patriarchal, neoliberal, and racially-biased politics that targets socially deviant individuals across diverse social groups, including women, African Americans, immigrants, and members of the LGBTQ community. The question then remains: how can we end it?

The cure may be in the diagnosis itself. Recognizing mass incarceration as a war on “Undesirables” shows how the metastasizing prison system affects *everyone*, requiring deeper analysis as a wide-sweeping human rights issue instead of singular scrutiny as a race problem or as a struggle of rich versus poor. The time has come that scholars and activists follow the French GIP’s “collection and dissemination [tactic]” and use information as the first tool in forging a path for change.<sup>116</sup> We must use all available data, including that which we have discovered from studying women’s imprisonment, to call out mass incarceration as a human rights crisis that harms millions of people in our lives—be they mothers, fathers, children, neighbors, friends, or loved ones. Based on the success of the Black Lives Matter and DREAMer movements in raising public awareness of discriminatory law enforcement practices and the human rights abuses that occur within confinement, *all targeted groups* should be engaged in order to break the oppressive cycle of mass incarceration. Women from all races, ethnicities, and economic backgrounds should follow the examples of Black Lives Matter and the DREAMers by contributing their own collective voice to the expanding discourse on mass incarceration. Once we have a united front of all affected groups exposing mass incarceration as a human rights crisis, we can begin the healing process. If mass incarceration’s victims are social “undesirables,” we need to develop—or return to—a criminal

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<sup>116</sup> Announced in 1971 by Michel Foucault, Le Groupe d’information sur les prisons (GIP) sought to establish a platform for changing “intolérable” prison conditions in France by information-sharing. As one means of informing the public of ongoing human rights violations in jails and prisons, the GIP directly gave prisoners a voice to divulge the reality of prison conditions by sharing their personal experiences. Perry Zurn & Andrew Dilts, *Active Intolerance: An Introduction*, in *ACTIVE INTOLERANCE: MICHEL FOUCAULT, THE PRISON INFORMATION GROUP, AND THE FUTURE OF ABOLITION 1* (Perry Zurn & Andrew Dilts, eds., Palgrave MacMillan, 2016).

justice model where people are *desired*. Instead of perceiving criminals as abnormal or “evil-minded”<sup>117</sup> and removing them from society, we must treat lawbreakers as human beings who are valued for their purpose in this world and their individual potential to make positive contributions to society notwithstanding prior wrongdoing or misfortune. In confinement, rehabilitation, not retribution, is a crucial step toward achieving this solution.<sup>118</sup> The greatest challenge, however, remains outside our jails and prisons. Instead of funneling resources into the carceral state,<sup>119</sup> society should direct its investments into alternative correctional programs, such as drug and alcohol rehabilitation networks, community support systems for nonviolent offenders,<sup>120</sup> jumpstart hiring programs to help formerly-incarcerated persons successfully reintegrate into society,<sup>121</sup> urban redevelopment projects, and “safe harbors”<sup>122</sup> for victims of domestic violence, child abuse, and other forms of harm that may lead to future criminal activity. If we are to end the carceral state’s

<sup>117</sup> See Herman Bianchi’s proposal to substitute tort law for criminal law in dealing with crime: “[The lawbreaker] is thus no longer an evil-minded man or woman, but simply a debtor, a liable person whose human duty is to take responsibility for his or her acts.” DAVIS, *supra* note 36 at 113–14.

<sup>118</sup> Examples of carceral rehabilitation include education/instruction programs, which allow prisoners to begin or complete a college degree, and/or learn a trade, such as cooking, gardening, or carpentry. See Angela Davis’ description of the former Pell Grants program at Greenhaven Prison. *Id.* at 58–59.

<sup>119</sup> *Id.* at 16 (identifying the prison as “a black hole into which the detritus of contemporary capitalism is deposited.”).

<sup>120</sup> Deirdre Golash identifies “re-integrative shaming” as one example. This is a process where less-serious criminals can work together with victims with the support of each side’s families to address their wrongdoing. By enabling the offender to form “personal attachments” with his or her wrongdoing, the offender can work to develop constructive solutions to redress the harm committed. DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* 166–67 (2005).

<sup>121</sup> Recognizing that “[a] felony conviction is like the ultimate black eye,” Drive Change (a New York City nonprofit organization) operates a three-tiered program to hire eighteen to twenty-five-year-old ex-convicts for jobs working in local food-trucks. According to Drive Change’s founder, Jordyn Lexton, the goal is to “hire, teach, and empower young people who are coming home from the criminal justice system.” Elyse Wanshel, *Food Truck Drives Social Change by Giving Jobs to Former Inmates*, HUFFINGTON POST (May 27, 2016), [http://www.huffingtonpost.com/entry/drive-change-food-truck-gives-former-inmates-job-skills\\_us\\_5745fa5e4b03ede4413a8a0](http://www.huffingtonpost.com/entry/drive-change-food-truck-gives-former-inmates-job-skills_us_5745fa5e4b03ede4413a8a0).

<sup>122</sup> Allegra McLeod’s prison abolitionist framework is partially based upon “. . . positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement” including community safe harbors to help victims of domestic violence. *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161–62, 1227, 1239 (2015).

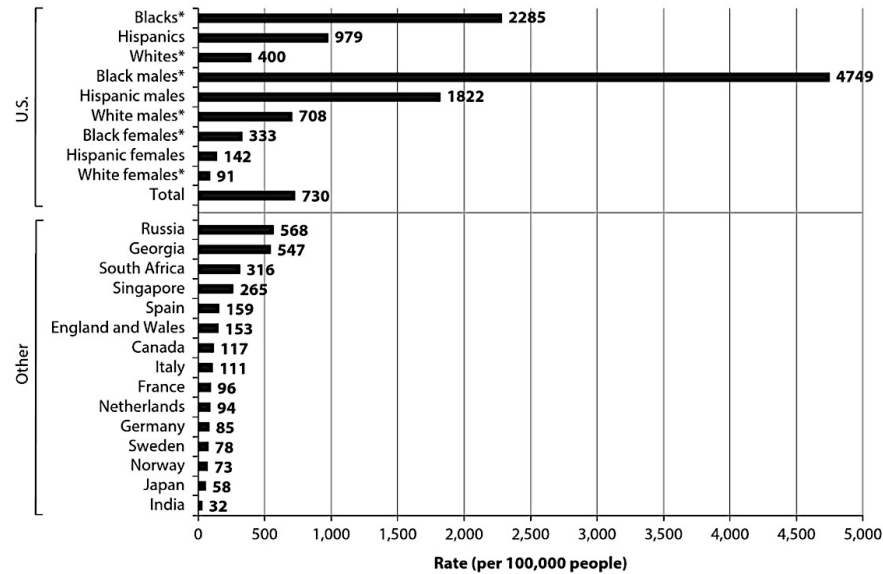
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zero sum-game, we need to develop a criminal justice system where *everyone*—regardless of gender, race, sexual orientation, or economic status—can win.

## APPENDIX

**Figure 1:** Incarceration Rates, Select Countries and Groups<sup>123</sup>**Figure 1.1.** Incarceration Rates, Select Countries and Groups

\* Excludes people of Hispanic or Latino origin

Sources: See p. 338, n. 16; Roy Walmsley, "World Prison Population List," 9th ed. (London: King's College, International Centre for Prison Studies, May 2011), [http://www.kcl.ac.uk/dept/law/research/icps/downloads/wppl-8th\\_41.pdf](http://www.kcl.ac.uk/dept/law/research/icps/downloads/wppl-8th_41.pdf) (retrieved February 11, 2014).

<sup>123</sup> GOTTSCHALK, *supra* note 4, at 5.

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**Figure 2:** Imprisonment Rates by Gender, Race, and Ethnicity per100,000, 2000 v. 2014<sup>124</sup>**Imprisonment Rates by Gender, Race, and Ethnicity per 100,000: 2000 vs. 2014**

		2000	2014	% Change
White	Women	34	53	56% increase
	Men	449	465	4% increase
African American	Women	205	109	47% decrease
	Men	3,457	2,724	21% decrease
Hispanic	Women	60	64	7% increase
	Men	1,220	1,091	11% decrease

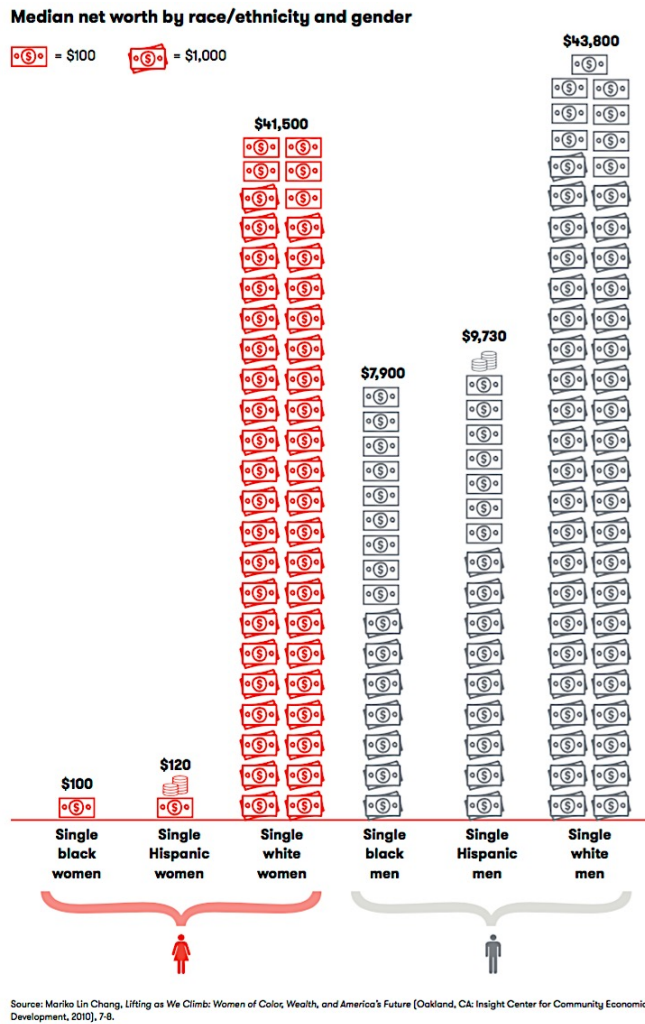
Source: *Prisoners Series*. Washington, DC: Bureau of Justice Statistics.**Figure 3:** Offenses of Female Inmates in Federal Institutions, 1986 Compared With 1991 (in percentages).<sup>125</sup>

<i>Offense Type</i>	<i>1986</i>	<i>1991</i>
Violent	7.1	2.0
Drug	26.1	63.9
Property	28.2	6.3
Robbery	4.4	2.0

SOURCE: Adapted from Kline (1993).

<sup>124</sup> *Incarcerated Women and Girls*, *supra* note 24, at 2.<sup>125</sup> BUSH-BASKETTE, *supra* note 19, at 117.

**Figure 4:** Net worth of prisoners according to gender and race/ethnicity<sup>126</sup>



<sup>126</sup> SWAVOLA ET AL., *supra* note 33, at 20.

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**Figure 5:** Section III of the Rules at California Institution for Women (CIW): Personal Appearance (c. 1960s-1970s)<sup>127</sup>

1. Women in CIW will dress appropriately to the occasion and activity in which they are engaged. . .
  2. Clothing will be neat, in good repair, and of proper fit.
    - a. Dresses and skirts will be moderate without extreme of length or fit.
    - b. **No open or revealing patterns are permitted with regard to blouses.**
  3. **Brassieres and panties will be worn at all times. . .**
  4. . . .Mid-calf or **masculine sox are not permitted.**
- . . . **High heeled pumps or sling pumps may be worn during leisure hours or for work** except when safety or health requirements prevent.
- . . . **Low neck, or loosely knit, revealing sweaters are not authorized.**

**Figure 6:** Missouri Inmate’s Guide to Institutional Living, “Social Rules” and Expectations (c. 1973)<sup>128</sup>

1. Be sure you are using acceptable language. No profanity or obscenities.
2. **Keep yourself clean, well-groomed, and attractive.**
3. **Be careful about telling tales and spreading gossip.**
4. **Do not appear off your Dorms unless you are suitably dressed.** Reasonable modesty is expected on the Dorms.
5. **On Sunday wear dresses until after 3 P.M.**
6. No loud arguments which disturb others are permitted.
7. **Improper personal behavior between two women is a segregation offense.**

<sup>127</sup> KATHRYN W. BURKHART, WOMEN IN PRISON, 315–17 (1973).

<sup>128</sup> *Id.* at 368.